

# Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not

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# Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not

## **Abstract**

This article examines the debate over the introduction of mandatory mediation in civil litigation. It analyzes why and how voluntary mediation works in order to measure how the process might change under the new regime being implemented in Ontario. The underlying narrative structures of mediation are exposed using semiotic theories commonly employed in the study of theatre. This article will show that mediation, when imposed on unwilling parties, will hinder its efficacy and compromise its theatrical processes. The author concludes that the best way to ensure that making mediation mandatory does not discredit the efficacy and benefits of the process is to encourage greater voluntary participation among members of the legal community and their clients.

# UNWILLING ACTORS: WHY VOLUNTARY MEDIATION WORKS, WHY MANDATORY MEDIATION MIGHT NOT<sup>©</sup>

BY GARY SMITH\*

This article examines the debate over the introduction of mandatory mediation in civil litigation. It analyzes why and how voluntary mediation works in order to measure how the process might change under the new regime being implemented in Ontario. The underlying narrative structures of mediation are exposed using semiotic theories commonly employed in the study of theatre. This article will show that mediation, when imposed on unwilling parties, will hinder its efficacy and compromise its theatrical processes. The author concludes that the best way to ensure that making mediation mandatory does not discredit the efficacy and benefits of the process is to encourage greater voluntary participation among members of the legal community and their clients.

Le présent article examine le débat sur la médiation obligatoire dans les litiges civils. En analysant pourquoi et comment la médiation facultative fonctionne, l'auteur prévoit de quelle façon le processus changerait si rendu obligatoire selon le régime que l'on met en exécution en Ontario. Les structures narratives sous-jacentes de la médiation se décrivent par l'emploi de théories empruntées à la sémiotique théâtrale. L'imposition de la médiation à participants peu disposés nuirait à son efficacité en compromettant ses procédés théâtraux. L'auteur propose que ce n'est qu'en augmentant le nombre de participants bien disposés que l'imposition de la médiation ne ferait pas déconsidérer ce processus utile.

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## I. INTRODUCTION

The mandating of mediation for civil litigation pits proponents of judicial expediency against the defenders of justice and fairness. This article arises out of the debate in Ontario over the introduction of a mandatory mediation program for civil litigation.<sup>1</sup> There are proponents and detractors of mandatory mediation, each with reasons why this kind of program should or should not be implemented. Despite much disagreement, which resembled a values-based dispute in which the participants advanced their diametrically opposed positions, the concept remained at the proposal stage for many months.<sup>2</sup> The lessons of alternative dispute resolution (ADR) teach us to go behind such positions to find the needs and interests of the parties. Only then can parties find common ground upon which the issues can be reconciled.

The parties in this dispute did not discover common ground. They disagreed on the basis of their irreconcilable positions, employing separate discourses without a common understanding from which to assess their divergent opinions. Although there was a sensitivity to the oxymoron implicit in the juxtaposition of "mediation" with the adjective "mandatory," none of the proponents or critics of mandatory mediation approached the question from first principles in order to determine the

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<sup>1</sup> Ontario, *Memorandum of the Rules Secretariat—Consultation on Mandatory Mediation* (Toronto: Law Society of Upper Canada, 1997) [hereinafter *Memorandum*].

<sup>2</sup> See K. Makin, "Ontario Looks at Mandatory Mediation in Civil Suits" *The [Toronto] Globe and Mail* (7 January 1998) A9. The program has subsequently been partially implemented. For the details, see text accompanying notes 99-101, *infra*.

possible consequences of imposing mediation. What was lacking in the debate was a close analysis of mediation itself: a systematic, coherent study of communications in the process of mediation. In order to consider the issue of mandatory mediation in an informed manner, one must understand not only what mediation can do, but how and why it works. Once this has been accomplished, the consequences of mandating what is generally considered to be a voluntary procedure can be accurately predicted.

One aspect of the detailed analysis to which I have referred can be found in a substantial number of books and articles which explain how to practice mediation.<sup>3</sup> Written by skilled mediators, these works describe how to achieve results in the mediation process. Insofar as these works focus on the steps in the process, they serve as “how-to” guides for the practitioner, but they do not really consider *why* these steps work. This “why” question is the very question posed by mediators to parties in mediation in order to get behind their positions to find their hidden interests. The answer to this question will tell us not only how mediation works, but by going behind the mediator’s moves<sup>4</sup> during a session, it will determine why it works. This is the essential first step in the examination of mandatory mediation.

How can we determine why mediation works? I propose to adopt the communication theory model used in the analysis of the semiotics of theatre. In this way, mediation can be analyzed as theatre. The mediator is writer, director, and actor in the proceedings. The parties and their lawyers are actors who play their roles out on the stage of mediation as guided by the mediator. On this stage they all become characters in a drama whose conclusion is the settlement—or perhaps non-settlement—of the dispute. This metaphor permits the application of semiotic theories of theatre communication to show not only how mediation works, but to suggest as well why the process works.<sup>5</sup>

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<sup>3</sup> There are a great number of these instructional and educational references. Only a sampling, including those which have been considered in this article, will be cited here: see C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d ed. (San Francisco: Jossey-Bass, 1996); J.B. Stulberg, *Taking Charge/Managing Conflict* (New York: Lexington Books, 1987); S.B. Goldberg, F.E.A. Sander & N.H. Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Boston: Little, Brown and Co., 1992); and J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass, 1984).

<sup>4</sup> The mediator’s moves are defined by Christopher Moore as those techniques employed by the mediator to assist the parties: see Moore, *supra* note 3 at 56.

<sup>5</sup> See D.A. Kolb, “To Be a Mediator: Expressive Tactics in Mediation” (1985) 1 J. Soc. Issues 11. Kolb employs the theatre metaphor in describing the mediator’s moves in assisting the parties to mediation but does not analyze the semiotics of mediated communication. See also J.W. Cooley,

Having built a model illustrating voluntary mediation to serve as the control for this analysis, a model of mandatory mediation will be developed to demonstrate how the motivations of the participants produce different outcomes under each model. Further analysis will determine what these differences imply concerning the operation of mandatory mediation and why it might or might not work.

To ensure that the control—the voluntary mediation model—is neutral concerning those aspects of the Ontario debate that are not directly related to the voluntary/mandatory dichotomy, it will resemble the existing mandatory mediation regime in certain respects.<sup>6</sup> It will therefore assume that mediation is voluntarily held at the same point in the litigation as it would be under the mandatory program. Likewise, mediation will be defined and studied in accordance with one of the main “how-to” authorities in the field, Christopher Moore, following his seminal work *The Mediation Process*.<sup>7</sup>

The preliminary hypothesis is that mandatory mediation will not operate in the same way as its voluntary form—contrary to the suggestions of other writers on this subject, it might not work at all.<sup>8</sup> I will test this hypothesis by the means outlined above.

## II. THE VOLUNTARY MEDIATION MODEL

As indicated, the voluntary mediation model I will develop in this article will mirror the mandatory mediation model under the Ontario regime.<sup>9</sup> The mediation session would commence ninety days

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“Mediation Magic: Its Use and Abuse” (1997) 29 Loy. U. Chi. L.J. 1. Cooley employs the metaphor of the performing magician to account for various tricks of perception that deceive mediating parties.

<sup>6</sup> The elements of the Ontario rule that will be incorporated into the control will be described in Part II, below.

<sup>7</sup> Moore, *supra* note 3.

<sup>8</sup> Other scholars have raised concerns about the effectiveness of mandatory mediation: see, in particular, C. Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or ‘The Law of ADR’” (1991) 19 Fla. St. U. L. Rev. 1. There are a range of concerns about mandating mediation. Some prefer to guarantee judicial safeguards for litigants: see O. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073; and G.T. Eisele, “The Case Against Mandatory Court-Annexed ADR Programs” (1991) 75 Judicature 34. Others identify the problems of coercion and power imbalances in mandatory mediation: see J.J. Alfani, “Trashing, Bashing and Hashing it Out: Is This the End of ‘Good Mediation’?” (1991) 19 Fla. St. U. L. Rev. 47; R. Ingleby, “Court Sponsored Mediation: The Case Against Mandatory Participation” (1993) 56 Mod. L. Rev. 441; and T. Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale L.J. 1545.

<sup>9</sup> Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as am. by O. Reg. 453/98, r. 24.1.

after the first defence is filed in an action.<sup>10</sup> The parties would therefore be represented by counsel in a lawsuit. The parties and their lawyers are required to attend mediation sessions,<sup>11</sup> but counsel would undoubtedly attend any way. If one or both parties does not attend<sup>12</sup> or file a statement of issues with documents necessary to inform the mediator of the nature of the matter, the mediator files a certificate of non-compliance.<sup>13</sup> If the Case Management Master or Judge invokes them, penalties for non-compliance range from the imposition of a timetable for the action, through striking of documents, including the defence, dismissal of the action, costs sanctions, or any other order that is just.<sup>14</sup> There is a provision for exemptions<sup>15</sup> or postponement<sup>16</sup> of the session, but for the purposes of this study it will be assumed that the substantial penalties or court appearances involved would compel the mediation to take place as and when intended, immediately after the close of the pleadings. The dispute will therefore have crystallized into its legalistic form as a dispute over rights enforceable at trial by judgment. In order to simplify the model, I will assume litigation involves one plaintiff and one defendant, each represented by counsel.

The communication model that is produced by this litigation can be shown in a standard semiotic square<sup>17</sup> set out as Fig. I.<sup>18</sup> The initial bargaining relationship between the disputants A and B, with its single route (horizontal line 1) running between them, is expanded into a square with the addition of their counsel. Communication between A

<sup>10</sup> *Ibid.* r. 24.1.09(1).

<sup>11</sup> *Ibid.* r. 24.1.11(1).

<sup>12</sup> *Ibid.* r. 24.1.10, 24.1.12

<sup>13</sup> *Ibid.* r. 24.1.13.

<sup>14</sup> *Ibid.* r. 24.1.13(2).

<sup>15</sup> *Ibid.* r. 24.1.05.

<sup>16</sup> *Ibid.* r. 24.1.09(1).

<sup>17</sup> Algirdas Greimas created the basic semiotic square for the study of literature: see A.J. Greimas, *Du sens: essais sémiotiques* (Paris: Éditions du Seuil, 1970) at 135-55 [hereinafter *Du sens*]. His square has been applied to the study of a statute by A.J. Greimas & E. Landowski, "Analyse sémiotique d'un discours juridique: la loi commerciale sur les sociétés et les groupes de sociétés" in A.J. Greimas, *Sémiotique et sciences sociales* (Paris: Éditions du Seuil, 1976) 79, and subsequently applied to the study of law in general by B.S. Jackson, *Semiotics and Legal Theory*, reprint (London: Deborah Charles, 1997) at 80ff. The semiotic square used in Fig. I is suggested by Jeffrey Rubin and Frank Sander, who employ a similar model to illustrate communication in representative negotiation: see J.Z. Rubin & F.E.A. Sander, "When Should We Use Agents? Direct vs. Representative Negotiation" (1988) 4 *Negotiation J.* 395 at 395-96.

<sup>18</sup> See Appendix, Fig. I, below.

and B will now cease to run along line 1, the top side of the square, and will pass only through and between counsel making the trip along the other three sides. The contribution of the semiotic square to this analysis is in its additional description of the corners of the squares and their relationships to one another. There are three relationships: the horizontal lines 1 and 4 indicate a relationship of contrariety; the vertical lines 2 and 3 a relationship of implication; the diagonal lines running through the centre of the square indicate a relationship of contradiction.<sup>19</sup> These relationships show very well how communication is dictated by the litigation structure. Although adopting contrary positions, parties A and B were able to negotiate until the time that the litigation began. Communication between them was only cut off by the ethical tradition of the adversary system, which prohibits communication between the litigants once they are represented by lawyers. Though likewise contrary in position, lawyers continue the negotiations on behalf of the parties.<sup>20</sup> The relationship between principal and agent is shown, on each side of the square, as the vertical line of implication connecting counsel to party. Communication between the lawyer and the client is implied; communication between party A and party B's counsel, however, or party B and party A's counsel, is contradicted by their relationships. B's lawyer may not communicate directly with A. In fact, the contradictory relationship is emphasized by the major feature of communication between counsel and the opposing party—cross-examination—which is an attempt not to communicate with the opposing party, but rather to disprove or contradict what the other party has stated.

What one notices immediately about this model is the rigidity of the roles, ranging from prohibition through implication, contrariety, and contradiction, all centered on establishing and advancing rights issues set out in the litigation. The litigation model does not enhance communication. On the contrary, it forbids communication, ensuring that it is only contrary or contradictory and therefore negative, and restricting it to pre-established categories of rights at issue in the court

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<sup>19</sup> See Jackson, *supra* note 17 at 88, 96.

<sup>20</sup> Counsel for A and B can also be described by what they are not. A's counsel is not party B. This confirms the basic semiotic relationship of contradiction between the occupants of the diagonally opposite corners of the square: see *Du sens*, *supra* note 17 at 137. Bernard Jackson has observed that the relationship between A and B is comparable to that between their counsel, but that the relationships are not logically equivalent: see Jackson, *supra* note 17 at 88. Though it exceeds the scope of the present study, the lack of equivalence which arises from the differing motivations of the two relationships of contrariety, and which influences communication in the model, merits further exploration.



documents. The parties create their own alternative discourses. They do not so much speak to each other as speak about themselves and against their adversary.

The parties might seek to change this dynamic by engaging a mediator. The nature of mediation is described in the Ontario rule as follows: "In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution."<sup>21</sup> The process of mediation itself is not further described. The mandatory regime is limited to prescribing the process of facilitating communication for the purpose of producing a resolution. Only these two purposes will be examined in the model of voluntary mediation; I will assume the parties have no ulterior goals for participating in mediation.<sup>22</sup>

The facilitation of communication is necessary due to the severe restrictions imposed by the adversarial litigation system. Resolution serves the purposes of the project itself to "reduce cost and delay in litigation."<sup>23</sup> Finding a "fair and early resolution"<sup>24</sup> may not be important to all litigants, but in our hypothetical voluntary mediation this is likely the reason why the parties would seek mediation. Let us turn now to the mediation model and its pragmatics in terms of the available means of resolving disputes.

### III. MEDIATION AS ENHANCED COMMUNICATION

A more detailed definition of mediation than that provided in the Ontario regime is now required. Moore states that

mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.<sup>25</sup>

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<sup>21</sup> *Rules of Civil Procedure*, *supra* note 9, r. 24.1.02.

<sup>22</sup> For discussion of the many possible ulterior motives for mediating, see the articles cited *supra* note 8. These include oppression of a susceptible party, delay of justice, increase of expense, information hunting, coercion of a settlement, and concealment of detrimental facts by resolving the matter prior to the completion of formal discovery procedures, amongst many others. Ulterior motives are limited only by human creativity.

<sup>23</sup> *Rules of Civil Procedure*, *supra* note 9, r. 24.1.01.

<sup>24</sup> *Ibid.*

<sup>25</sup> Moore, *supra* note 3 at 15 [emphasis omitted].

The mediator ... works to reconcile the competing interests of the two parties. The mediator's task is to assist the parties in examining their interests and needs and in negotiating an exchange of promises and the definition of a relationship that will be mutually satisfactory and will meet the parties' standards of fairness.<sup>26</sup>

[Mediation is] a voluntary process ... *Voluntary* refers to freely chosen participation and freely made agreement.<sup>27</sup>

The last quotation shows that Moore considers the concept of voluntariness to be so essential to mediation, both at the entry and at the agreement stages, that he includes it in the definition of the process. The other two points require deeper examination for my purposes. In the Ontario rule, the mediator is a communication facilitator who, according to Moore's definitions, "intervenes" and "assists" the parties for the purpose of reaching a settlement. This is done by reconciling "competing interests" and "needs." In our model, therefore, we are considering a voluntarily undertaken, interests- and needs-based intervention through the facilitation of communication in a rights-based dispute environment. This intervention will attempt to assist the parties to reach a voluntary resolution of their dispute. The mediation can be best illustrated by adding to our previous model. Figure II shows the communication model when it becomes a voluntary mediation.<sup>28</sup>

William Ury, Jeanne Brett, and Stephen Goldberg describe the three possible approaches to the resolution of disputes as power, rights, and interests, which they illustrate with three concentric circles:

The innermost circle represents interests; the middle, rights; and the outer power. The reconciliation of interests takes place within the context of the parties' rights and power. The likely outcome of a dispute if taken to court or to a strike, for instance, helps define the bargaining range within which a resolution can be found. Similarly, the determination of rights takes place within the context of power. One party, for instance, may win a judgment in court, but unless the judgment can be enforced, the dispute will continue. Thus, in the process of resolving a dispute, the focus may shift from interests to rights to power and back again.<sup>29</sup>

This kind of shift occurs when the parties in our model choose interest-based mediation in the context of rights-based litigation. Mediation takes place entirely within the interests circle, while the parties and counsel retain their positions on the inner edge of the rights zone, where it borders on the interest circle, due to the shape of the

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<sup>26</sup> *Ibid.* at 18.

<sup>27</sup> *Ibid.* at 19 [emphasis in original].

<sup>28</sup> See Appendix, Fig. II, below.

<sup>29</sup> W.L. Ury, J.M. Brett & S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988) at 9 [hereinafter *Getting Disputes Resolved*].

semiotic square. Rights are seldom entirely abandoned in mediation; they are frequently referred to in considering the parties' BATNA (Best Alternatives to a Negotiated Agreement)<sup>30</sup> since litigation is the immediate alternative to a negotiated agreement. The mediator (M in Fig. II), who is selected by both parties and their counsel, is positioned entirely within the interests circle; by virtue of their neutral role as facilitator, they must stand in the direct centre of both the circle and the square. In this position, the mediator is equidistant from the parties and their counsel at the intersection of the diagonal lines of contradiction running from A to B's counsel, and from B to A's counsel.

The position of the mediator inside the communication square and entirely within the interests circle underscores the mediator's median position in all respects. The mediator can speak with all four participants who in turn, by speaking to the mediator, can communicate indirectly with the other participants, who will "overhear" whatever is said. Indeed, the mediator's presence at the intersection permits the lines of contradiction to be broken and allows A's counsel not only to hear what B will say, but permits A's counsel to speak directly to B in a non-contradictory manner without breaching ethical rules. Likewise, A and B will not only overhear what the other says, but will be able to speak directly to one another again.

Will this enhanced communication lead to agreement? Listening and hearing are important elements in the process. When one person speaks in a mediation session, the others will be listening and may therefore hear things that draw them closer to an agreement. The word for an agreement, "entente," comes from the French verb *entendre*, meaning not to speak or to listen, but to *hear*, and therefore to *understand*. The participants' capacity to hear and understand, and not their propensity to build their position by tearing down their opponent's, permits agreement to emerge in an interest-based process. Communication is not defined as much by what is said as by what is received. The meaning of any discourse lies primarily in the ability of the recipient to decode the message, and in the interpretation that is subsequently given to it. What is said is only "virtual" communication: reception and comprehension of the message actualize the transfer. Mediation promotes communication and increases the chance that the message will come through clearly, with the same meaning for both parties. This is due to the openness of the communication environment and its basis in the underlying interests, rather than the parties' adopted

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<sup>30</sup> R. Fisher & W. Ury, with B. Patton, ed., *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (Boston: Houghton Mifflin, 1991) at 100 [hereinafter *Getting to Yes*].

positions, which might otherwise obscure their real motivations. Likewise, by installing a single interlocutor in the place of two others, the long journey around the three edges of the square is short-circuited, decreasing the likelihood that the message will be distorted in transit, and enhancing the possibility that the interpretation will coincide with the speaker's intention.

These enhancements of communication, which show *how* mediation works, do not, by themselves, explain *why* mediation works. Why would communication, liberated by the introduction of a neutral third party, suddenly result in agreements? Why would parties not entrust their representation at mediation to the counsel that they are paying, in any event, to attend the mediation? They are, after all, the paid spokespersons of the parties whom the latter have chosen for their persuasive skills. Liberating communication does not necessarily mean that the two discourses can be reconciled. Something else must happen to unite them. Why do two opposed discourses become one? To answer these "why" questions, I must turn to the analysis of mediation as theatre.

#### IV. MEDIATION AS THEATRE

Theatre is an art in which the participants, playing roles created by an author and guided by a director, create a story. The variations on this basic premise are endless, ranging from the recreation of real events, to the creation of fiction, to the "happenings" of the 1970s which lacked script, plot, and direction. At the heart of each is the role-playing concept.<sup>31</sup> It is in this respect that theatre and mediation are most alike. The parties in mediation are asked to play a role different from the one they play in litigation. They act out a play which, because it is not determinative of their rights in the litigation, allows them considerable freedom to perform their part. Of course, they may be reluctant to put their full effort into this play, but the mediator, whom they have chosen to assist them, acts as the writer, director, and one of the central characters in the play. Mediators will encourage the players to throw themselves into their roles to achieve the maximum result. For this, mediators have an array of procedures at their disposal to encourage full participation. Their presence at all phases of the mediation to supervise the performance and to correct the players, the script, and even their

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<sup>31</sup> See A. Ubersfeld, *L'école du spectateur: lire le théâtre 2* (Paris: Éditions sociales, 1981) at 9.

own contribution, is critical to the success of the process. The mediator's specific moves will be discussed below.

The status of mediation as non-final is itself the mediator's most valuable tool. The parties can walk away at any time and need not agree to any deal which they do not think is in their best interests. In essence, the mediation doesn't count as reality; it is a hypothetical exercise, like a play. Edward De Bono uses the term "Po" to introduce any statement that is made to provoke a different way of thinking.<sup>32</sup> It is drawn from the common syllable in words such as "hypothetical," "possible," "potential," "poetry," and "suppose,"<sup>33</sup> which also describe the nature of theatre. It is the art form of pretending and creating the possible. Mediation is likewise conducted entirely in the realm of Po. There is nothing final in mediation until a written agreement is signed, and that only happens at the conclusion of the process. Free thinking and the exploration of options is central to a process which is intended to develop a solution that provides greater gains to both parties than the losses they might suffer in order to resolve the dispute. This is the win/win integrative settlement possibility inherent in the exploration of interests, as opposed to the assertion of rights and the adoption of limited positions. Positions must be sacrificed to reach a compromise in a distributive settlement of the dispute, creating a win/lose perception of the resolution.<sup>34</sup>

The comparison of theatre and mediation is open to the criticism that the latter, unlike the former, has no audience. Theatre, however, often has no audience but the players. Society theatre of the 18th century in France was often written for and acted by the members of social circles who would put on the play themselves for their own amusement.<sup>35</sup> Their appreciation of the performance was not impaired by their presence on stage, where they enjoyed the performances of others. One might argue that the effect for the performer is even stronger than for a detached audience. In fully assuming their roles, the participants might gain a greater understanding of themselves and of their opposite numbers than might a passive audience. In mediation, the parties play not only for each other, but also for the mediator, whom they see as outside the dispute although the mediator is, in fact, inside the mediation process. In this way the mediator is able to serve as the

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<sup>32</sup> E. De Bono, *Teach Yourself to Think* (London: Penguin, 1996) at 131.

<sup>33</sup> *Ibid.*

<sup>34</sup> See *Getting to Yes*, *supra* note 30, c. 3.

<sup>35</sup> See J. Curtis & D. Trott, *Histoire et recueil des Lazzis* (Oxford: Voltaire Foundation, 1996).

audience while still maintaining control of and participation in the process.<sup>36</sup>

### A. *Denial*

Some theories developed for the analysis of theatre can be applied to mediation. The first of these is denial.<sup>37</sup> When we see a play, we are captured by it. Through our identification with the characters, we believe that the action is real while denying the absolute reality of the play. Nevertheless, the most effective moments come when we suspend disbelief in its reality. In mediation, the parties are able to consider the entire procedure as purely hypothetical and non-binding. But there will be moments when they are captured by the reality of the performance and contribute without the “second thought” of denial. These will also be the most successful moments in the mediation. There are real possibilities for change when the hypothetical is confused with the real.

### B. *Distancing*

Similarly, the concept of the distancing<sup>38</sup> of a theatrical presentation contributes to the success of mediation. We distance ourselves from the theatrical performance, particularly its less pleasant aspects, by reminding ourselves that it is just a play. This permits us latitude that we could not tolerate in reality. The horror genre is an excellent example of this process in operation. What we could not accept in reality we are willing to tolerate in the theatre because we are able to say that it is not real. This same concept applies to mediation. Because the process is not real in the sense of binding the rights of the parties, the participants will allow much more serious discussion of needs and interests. Their belief that the mediation will be unenforceable against them in the real world—that the entire mediation and its consequences will disappear when the process ends—allows them to distance themselves from the consequences of open participation.

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<sup>36</sup> Although some might take exception to my use of this metaphor, namely that theatre is not used to resolve disputes, many plays in fact do just that. They represent the moment of resolution of a conflict that introduces a new social order. See generally N. Frye, *Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957).

<sup>37</sup> See P. Pavis, *Dictionnaire du théâtre* (Paris: Messidor/Éditions sociales, 1987) at 113 (dénégation); and Ubersfeld, *supra* note 31 at 311-18.

<sup>38</sup> See Pavis, *supra* note 37 at 127 (distanciation).

C. *Frame and Contents*

The most important application of distancing to the theory of mediation concerns the presence of the mediation process within the frame of litigation. Let me explain first the effect in theatre of a frame on its contents, and then show how this applies in mediation. At its most basic level, theatre is framed by the real world in which it takes place, but there are further enhancements of this framing process whenever a play takes place within a play. Perhaps the most famous example is the *Murder of Gonzago*, the play within Shakespeare's *Hamlet*.<sup>39</sup> What are the consequences of this procedure? The play within *Hamlet*, as altered by Hamlet,<sup>40</sup> refers back to the actual events of the King's murder by having it re-enacted before Claudius, the murderer. The play within the play is therefore more real than the framing play, which itself is less real than the audience's reality.<sup>41</sup> There is a polarity shift brought about by the insertion of a play within a play. The real world and the play are positively and negatively charged, respectively, while the play within the play, which purports to tell the truth, is positively charged. The internal play, without the frame around it, would simply be a play with a negative polarity. Due to its frame, it gains an appearance of truth that is greater than that of the framing play. The meaning of the play changes substantially due to the polarity shift.

An excellent illustration of this can be found using another play by Shakespeare, *The Taming of the Shrew*.<sup>42</sup> As written, this play is objectionable not only as it purports to show a husband's domination of his wife, but her acceptance and finally her support for her own oppression. However, if a frame is placed around the play—for example, a man falling asleep in a prologue is awakened by his wife Kate, “untamed,” in the epilogue—the play can be presented as the man's dream. The play, which is now within another play, takes on an ironic character, using the same words to produce a different message

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<sup>39</sup> W. Shakespeare, *Hamlet*, Act III, Scene ii.

<sup>40</sup> See *ibid.* Act II, Scene ii.

<sup>41</sup> See Ubersfeld, *supra* note 31 at 112; and G. Forestier, *Le théâtre dans le théâtre: sur la scène française du XVIIe siècle* (Geneva: Librairie Droz, 1981) at 138-39, 177. L. Dällenbach, *Le récit spéculaire: contribution à l'étude de la mise en abyme* (Paris: Éditions du Seuil, 1977) writes generally on the consequences of embedding one narrative within another when both narratives show marks of similarity: the defining parameters are discussed at 18. See also E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Cambridge, Mass.: Harvard University Press, 1974).

<sup>42</sup> See L. Magnusson, “The Taming of the Shrew: Framing the Taming” in *Performance Program for The Taming of the Shrew* (Stratford, Ont.: Stratford Festival, 1997) 5 at 5-7.

for the audience. Through the imposition of the frame, which changes the polarity and therefore alters the interpretation, the contents are no longer objectionable.

How does this work for mediation? The real world in which the dispute arises frames the litigation process, which is invoked to resolve the conflict. Mediation, as shown in Fig. II, is itself framed by the litigation. Applying semiotic theories of theatre, the real world dispute is positively charged while the litigation it frames has a negative polarity. The negative charge is consistent with the previous analysis of the litigation model, whose artificiality denies, blocks, and imposes detours on the delivery and reception of messages composed in opposing discourses. Inside the semiotic square lies the more open field of the mediation, where the communication and reception of messages is enhanced. The mediation structure is further refined when a caucus is called. This becomes a play within the play of mediation and it bears yet another polarity to differentiate it from the mediation.<sup>43</sup>

Of what use is the construction of this multi-layered model? By breaking down the dispute into layers of opposed polarities, the mediator is able to employ each layer as a foil to the others, thereby enhancing the interplay of distancing and denial. In effect, the mediator sets up positions which are more attractive (caucus within mediation, mediation within litigation) to render those that initially appear attractive (litigation within the dispute rather than the insoluble dispute itself) less so. It is a game of altering perceptions. The impossible, once broken down into smaller tasks and rendered more attractive, becomes possible. By gradually repolarizing and merging the inner portions of the model with those surrounding them, like a series of shells, the mediator is able to bring about a resolution of the dispute.<sup>44</sup> The

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<sup>43</sup> The implications of the caucus for voluntary mediation will be discussed in Part V(C), below.

<sup>44</sup> This type of plotting of comedy is very common in the plays of Marivaux, particularly "Les fausses confidences" in F. Deloffre, ed., *Théâtre complet de Marivaux*, vol. 2 (Paris: Garnier frères, 1968) 339, which contains five embedded levels within the frame. Dubois, as mediator between the two potential spouses, uses framing to help Dorante obtain as his wife Araminte, whom Dorante loves but does not equal in wealth. Each of the interior plots work to change Araminte's perception of Dorante so that by the end of the play, whose action occupies only one day, Araminte not only admits a new-found love for Dorante, but agrees to marry him. The outcome is believable because the changes in perception are accomplished as each level changes polarity when it is resolved into its frame. The ultimate resolution occurs when the initial frame, the plan to trick Araminte, is revealed to her by Dorante, but Araminte is nevertheless unwilling to part with him. For a detailed analysis of the resolution of the many levels in this play, see G. Smith, "Mise en abyme, théâtralité, distanciation et dénégation dans *Les fausses confidences* ou comment rendre un amour improbable vraisemblable" (1997) 3 *Applied Semiotics/Sémiotique appliquée* 141.



perceptual changes that accrue during the exploration of the various levels are imported into the dispute—and ultimately into the real world—by its resolution. The result in a successful mediation, according to the Ontario model, is a mutually-acceptable resolution of the dispute.<sup>45</sup>

The mediator employs various moves, or techniques, to promote the success of the mediation. These moves are procedural, not substantive. The mediator's removal from the substance of the dispute gives the mediator greater freedom to implement procedural moves.<sup>46</sup> As it is not possible to explore all of these moves within this article, I have selected four of the most common to illustrate how mediators are able to change the participants' perceptions during the course of the mediation. These are: structuring the mediation, reframing the participants' contributions, caucusing, and reality checking. Each of these techniques will be explored in turn below.

## V. MEDIATOR TECHNIQUES

John W. Cooley describes the mediator as a deceptive magician tricking the participants into resolving their dispute.<sup>47</sup> Doubtless the mediator is a performer who controls the process, employing techniques within the mediation structure to alter perceptions and to assist the participants towards the resolution of an intractable dispute. There is no real magic in this, however, only the use of the pragmatics of communication to alter perceptions of meaning. By pragmatics, I refer to the context in which words are used.<sup>48</sup> The meaning of a word changes according to how, where, by whom, and to whom it is spoken. An example is the exclamation "Help!": if sung, it could be recognized as the Beatles' song, but if shouted from a burning building, it would signify someone in need. Alternatively, if intoned with disgust or dismay, one might merely be complaining about something. Placing any version of this exclamation in a frame changes the perception of its meaning by altering its reality. In mediation, the pragmatics of communication are used as the major tool to change polarity, and therefore participant

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<sup>45</sup> See *Rules of Civil Procedure*, *supra* note 9, r. 24.1.02.

<sup>46</sup> See Moore, *supra* note 3 at 74-75.

<sup>47</sup> See Cooley, *supra* note 5.

<sup>48</sup> See A.J. Greimas & J. Courtés, *Sémiotique: dictionnaire raisonné de la théorie du langage* (Paris: Hachette, 1979) at 288 summarize the term *pragmatique* in its American usage as the conditions of enunciation of the discourse. This is the meaning adopted here.

perceptions, leading to the eventual depolarization of the dispute. The first and most important tool of the mediator in this regard is the structuring of the mediation.

### A. Structuring

Mediators enter the dispute at a point when it is already highly structured, as shown in Fig. I. Litigation has prescribed steps leading to an adversarial trial, which is resolved by the judge's decision. The judge arrives at his or her decision by weighing, within the context of the law and rules of evidence, the conflicting stories created and presented by counsel from the material facts of the dispute, and choosing the more probable version.<sup>49</sup> In contrast, the mediator has to create a structure within which the parties will be able to move towards a single perception, or story, and a joint resolution of the dispute. Structuring is the narrativization of the dispute's resolution through mediation. From divergent perceptions and a series of positions and legal rights, the mediator must create a narrative path that will lead the parties to a resolution of their dispute on interest-based principles. Although mediators do not announce that they will do this, they nevertheless structure the mediation to produce this result. This "mediation plan" is initiated by the intervenor<sup>50</sup> but it must seem to be the participants' own creation and not one imposed upon them.<sup>51</sup> This enhances their acceptance of the story created in the narrative structure of the mediation.<sup>52</sup>

We are accustomed to the structure of stories and, without necessarily being aware of the transitions or phases they use to reach their conclusion, we can appreciate their typical narrative paths. Semiotic analysis refers to four phases in narrative: manipulation,

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<sup>49</sup> See C.N. Candlin & Y. Maley, "Framing the Dispute" (1994) 7 *Int'l J. Semiotics L.* 75 at 92-93.

<sup>50</sup> See Moore, *supra* note 3 at 141.

<sup>51</sup> *Ibid.* at 227.

<sup>52</sup> See *Getting Disputes Resolved*, *supra* note 29. See also C. Costantino & C. Sickles-Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1996). Costantino and Sickles-Merchant deal with the creation of conflict management systems. Both emphasize the greater acceptability to participants of self-created procedures.

competence, performance, and recognition.<sup>53</sup> These four phases comprise, respectively, the creation of the difficulty that sets the plot in motion, the acquisition of the knowledge or skills needed to remedy the problem, and the performance of the tasks required to reach the last phase, which is the resolution of the initial difficulty. We will deal with these in turn as they appear in the mediation narrative.

### 1. Manipulation

The manipulation phase has already occurred prior to the mediation. The dispute itself is the reason the parties are seeking mediation. There is probably an impasse, or dissatisfaction with the litigation process as a means to resolve their problems. The parties are therefore ready for the intervention of the mediator and will be receptive to, and cooperative with, the mediator's techniques. In preparation for mediation, the mediator learns from the parties the origins and current status of the manipulation phase. From this basis, the mediator is ready to structure the next three phases of the mediation narrative.

### 2. Competence

The competence phase has three parts: mediators educate the parties about the process, determine the best approach to assist the parties, and set the appropriate systems in place. Before beginning the exchange between the parties, mediators must first explain the process. In particular, mediators must stress that they are only there to assist the disputants in finding their own resolution. They must then explain how mediation operates and what their roles are. The education step should not only enhance the competence of the participants in the process, but also their commitment to it.<sup>54</sup> The mediation itself begins with the participants speaking about their dispute. By observing the parties at the outset of the mediation, intervenors can perfect their understanding of the participants and the issues, and begin to create a plan for them to follow in the performance phase. Even by setting the agenda in the

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<sup>53</sup> See Greimas & Courtés, *supra* note 48 at 220 (manipulation), 52 (compétence), 270 (performance), and 320 (sanction); and Jackson, *supra* note 17 at 70, where the narrative structure is applied to law and the final phase is described as recognition.

<sup>54</sup> See Moore, *supra* note 3 at 159-60.

competence phase, the mediator will begin to achieve consensus by reframing the parties' discourse to create joint perceptions. This is the first step in establishing an agenda containing mutually compatible goals.

The completion of the competence phase will also serve as a first example to the parties that some perceptions of the matters in dispute might be satisfactory to both parties. This is in effect a dress rehearsal for the performance phase. It gives confidence to the parties, reassuring them that they can, in fact, agree on something and can therefore play their roles in the mediation.<sup>55</sup> The parties will buy into a process that they see has already started to work.<sup>56</sup> The competence phase also includes the setting of the stage, including props, costumes, and appropriate spaces for the mediation.<sup>57</sup> By the end of the competence phase, the outline of the script is in place and the stage, props, and actors are ready to put on their performance as guided by the director, the mediator.

### 3. Performance

In the performance phase, the mediator employs moves to assist the parties towards the final stage, the recognition of a joint or congruent perception that allows for the resolution of the dispute. As such, the performance stage contains the greatest usage of the other three categories of mediator techniques which will be discussed in the next three sections of this article: reframing, caucusing, and reality checking. The agenda having been set, the more-or-less impromptu performance begins. There is no fixed script, merely an outline of topics to be examined and a series of techniques to be employed to avoid an impasse. Just as the narrativization of mediation breaks the process down into manageable and logical segments, so too the reduction of the dispute to a series of agenda items in the competence phase reduces the magnitude of the steps involved. This makes each step easier to accomplish.

The steps will fall into two categories as set out in chapters ten and eleven of Moore's text: "Uncovering Hidden Interests of the

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<sup>55</sup> *Ibid.* at 177-80.

<sup>56</sup> *Ibid.* at 159.

<sup>57</sup> *Ibid.* at 186-90. Moore discusses the importance of the mediator's clothing and the physical arrangement of the space(s) used in the sessions, the use of visual aids, as well as the symbolic importance of a party bringing an object in dispute to the mediation.

Disputing Parties” and “Generating Options for Settlement.”<sup>58</sup> Both of these activities gain from the Po nature of the mediation. Interests and needs are more likely to be expressed in mediation than in court because there is less risk in revealing them off the record. Likewise, the parties generate options for settlement more creatively when they will not be held to them by the force of a judgment. Nevertheless, if the parties stumble in playing their roles, the mediator can intervene with reframing, caucusing, and reality checking to assist them to continue the mediation. Improvisation is required from the mediator and expected from the participants. If the latter stick to their old script of positions and rights, the mediation will never enter the interests circle of Fig. II. Although it might still succeed, the mediation will be less likely to result in a mutually acceptable settlement.

#### 4. Recognition

The settlement is the recognition phase of the mediation. Not all mediations result in settlement. As this is the explicit purpose of the Ontario regulation, however, I will consider it to be the outcome of successful mediation. In this final phase, the parties jointly consider the options, and, through bargaining, these options are incorporated into an agreement.<sup>59</sup> The range of options available in the evaluative phase is wider than those available through the entirely uncritical generation of options. Accordingly, the possibility that appropriate solutions will be found is greater.<sup>60</sup> The process of bargaining and assessment are facilitated by the changes in perception. This is true not only with regard to the issues, which now share a unified discourse, but also with regard to the parties, who now see each other not as contrary or contradictory, but rather as cooperative. Final agreement can easily be reached when the parties are sending and receiving their messages in the same language.

The recognition phase marks the collapsing of the Po segment of the mediation and its reintegration with the real world beyond the dispute. In effect, the negatively-charged frame of the litigated dispute melts away with the resolution and the positively-charged mediated

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<sup>58</sup> *Ibid.* at 231-66.

<sup>59</sup> *Ibid.* at 269-317.

<sup>60</sup> See De Bono, *supra* note 32 at 185-86.

settlement blends back into the positively-charged real world in which the settlement will take effect.

In summary, the narrative structure established by the mediator leads towards the resolution of the dispute in stages which are subdivided into processes and procedures. This is the mediator's first technique to change perceptions of the dispute. The mediator makes it appear smaller, more manageable, and therefore capable of resolution. These phases also provide the parties with the opportunity to alter their perceptions of one another gradually, in a non-binding forum. The participants are empowered by this process as they gain competence to perform their roles under the guidance of a skilled director. In the narrative format, the process leads to a conclusion which flows logically from the preceding phases. We will now examine three techniques used by the mediator at various points in the process to ensure that it proceeds along the narrative course to its conclusion.

### B. Reframing

Within the context of the structured mediation, the mediator's goal is to facilitate communication in order to help the parties to reach a mutually acceptable resolution.<sup>61</sup> To promote this outcome, the parties must employ the same discourse. As I have indicated, this is not the case in the model in Fig. I. Mediators must translate their separate discourses to find their commonalities. They can then harmonize the contrary and contradictory texts into one that is mutually acceptable. The parties, however, must participate in this change so that it will not simply be imposed upon them from the outside. Mediators therefore encourage the parties to express themselves by inviting them to participate, but also use questions to elicit material that will be useful in fashioning the joint discourse.<sup>62</sup> Mediators' questions should elicit or clarify information that can be used to locate the common interests of the parties. They will also determine interests that the parties might satisfy for one another at little cost to them. Mediators seek to make the dialogue productive and inclusive rather than recriminative and divisive. Their main tool in accomplishing this is reframing of the parties' contributions.

Reframing is not simply repeating, paraphrasing, or summarizing; these procedures do not change the character of what has

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<sup>61</sup> See *Rules of Civil Procedure*, *supra* note 9, r. 24.1.02.

<sup>62</sup> See Moore, *supra* note 3 at 210.

been said. Reframing alters the language used to describe the dispute; it “involves altering the participants’ perceptions and current frames of the behaviour, attitudes or issues in the dispute.”<sup>63</sup> Since altering perceptions is critical to the creation of the joint discourse, reframing acts as the essential bridge between the two discourses by highlighting the common elements and creating a single perception of the dispute from that shared point of view. Reframing can be of two kinds: a gist or an upshot.<sup>64</sup> These are defined by Christopher Candlin and Yon Maley as follows:

In a gist, the substance of the response approximates to the preceding contribution, in the sense that the meaning of the one is very close to that of the other: they share the same truth conditions. ... [T]he gist response contains strong cohesive textual links with the preceding utterance. Its orientation is typically past or past-to-present ...<sup>65</sup>

An upshot response, on the other hand, does not necessarily contain the same propositional content as the preceding contribution; rather it is an inference by the mediator from what has been said and as such is open to challenge.<sup>66</sup>

The upshot synthesizes the present and has a present-to-future orientation because it attempts to alter perceptions for the consideration of the dispute following the point of reframing. A gist is more likely to be accepted by the parties than an upshot, but it is generally the upshot that is more important in forging a joint discourse. Gists generally attempt to “eradicate negative attitudes and emotions and substitute neutral, blame-free ones” or clarify discourse.<sup>67</sup> Upshots generally try to do more by cohesively thematizing<sup>68</sup> the discourse according to categories susceptible to further exploration. Gists are therefore passive, while upshots are active since they are more likely to move the mediation forward.

When a gist or an upshot is used to alter perceptions of meaning, the result is more than a simple depolarization of language. The upshot is the intersection of two previously contrary discourses at which a joint discourse comes into being. Once the upshot is accepted and the intersection is perceived by the parties, a new basis of discussion arises

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<sup>63</sup> See Candlin & Maley, *supra* note 49 at 80.

<sup>64</sup> *Ibid.* at 81.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* at 82.

<sup>67</sup> *Ibid.* at 87. See also Moore, *supra* note 3 at 222-23, where he describes this kind of intervention as the depolarization of language.

<sup>68</sup> See Candlin & Maley, *supra* note 49 at 87.

along joint thematic lines. The mediator, ever conscious that the parties must see the new discourse as their own creation, will ensure that the upshot is carefully drawn to reflect the parties' comments, not the mediator's own judgements.

Reframing, then, creates a joint discourse free from value-laden terminology. Further, it is neutrally and jointly thematized so that the problems and their solutions can be approached by the parties from the same point of view. Separate discourses are shown to have common underpinnings. With the harmonization of their perceptions, their language, and the subjects to be discussed, the parties are in a position to work together towards the common goal that is the resolution of the dispute: the actual performance of the play. Should they become blocked at this point, the mediator can use the technique of caucusing to assist them.

### C. *Caucusing*

Moore provides the following description of the caucus technique:

In a caucus, the disputants are physically separated from each other and direct communication between parties is intentionally restricted. Caucuses are initiated in response either to external forces that affect the negotiators and the general conflict situation or to problems arising from issues, events, or dynamics in the joint session.<sup>69</sup>

Caucuses are used to restrict direct communication between the parties. This would appear to be contrary to the purpose of mediation to facilitate communication,<sup>70</sup> but caucusing has a corollary affect that enhances communication with the mediator. This type of communication is possible due to the physical isolation of the caucus from the mediation, giving it a team atmosphere. In the absence of the other party and his or her counsel, the party in caucus will communicate more openly with the mediator<sup>71</sup> and the mediator may communicate in a less neutral way with the party.<sup>72</sup>

Why do these consequences flow from the caucus structure? The caucus is, in fact, a play within a play, and the joint-session mediation

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<sup>69</sup> Moore, *supra* note 3 at 319 [footnotes omitted].

<sup>70</sup> See *Rules of Civil Procedure*, *supra* note 9, r. 24.1.02.

<sup>71</sup> See Moore, *supra* note 3 at 319-20, which indicates that a number of the uses of caucus depend upon this additional freedom.

<sup>72</sup> *Ibid.* at 223, 323. See also Kolb, *supra* note 5 at 18-19.



itself now serves as the frame for each caucus. Masks worn at the joint-session may now be discarded under the protection of confidentiality.<sup>73</sup> Information concerning interests and needs that was not communicated in the mediation, where it might display weakness, may be revealed more freely to the mediator in caucus. In a play within a play, polarity changes as it does between the play and its frame.<sup>74</sup> The action of a play within a play is unreal not only in the real world, but also in the framing play. This produces, in the case of the caucus, a doubly positive polarity, enhancing the hypothetical Po nature of the mediation by giving confidentiality to what is said in caucus. What is said in mediation does not count in litigation; what is said in caucus does not even count in the mediation.

Each party's perception of the mediator also changes. The mediator can be the special assistant to both sides without either of them knowing that a mask has been donned by the mediator in caucus to get them to cooperate more fully in the process.<sup>75</sup> In addition, because the other party is not present, the party in caucus believes that what is said will not be heard by the other party. This is enhanced by the confidentiality promised by the mediator. The caucus is the environment that offers the most freedom in which to explore the hypothetical, and therefore the richest source of ideas for the resolution of the dispute.

It might at first seem odd that the area of mediation which restricts communication the most would be the most productive in advancing a resolution. This is really not surprising when the purposes for which the mediator uses the caucus are examined. It must be remembered that the mediator must caucus with both sides equally to maintain the perception of fairness. There are therefore two parallel examples of a play within a play, each with its own team atmosphere. These are represented by quadrants 2 and 3 in Fig. II. The communication is indirect, as it was in the litigation model shown in Fig. I, passing from one team to the other through the common nexus of the mediator. The mediator is the common element who convenes each caucus and sponsors the proceedings with the knowledge of what has transpired in the other caucus. Mediators are thus capable of steering the discourse in each caucus along a similar path without revealing their

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<sup>73</sup> See Moore, *supra* note 3 at 170.

<sup>74</sup> See Ubersfeld, *supra* note 31 at 112. See also Forestier, *supra* note 41.

<sup>75</sup> See Moore, *supra* note 3.

agenda, or the confidential information they have learned, to either party.

As mediators shuttle between caucuses, their role as the source of knowledge gains importance, and the caucuses become dependent upon their formulations of the information passing back and forth between the teams. This dependence extends to the teams' knowledge of who is really speaking when the mediator speaks. The mediator can assume authorship of any message and transmit it more easily in a modalized or indirect form. For example, the mediator may learn in caucus in quadrant 2 precisely what team A would offer to settle the dispute. Rather than saying to team B that team A offers to settle the matter on certain terms, the mediator can frame the information as follows: "What if I could get you ... ?" or "Would an offer of ... be reasonable?" Even if the settlement range of team A was communicated in confidence, this method of modalizing the concept does not reveal the source of the settlement proposal. Mediators can also take responsibility for communicating such a proposal explicitly from an offering team on the basis that they assume it as their own. The offering team is therefore not bound by it as it would be by a direct offer and the settlement range can safely be tested without commitment.<sup>76</sup>

The most important feature of the caucus is its capacity to blur the origins of the discourse. Neither party ever really knows the origin of the mediator's suggestions. Indeed, as the mediator seems to be in collusion with the party while the mediator caucus with them, the party can only see the mediator as speaking for the party's own benefit. In caucus, the mediator acquires enormous potential to alter the perceptions of the parties in the mediation—and in the dispute itself—by blurring the intention and origin of discourse. The comparative polarities of each of the levels, starting on the caucus level at double positive, working outwards to the single positive of joint-session mediation, and finally to the negative polarity of the litigation, camouflage the actual reduction of bi-partisan communication that comes about in caucus.

In caucus, only the mediator acquires greater access to communication. While the parties may feel more free to communicate

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<sup>76</sup> However, there is a drawback to caucusing. Just as mediators enjoy extended influence over the exchange of information in caucuses, they lose the verification of what they learn from one team by the other which would be available in joint session. A knowledgeable but dishonest party can mislead the mediator in caucus where the latter is beyond the correcting influence of the other party. A party could, in theory, exploit a credulous mediator in an active effort to take advantage of the other party. The caucus is therefore a powerful but risky technique to employ, as it is both enriched and endangered by the privacy which it provides.

in caucus than in mediation, and communication in mediation is, in fact, more free than in litigation, the parties and their counsel can only guess at the origins and intention of the mediator's discourse. Since the pragmatics of framing reach their deepest level in the caucus, it is the most powerful tool in the mediator's armoury of techniques. The final tool of the mediator that I will treat in this article is reality checking. Since it occurs most often within a caucus, reality checking derives much of its effectiveness from the pragmatics of the multiple frames that lie around it.

#### D. *Reality Checking*

I will be dealing with two aspects of reality checking in this section. The first relates to one party's perception of the other's settlement range, and the second considers whether or not the potential resolution should be accepted. In the first instance, the parties are asked to put themselves in each other's position to consider the matter from their point of view. In the second, the party considering resolution is encouraged to do so in light of the alternative. Both strategies are designed to encourage moderation and collaboration at the point of resolution; the mediator "raise[s] the specter of impasse."<sup>77</sup> We will look at each in turn.

When the mediator asks the parties to put themselves in the other's place to consider a potential settlement, this is generally done in caucus.<sup>78</sup> Isolating one party from the other to perform this task is essential—if the opposing party were present it would criticize the proposal. The role-player would then feel obligated to retort by supporting the proposal, thereby entrenching the position rather than empathizing with the other party. The caucus of the party being asked to role-play resembles the opposing caucus, in which the opposing party, upon learning of the settlement proposal, would tell the mediator the reasons why this would not be acceptable. The party who wishes to make the settlement proposal is being asked in the reality check to anticipate a reaction that has not occurred and will not occur if the proposal is not made.

Because the role-playing party voices criticism during a reality check, and not the other party, the former is more likely to see the validity of the latter's arguments, and assume them as its own. The

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<sup>77</sup> Moore, *supra* note 3 at 276.

<sup>78</sup> See *ibid.* at 275-76.

parties have been asked to create yet another level of imbedded theatre, a play within the play of the caucus, this time acting out a hypothetical version of the other caucus within their own. The role-playing party is likely to succeed, as it is effectively persuading itself. When the role-playing party realizes that its proposal is unlikely to please the other party, the former will likely change its mind. Without creating an adversarial argument, then, the mediator is able to enlist the party's own aid in altering its perception of the proposal, allowing it to check reality without actually experiencing it or risking impasse.

Should the role be reversed and a recalcitrant party be unwilling to accept a reasonable resolution, the mediator can once again use the layers of the mediation model.<sup>79</sup> Much effort has been expended to create a positive polarity and atmosphere of cooperation through the structuring of the mediation. The investment has been high and the parties have no doubt felt that progress has been made. When a party refuses to resolve the matter along reasonable lines, the mediator can invoke the negative polarity of the litigation frame and the loss of all that has been accomplished in the positive atmosphere by asking the party to consider their BATNA, which would be a return to the negatively-polarized litigation.<sup>80</sup> This is a true reality check in that the litigation is quite real in relation to the hypothetical world of the mediation. As the party has been living in a more positive atmosphere for some time, the rude awakening that the recollection of negatively-polarized litigation would bring has a stronger effect than it would have had before mediation. A party's perspective on the value of what the mediation has created will be altered by the fear of losing the status quo of mediation to the status quo *ante* of litigation. A party will likely alter its position and accept the proposal to avoid the possibility of returning to litigation and losing the gains made in mediation.

Reality checking involves juxtaposing the levels of polarity created through the stages of mediation to foster new perspectives on the dispute and the progress made in resolving it. Once again, it is a question of distancing. In order to ensure that a party recognizes the gains that have been made and the advantages of the mediation, the mediator raises the spectre of the party's loss in returning to the pre-mediation situation. By distancing a positive result within reach by raising the possibility of a negative result, the mediator can alter the perception of gains achieved by each party, encouraging them not to lose

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<sup>79</sup> *Ibid.* at 276.

<sup>80</sup> *Ibid.* at 277-78.

them in reality. The gains can no longer be taken for granted; the parties will strive to hold on to them once they perceive the consequences of not doing so.

At this stage of the mediation, when resolution is near, the real world beyond the litigation seems nearer for the parties and preferable to a return to the litigation. The dispute is on the verge of being resolved, dissolving the negatively charged litigation frame that separates the positively charged mediation from the positively charged real world outside the litigation. With an agreement to settle the dispute, the litigation disappears, the caucuses merge with the mediated settlement and the dispute once again merges back into the real world. The narrative set out by the mediator from the beginning has come to its conclusion with a recognition of the agreement. The parties can go home from the theatre without even crossing the litigation frame, as it no longer exists.

## VI. THE PRAGMATICS OF MANDATORY MEDIATION

Making mediation mandatory does not necessarily change its pragmatics. In fact, there are three possible situations in our two-party mediation model when it is made mandatory: both parties, one party alone, or neither party are willing to mediate. In the first case, the pragmatics of mediation should not change. Simply because a step is mandatory, the parties' willingness to undertake it does not necessarily change. They will likely behave in the same manner as they would in a totally voluntary situation. The pragmatics of mandatory mediation for willing parties would probably be the same as illustrated in Fig. II and as discussed above. In fact, mandating mediation might encourage willing parties to enter the process, as neither party would have to broach the subject first—something that might otherwise be seen as an indication of weakness. In the other two cases, however, the pragmatics would change. Figure III, which represents two unwilling parties, and Fig. IV, which represents one unwilling and one willing party, show this change in terms of the model in Fig. II.<sup>81</sup>

Mediation is mandated through legislative, regulatory, or judicial power, removing the choice not to engage in mediation and replacing it with a requirement to do so. The difference appears in the placement of the semiotic square in Fig. III and of its counterpart, the rectangle in Fig. IV. In both cases, unwilling parties are indicated by the

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<sup>81</sup> See Appendix, Figs. III and IV, below.

displacement of the square from the interior of the interests circle outwards to the edge of the rights zone, where unwilling parties are influenced by power. Although they are not forced to agree in substance to a mediated settlement, they are forced to participate in the mediation process. Interests are still included in the squares, but the mediation model now must also include rights and reflect the influence of power. Unwilling parties forced by law to participate in mediation, unlike whole-hearted actors in the theatre of mediation, are not likely to behave in the same way. Their attention will always be distracted by the influence of power and rights which compel their performance. The analysis that follows will demonstrate how their performance under mandatory mediation would differ from the performance that has been described for voluntary mediation.

Compared with litigation, voluntary mediation enhances communication. This is demonstrated in Fig. II by the mediator's presence at the centre of the circle of interests, in a position that is theoretically neutral, equidistant from both parties, and which interrupts the contradiction diagonals. If mediation is imposed, will the parties perceive the mediator as occupying a similar position? Mediators can attempt to convince the parties of this, but I believe they will be perceived as coming from outside the square as the agent of power. They therefore occupy an ambiguous position for unwilling parties. Will they be able to enhance communication? If the parties perceive the mediator as appropriating a central position to open communication, the motivation for this will be in doubt for an unwilling party. These parties will be less open to the enhanced communication if it results from power and not from agreement. This suspicion will likely inhibit communication between unwilling parties.

In order to get over this difficulty, the mediator must cover more ground than in a voluntary mediation. As Fig. III shows, when both parties are unwilling, the discourse must pass from the power zone where it is imposed and through the rights circle to reach the interests circle. The burden of distance, and level of persuasion required to accomplish this complicates the mediator's task, forcing him or her to become an advocate for the process. This detracts from the mediator's impartiality; even if the mediator is impartial towards the parties, he or she must become partial to a process which the parties reject. The parties will be hostile to assistance if they perceive the mediator's interests to be contrary or even contradictory to their own from the start of the process. Even when only one party is unwilling, the mediator's neutrality will suffer from this difference, as the mediator will have to persuade the unwilling party to participate. The disparity here is shown

in Fig. IV by the rectangle which pulls the mediator off centre in the interests circle. Mediators must become an advocate of a process in which only one party believes. Their neutral position is compromised from the outset because they will be perceived by B as siding with A.

Voluntary mediation is hypothetical and non-binding. The Po nature of mediation is compromised when parties are unwilling to participate. For them the process appears very real as it blocks their access to litigation. There are penalties for non-participation which have an impact on the litigation.<sup>82</sup> Although there is no penalty in the Ontario rule for incomplete participation, the United States experience shows that this is only a precedent or two away.<sup>83</sup> The remedies of blocking access to rights and the imposition of power for failure to cooperate renders the mediation very real because failure to fully participate could be disastrous. During their compulsory participation, the unwilling parties will always be conscious of their compulsion.<sup>84</sup> Consequently, they will never experience the kind of commitment to the process which produces the theatrical effects of distancing and denial. As the proceedings will always seem real, the unwilling parties will never sufficiently lose themselves in their roles to reveal their needs and interests, nor will they be prepared to imagine an interest-based solution. They will be wary not to reveal something in the mediation that might hurt them in the litigation. Unlike the Po nature of mediation for willing parties, who see litigation only as a fall-back, mediation does not count for unwilling parties, who fear that mediation will only prejudice the main event—litigation. A process that does not secure the commitment of the parties will not work effectively.

In voluntary mediation, the mediator is able to use the altered polarity of mediation as a foil to encourage the parties to work towards a solution in the dispute. Mediation is held up as being preferable to litigation, which, in turn, is better than avoiding a resolution to the dispute. However, where parties are unwilling to mediate, mediation is not preferable to litigation. In fact, the polarity of mediation, which

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<sup>82</sup> See *Rules of Civil Procedure*, *supra* note 9, r. 24.1.13(2) provides for the possibility of suspending the non-complying party's participation in the lawsuit, or even dismissing its claim or striking out its defence.

<sup>83</sup> See L.V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" (1993) 1 J. Disp. Res. 1.

<sup>84</sup> See R.A.B. Bush & J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) at 142-43. Bush and Folger demonstrate, through an actual example of mediation which the parties had been directed to attend by the court, that it is only the freedom to refuse to participate that promotes cooperation in a party compelled to attend.

appears to them as undesirable within litigation, is negative for unwilling parties. They would prefer to return to litigation and are therefore less likely to find an acceptable solution in mediation. Once the polarity of mediation is perceived as being negative, anything contained in it will also appear to be negatively charged, and therefore suspect, to the unwilling parties. This will have a substantial effect on the mediator's four techniques discussed in the analysis of voluntary mediation.

The mediator seeks to create a narrative structure for the process that will resolve the dispute at the conclusion of the mediation. In voluntary mediation, the parties are seeking a mediated solution and are therefore quite willing to follow the mediator's narrative plan. This plan involves the revelation and exploration of needs and interests which would not come out in a rights-based procedure. Unwilling parties will question the imposition of an agenda that requires them to reveal secret interests and needs which could be interpreted as weaknesses or vulnerabilities in the litigation. If these needs and interests are not revealed and explored, the mediation will be blocked at the reconciliation of rights, an area of the model included in mediation whenever there are unwilling parties. This type of reconciliation is believed to be more appropriately accomplished at trial, as trial procedure is designed for that purpose and therefore contains the appropriate procedural safeguards.<sup>85</sup> Similarly, enforcement of the trial verdict is also more appropriately accomplished at the boundary between rights and power, the location of the unwilling parties in mandatory mediation. Unwilling participants will not only be unwilling to follow the mediator's narrative path, but are also unlikely to believe that it will produce an enforceable, lasting result, as it would be far from the rights and power that they see as the enforcers of agreements.

Reframing by the mediator locates the common points in the parties' separate discourses, forging from them a neutral and common discourse in which a resolution of the dispute can be found. Unwilling parties will refuse to abandon their rights-based arguments and will therefore refuse to accept the joint discourse. Where the mediator tries to make discourse neutral in a gist, the parties will continue to attribute the discourse to its speaker and impute a negative or hostile intention to it. The unwilling parties will refuse to allow the separation of the people from the problems.<sup>86</sup> When an upshot is used, the forging of a joint and common discourse will be rejected by the unwilling players who will

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<sup>85</sup> See articles cited *supra* note 8.

<sup>86</sup> See *Getting to Yes*, *supra* note 30, c. 2.



reimpose the initial sense of the discourse on the upshot, thereby generating debate over the creation of the discourse itself. Rather than accepting the thematization of the mediation and following the present-to-future vector of the upshot, unwilling parties will continue to focus on past conduct in which their rights are founded in order to support the case that they are building for litigation. The attempt to create a common, neutralized discourse will be seen as a denial of those rights and will be resisted. Joint discourse is impossible where adversarial argumentation is the response to gists and upshots. Without the forging of a joint discourse to consider resolution of the dispute, the mediation cannot pass from rights and power to interests.

The mediator may seek to isolate the unwilling parties in caucus in order to create the joint discourse without their being aware of the process and therefore resisting it before the return to joint session. However, unwilling parties will view the caucus as oppressive rather than liberating. As indicated above, the caucus merely doubles the unreal negative polarity of the mediation. Unwilling parties will see the caucus as pushing them even further from the assertion of their rights which is their goal in the litigation and which was still, at least partially, possible in joint session. Unwilling parties will not reveal confidential information to the mediator because they distrust the mediator as an agent of power, as represented in Fig. III, or as an agent of power in league with the willing party, as represented in Fig. IV.

The semiotician Algirdas Greimas proposes that an actantial analysis can be applied to all narrative constructs to reduce them to six actants who perform the basic roles of the story.<sup>87</sup> These roles can then be set out syntactically in a single sentence that describes the narrative. A *sender* provokes the *subject* to pursue an *object*, aided by *helpers* and blocked by *opponents* with the intention that the results of the quest will go to a sixth actant, the *receiver*. If we apply this grid to compare mediations where parties are willing as opposed to unwilling, we can see that the parties' perceptions of the mediator's actantial role change. By willing parties, the mediator is seen as helping them as subjects to form their own agreement, while by unwilling parties, the mediator is seen as the subject pushing the parties towards agreement for their own benefit. Through this usurpation of subjectivity, the parties are deprived of their proper role as subjects seeking a resolution by and for themselves.

The perception of the mediator by unwilling parties can best be expressed in the terms used in Joseph Stulberg's "how-to" guide for

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<sup>87</sup> A.J. Greimas, *Structural Semantics: An Attempt at a Method*, trans. D. McDowell, R. Schleifer & A. Velie (Lincoln: University of Nebraska Press, 1984) at 178ff.

mediators.<sup>88</sup> Stulberg discusses the same procedures as Moore, but in an entirely different tone. Moore takes a helper approach, favouring terms like “help” and “assist,” and mitigators and modalizers, such as the conditional mood, which indicate a possible course of conduct rather than a prescription.<sup>89</sup> Stulberg, by contrast, takes a mediator subjective approach by giving his book the title *Taking Charge/Managing Conflict* and by describing the mediator’s role with the terms “force” and “compel” from the very beginning of his analysis.<sup>90</sup> He suggests that mediators “capitalize on inconsistencies and vulnerabilities to develop a framework for agreement.”<sup>91</sup> His use of acronyms as mnemonics for the practice of mediation reinforces his conception of the mediator as subject of the mediation. The admonition that “the mediator must seize control of the discussion” is represented by the acronym “CNTRL” which he applies to the structuring of the mediation.<sup>92</sup> The mediator’s role is summarized by the acronym “BADGER,” further enhancing the dominant and persistent stance required by the subject mediator according to Stulberg.<sup>93</sup> Finally, the acronym for the caucus is “ESCAPE,” a verb which makes the mediator the subject.<sup>94</sup>

The caucus is the mediator’s refuge when progress cannot be obtained by controlling and badgering. The “A” in ESCAPE stands for “attack recalcitrant party.”<sup>95</sup> In the case of unwilling parties, recalcitrance will be a hallmark of their behaviour. After being controlled and badgered, unwilling parties will feel imprisoned and attacked in caucus if mediators seek to isolate them and compel them to cooperate with the process. The response to attack is defence, not cooperation. Each of the techniques employed by the mediator will appear to the unwilling party as aggression, as Stulberg explicitly describes them, and not as assistance, as they are described by Moore. It is perception that matters, not the technique itself. From the unwilling parties’ point of view, if the technique is calculated to make them do something which they do not want to do, it will be perceived as an attack,

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<sup>88</sup> See Stulberg, *supra* note 3.

<sup>89</sup> See Moore, *supra* note 3.

<sup>90</sup> *Ibid.* at 1.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* at 89.

<sup>93</sup> *Ibid.* at 58.

<sup>94</sup> *Ibid.* at 109.

<sup>95</sup> *Ibid.*

provoking defensiveness, not cooperation. To unwilling parties, the caucus—potentially the most effective element of voluntary mediation—will seem like a trip to the interrogation chamber in the prison of mediation, turning the caucus against the mediator and against the mediation itself.

The mediator's final technique is reality checking, in which the mediator plays polarities against one another to encourage settlement when the alternative is not as attractive. Unwilling parties, however, find the mediation less attractive than the alternative. The gains achieved by unwilling parties to mediation up to this point in the process will likely be few, due to the problems already cited, and they will appear less attractive than proceeding with the litigation. The mediator has no real foil to hold up to encourage settlement. Reality checking will not encourage settlement, but rather remind the unwilling parties that the litigation is their alternative and that the sooner they leave the mediation, the sooner they can proceed with the litigation. Reality checking as a means of encouraging the acceptance or offer of a settlement at mediation will backfire when used on unwilling parties.

## VII. CONCLUSION

To debate the opposition of mandatory and voluntary mediation is to employ irreconcilable terms. In order to characterize their opposition in terms that are more capable of reconciliation, the reasons behind the difference in their application in practice must be revealed. It is the question of the willingness of the parties to mediate which should be explored. If mediation is forced upon unwilling parties, the likely consequence will be the failure and disrepute of the process. Considering its usefulness, this would be an unfortunate consequence. The remedy would appear to be to encourage parties to willingly participate. In order to do this, however, one would need to know why parties are unwilling.<sup>96</sup>

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<sup>96</sup> *Memorandum, supra* note 1 at 8 describes the results of a survey conducted in the United States. See also D. Stienstra & T.E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* (Washington, D.C.: Federal Judicial Center, 1995). In this report, a comparison is made between opt-out and opt-in provisions for arbitration. The former were more successful in procuring party participation in ADR. However, it would be interesting to know why the parties who opted-out or failed to opt-in behaved as they did. Motivation is the key to answer the question of a party's willingness to mediate. Learning precisely why parties are unwilling to mediate is the first step in changing their minds.

One could suggest a number of possibilities to explore in empirical research of unwilling parties. The following list is clearly not complete: Do the parties fear the unknown? Do they feel they will be oppressed by the other party when the procedural safeguards of litigation are taken away? Do they feel that they can win a complete victory at trial, but might feel obligated to share at mediation? Do they want to set a precedent for future court proceedings? Is the party they are about to enter mediation with known to be difficult unless faced with the threat of power created by judicial determination? Does the willing party only wish to further delay the imposition of power on it by the courts by engaging in mediation?

In creating a mandatory program, these issues and any other sources of unwillingness must be addressed in order to assure success. A good beginning would be an educational program for all lawyers that would show them the benefits of mediation and how they can be achieved. This knowledge could be passed along to the clients through the distribution of materials not only describing the process, but showing how it works and permitting the clients to participate in mock mediations as role play exercises with their counsel.<sup>97</sup> Kits containing role play exercises, along with learning materials, could be supplemented with independent coaching by persons skilled and knowledgeable in mediation. The participants would gain the sense of security in the process needed for them to reveal their needs and interests. How better to learn about theatre than to perform it?

The mandatory mediation regulations could also provide for flexibility on consent of the parties which would not necessarily eliminate the requirement to mediate, but require its consideration and use, subject to compelling contraindications, before trial. Exemptions are already available in limited form and upon limited grounds in the regulations, but only upon order of the court.<sup>98</sup> This exemption procedure must be liberally and knowledgeably interpreted to prevent the process from falling into disrepute.

Finally, mandatory mediation itself should not be forced upon unwilling parties. The attorney general of Ontario was reported in *The Globe and Mail* as threatening to legislate mandatory mediation if the legal establishment did not agree to it voluntarily.<sup>99</sup> Ultimately, a compromise was arranged, extending the Ottawa pilot project to require

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<sup>97</sup> See Grillo, *supra* note 8 at 1608.

<sup>98</sup> See *Rules of Civil Procedure*, *supra* note 9 at 24.1.05

<sup>99</sup> See Makin, *supra* note 2.

all civil, non-family case managed actions to proceed to mediation, and adding a Toronto element, where currently 25 per cent of actions are subject to case management and to mandatory mediation.<sup>100</sup> The lessons of dispute resolution system design indicate that a process is much more acceptable and widely used if it is proposed by the users themselves.<sup>101</sup> The Ontario government has used a power solution to impose a process on potentially unwilling parties. As I have established in the preceding analysis, the consequences of this approach to mediation are detrimental to its success. The better approach would have been to prove the usefulness of mediation to members of the legal community so that they would willingly embrace it, and encourage their clients to do likewise. One can only hope that, during the phase-in period, the education of the legal community will continue, and mediation will not be discredited as a mechanism of dispute resolution before its efficacy has been established and recognized.

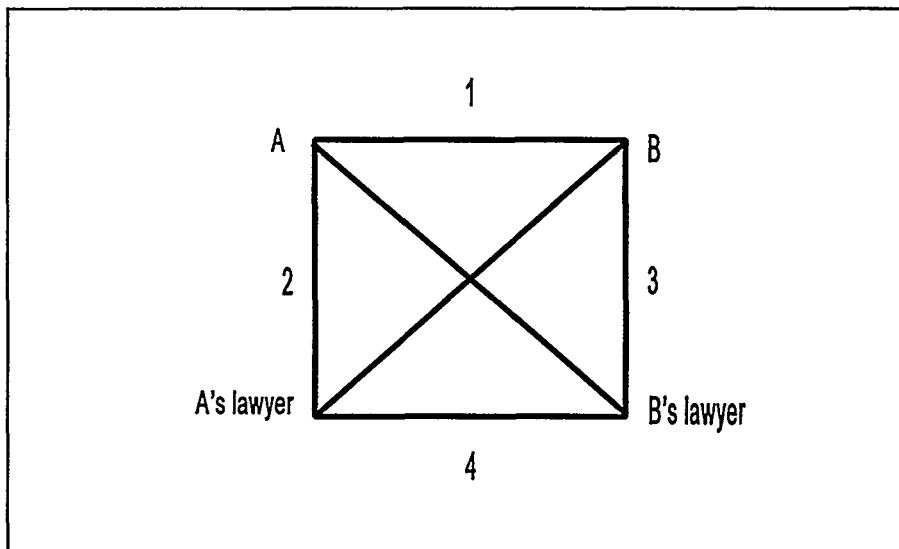
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<sup>100</sup> See *Rules of Civil Procedure*, *supra* note 9, r. 24.1. The Ontario Mandatory Mediation Program is expected to apply province-wide over the next few years.

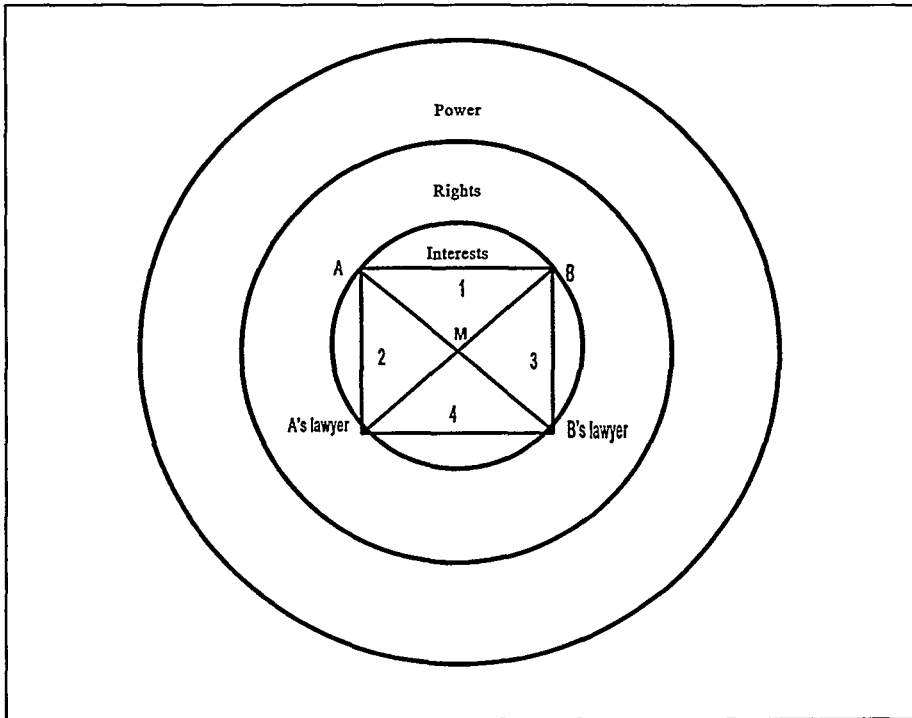
<sup>101</sup> See articles cited *supra* note 52 regarding the basic tenet of conflict management system design that a self-created and adopted process is more acceptable and therefore more likely to be used by the parties.

# APPENDIX

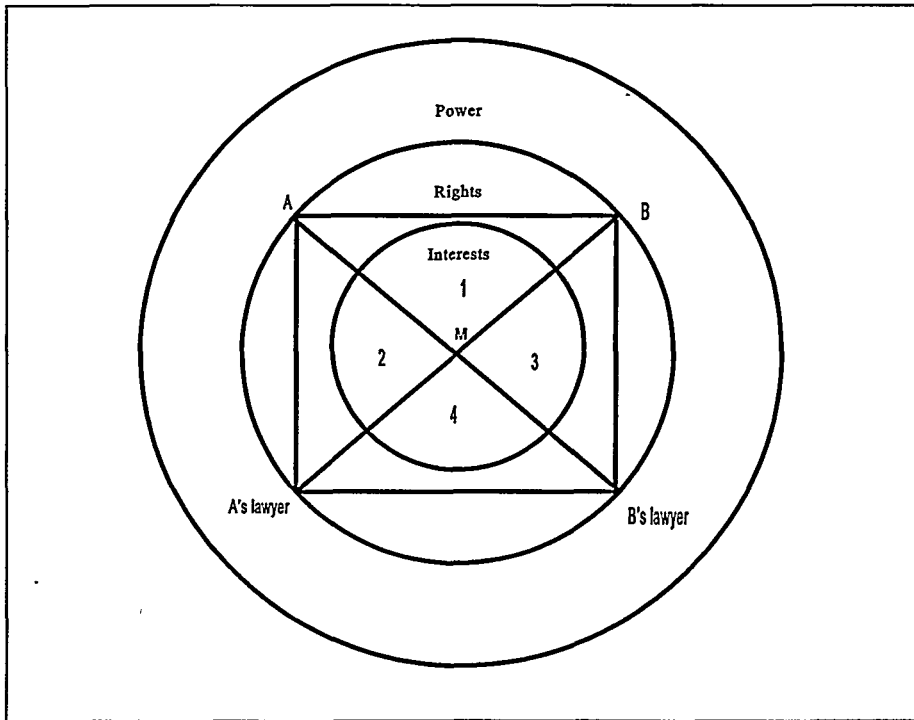
FIGURE I  
COMMUNICATION IN LITIGATION



**FIGURE II**  
**VOLUNTARY MEDIATION**



**FIGURE III**  
**BOTH TEAMS UNWILLING**





**FIGURE IV  
TEAM B UNWILLING**

