



5-2005

Selling Mediation: Mimetic, Distancing, and Appellating Practices in the Marketing of an Emerging Profession

Andrew Woolford

University of Manitoba, woolford@ms.umanitoba.edu

R. S. Ratner

University of British Columbia, rsratner@interchange.ubc.ca

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Recommended Citation

Woolford, Andrew and Ratner, R. S. (2005) "Selling Mediation: Mimetic, Distancing, and Appellating Practices in the Marketing of an Emerging Profession," *Peace and Conflict Studies*: Vol. 12: No. 1, Article 1.

DOI: 10.46743/1082-7307/2005.1054

Available at: <https://nsuworks.nova.edu/pcs/vol12/iss1/1>

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Abstract

Individuals both within and outside the legal profession have been drawn by the 'promise' of mediation. In it they see a means for facilitating communicative exchanges between actors in conflict, which they view as a dramatic improvement on the adversarial practices of the formal legal system. However, despite the appeal of mediation to potential practitioners, there is not yet sufficient consumer demand to sustain the number of people who possess mediation skills. This has resulted in an overcrowded mediation market in which practitioners are forced to market themselves so as to compete for a limited clientele. In this context, the emerging mediation profession, with its still forming regulatory bodies, confronts the challenge of managing the image of mediation in the face of the increased marketing activities of mediators. In this paper we examine these marketing activities (described as mimetic, distancing and appellating practices) and their consequences for the public presentation of the mediation "profession."

Keywords: *conflict, marketing activities, mediation profession, mediation skills, sustainability*

Author Bio(s)

R.S. Ratner is a professor emeritus of sociology in the Department of Anthropology and Sociology, University of British Columbia, Vancouver, B.C. He has published in the areas of social movements, critical criminology, political sociology, and group interaction. He is currently engaged in research on genocide reparations, mediation, and restorative justice. He can be reached at rsratner@interchange.ubc.ca.

Andrew Woolford is assistant professor of sociology at the University of Manitoba. He is the author of *Between Justice and Certainty: Treaty Making in British Columbia* (UBC Press, 2005), as well as several articles on mediation, restorative justice, and reparations. He can be reached at woolford@ms.umanitoba.edu.

SELLING MEDIATION: MIMETIC, DISTANCING, AND APPELLATING PRACTICES IN THE MARKETING OF AN EMERGING PROFESSION

Andrew Woolford and R.S. Ratner

Abstract

Individuals both within and outside the legal profession have been drawn by the 'promise' of mediation. In it they see a means for facilitating communicative exchanges between actors in conflict, which they view as a dramatic improvement on the adversarial practices of the formal legal system. However, despite the appeal of mediation to potential practitioners, there is not yet sufficient consumer demand to sustain the number of people who possess mediation skills. This has resulted in an overcrowded mediation market in which practitioners are forced to market themselves so as to compete for a limited clientele. In this context, the emerging mediation profession, with its still forming regulatory bodies, confronts the challenge of managing the image of mediation in the face of the increased marketing activities of mediators. In this paper we examine these marketing activities (described as mimetic, distancing and appellating practices) and their consequences for the public presentation of the mediation "profession."

Introduction

Mediators exist in an undefined professional space; that is, there is a lack of clarity with respect to whether mediators constitute an autonomous profession, whether they are a subset of a broader legal profession, or whether they are simply a diverse group of practitioners of a specific skill set. Because of this uncertainty surrounding the professional status of mediation, specific challenges arise with respect to marketing mediation. These challenges are diagnostic of the uneven development of the mediation "profession," indicating both the competition amongst mediators to define the boundary conditions of their practice and the social, political and economic conditions under which this aspiring profession is struggling to emerge.

As is the case for many professional bodies, mediators confront a tension between popularizing and monopolizing the skills of their would-be profession when marketing their services. Brown (1986, 37) articulates this tension as follows:

Groups of practitioners trying to establish new professional institutions have first to establish the value of their work in the eyes of a clientele. At the same time, however, these would-be professionals have to preserve their specialized knowledge from

becoming common knowledge. An inherent tension arises between the twin tasks of popularizing one's contribution to society, so that it is comprehensible enough to be appreciated, and monopolizing one's knowledge, so that it is incomprehensible enough to be marketable.

Current conditions within the realm of dispute resolution have resulted in a mediation market that has become saturated with practitioners, and yet there is not an adequate client demand to sustain all of these practitioners. Faced with a shortage of clients, many practitioners opt to "diversify" their services by providing training for would-be mediators, further magnifying the problem. We will argue that, in these competitive circumstances, pressures are placed upon mediators to adapt and transform their marketing strategies in ways that may, in fact, contradict the image of "professionalism" they wish to project. In this paper, then, we provide an analysis of the economic and symbolic practices associated with the marketing of mediation. In doing so, we treat "professional" mediators as a complex group of actors engaged in a process of negotiating their collective definition, which requires them to balance an image of their profession as one that is non-coercive, altruistic, and predicated on open and honest communication, with the practical need to operate within a market of economic exchanges in order to guarantee their own occupational survival. The confluence of these factors has specific consequences with respect to the ways that mediators present themselves publicly, and places limitations on their client-seeking activities. Moreover, this is a precarious balance and a danger that mediation, through the marketing efforts of mediators seeking to secure employment within a competitive field of professional activity, will increasingly become a commodified object of legal consumption and less a communicative tool of dispute resolution. In sum, our objectives in this paper are to describe the current market conditions under which mediators operate and to examine the specific challenges these conditions present to the communicative practice of mediation, with an emphasis on mediator marketing practices.

The arguments presented in this paper draw upon thirty in-depth, semi-structured interviews with mediators and mediation trainers in Vancouver and Winnipeg. The co-director of the University of British Columbia's Program on Dispute Resolution, herself a trained and experienced mediator quite familiar with the mediator network in Vancouver, furnished us with the names of practicing mediators based on her knowledge of their mediation style (for example, evaluative, facilitative, and transformative), and these twenty-five individuals provided us with a diversity of perspectives on the professionalization of mediation and on mediator marketing. In Winnipeg, where there are fewer practicing mediators, we contacted those mediators who listed their services in the local Yellow Pages for interviews and subsequently interviewed five of these individuals to discuss the challenges of generating awareness of mediation in a small-market. In addition, a content analysis of mediation advertisements published in four commonly-used legal resources (*B.C. Mediation Directory*, *Ontario Reports*, *Canadian Lawyer* and *Lawyer's Weekly*) and local Yellow Pages in British Columbia, Ontario, and Manitoba over a two-year period (2002-2004) was conducted to highlight common

themes in mediator advertisements. Finally, an examination of the mediation literature and guidebooks on “how to effectively market one’s mediation practice” as well as the sociological literature on advertising and professionalism, were reviewed to inform our analysis.

Mediation and its Relation to the Juridical Field

We situate mediation in relation to what Bourdieu (1987) refers to as the “juridical field.” In Bourdieu’s (1987, 817) words, “The juridical field is the site of competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world.” Mediation, or, more generally, alternative (or “appropriate”) dispute resolution, can be viewed as a practice competing for legitimacy within the juridical field. However, the form of legitimacy sought varies with respect to the visions of the juridical and social worlds possessed by various mediators, ranging from those seeking the inclusion of mediation as a consumer option in the juridical marketplace to those working toward a transformation of the juridical field in the interest of a more humanizing brand of justice. While the former approach would see mediation play a role in supplementing and reproducing the contemporary juridical field by handling those cases that are not well suited to the adversarial process, the latter approach imagines a revolutionized juridical field in which adversarial legal processes are replaced by relationship-building strategies and norms.

The competition between adversarial and conciliatory legal strategies is symptomatic of the flux that exists within the current juridical field. At the same time, this field does not exist in a vacuum but is susceptible to the market properties of and pressures from other fields, such as business, as well as broader societal trends. Because juridical practices are directed toward actors who operate in other social fields, it is necessary that this field on occasion adapt its valuation practices so as to maintain congruence with these other fields. For example, given the complexity, time and expense of many legal cases, there has been a demand, particularly on the part of multinational conglomerates and other corporate entities, for “forum shopping” (Dezelay 1995, 5) so that disputants can seek out a juridical forum that will “fit the fuss” (Dezelay 1994). This has resulted in the market principles that govern economic activity becoming more salient within the juridical field, which is reflected in the creation of a juridical market from which purchasers can select justice options (for example., arbitration or mediation) that suit their business interests. More broadly, the multiplication of justice options is associated with an ascendant neoliberalism that has placed a premium on government devolution and deregulation, thus providing an ideological foundation for informal and non-governmental dispute resolution strategies. In this sense, these external pressures have created a space for practitioners of commercial mediation to market these services, and have resulted in some mediators and lawyers marketing themselves to these clients in a manner that emphasizes their non-legal

qualifications (such as MBAs) or their experience at the helm of small businesses. Similar pressures can be identified as emanating from therapeutic fields, such as social work, especially with respect to the practice of family law. In this subfield of law, increased attention to issues such as the negative impact of divorce on children has inspired some lawyers to adopt “collaborative” practices that lead to more amicable forms of family dissolution.

Despite these social and economic changes that are contributing to a growing demand for mediation in certain sectors, the position of mediation in relation to the juridical field is, as of yet, undefined (see Woolford and Ratner 2005), and this uncertainty has consequences for the ways in which mediators market their services. Indeed, there is a significant degree of internal competition within the subfield of mediation which affects the relationship between mediation and the broader juridical field, and which influences the strategies employed by various mediators in their advertising.

Symbolic and Economic Challenges to the Emerging Mediation Field

i) The Crowded Mediation Market:

In the past few decades there has been a burgeoning of mediation and conflict resolution training, with literally hundreds of these programs appearing in North America. In British Columbia alone, there are twelve programs that offer training in mediation skills. Some, such as the program offered by the Continuing Legal Education Society of British Columbia, provide students with the training required to qualify for the British Columbia Mediator Roster, a professional body established to offer potential clients a list of competent mediators. In general, all programs stress some combination of dispute resolution theory, dispute resolution skills training, and a practicum.

The minimum qualifications for mediators vary from jurisdiction to jurisdiction. In many regions, there exists an absence of ADR licensing requirements and therefore there are few barriers to entry into the practice of mediation (Jessani 2003). For example, in Winnipeg, Manitoba, where mediation is at an early stage in its professional development, anyone can hang out their shingle and claim to be a mediator. This is an issue of great concern for credentialed mediators because it risks popularizing the practice of mediation in a way that discourages any chance of establishing a professional monopoly. Indeed, several religious and political groups (e.g., Mennonites, Quakers and peace activists) have made basic conflict resolution training available to their adherents, further popularizing the practice of mediation. Not all mediators, however, view such popularization as problematic. Some, particularly those who adhere to what Bush and Folger (1994, 20-22) describe as the “transformation story,” believe that the mission of mediation is to transform “people from dependent beings concerned only with themselves (weak and selfish people) into secure and self-reliant beings willing to be concerned with and responsive to others (strong and caring people)” (Bush and Folger 1994, 20). However, from a market-oriented standpoint, this objective of widespread human empowerment and empathy creation, if taken to its extreme, could have unintended consequences for the development of mediation as a

profession since hired mediators would be of little use in a social situation where individuals were capable of resolving their own disputes.

Beyond the market-based concerns stemming from the popularization of mediation, there are also problems that arise from the swelled ranks of trained mediators. Mediation, as an occupation, appeals to many because, at least in theory, it promises aspirants a more direct opportunity to provide services that allegedly help people solve their everyday problems. Mediation training schools and institutes often appeal to these humanistic desires by directing their advertisements toward the prospective student's moral self-identity. For example, the advertisement for the Royal Roads University Master's Program in Conflict Analysis and Management suggests, "In this WORLD there are trouble makers and PEACE makers. YOU'RE the latter." The Director of the Institute of Conflict Analysis and Management (2004) similarly writes, "Choosing ICAM for your studies will be the start of an exciting journey that will combine your psychological, intellectual and spiritual resources to make a positive difference in your personal, professional and community relationships." Some advertisements go beyond this sort of humanistic appeal to suggest that a secure livelihood can be obtained through one's commitment to peace and conciliation. In the words of one disappointed mediator, many have been brought into it by people advertising training as a gateway to a new and lucrative profession – when it is not. ...I've seen programs (e.g., not just the '40 hour' training seminar, but 18-24 semester hours of class work, spread over 2-3 years of night classes) sold that way at \$800.00 a credit hour, draining people of time and hope and energy and money, and, at the end, leaving them with nothing but exhaustion. That is criminal – and common (quoted in Marsh 2003, n.p.).

Those who complete the training are often advised by working mediators not to "quit their day jobs" since few mediators are able to earn a full-time living early in their careers. The exceptions to this rule are senior mediators who have established reputations and who receive the bulk of well-paying commercial and government contracts. New mediators, in contrast, are counseled to seek out a suitable mediation "niche" and to creatively explore how they might better market their practices. Many mediators supplement lean practices by offering mediation training, thereby contributing to the influx of new mediators on the market. This can extend to offering mediation training to other professionals, such as lawyers. As a Pepperdine University program on "Mediating the Litigated Case" suggests, "Now lawyers and other established professionals can use their expertise to break into a new area of practice with tremendous possibilities."

Other mediators develop expertise in novel service products such as "conflict coaching" that are marketed in the corporate world. According to Noble (2002, n.p.), "Conflict coaching is a specialized niche and a dispute resolution technique that unites the fundamentals of coaching and conflict management. The object of this process is to help people one-on-one, to develop and improve the way they deal with workplace conflict." In general, new mediators are encouraged to seek out "uncharted" territories in which to offer their services (Seamone 2000).

ii) Mediation as a Moral Enterprise: Maintaining the Symbolic Dimension of Mediation in the Face of Economic Challenges.

The competition that exists amongst mediators, and between mediators and other juridical field professionals, such as lawyers, as well as the danger of over-popularizing mediation, create conditions in which mediators may find themselves drawn toward marketing strategies not entirely reflective of their idealized image of their profession. Even established professionals, such as lawyers and physicians, find the pull toward businesslike behavior problematic because it portrays the professional as someone acting in a self-interested rather than altruistic fashion (Bullard and Skipper 1999; Ritzer 1971), and runs contrary to the ideal image of the professional as one who places the interests of the client and the profession first and foremost. With the emerging profession of mediation, this problem is accentuated because altruism is not only associated with one's professional status; it is also said to be the very core of the practice for certain types of mediation (e.g., facilitative and transformative mediation), which are often represented as communicative and ethical strategies of dispute resolution. The task of the facilitative or transformative mediator is to encourage conciliatory exchanges between actors in conflict to help them develop the communication tools they require to reach a mutually agreeable resolution to their conflict. However, the more mediators are forced to act in a competitive and entrepreneurial manner, the more they risk failing to "walk the talk" of their profession. For example, interventions intended to improve a mediator's settlement rate, in part as a strategy to increase the mediator's marketability, could contradict the mediator's dictum that prioritizes client empowerment.

Transformations beyond the juridical field are also contributing to heightened competition within the mediation market. With the ascendancy of neoliberalism we have witnessed an ideological shift toward less government, deregulation, and increased competition amongst various providers of social services (Field 1988). Free enterprise and the market are the reigning models of social organization; even the government today acts more as a purchaser than a provider of services, operating within a "quasi-market" in which service providers compete for government funds. This leads to "a position where, in order to demonstrate their fitness, public sector organizations must reinvent themselves in the style of private sector concerns: corporate identities – a logo plus an expensively commissioned house-style, name-badges, uniforms, etc.; promotional literature; pro-active external relations strategies—particularly targeting the news media; even placing triumphalist advertisements" (Aldridge 1996, 188). Mediators also find themselves increasingly compelled to succumb to the logic of the market and take steps to compete more aggressively for consumer and government dollars.

Mediators, however, clearly face a broad array of pressures when they seek to sell their services within the juridical field. This is evident in a discussion that recently took place on a mediation website, where mediators were asked the following question: "If how I make money from mediation is the wrong question, what is the right question?" This query captures the challenge faced when attempting to maintain the symbolic and moral dimensions of mediation in the face

of market pressures. While some mediators, such as the one quoted earlier, criticized mediation training schools for making unrealistic promises about the opportunity for money-making in the mediation marketplace, others sought ways to balance their need to make a living with their moral commitment to the practice of mediation. For example, one mediator wrote: “The marketplace has a sense for why and what people have to offer. When the market smells the ‘quick buck’ mentality, I believe that it runs in the opposite direction. People who ask the question, ‘How do I make money’ are focused on themselves... not the marketplace. In contrast, we are interested in the people and the processes. The marketplace gravitates to that” (quoted in Marsh 2003, n.p.). In a similar vein, another mediator wrote: “Mediators should rise above the majority in our thinking and ask the higher question: ‘How can I help others reach their goals, solve their problems?’ It is in accomplishing this task that mediators will solve the money issue” (quoted in Marsh 2003, n.p.). And, “I, for one, am in this for my clients. I believe if I succeed with them and for them, my career (and its income) will take care of itself” (quoted in Marsh 2003, n.p.). In each statement, the argument is made that moral practice is economic practice; that is, if a mediator remains true to the moral enterprise of mediation he or she will be rewarded with sufficient business.

Others answer the question in a pragmatic rather than idealistic manner, arguing “I believe that mediators... may benefit from some measure of training in marketing and starting and running a small business, preferably one that includes components on ‘networking’ and ‘strategic planning’” (quoted in Marsh 2003, n.p.) or “Since this a business then we need to look at how we manage our business, and perhaps individually reposition ourselves as experts in one field or industry. In other words engage in niche marketing and learn to manage a business” (quoted in Marsh 2003, n.p.). These budding professionals have embraced the common sense of the marketing profession and are looking to other “experts” to advise them on how to expand their mediation practices. Indeed, there now exist marketing outfits and training programs that are dedicated solely to the cause of helping mediators better market themselves and sell their skills to an under-informed and often indifferent general public.

Thus, there exists a tension in the marketing of mediation between the need to continue to “walk the talk” of mediation by presenting oneself honestly and putting the needs of the client first and the need to embrace an entrepreneurial model that will make mediation more marketable. Those committed to “walking the talk” have faith that an honorable self-presentation will result in a viable mediation practice. Those who embrace the marketing model argue that the modern context of market capitalism demands more assertive marketing behavior. Others, however, attempt to negotiate this divide by reframing marketing as a moral practice. For example, Williams (2002, n.p.) states:

I understand that we are professionals and must act in a professional manner when presenting our services to the public. I also know that from a business perspective, if we don’t promote our services, the public will not know mediation is available. If you really believe that your mediation

services have value to assist people in resolving their conflicts, then what benefit is that belief if those [whom you desire] to serve, do not know you exist.

Through this reframing, the marketing of mediation services becomes primarily a means for informing the general public about the availability of dispute resolution services, and less an economic practice of self-promotion. This raises the tricky question of professional advertising.

Advertising is one of the marketing practices most commonly associated with less valued mercantile pursuits; therefore, its use threatens to “lessen the symbolic distance” between professionals and the sellers of commodities (Bullard and Skipper 1999, 19). However, in a society where we have seen “the relentless commodification of all areas of social life, and the rise of market values” (Holt and Schor 2000, viii), it is not surprising that professional services would need to enter the consumer realm. Add to this the judicial decisions in the United States that prohibit restraints on professional advertisement and a general consumer acceptance of advertisements by professional service providers (Bullard and Skipper 1999), and the stage is set for greater usage of professional advertising.

To date, mediators have been less frequent users of print media advertisements than lawyers. However, this is beginning to change, and we are likely to see increased advertising by mediators as mediation services come more in demand. Currently, it is in the larger Canadian markets, such as Vancouver and Toronto, that mediators most frequently use advertisements (in particular, lawyer mediators who are clearly more familiar with the medium). These advertisements are most often posted in mediator directories, trade magazines, legal newsletters, websites, and the Yellow Pages. It is less common for mediators to advertise in major newspapers or on television because of the expense of and minimal return generated by such advertisements. In smaller markets, such as Winnipeg, mediator advertisements are typically limited to listings in the Yellow Pages and photocopied pamphlets describing the services offered. More generally, these small-market mediators use word-of-mouth and public speaking engagements as means to make their services known, as well there is a minor Web presence amongst these small-market mediators.

Mediator professional organizations are preparing for the advent of increased mediator advertising by including in their codes of conduct stipulations about the appropriate use of advertisement for mediation. Although these codes have little force—the most severe punishment they can typically administer is removal from the professional organization, and not a ban from practicing mediation—they do provide clear guidelines for the ways in which mediators can present themselves to the public. One stipulation common to almost all mediator professional codes of conduct emphasizes mediators’ obligation to be honest in their advertising endeavours, and to “refrain from guaranteeing settlement or promising specific results” (Ontario Ministry of the Attorney General 2002).

In the next section we explore specific strategies used by mediators in their marketing, with special attention paid to their current advertising practices.

Selling Mediation

Mediator marketing strategies are broad. Several guides, courses, and articles are available to those who wish to make their practice known. In general, emphasis is placed upon creating one's "mediation signature" (this is a description of one's approach to mediation that is used to attract clients), identifying types of mediation services offered, and defining a "target market" (Mosten 2001; see also, B.C. Mediation Directory 2002/3). Once these goals are achieved, the aspiring mediator turns toward marketing his or her services. Marketing activities include: mailed announcements, press releases, open houses, brochures, networking with referral sources, "Yellow Page" and other paid advertisements, creating a "Web presence," teaching, and public presentations. For those seeking "expert" help on marketing their mediation practice, there is even a growing industry that instructs mediators in the art of marketing. Golden Media, a California-based advertising firm that specializes in helping mediators market their practices, offers a complimentary marketing notebook to mediators to help them sell their mediation practices. The rationale offered by Golden Media (2001: n.p.) for their services is "The best investment a business owner can make is in increasing their visibility and establishing themselves as an authority through effective marketing and promoting." Here, mediators are asked to view themselves as 'business owners' who need to make wise entrepreneurial decisions, including hiring Golden Media.

As mentioned above, advertising is a mediation marketing strategy that is growing in popularity. Goldman and Papson (2000, 81) point out that, in general, "Advertisements are structured to boost the value of commodity brand names by attaching them to images that possess social and cultural value." This is certainly evident in the marketing practices of mediators, and we will identify three such practices below: Mimetic practices that seek to capitalize on the professional status of lawyers; distancing practices that rely on images that contrast mediation and legal practices so as to pursue a "profit of distinction" (Bourdieu 1984) by differentiating mediation from other legal practices; and appellating practices that attempt to create a clientele for mediation by appealing to potential consumers as "moral" and "responsible" actors. However, although these practices are often explicit in mediator advertisements, we feel it is also crucial to examine the absences or silences of mediation marketing—i.e., what is not said in these advertisements—as profit can be obtained by avoiding blatant attempts to convince or sell potential consumers (e.g., guarantees of settlement) and by employing a style of self-promotion that is viewed to be primarily "informational."

i) Mimetic Practices: The Professional Lawyer as Marketing Model

Mimetic Practices of marketing are those that seek symbolic profit by associating mediation with the more established professions, in particular the legal profession. Legal professionals are of course part of a diverse group of actors who are in contestation with one another with respect to their collective definition. This said; there exist certain widely shared cultural understandings of the legal profession that can be tapped into by savvy mediators.

Law and other classical professions, such as medicine, have seen their marketing practices change over the last two centuries. For example, in the nineteenth century, medicine was more of a trade than a profession, and physicians would advertise their services through bills and promotional cards (Field 1988). Indeed, at this time, it was common for charlatans to advertise grand claims about their healing powers or the healing properties of various concoctions (Barber 1988). This misuse of advertisements led the American Medical Association to set a new professional standard, banning advertising by its members (Barber 1988). By the mid-twentieth century, this practice of banning advertisements was the norm among North American professional associations. As Field (1988, 14) writes, “One of the important criteria that characterized a gentlemanly occupation, was that its practitioners do not solicit clients or patients; advertising became taboo, precisely because of its symbolic association with business, with commerce, with trade, with competition and ...with fraud and deception.” However, by the 1970s the courts began to question the power of the professional associations to forbid advertising by their members. In the United States, a 1977 Supreme Court decision stated that advertising by professionals is constitutionally protected as a form of commercial speech (Seron 1993). This opened the door for professionals of all stripes to place advertisements in newspapers, in Yellow Pages, and even on television.

However, the original concerns that motivated professional organizations to ban advertising remained, and this resulted in attempts by professional associations to limit advertising by professionals to an “informational” model. This is a form of advertising that, as the mediation codes of conduct addressed above suggest, makes no promises or claims as to the efficacy of the professional service; instead, advertisements are limited to “matters that educate and inform the public” (Family Mediation Canada n.d.). According to Family Mediation Canada (n.d.), this is information that simply describes the mediator and the services offered: “name, address, telephone and FAX number, office hours, relevant academic degree(s), relevant training and experience in mediation, appropriate professional affiliations and membership status, and any additional relevant or important consumer information.” This is a principle similar to the standards set out in the Canadian Bar Association’s Code of Professional Conduct (1987), which warns that lawyers “must not mislead the uninformed or arouse unattainable hopes and expectations.”

The distinction between advertisements that inform potential clients and advertisements that seek to influence or manipulate client behaviors may, however, be overdrawn in these codes of conduct. As Barnard (1995, 35) states, “Advertising as informing intends to influence or modify behaviour; ...there is no point to information that does not influence or modify behaviour.” In fact, the very roots of the word ‘advertising’ support this argument—the Latin *ad* meaning ‘to’ and *vertere* meaning ‘to turn’ suggest that someone’s attention is being turned toward something (Barnard 1995, 27). Bourdieu’s (1998, 93) concept of an “interest in disinterestedness” summarizes well the stakes involved in informational advertising, which allows mediators and other professionals to advertise in a manner that does not expose their economic interests, thereby highlighting the altruistic face of the profession.

In this sense, the informational advertisements employed by mediators can be understood as a simulacrum (see Baudrillard 1981). They hail an “informational” past of advertising that never truly existed, and make this imaginary past the signifier for the modern mediator’s dignity, honour, and sincerity. Thus, these professional advertisements are not simply presenting the basic information needed by a potential clientele; they are emulating a form of advertisement that is perceived to be professional and thereby engaging in a process of professional claims-making. As Goldman and Papson (2000, 88) note, “Advertising continuously appropriates meanings, which it chews up in the process of recontextualizing those meanings to fit commodities and corporations.” This “cannibalism” is evident in mediator’s advertisements as they seek symbolic profit through the formation of a mimetic relationship with legal advertising, capitalizing on the cultural value attributed to a more established profession.

With a number of lawyer-mediators operating in the juridical field, it is not surprising that there would be many similarities between mediator and lawyer marketing practices. Mediators with legal backgrounds tend to foreground this information in their advertisements. For example, the advertisement for Boelman & Company (Vancouver) states, “Mahnaz Boelman is a lawyer, chartered mediator, and arbitrator.” The rest of the advertisement lists briefly Boelman’s professional organization memberships, experience, teaching and coaching activities, and areas of mediation expertise. With its simple layout (a light blue background with a thin white border) the advertisement communicates the professionalism of the mediator, in part, by dint of her membership in the legal profession, but also through an integrity demonstrated by the absence of grand claims and promises. Non-lawyer mediators also aspire to the solemnity and integrity of the marketing strategies used by legal professionals. Indeed, the majority of mediator advertisements and public notices (lawyer and non-lawyer) follow a similar minimalist strategy.

“Marketing” involves more than just advertisements, however. Mediator marketing guides typically recommend that beginner mediators replicate the professional marketing strategies of other professionals: mailed announcements are to be printed on “high-quality paper stock,” business cards should be “classy,” and brochures are to be stylized to send the message that the mediator is a serious professional (Davis 2002; Mosten 2001). Professional comportment is also advised, with special emphasis placed on exhibiting “good manners” and “accountability” (e.g., sending thank you notes to everyone who provides you with a referral). In other words, the mimetic quality of effective marketing extends beyond media presentation and includes embodied practices of professional conduct.

In their advertisements, non-lawyer mediators and lawyer mediators alike, attempt to communicate their professionalism through various strategies, a sampling of which will be discussed here. Many use photographs of the mediators to both illustrate and humanize professionalism. An advertisement for the Toronto-based Dispute Resolution Services presents a picture of their president, smiling, but also dressed in a business suit. The word “INTEGRITY” is presented prominently in the text (in another advertisement, they include the words “PROFESSIONALISM and

DETERMINATION”). In other advertisements used by the same firm, the advertisement form is disguised by repackaging the ad as an announcement for a new mediator who has joined the firm. This is similar to the strategy of the congratulatory notice through which a Law firm announces members’ attainment of mediating qualifications. For example, Elkind, Lipton & Jacobs LLP (Toronto) posted the following advertisement to “congratulate our partner PAUL JACOBS Q.C., C. Med., C.Arb. on being designated both Chartered Mediator and Chartered Arbitrator by the ADR Institute of Canada”. Here, they focus on Jacobs’ achievement, citing that he is one of a few Canadian professionals who have earned both of these designations. This focus is related to two other buzzwords in mediation marketing: experience and expertise. Mimetic practices seek to demonstrate that the mediator has a substantial background in the juridical field, since there often exists a bias against contracting new, “green” mediators. For example, J. Jay Rudolph (Toronto) notes his “High Settlement Rate – Over 10 Years of Experience” just as Michael Silver (Toronto) advertises himself as “one of the most experienced ADR Practitioners in Ontario, having mediated on thousands of occasions.”

Mediators also seek profit from other credentials and professional affiliations that they hold, aside from their legal degree(s). David Lipton, a Toronto-based mediator, advertises that he brings “Business Expertise to Mediation” that is derived from his position teaching management and international strategy MBA classes at York University. This form of targeted marketing is common in mediator advertising, as mediators seek to identify their specific juridical niche (e.g., family, construction, workplace, human rights). The intent in all of these cases is to provide “information” that encourages product purchase. The key selling point is the mediator’s professional qualities, qualities associated with other professional groups.

ii) Distancing Practices: Constituting Mediation as a Practice Distinct from the Law through Marketing

While certain benefits accrue from associating mediation with legal professionalism, it is nonetheless necessary that mediators engage in “product differentiation” in order to distance their practices from negative perceptions of the legal profession and to distinguish a specific mediation niche. The goal of these strategies is to present mediation as a profession different from other professions. Dispute Management Inc., for example, describes their services as “Beyond law...” How this distancing process unfolds often depends on the type of mediation being marketed: evaluative mediators, who are more directive in their approach to resolving conflict, tend to market mediation as a time-saving approach to settlement (with the resultant cost-savings left implicit) and therefore as a pragmatic exchange between actors in conflict; in contrast, facilitative mediators, who focus on client empowerment and interest conciliation, and transformative mediators, who focus on the creation of shared values through the mediation process, are more likely to market mediation as a moral exchange between actors in conflict, directed toward their mutual benefit. Thus, whereas the first group distances itself from legal professionals through an emphasis on procedural superiority, the latter two appeal to

normative sensibilities critical of the adversarial practices of law.

It should also be noted that, although there are publicly valued aspects of professionalism from which mediators may wish to profit, such as the notion of professional altruism and the reverence provided to certain professional actors, there are also negative connotations attached to the professions from which mediators attempt to distance themselves. The deprofessionalization movement of the 1970s, as articulated by writers such as Illich (1977; see also Illich et. al. 1977), contributed to a reframing of professional conduct by portraying professionals as suffering from what Johnson (1972, 17) refers to as a “trained incapacity for social responsibility” and as actors who appropriate the skills and knowledges of local communities and translate these collective resources into the complex and esoteric language of the professions. Mediators often seek to exploit these negative images of legal professionals by drawing subtle contrasts to lawyerly practices. For example, an advertisement for Chalke & Company (Vancouver) follows the two-tone color presentation used by Boelman and Company (mentioned above), and includes as background a stylized logo (C&C). However, the services offered by Chalke and Company are differentiated from those delivered by lawyers, as less prominence is given to the professional qualifications of the mediators and more to their “15 years experience successfully resolving disputes.” Similarly, L Leslie Dizgun (Toronto) warns potential clients that “Settlements don’t just happen” while Ellyn-Barristers (Toronto) offer, “Selecting the right mediator could be your best strategy.” These advertisements are typical of those used by evaluative mediators in that they draw the reader’s attention to the pragmatic superiority of mediation, and implicitly criticize the inefficiency of the adversarial courtroom. Some, like the British Columbia Arbitration and Mediation Institute, are more explicit in their criticisms: “Avoid Litigation: The route through the courts is costly, slow and congested.”

Other advertisements are more critical of the disempowering and alienating nature of adversarial law. The focus on resolution is repeated in advertisements for the CORE Clinic (Vancouver) and the ADR Institute of Canada, the latter of which states in bold “we help you resolve disputes.” Riverdale Mediation (Toronto) promises a justice experience that is “less adversarial, more satisfying.” Unlike Chalke and Company, these mediators highlight the personal empowerment and satisfaction that are said to derive from participation in mediation. Moreover, they constitute mediation as a moral practice through these distancing strategies. Mediators are portrayed as facilitators who help individuals in personal problem-solving and not as unknown actors (like judges) who impose resolution on the parties.

Mediators looking to gain a foothold in the dispute resolution market are advised to “Maximize Your Time at Network Events: Build trust in yourself. Smile and greet everyone within reach. Dress the part. Have a 30-second introduction statement. Take brochures to the event. Pass them out at the table with your card. Email or send a postcard to each person after the event to say ‘nice to meet you’ and some information of interest to them” (Davis 2002). Here, the mediator’s self-presentation and comportment are crafted so as to communicate professionalism,

yet also a degree of personableness that contrasts with the image of the indifferent professional. This is related to the marketing mediator's objective to "build trust" (Davis 2002) which is at once an embrace of the "professional" designation so as to profit from its symbolic capital (derived from cultural traditions and assumptions about professional "knowledge") and a distancing from the derided qualities of professionalism, for example the professional's reputed careerism.

A final note, the objective of product differentiation, in combination with the competitive mediation market and the need for mediators to diversify the services they offer in order to sustain their practices, has contributed to a "fracturing" of mediation as a profession. Mediators are rarely simply in the business of providing facilitation services for people in conflict; instead, they simultaneously pursue multiple service opportunities. For example, the advertisement for True North Dispute Management (Vancouver) lists the various services they provide: dispute management systems design, dispute management systems consultation, mediation services, mediation and other training services, and career coaching for dispute resolution professionals. This allows companies such as True North to expand their services beyond the boundaries of the juridical field (and to further differentiate themselves from legal professionals) by offering conflict coaching, systems design and consultation, and other services to corporations seeking to improve their internal dispute resolution systems without entering the costly and time-consuming juridical field.

iii) Appellating Practices: Constituting a Clientele for Mediation

Goldman and Papson (2000, 82) suggest: "When ads hail us, they appellate us, naming us and inviting us to take up a position in relation to the advertisements. Consumer ads greet us as individual viewers with what seem to be our own (already) ideological assumptions and personalities." The ideological assumptions presupposed by marketing mediators include a pragmatic desire for expedient settlement, a sense of disenfranchisement from an esoteric juridical field, and a normative orientation toward conciliatory settlement, among others. But the advertisements and other marketing strategies do not simply appeal to long held beliefs about the juridical field; they also constitute these beliefs, and thereby seek to constitute a clientele for mediation.

Mediation bodies and organizations often produce "resources for clients" which, among other things, provide potential clients with advice about selecting a mediator. This literature initiates the "responsibilization" (Burchell 1993) process whereby the client is represented as an empowered actor responsible for the fate of his or her dispute. The success of mediation for the particular client is, in part, attributed to the diligence demonstrated by the client in selecting a mediator (e.g., examining what sort of assistance is required from the mediator, whether or not the mediator should possess expertise in a specific area, and the degree to which the mediator should play an "evaluative role") for example, the B.C. Mediation Directory 2002/3, 2-10. Through marketing approaches ostensibly designed to inform potential clients about what mediation is and what it might do for them, an attempt is made to train clients to make use of "appropriate" dispute resolution; that is, to seek the correct forum for the conflict which they face. However, underlying

this training is an assumption that mediation is appropriate for most conflicts, and a desire to make mediation an instinctive choice for dispute resolution amongst the general public. As Simon (2004, n.p.) puts it,

If there is ever going to be a mediation profession, we must create a program whereby the general public 1) becomes aware of mediation, 2) puts it before litigation as their primary choice for dispute resolution, and 3) comes to understand that it is applicable wherever and whenever disputes arise. Mediation will only be a real profession when the public thinks as naturally of calling a mediator to help resolve a dispute as they now think of calling a doctor when they develop the sniffles.

These appealing practices are also evident in the public presentations used by mediators as part of their marketing strategies. These presentations are typically offered at local Rotary clubs, universities, or other situations where a captive audience might be found. They serve as an opportunity to introduce individuals to the tools of mediation (without popularizing these tools to the point where professional services are no longer needed) to make them aware of how they might apply to their own lives. Quite often, these presentations feature a strong normative component that appeals to the listener's desire to resolve conflicts in a peaceable and rationale manner. A similar, yet more long-term strategy involves introducing mediation techniques to grade school age children to provide them with the basic tools needed to resolve schoolyard conflicts. While there is a danger that these services might detract from a professional monopoly over mediation skills, the altruistic desire to help young people better deal with conflict is coupled with an appealing strategy to train these young people toward a particular model of dispute resolution that they may call upon later in their lives.

Appealing practices also occur through the presentation of mediation as a form of "symbolic" rather than "economic" exchange (see Bourdieu 1998). This is an appeal to an idealized mode of human interaction; one that casts aside matters of crass economism and monetary relations for the sake of matters of interpersonal ethics (words such as "integrity", "dignity", "honour", and "creativity", often cited in mediator advertisements, are important here). The realm of symbolic exchange is one ruled by the "taboo of making things explicit," whose form par excellence is the price). To say what really is, to declare the truth of the exchange, or as is often said, "the truth of the price (before giving a present we remove the price tag...), is to destroy the exchange" (Bourdieu 1998, 95-96). Mediator codes of conduct typically limit the advertising practices of mediators in a manner that requires them to bracket their economic motivations by representing themselves through symbolic rather than economic language and actions (such as by forbidding display of mediation costs and requiring that advertisements be used to further public knowledge and acceptance of mediation). This is an imposition of form that serves to reinforce the collective image of the profession and keeps implicit the economic objectives of mediator self-marketing. It is also an appeal to consumer sensibilities, constructing the ideal user of mediation as someone who is more concerned with reaching a fair settlement than as a person seeking to maximize profit through litigious means.

Conclusion

In this paper we have illustrated a selection of mediator marketing practices which characterize the difficult position of mediation within the juridical field. As a sub-field within a broader field dominated by the formal practice of law, mediation competes with the law for legitimacy in terms of defining the process of conflict resolution. While seeking to establish mediation as a professional practice within this juridical market, mediators face the predicament of attempting to profit both by associating mediation with and distancing mediation from the formal legal professional. Thus there is a balance to be maintained between mimetic and distancing practices within mediation marketing. As well, there is a need to further popularize mediation through appellating practices directed at juridical consumers; however, these appellating practices must avoid popularizing and spreading the practice of mediation to the extent that mediation professionals lose their monopoly over their skill set.

This said, it should not be assumed that juridical consumers are empty screens on which mediators can project their conflict resolution advertisements; for these consumers, the subtext of economic advantage that underlies mediator marketing may make the moral claims about mediation seem much less consequential. As Adorno and Horkheimer (2000, 17) observed in their critique of mass culture, “We have even learned how to identify abstract concepts as sales propaganda. Language based entirely on truth simply arouses impatience to get on with the business deal it is probably advancing.” Regardless of the extent to which mediator marketing projects a moral and personable image of its practices, it still confronts an often media savvy and cynical consumer who is immersed in a world defined by a surfeit of advertising images, and who is likely to suspect that economic motives underlie marketing efforts. Under these circumstances, mediator advertising, as a general form, may attach to mediation the taint of commodification, and therefore dampen the humanistic representation of this conflict resolution technique that some mediators wish to communicate. But this is not a necessary outcome so long as those who market mediation respond to and incorporate consumer wants and needs into their services.

However, as competition in the mediation market increases, and assuming the continued hegemony of the “marketing model” as a basis for rational action, marketing practices are likely to become more aggressive, drawing mediators away from mimetic practices that aspire toward “informational” and “professional” marketing strategies. Aggressive marketing would also inspire distancing practices that overstate the benefits of mediation compared to other juridical professional services, and produce more assertive appellating strategies that seek to habituate consumers to mediation practices. This, in turn, would discourage self-empowerment, making it difficult for potential users to know what forms of dispute resolution they can invoke on their behalf. In such a situation, mediation would violate the rules of its own game by placing its instrumental motivations in the forefront while minimizing its claims to build disputants’ communicative capacities. With this self-contradiction, the ethical neutrality of the mediator risks becoming

suspect because of overweaning economic motives.

Therefore, although there is reason to be skeptical about the “informational” claims of mediator marketing, and reason to problematize representations of marketing as a moral or altruistic practice, there is more reason to fear the devolution of mediation marketing practices into the fully commodified realm of market capitalism, especially for those who consider themselves facilitative and transformative mediators. The public presentation of mediation as a symbolic and moral practice may belie these mediator’s economic motivations, but the unmasking of this representation, and the entry of mediation into the realm of crass consumerism and evaluative efficiency, would contrast too severely with the stated ideals of this conflict resolution technique. For facilitative and transformative mediators, mediation is a form of communicative rather than instrumental action. Yet marketing strategies reliant on some of the described advertising techniques threaten to locate their activities more in the instrumental realm. For this reason, these communicative mediators, despite the fears of “professionalization” expressed by some, have reason to support professional regulation of marketing practices to prevent their ideals from being publicly compromised, assuming these codes gain adequate power to actually deter the misuse of marketing techniques by professional mediators. Thus, although some facilitative and transformative mediators deride professionalization as a betrayal of mediation’s grassroots commitment to empowerment and inclusiveness, the failure to impose restrictive controls on marketing may end in a more egregious betrayal of those origins, as the mediator’s commitment to communicative ethics disappears in a milieu of unregulated, profit-oriented advertising.

For this reason, those who adhere to facilitative or transformative mediation models may need to embrace professionalism in the form of marketing standards that protect the “good image” of mediation in the face of increasing commercialization. Professional codes of this sort need not empower an already powerful set of gatekeepers, such as lawyer-mediators; instead, they can secure ethical standards that promote the good intentions of practitioners and the welfare of the public clientele. This does require, however, that facilitative and transformative mediators organize within professional bodies to ensure that they have a voice in deciding the shape of the profession. Given Durkheim’s (1985, 141) pungent representation of the “amoral character of economic life”, and the fact that mediation is increasingly a service exchanged for economic profit, it is more and more imperative that ethical regulation of the profession be established to preserve the symbolic and communicative dimensions of mediation in the face of market pressures.

Endnotes

¹ We would like to thank Sean Byrne and Honggang Yang for their assistance in readying this article for publication. We would also like to thank the two anonymous reviewers from *Peace and Conflict Studies* for their helpful commentary on and constructive criticisms of an earlier draft of this paper.

¹ In its most general sense, “mediation” refers to a dispute resolution practice in which a neutral intermediary facilitates a consensual resolution for parties in conflict, sparing them the time, cost, and adversarial wrangling of the courtroom. This definition is consistent with that used by the majority of our interviewees, although some commentators question the assumption of mediator “neutrality” (see, for example, Cobb and Rifkin 1991) and the presumed benefits of time and cost savings.

¹ In larger markets such as Vancouver and Toronto, some mediators successfully practice their craft full-time; however, in a smaller mediation market, such as Winnipeg, where there exists less demand for commercial mediations, very few mediators survive solely on the basis of their mediation skills.

¹ See also California Dispute Resolution Council, 2000; British Columbia Mediator Roster Society, 2002; and, Family Mediation Canada, n.d.

¹ Collins (1990, 25) refers to a similar process of ‘status emulation’: ‘Within the specific realm of professions, as occupations which have organized to restrict their work from market competition, this creation of supra-markets takes place through a process of status emulation. The success of older occupations in acquiring privileges for themselves sets up models towards which other occupations can strive.’ However, this term appears to refer primarily to practices of emulating professionals who operate in other fields of occupational activity, and who provide a model through which an occupational group can pursue market closure. ‘Mimetic practices’, in contrast, also include efforts to appropriate the legitimacy and the professional behaviours of competing occupational groups.

¹ However, it should be noted that Family Mediation Canada sets criteria that are more restrictive for its members than the Canadian Bar Association, perhaps due to a need for tighter controls to be placed on an emerging profession. This said, the Canadian Bar Association is better able to enforce its standards, as it has greater powers to discipline its members.

¹ We are not suggesting that mediators’ (or other professionals, for that matter) practices are entirely economic or entirely altruistic. Rather, we are merely noting that marketing strategies focus on the altruistic dimension of the profession because it is believed that an accent on the economic dimension turns away their potential clientele.

¹ Evaluative mediators have already entered and accepted this realm of practice through their efforts to meet the time and cost saving interests of commercial clients.

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