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# Mediation on trial: Ten verdicts on court-related ADR

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# Mediation on Trial: Ten Verdicts on Court-Related ADR

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*This article critically evaluates the development of court-related mediation by reference to the evolution of ADR practice and theory. The author explores the divergent approaches taken in different jurisdictions to the relationship between ADR and court-based processes while referring to some similar phases of development and the varied empirical examinations of process. The integration of ADR into the 'mainstream' dispute resolution culture is also explored from the perspective of the diversity versus consistency of process debates while reflecting upon the variations in ADR usage between inquisitorial and more adversarial legal systems.*

## Introduction

For safety purposes, Australian beach-goers are advised to swim between the flags under the watchful eye of a lifeguard. Similarly, Australian litigants are being advised – and in some cases ordered – to litigate between the flags under the watchful eye of a judge. In all other cases the parties are encouraged to use ADR, in particular mediation. However, unlike beach flags, which are required to accommodate more and more swimmers each year, the litigation flags continue to move closer together, accommodating fewer cases. In some Australian jurisdictions it is virtually impossible to get a trial date without first having attended an ADR process.

This is not just an Australian trend. In both common law and civil law jurisdictions around the world, court-related mediation schemes, and in particular schemes involving mandatory mediation, continue to increase in popularity, thereby closing the gap between the litigation flags. Despite a great deal of debate about the legitimacy of mandatory court referrals to mediation, the reality today is that mandatory mediation cases make up the collective bulk of court-related mediation in the common law and civil law worlds (Alexander, 2003).

This article puts mediation on trial in a critical appraisal of the court-related mediation movement to date. It considers court-related mediation in terms of the path it has travelled, the outcomes it has produced, the process that has developed in theory and in practice, and the structures in which mediation services are offered.

Court-related mediation refers to all forms of mediation that take place with the support and encouragement of, or at the direction of, the court. Court-related mediation schemes can be either voluntary or mandatory. They also vary according to whether the referral to mediation is regulated by legislation or not, and, in mandatory schemes, as to whether the court has a discretion to mandate mediation in a specific case or not. Finally, schemes can be differentiated according to who conducts the mediations – judges, other court employees or external mediators with specific qualifications. Unless otherwise specified, the terms 'mediation' and 'court-related mediation' are used interchangeably in this article.

## The Modern Mediation Movement – Different Paths Throughout the World

The modern mediation movement began in the USA in the 1970s, travelled to other common law countries such as Australia, New Zealand, England, Canada and South Africa in the 1980s and, since the 1990s, has been weaving its way through Asia and continental Europe. It is interesting to consider the reasons behind the timing of mediation developments throughout the world. As a consensus-based form of ADR, mediation had enjoyed a wide range of supporters for an equally wide range of reasons.

Courts were keen to introduce forms of ADR which would improve access to, and the delivery of, justice in the courts. Politicians agreed with the need to reduce court backlogs and, additionally, saw the benefits of providing dispute resolution that was quicker, less expensive and satisfactory to the parties – in other words, providing would-be litigants with a dispute-resolution option that allowed them to avoid the courts altogether. Disillusioned lawyers saw the opportunity to enhance client-centred service. Many professional advisers including lawyers, social workers and psychologists saw an opportunity to provide disputants with an opportunity to have greater control over the

outcome of their disputes and potentially transform their dialogue and their relationships. Community advocates saw in mediation the benefits of bringing responsibility for, and management of, conflict back into the community (de-legalisation of conflict).

Yet it was not until the litigation crisis in common law jurisdictions reached its peak that the political push and pragmatic need for alternatives to litigation were sufficiently strong to launch the mediation movement into the legal political spotlight, thereby attracting substantial government funds, becoming the subject of legislation and an integrated element of most university legal curricula. Conversely, in most civil law countries, there has been no equivalent litigation explosion with respect to both legal costs and court delays and the development of ADR in these countries reflects, inter alia, this factor.

For example, when German politicians began to include mediation rhetoric in their political speeches in the mid-1990s, they were complaining about court backlogs of six to 12 months and adopting the litigation explosion rhetoric of countries such as the US and Australia. Jurisdictions in the US and Australia had been dealing with a backlog of several years and astronomically higher costs (Alexander, 2003). Users of the German legal system have not suffered the same level of inability to access justice as their Anglo-American counterparts before the introduction of court-related mediation systems.

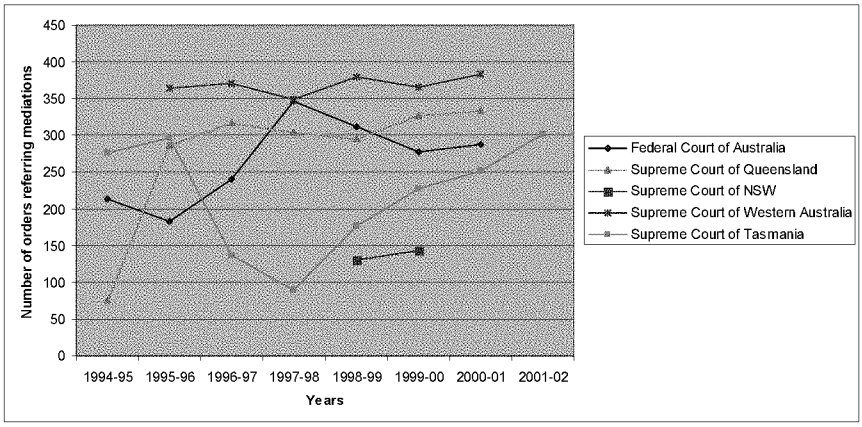
One cannot therefore make assumptions about the background to the introduction of mediation in different countries. The value of direct legal transplants of court-related mediation models needs to be considered in light of the diverse legal, political and cultural needs of donor and donee jurisdictions.

## Four Phases of Development in Court-related Mediation Schemes in Common Law Countries

Most of the empirical research on court-related mediation is drawn from common law jurisdictions where forms of court-related mediation have been practised for one or two decades, depending on jurisdiction. Empirical research in continental Europe to date primarily deals with family mediation and victim-offender mediation. The court-related programs that do exist have not been in operation for a sufficient length of time to produce empirical research results.

The establishment and development of court-related mediation schemes in common law jurisdictions follow a four-phase pattern. These four phases have been identified from statistics from court jurisdictions in the US (Birke and Teitz, 2003), Australia (Sourdin, 2003), Canada (Hann et al, 2001) and the UK (Mistelis, 2003). The pattern is represented visually in Graph 1 using statistics from a number of Australian state and federal courts.

***Graph 1: Court-related Mediation in Australian Courts***




*Phase 1. The dating and getting to know you period comprising initial scepticism and a slow build-up of court referrals*

Phase 1 is characterised by the introduction of a court-related mediation scheme. Typically, the scheme has been introduced by legislation. The use of mediation as prescribed by the legislation is typically either voluntary (ie with the agreement of the parties) or soft mandatory (ie mandatory at the discretion of the court). During this phase mediation as a term may be widely recognised by the profession and the judiciary but specific knowledge, a good understanding of how mediation works and practical experience with the process is limited to a few. Lawyers lacking personal experience with mediation are less likely to refer their clients to it (Spegel, 1998). In short, most lawyers and judges, having had little or no exposure to mediation are reluctant to embrace the practice, which they fear may impact negatively on their legal practice

or judicial role. The success of the newly minted mediation scheme is often dependent on a number of its most committed supporters amongst the judiciary and the legal profession. Accordingly, the uptake of mediation is hesitant and slow.

*Phase 2. The honeymoon period representing a sudden surge in court referrals*

As the initial scepticism retreats and the gatekeepers to mediation (particularly the judges in court-related mediation schemes) enjoy their first success stories, the scene changes dramatically. The court experiences a rapid clearing of cases pending trial, better case management and perhaps even positive feedback from users of the justice system and the media. Politicians, Court Registrars and Chief Justices quote statistics indicating that access to justice is improving and disputants who go to mediation are satisfied with it as a speedy and less expensive alternative to court.

It is interesting to note that the statistics for Tasmania do not follow the pattern suggested. At the time of the introduction of the mediation pilot program in 1995 there was a great backlog of cases. Many of these were referred to mediation. After the backlog dissipated, referrals dropped. The *Alternative Dispute Resolution Act* 2001 (Tas) introduced a mandatory mediation scheme to the court. Since that time referrals have been gradually increasing. The Tasmanian judiciary and the legal profession have been able to draw on their experiences from the mid-1990s for the current scheme (telephone interview, 2003). According to the four-phase model introduced in this essay, the Tasmanian Supreme Court is now in Phase 2 with mediation on the uptake.

*Phase 3. The married-life period representing a flattening out of court referrals*

As partners for life, mediation and the justice system develop a more sophisticated understanding of each other. Having reached a certain critical number, court referrals plateau. There can be a number of reasons for this. First, the number at which the referrals flatten out could represent the optimum number of referrals, allowing matters that are best managed by means of a judicial decision to go to court. Second, in soft mandatory schemes, gatekeepers learn to recognise cases that are suitable for mediation and those that are not. If this hypothesis is

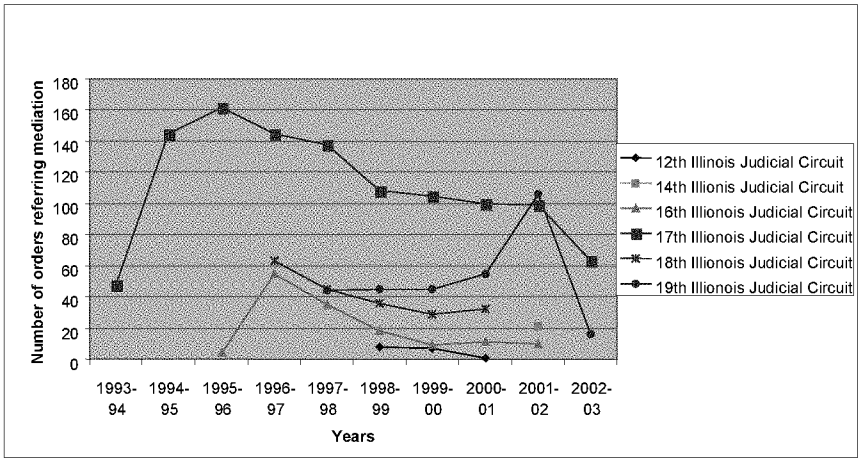
true it would mean that the actual number of suitable referrals is increasing and the number of unsuitable cases being referred to mediation is decreasing, resulting in an overall stabilisation of numbers. Third, judges may fear a loss of adjudicative work and a cut in their allocated budget if they refer even more matters to mediation resulting in a stabilisation of number of referrals. There is, however, no data to support any of these reasons – only anecdotal evidence.

*Phase 4. In some cases where the marriage has been going for a while, there are signs of separation*

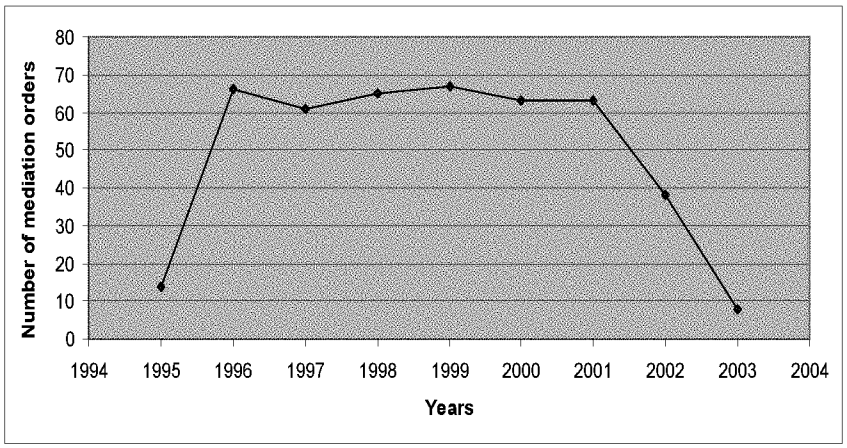
The 'separation' represents a noticeable drop in the number of court referrals after the period of flattening out described in Phase 3. It does not emerge in all common law jurisdictions considered in this article, but where it does appear, it generally follows a period of a sustained number of referrals as described in Phase 3. In some Australian jurisdictions there is a hint of dropping numbers in mandatory court referrals (see Graph 3). The trend indicating an overall reduction in court referrals is more distinctive in a number of US jurisdictions. Graphs 2A and 2B (over page) present a striking graphic of this phenomenon. In terms of the 'separation', whether there is hope for reconciliation or whether divorce is knocking at the door remains to be seen. Again, we need to understand the reasons behind the drop in court referrals to mediation. We need to establish if courts are changing their referral patterns and, if so, how. Are courts simply referring fewer matters to mediation or are they referring parties to processes other than ADR (see under heading, 'Phrase 3', above). Specifically, we need to ask questions about the correlation between the court-referral model (Boulle, 1996: 188-92), the usage of mediation and settlement rates at mediation.

Or is it rather that lawyers are sending matters to mediation before the court has a chance to refer them? In jurisdictions like Australia and the US there is growing body of case law and legislation establishing, first, the professional duties of lawyers in advising clients about dispute-resolution options; and, second, their duties within a mediation (Wade, 2004). Anecdotal evidence suggests that, where courts have been very active in referring matters to mediation over a period of years, the legal profession is more likely to use mediation where appropriate. In other words, the culture of the legal profession is changing.

*Graph 2A: Court-related Mediation in the Illinois Judicial District*



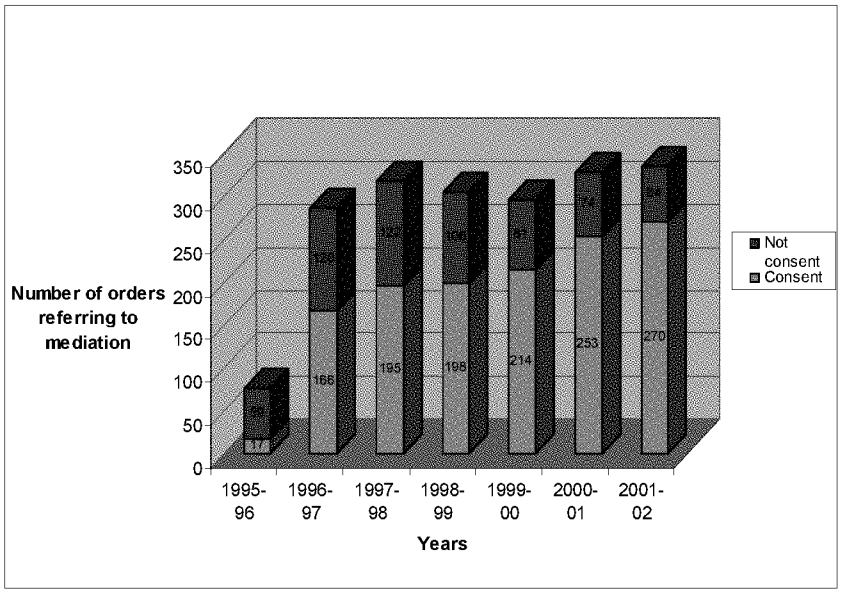

*Graph 2B: Court-related Mediation in the District Court of Nebraska*




This can be seen very clearly in the jurisdiction of Queensland, Australia. The mediation referral system in the Supreme Court of Queensland was established by the *Courts Legislation Amendment Act* 1995 (Qld) and is regulated by the legislation in conjunction with the *Uniform Civil Procedure Rules* 1999. Judges possess a discretionary power to refer matters to mediation. At the same time, recent case law

in Queensland and other Australian jurisdictions (for example, *Morrow v Chinadotcom*, 2001) suggests that the judiciary takes into account, inter alia, the attitude of the parties to mediation and the likelihood of good faith participation in the mediation in determining whether to refer the matter to mediation – a 'soft mandatory' model. The Queensland judiciary is very supportive of mediation initiatives, clauses, agreements and referrals. A small number of senior barristers now earn most of their income from conducting mediations, rather than trials. A litigation lawyer was recently heard saying that that the last time he was in court was more than two years ago. Whilst there has not yet been a falling off in overall referrals to mediation in Queensland, there has been a flattening out of the overall referrals to mediation and a drop in the number of non-consent orders. In other words, the number of consent orders is increasing (see Graph 3). In a jurisdiction where mandatory referrals are unlikely to occur unless both parties indicate, albeit reluctantly, that they are prepared to participate in good faith,

***Graph 3: Consent and Non-consent Orders for Mediation in the Supreme Court of Queensland***



an increase in consent orders may indicate the development of a different disputing culture, which has come to know the benefits of mediation in appropriate cases. Further, on the basis of this trend, one could speculate that if more parties and their lawyers are consenting to mediation through orders, then it also likely that others are going to mediation before the matter is even filed in court. There is, however, no data to support this speculation.

## The Myth of Court-Related Mediation "Freeing up" the Courts

> In the fullness of time the number of cases that go to court will significantly diminish. Indeed, I believe that this is the case in Queensland at present. One would hope that the cases not resolved via an ADR process that then proceed to court would be the legally difficult cases that potentially result in the laying down of societal norms (Hanger, 2003: 108).

Despite his optimism, Hanger goes on to make the point that the criteria according to which litigants decide whether or not to go to trial do not generally focus on the legal complexity of the case. It is much more likely that factors such as cost, timing and negotiation strategy will be in the foreground. Australian trial judges will anecdotally tell you that they have not noticed neither an increase in legally complex cases nor in cases where the law or precedent value is 'important' in their courtrooms. On the contrary, an interesting development in the jurisdiction of Queensland has been the significant rise in litigants-in-person since the introduction of mandatory mediation schemes linked to courts and legal aid. Where litigants are required to mediate as part of a court-related mediation scheme or as a requirement of receiving legal aid, they may not have the funds to engage legal representation to pursue the matter in court. As a result there may be increased pressure to reach a settlement at mandated mediation. Although the courts are no longer congested, the cost of litigating with legal representation remains beyond the reach of most once-only litigants. Anecdotal evidence suggests that it is frequently poorly advised clients or litigants with limited financial means disputing on a matter of principle who, having exhausted any Legal Aid funding available to them at a mandated mediation, choose to litigate in person. This unintended consequence of strongly encouraging and mandating mediation creates

a difficult situation for the judges and for the unrepresented litigant, as well as the lawyer on the other side. Rather than increase access to justice, it hinders it.

## ADR Industry Regulation and Competing Mediation Objectives

Stakeholder values and interests inform the visions and objectives of mediation schemes. There is a range of stakeholder groups with diverse interests and motivations that have played a role in the development of ADR worldwide. They include the judiciary, lawyers, social workers, psychologists, litigants and governments. Together they possess a range of interests related to mediation, which were outlined earlier in this article.

The fact that stakeholder interests differ does not necessarily mean that they must compete. They are, in fact, interrelated. The objectives of reducing court backlog and cutting the costs of disputing are related to objectives of increasing access to justice and improving party satisfaction with dispute resolution processes. Yet, to the extent that mediation schemes are sponsored by one stakeholder group only, their objectives will prioritise the interests of this stakeholder groups at the expense of others.

As the ADR industry becomes increasingly regulated through the introduction of statute-based mediation schemes, so the number of schemes promoting efficiency and access to justice – rather than transformative goals as their primary objective – will also increase. In court-related mediation schemes quantitative data related to service-delivery objectives, such as reducing court backlog and reducing overall disputing costs for litigants, appear to have a greater impact on decision-makers than qualitative objectives. Qualitative objectives, such as transformation of the relationship between the parties and de-legalisation of the dispute, frequently take a back seat.

Current reality seems to be that funding shortages frustrate attempts to establish a regulatory framework that encourages the promotion of a range of qualitative and quantitative mediation objectives, and measures the extent to which those objectives are met.

## Mixed First Round of Empirical Findings

Research findings currently available (mostly in common law jurisdictions) comprise the first round of empirical research in the field. The findings primarily relate to court-related mediation schemes, family mediation and victim offender mediation programs. In general, findings indicate a correlation between the level of plaintiff satisfaction and the type of dispute resolution process used, so that plaintiffs' satisfaction with the process increases with their participation in the process. The findings also indicate a high rate of agreement reached by parties at mediation and a high level of satisfaction with the fairness of the process. However, at least one US study was unable to show that mediation held any advantage over litigation either in terms of time and money savings for the justice system or in terms of party satisfaction and views of fairness (Kakalik et al, 1996).

Further, empirical research is not convincing on the question of whether court-related mediation alters the ratio between cases tried and settled. What the research does suggest is that cases settled are now being settled earlier than usual and in a more structured way through mediation, thereby reducing the costs and time involved in case management and freeing up the courts to hear cases promptly (Clarke and Gordon, 1997: 311).

This sort of information represents the first wave of empirical data collected during the infancy and adolescence of the mediation industry. It seems likely that, as the disputing culture begins to change, the ambiguity of the empirical research results will gradually diminish.

## Strong trend Towards Early Regulation in Civil Law Countries

Whereas the mediation movement in most common law jurisdictions can be characterised by an early period of experimentation and diverse practice, only recently moving towards increased regulation and institutionalisation, a number of civil law jurisdictions have moved directly to regulate mediation through laws and organisational marketplace structures (for example, § 15a EGZPO Introductory Law to the Civil Code of Germany). This trend seems to reflect the civil law culture of systems, codes, regulation and paternalistic government interventions.

The more mediation is regulated, particularly through the direct or indirect mandating of mediation, the more rapid the development of a case-based jurisprudence to accompany and interpret the regulation. In other words regulation inspires even more regulation.

In civil law Europe, mediation services and training are structured around specialisations that relate to substantive legal areas rather than process – for example, environmental mediation, commercial mediation, family mediation, workplace mediation and insolvency mediation. Training is conducted according to these categories and standards for practice are drafted by organisations representing these areas. One has to wonder how long it will take before the field becomes over-regulated through the integration of substantive law principles into the corresponding mediation categories.

By comparison, in common law jurisdictions, whilst many mediators develop a practice in certain 'substantive' areas, most do not advertise their services as relating to one practice area only. Moreover, advanced training in common law jurisdictions, while including some substantive specialisations such as family law, more typically focuses on process – for example, negotiation skills, facilitating multi-party disputes, representing clients in mediation, dispute systems design, transformative mediation, evaluative mediation and facilitative mediation.

## Two Conceptual Approaches to Court-Referred Mediation: Justice Model and Marketplace Model

Civil law judicial traditions have traditionally contained mediative elements such as the settlement function of the judge, which has no legal common law counterpart. The old arguments about whether or not judicial settlement is equivalent to mediation need not be repeated here (Alexander, 2001). What is interesting, however, is how this judicial model has impacted on court referral models.

The case of Canada provides a useful illustration. In Canadian civil courts there exist two models of mediation. The first is voluntary mediation that takes place as part of the court proceedings before a judge who will *not* be the judge at the trial if the mediation does not result in settlement. This is mediation within the courts. The parties usually must agree to the mediation, but they do not have the choice of

the mediator and do not have to pay. This model (the justice model) is predominant in the new Code of Civil Procedure of Québec.

The second model is a mediation referral by the courts, sometimes mandatory, sometimes requiring the consent of the parties. Usually, the parties choose a mediator from amongst professional mediators who, most of the time, are external to the court and approved or accredited by ADR bodies. These mediators are usually paid directly by the parties but public funds are available in some limited circumstances. In some instances mediator fees are subject to regulation. This model (the marketplace model) is favoured in the common law provinces, mainly Ontario and Saskatchewan.

While it is true that a variety of models exist in all jurisdictions, the justice model is more frequently found in civil law jurisdictions and the market place model in common law jurisdictions. The justice model views mediation as an extension of the service of the courts and, even where the mediations are outsourced to external mediators, the justice system bears the cost. Conversely, the marketplace model extends the arm of the court into the private sector and has contributed to the creation of a new industry – private court-related mediation.

As common law jurisdictions have started to integrate civil law procedures, such as judicial case management and judicial settlement in a number of courts and tribunals, one has also seen the introduction of the justice model of mediation into those courts. Two Australian examples of courts and tribunals that employ the justice model of court referral are the Queensland Commercial and Consumer Tribunal and the Commonwealth Administrative Appeals Tribunal.

## Gap Between Theory and Practice

I was once asked at a conference whether I considered myself to be a practitioner or a theoretician. Struggling with the response, I decided that the reason I could not provide a coherent one-word answer was based on the nature of the question. To my mind the question was based on a flawed premise, namely that theory and research, on one hand, and practice and process, on the other, are mutually exclusive. Nevertheless, it remains a fact that the existing gap between mediation theory and practice is wide and that one of the greatest challenges facing the modern mediation movement today is bridging this gap.

Around the world, practice models reflect:

- the nature of mediation training,
- the professional background of the mediator, and
- the legal and organisational structures within which the mediation is conducted.

Generally, civil law mediation training is significantly more in-depth in terms of contact hours (commonly between 200 and 500 hours), interdisciplinary theory and clinical practice requirements. Nevertheless, it appears that at least in the German speaking civil law countries, despite a strong interdisciplinary focus in training, the emerging areas of mediation practice mirror legal substantive categories of practice (Alexander, 2003). By comparison, the predominant training model in most of the common law world involves a very skills-focused 25- to 40-hour course. Clearly such minimal training is unlikely to alter significantly a mediator's previous disciplinary training. For the most part, lawyers remain lawyers and social workers remain social workers.

The theory-practice gap is arguably more pronounced in court-related mediation where lawyers or judges play a role in the mediation process and tend to legalise aspects of it. Moreover, most court-related mediation schemes specify neither the values nor the specific mediation process to be employed under the legislation. Accordingly, court-related schemes will likely support a wide range of practices called mediation – many of which will look nothing like the theory. Flexibility? Yes, but at what cost?

## Supply of Mediators Exceeding Demand

Attempts by any one profession to monopolise mediation have failed. Yet tensions between various groups continue to play themselves out in an emerging market in which, with the exception of mandatory programs, there are still too many mediators and not enough clients. Supply outweighs demand on the open market. As long as it continues to do so, there will be attempts to regulate who can mediate. Meanwhile, the mediation training market has mushroomed to such an extent in both civil and common law jurisdictions that it has drawn attention away from the supply-demand gap. Many freelance mediators keep themselves in business through a combination of private work, mandatory mediation panel work and training.

## Diversity Versus Consistency Debate Continuing to Define Modern Mediation Movement

The tension between the desire for innovation and experimentation in the emerging field of mediation, on one hand, and the desire for quality and consistency in mediation services on the other, comprises the essence of the diversity versus consistency debate. It is a debate that goes to the heart of mediation practice and theory and directly affects the nature of the mediation process and the legal and political structures within which mediation operates.

In an attempt to balance this tension, the US was the first country to attempt to develop legally binding uniform mediation standards through the Uniform Mediation Model Law, which may now be adopted by the various US States. The US drive towards a national uniform solution reflects the vast and complicated web of regulations of mediators and mediation that have led to a great deal of confusion about rights and obligations of the mediator, clients, lawyers and courts. The Model Law is the result of a long consensus-based process and does not deal comprehensively with all issues relating to standards.

A very different approach has been taken in Australia where a recent report (NADRAC, 2001) to the Commonwealth Attorney-General recommended that all ADR service providers adopt a code of practice dealing with specific issues, while at the same time encouraging diversity by leaving the particular choice of standard up to specific practice areas and service providers. This is called the framework approach – developing a national framework for standards within which diversity and consistency can co-exist.

The mediation landscape in Europe is dotted with diverse stakeholder groups representing very different interests and cultures. For this reason and also to maximise opportunities for experimentation it seems that a framework approach to standards may be a valuable resource for European mediation. The alternative would be to transplant an American model to a different legal, political and cultural model.

Perhaps the answer to the diversity versus consistency debate is that there is no answer. Rather, the continuing tension between the two extremes is vital to the mindful integration of mediation into

mainstream disputing culture. Once stakeholders believe that an answer has been found for the range of questions raised by the debate, the tension will collapse. With nothing to fight for, stakeholders will expect all the benefits of consensus-based ADR to be sustained without further input, debate and management.

## Note

* Parts of this article are drawn from N Alexander, 'Global Trends in Mediation: Riding the Third Wave' in N Alexander (ed), *Global Trends in Mediation* (Köln: Otto Schmidt Verlag 2003) with the kind permission of the publishers.

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§ 15a EGZPO Introductory Law to the Civil Code of Germany.
The Uniform Mediation Model Law can be located at:
<http://www.nccusl.org/nccusl/Annual_Meeting_2001/MED01AM.pdf?> (4 January 2003)
Uniform Civil Procedure Rules 1999 (Qld)