

Chapter Three

The Emergence of Mediation as a Profession

Introduction

This chapter sets out to do two things. Part I overviews sociological theories of professions and recent activities directed at regulating the practice of mediation. The debate over mediators' credentials is a major tension underlying this study about what mediation means today. Those in favour of regulation believe it will set mediation on a path toward becoming a profession. Those opposed believe it is premature to restrict the practice of mediation before understanding the breadth of its nature, and that regulation would pose a threat to the diversification of mediation. If, as it seems, mediation is emerging as a new profession then we can expect to find certain activities that might be better understood using the lens of professions theory. Some of the activities related to regulating the practice of mediation are also presented in this section.

Part II of this chapter presents the views of respondents regarding the regulation of mediation and includes some of their concerns with respect to changes that they see taking place. Similar to what can be found in the literature, respondents are not in agreement on whether the field should be regulated. This should not be surprising given the various ideologies of mediation discussed in the previous chapter. Should regulation occur, however, the opinion of respondents is that all stakeholder groups should be involved in shaping these regulations. They also believe regulations should be seen as guidelines, and they should be national, minimal, flexible,

inclusive, and performance-based. This section is more descriptive than analytical. It begins to set the tone for the insights that emerge from this dissertation – that there are many conflicting and converging views about the nature and the future of mediation.

I. Sociological Theories of Professions

While there is little consensus among sociologists on what makes a professional (Freidson, 1983), there does seem to be agreement that professionalization is a feature of the occupational structure in advanced industrialized societies (Larson, 1977), and that professionals are growing in number (Brint, 1994). Before World War II only one percent of all employed people in the United States were college educated and classified as professional workers compared to twelve times that many today (Brint, 1994:3). The most highly educated of all strata, today's professionals are considered distinct from business executives and managers and include most doctors, natural, social and computer scientists, engineers, certified public accountants, economists, lawyers and some clergy.

Professions have been around since the 13th century; their modern history developed with the emergence from the dominance of the church and guilds in the late medieval period (Brint, 1994). The clergy were the first profession to organize, law was next having emerged during the second half

of the 12th century, then medicine organized during the 15th century.

Professions are considered different from other occupational forms of work because of their autonomy and control over the work that they do, most often with the support of the state.

Professionalization refers to the progress of an occupation toward professional status. Most theorists seem to agree that professionalization is linked to social production and certification of knowledge. It is both a social and an economic institution and one that encourages strong identification with work (Brint, 1994). Views of professionalization have changed over time and been studied in different ways. Early theorists adopted a structural-functional and trait-approach which emphasized ideal-type characteristics and social reproduction (Parsons, 1939; Carr-Saunders and Wilson, 1933; Hughes, 1958; Greenwood, 1957; Millerson, 1964). Professions were distinguished from occupations based on their systematic education and knowledge, and whether the work was viewed as being in the interests of the social good. Combining naturalism and typology, researchers examined the life history of a particular occupation, reviewed what were then considered essential traits, and, based on an “ideal-type” in Weber’s sense, decided whether it really was a profession. One of the classic studies by Carr-Saunders and Wilson (1933) investigated more than thirty vocations that were granted or claimed professional status. The authors came up with characteristics typical of

professions by identifying what they had in common and how they differed. Later on Greenwood (1957) argued for set of attributes of a profession: systematic theory, professional authority, sanction of the community, regulative codes of ethics, and a culture. Later still, Goode (1972) identified professions as a community within society by virtue of eight characteristics: 1) once in it few leave, 2) members are bound by a sense of identity, 3) shared values, 4) role definitions are agreed upon and the same for all, 5) common language, 6) community has power over its members, 7) clear social limits, and 8) controls the next generation through selection, training and socialization (p. 17).

Many non-professional occupations have the same characteristics as professional groups, but to lesser degrees. Greenwood (1957) and Pavalko (1971; 1972) saw these attributes distributed along a continuum with the undisputed professionals at one end (doctors, lawyers), the less developed and less prestigious scattered in the middle (clerical, sales crafts) and the least skilled at the other end (truck drivers, cleaning staff). Pavalko's scale allows professions to be defined according to differences of degree, rather than of kind. Thus, established professions would have most if not all of the attributes, would-be professions would have some of the characteristics, and non-professions would have none of the attributes.

Critics of the trait-based approach found fault with its atheoretical character. They also rejected the fact that it accepted professionals' definition of themselves. And they argued that reliance on ideal-type definitions make it difficult to compare cases (Johnson, 1972; Freidson, 1971). That such models implicitly accept that there are, or have been, "true" professions exhibiting to some degree all of the essential elements is said to be more idealistic than realistic (Johnson, 1972). Freidson (1971) believed it a mistake to take for fact what professionals said to be true. He suggested that what professionals say to justify their privileged might be better taken as political ideology and not an intrinsic difference. Another criticism of the trait approach is the absence of attempts to articulate the relationships among the traits. For example, theorists did not look for a direct causal link between expert knowledge and authority (or any other trait for that matter), nor did they look for links resulting from elsewhere. Critics also questioned trait-based theorist's conclusions because they mostly studied Anglo-American culture at points in the historical development of the profession (Johnson, 1972).

Classic trait-based theories were followed by process-approaches thought to be more sensitive to social change. Accepting professionalization as a natural process, theorists focused on the sequence of events that led to becoming a profession rather than static traits (Caplow, 1954; Wilensky, 1964; Ritzer, 1977). Caplow (1954) identified four steps in the development of a profession, Wilensky (1964) identified five steps, and then Ritzer (1977)

formulated a six-step process. His steps included: 1) full-time occupation, 2) change of name, 3) development of professional associations, 4) training schools, 5) code of ethics, and 6) political agitation to win popular support (p. 46-48). Process theorists were criticized, however, on the basis that process simply replaced structure.

In 1964, the work of two sociologists, Wilensky and Millerson, prompted theorists to posit that professionalization was a matter of power. They argued that although many occupations aspired to control their training and work, it was only professionals who succeeded due to their ability to control areas of uncertainty and organize for collective validation. Using a trait-based approach, they were the first to connect traits with political concerns. Later, Johnson (1972), Larson, (1977), Klegon (1978), Freidson (1971; 1983) and Ritzer and Walzack (1986) strongly rejected the trait approach and argued that self-preservation was a more accurate reflection of how their power and authority was used. This shifted the study of professions to issues of control and dominance. Claims of dedication to service in the public interest were challenged. Claims to high ethical standards were thought only to protect the privilege of professionals. And claims of formal knowledge were linked to power. In its extreme form, the power approach to theory assumes no qualitative differences between professionals and non-professions except that the professions have greater power. The less extreme variant argues that the power of the profession allows it to create the

traits necessary to be a profession or convince others that they possess the required traits. Thus, the claim to professional status²⁵ is seen as a political process where certain social conditions allow occupations to claim and maintain autonomy and influence. Advocates of the power approach theory believed that professionals gained their stature not by actually acquiring certain characteristics, but by convincing others they had. By seeing monopoly rather than control of relationships, power theorists moved the focus of debate from the forms of professionalization to its functions. They posited that the establishment of codes of ethics served the function of excluding outsiders rather than allowing a natural evolution in the development of a profession. Professions came to be seen as self-serving rather than altruistically serving society at large. Power approach theories still dominate much of contemporary professions literature.

Modern professions are distinguished from professions of yesteryear in two important ways. First, today's professions are being challenged on what were once considered the hallmarks of a profession - placing the social good before self-interest and claiming expert knowledge. Second, they have a relationship to the political market. Today's professionals are often salaried employees in organizations who, because they submit to a bureaucratic

²⁵ Claims to professional status are often accompanied by codes of ethics, associations, claims of trustworthiness, performance of important social services, and holding the qualifications to do the work.

system of managerial control, have lost much of their autonomy. Even though there is a wide variation in organizational employment the character, of the professional is diminished with standardized procedures and centralized authority (Carr-Saunders, 1955). Interestingly, most professionals in the 1990's are employed in nonprofit and public sector work (Murphy, 1990; Brint, 1994). This is true for no other major socioeconomic group. Another important aspect of today's professionals is that they no longer think of themselves as more important to society than other occupational groups (Brint, 1994). Instead, their sense of identity is developed through a sense of shared education and high level of expertise.

Contemporary approaches to the study of professions include political and economic theories (Brint, 1994; Torstendahl and Burrage, 1990), class theories (Freidson, 1986), and systems theories (Abbott, 1988). Brint defines the essential characteristics of professions as a form of organization that has nothing to do with public service, ethical standards or collegial control, and he suggests that profit making has taken precedence over public welfare. Brint's characterization of a modern professional is based on American studies, others do not have such harsh depictions (Carr-Saunders, 1955). Brint points to the de-regulation climate of the 1960's in the United States as the point in time when professional work began to be viewed as a commercial activity. During these years bans on advertising, standard fees for service and the expectation of pro bono work were abandoned. In turn, this changed

an important component of the professional environment - that of social trusteeism. He, like others, believes that it is through professional associations and the regulatory state that professions gain control over how their work is to be accomplished. Brint supports the notion that professions are the new form of middle-class labor (1994:25). Carr-Saunders links the change in the character of a profession as a “movement toward specialization in general” (1955:282) and a “disintegration of the traditional professional concept” (p.286). Class theorists see higher education as the key to the formation of a “new class” thus professionals constitute a class by virtue of having higher education that they depend on for a living. Broadly defined, the new class is an undifferentiated, broad white-collar class who do “clean” work (Freidson, 1986:42). In new class theories, the claim to public service and possession of specialized formal knowledge is used to distinguish them from other occupational work. The ideology of professionalism and the demand for autonomy are characteristic of the new class. In spite of common life-styles, this new class does not act as a class and members have competing interests.

Systems theory sees all aspects of the socio-cultural system directly or indirectly related in a causal network. Looking at professions a part of a system of professions can be largely attributed to the work of Andrew Abbott (1988). Abbott questions the evolution and interrelations of professions, and believes groups control their skill in two ways: 1) abstract knowledge and 2) technique

(such as in a craft). Abbott's main thesis is that professions compete by taking over each others' tasks. Rothman (1984) refers to such an activity as "encroachment". In his article on the deprofessionalization of law, he points to the law professions' history of competition with accountants, bankers, realtors and other professionals who sought to enhance their prerogative and rewards by expanding into new areas previously the domain of law professionals. Kronus (1976) defined the same phenomena as a problem of "boundary maintenance". In Abbott's view, to study the professions is to examine the tasks of professions, the groups that carry them out, and the changing links that bind them to one another. Professional work is tied directly to a system of knowledge that formalizes the skills on which the work proceeds. The ability of a profession to sustain its jurisdiction lies partly in the power and prestige of its academic knowledge. Academic knowledge accomplishes three tasks - legitimation, research and instruction, which in turn influence the vulnerability of professional jurisdiction from outside interference. Professions emphasise theory rather than practice, for they control the former much more than the latter. Although not arguing for a systems approach in the sense that Abbott proposes, Haug (1973) predicted a "tug of war" as older professions try to hang on to what they had and new workers try to lay hold of a piece of the action. Just as older professions argued they were the experts, newer groups profess to know and understand the work area. For Abbott, these claims of work are described as claims over jurisdiction. Nonetheless, even though old

professions may fall prey to new ones, the argument is that professions themselves are never totally eliminated (Abbott, 1988; Murphy, 1990).

To summarize, the study of the professions asks important questions. When and how knowledge affects social structure? What social conditions determine who will control what kinds of knowledge? It is grounded in historical comparisons that allow us to account for variation and for the dynamics of change. "Post-revisionist" theories suggest "it is not the existence of knowledge that is crucial, but how it is socially organized" (Collins, 1990:18). This leads Murphy, to define a profession as "a new governing class whose power is based on the control not of the means of production, but of the means of knowing in a post-industrial system increasingly founded on technology" (1990:71).

The ability to mediate, as in other professions, concerns complex human relationships. A mediator's work is not based solely on scientific knowledge or technically specialized skills. Instead their knowledge is largely tacit and their skills are potentially available to others. This means that the basis upon which they claim authority to practice is regularly open to challenge. Thus, mediators are forced to gain credibility by projecting an impression of professionalism. They try to foster the impression that they are experts, they manage their rapport to build trust with the parties, and they legitimate their efforts by mobilizing data (Kolb, 1985).

The right to claim expert knowledge and lay claim over areas of work is at the heart of the credentialing debate in mediation. Fueling the debate is the fact that there is still little agreement about core values or knowledge areas, there is also not a system of language that is generally understood by those who work as mediators²⁶. Thus far, legislative restrictions have not been sensitive enough to the various mediation approaches currently being used in the field. This in turn, constricts rather than enriches mediation practice (Waldman, 1996). The following presents some of the debates about, and activities directed toward, regulating the practice of mediation.

The Regulation of Mediation

The debate over the regulation of mediation has been going on for the last decade or more²⁷. Recent focus has been on the issue of credentialing²⁸, along with how and what to require when it comes to certifying mediators. The discussion has focused less directly on the issue and value of regulation per se. Instead, the controversy has been generated by talk of restricting entry into a field, which has traditionally prided itself on accessibility, and on grassroots people-skills. What started in the mid-1960's as a move to "de-

²⁶ This is a major insight of this research – that while mediators use common words to describe their work, they do not always mean the same thing.

²⁷ In 1987, the Commission on Qualifications of the Society of Professionals in Dispute Resolution (SPIDR) was formed to study the question of what qualifies someone to be a dispute resolver.

²⁸ I use the term credentialing to refer to accreditation, certification, and licensing as forms of self-regulation that imply the setting of standards and measurement of conformity by an organization or institution. I include these activities when I use the terms regulation and professionalization.

professionalize" legal institutions for problem-solving and dispute settlement appears to many critics to have come full circle.

This debate within mediation reflects a range of interests and practices at work.

At one extreme are the neighbourhood centres espousing voluntarism, self-help and peer relationships. At the other end are highly trained professionals who want to make a decent livelihood carving out a niche in the professional world of help somewhere between career diplomats, organizational consultants, lawyers and therapists. Clustered along both ends are differing views of charging fees and differing perspectives on credentialing (Kraybill and Lederach, 1992).

Discussions of credentialing for practicing mediators evoke strong reactions, both positive and negative. While applauding the field's growth in stature, some find the discourse about credentialing troubling. They fear that elitism may threaten personal and social empowerment. Proponents argue that mediation demystifies and de-institutionalizes formal settlement mechanisms. They believe that through mediation the resolution of conflict is drawn away from "professionals" and returned to those most affected by it, thereby empowering participants and stimulating social transformation. The fear is that the apparent, and some would say inevitable, move to professionalize the field may place individual and collective empowerment at risk as "grass-roots" and volunteer mediators are marginalized because they do not meet the requirements of a "professional" mediator.

In a previous study (Picard, 1994), Pavalko's occupation-profession continuum was used to analyze the activities of the contemporary mediation movement. This study found that mediation had advanced considerably in all of Pavalko's trait characteristics to varying degrees. When placed on his continuum, four of the eight traits (relevance to basic social value, motivation, sense of commitment, and community) fell along the professional end. Less clear were the remaining four traits (theory, training, autonomy, code of ethics). Although each trait had made considerable advancement and were at varied points along the occupation-profession continuum, they were judged to lie toward the non-professional, rather than the professional end of the continuum. Given that Pavalko admits that it is difficult to determine which trait is more important and that no one profession would exhibit all of the dimensions to a high degree, the study concluded that mediation was a "profession in the making" (p. 157). Carr-Saunders (1955) would refer to contemporary mediation as a "would-be profession" bent on claiming recognition for the expertise that its members hold. Both theories lead to the speculation that standardization and a system of certification for mediators will be established in the future. As an emerging profession multiple and complex activities are likely to be going on within the field. This research found this to be true.

A number of questions arise with the move to be seen as a profession. Should standards be set, and if so, by whom? What qualifies a person to practice as a mediator? How do we assess mediator competency? What

initial and ongoing training is required? Who should govern the credentialing of mediators? There is still no consensus on the answers to these questions. Depending on the forum, there are guidelines describing mediator qualifications and some standards to govern the process, but usually they are advisory and not mandatory²⁹. Some mediators argue that it is premature to focus on questions of credentials and that doing so will hinder the development of the field. Others believe that, while the licensing of mediators by the state has yet to occur, legislators, judges and government agencies are already deciding who may and may not mediate through program policy and procedure decisions. The issues are contentious, and for good reason. The creation of an organized group or subculture which would govern and limit access to the field warrants intense scrutiny. The fear that mediation may become exclusive and elitist appears justified when we look at what has happened in the legal and health professions, to name only two.

Fueling the call for the setting of credentials is growing concern regarding several views about mediation. First, that mediation is thought to be “easy”. Second, that non-mediator trainers can teach mediation skills. And third, that offering mediation is more important than the quality of service

²⁹ See generally, Family Mediation Canada (FMC), “Practice Guidelines and Family Mediator Certification Process,” 1997; Academy of Family Mediators (AFM), “Standards of Practice for Family and Divorce Mediation,” 1995; Society of Professionals in Dispute Resolution (SPIDR), “Ethical Standards of Professional Responsibility,” 1986; National Association for Mediation in Education (NAME), “Recommended Standards for School-Based Peer Mediation Programs,” 1996; Arbitration and Mediation Institute of Ontario Inc., “Rules of Procedure for the Conduct of Mediators,” (nd).

that is offered (Herrman, 1993). These ideas raise concerns about how to stop individuals without “approved” credentials and with little or no hands-on mediation experience from practicing as mediators or mediation trainers. Those advocating for setting criteria for practicing mediators argue that credentials would protect the consumer and the integrity of mediation. Opponents maintain that inappropriate barriers for entry into the field would be created and dissemination of peacemaking skills in society at large hampered. Currently, none of the various commissions struck to study and report on these and other related questions have had their recommendations implemented by the field as a whole.

The fear of creating a monopoly lies at the heart of the credentials debate. Certification and licensing would have significant implications not only for mediators who deal with family, corporate, public policy and international disputes, but also for those working in neighbourhood centres, schools and other community-based programs. There is the concern that services now offered by these groups will no longer be recognized as legitimate, causing public favour and funding to be lost. Non-adversarial dispute settlement options, it is argued, would be available only to the elite and the wealthy - one of the problems with formal justice systems which mediation innovators set out to change.

If mediation becomes a “profession”, as defined sociologically, critical theorists predict occupational closure; in other words a "formalization of informalism" (Pirie, 1994). This predication underlies this study's interest in examining what mediation means today. The professionalization of mediation underlies this work for two other reasons. First, it is a contemporary and contentious topic. Every principal association in North America has undertaken studies, formed committees and presented reports on the subject³⁰. Should mediators have professional degrees? What training do they need? How will we know if a person is qualified to mediate? Although advanced degrees are not viewed as legitimating mediator performance, instead performance-based standards are being emphasized by the majority of associations, the tendency by government and legal institutions has been to require them³¹. In the case of lawyers, stipulations are being placed on length of time in legal practice³².

³⁰ See generally, Honeyman, “On Evaluating Mediators,” *Negotiation Journal*, 1990; the Society of Professionals in Dispute Resolution (SPIDR), *Qualifying Neutrals: the Basic Principles., Report of the SPIDR Commission on Qualifications*. 1989, and *Ensuring Competence and Quality in Dispute Resolution*, 1995; Edelman, “A Commentary on Family Mediation Standards”, *Mediation Quarterly*, 1986; Morris and Pirie, *Qualifications for Dispute Resolution: Perspectives on the Debate*. 1994; Waldman, “The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity,” *University of San Francisco Law Review*, 1996; NIDR, *Performance-Based Assessment: A Methodology for use in Selecting, Training and Evaluating Mediators*, 1995; English, *Family Mediation Canada Standards and Certification Project*, 1993; Hart, “Draft Model Guidelines for Court-Connected Mediation Programs,” a paper presented to the Canadian Bar Association, 1998; Shaw, Singer and Povich, “National Standards for Court-Connected Mediation Programs,” *Family and Conciliation Courts Review* Vol. 31 No. 2, 1993:156-225.

³¹ For example, some American states now require advanced degrees including Alabama, Virginia, Florida, and some parts of California. If not a lawyer, mediators can be a psychiatrist, a certified public accountant, or have a Master's degree or better from any of the social or behavioural sciences.

³² In Canada, the Law Society of British Columbia requires three years experience. In the United States, the state of New Hampshire requires trial experience of ten years. In Florida, for trial court level matters over \$15,000 a mediator must be a Florida attorney in good standing with at least 5 years membership in the Florida Bar; for Family Circuit Court they must be a licensed attorney from any jurisdiction for at least 4 years (or they can be a psychiatrist, a certified public accountant, or have a Master's degree or better from any of the social or behavioural sciences).

Requiring a degree to practice as a mediator even though there is no evidence to support that formal education is required to be a competent neutral and knowing that they would create barriers of entry to the field, fits classic patterns of professionalization. Is what we see happening the beginning of occupational closure and elitism? Second, there are many prominent and thoughtful people in the field who see professionalization as a natural and progressive activity and it is easy to be convinced by their arguments. Proponents posit many benefits to professionalization including being able to ensure quality service, maintain the integrity of the process, and protect the consumer. Referring to mediation as a profession would accord it dignity, confer practitioners with a higher degree of respect, and provide financial benefits. The danger lies in defining mediation too narrowly, thus constricting rather than enriching mediation practice, and defining it before the complexities of its present nature are fully known.

Two points can be made about the debates on regulations that have formed to date. The first has to do with the tenor or the nature of the discourse. That tenor has taken on a distinctly narrow and “legalistic” tone, one which focuses on agents, techniques and processes, and the access to them, not on the wider purposes or goals of those processes or techniques. Importantly, it uses legal arenas of dispute resolution as the reference point against which the practices and agents of mediation are assessed. The second point is that in the absence of any consensus by the practitioners and

in the absence of an explicit regulatory schemes, informal credentialing has been occurring through the practices of the state, notably in mandated mediation programs such as Ontario's³³. The danger is twofold. First, that the direction of the field will be decided in large part by the dictates and needs of the state, of the legal profession, and of the formal legal institutions which mediation was intended to supplant. Second, that formal regulatory schemes, when they arrive, will follow the practices and directions already in place. This second point requires some elaboration.

It is clear from the North American experience in recent years that there is increasing interest on the part of various governments and of the legal profession in alternate processes of dispute resolution in general and in mediation in particular. In Canada, legislation providing for the use of mediation is relatively new and most of it is silent on the issue of qualifications of mediators. The first to pass "enabling" legislation was the government of the Yukon Territory, in 1992. This legislation allowed for mediation in environmental disputes. In June of that same year, the *Canadian*

³³ Ontario has a model of mandated mediation in civil matters that favours the evaluative approach, which focuses on entitlements, efficient case management, advice, and links to and from the formal court system. While there is no one standard as to qualifications, credentials, training, models of mediation, performance standards and so on, what is evident in the operational scheme is the focus on attaining quick settlements and avoiding costly trials. Larger goals of a facilitative, more relational focus on needs, experience and transformation are nowhere to be found. Under the legislation, mediators are provided free to the parties for a three-hour session; if a settlement is not reached, then the parties either pay themselves for further mediation or go to court. A "good" mediator is one who can get a settlement, and because the parties' lawyers are effectively choosing the mediators from a roster of mediators, those who are favoured (and who will therefore survive in business) are those who opt for an evaluative model of mediation³³. Facilitative and transformative model concerns, which are needs-based and focus on the parties reaching a solution themselves are lost.

Environmental Assessment Act was given final reading; it provided for the use of mediation in a variety of situations and outlined the procedure for the appointment of a mediator (Diepeveen, 1992). Canada's *Divorce Act* requires lawyers to mention mediation to their clients, and the federal *Young Offenders* legislation encourages the use of alternative measures, which in some provinces results in referral to mediation programs. Legislation passed in Ontario in 1990 made mediation of no-fault benefit disputes mandatory. Consequently, the Ontario Insurance Commission set up a special division, the Dispute Resolution Group, to be responsible for the delivery of fair, fast, cost-efficient and effective methods of resolving disputes relating to benefits awarded between insured persons and insurers. In January of 1992, the Ontario government proclaimed a new *Arbitrations Act*, which encourages business people to use alternative dispute resolution as a way of settling disagreements without the expense and delay of litigation. And in 1995, the Ontario government passed a practice direction setting out new procedures to set up ADR centres in Toronto and Ottawa. None of this legislation defines who can mediate. There is a strong argument to be made that this may change, given the American precedent where legislators are deciding who can mediate, who certifies those eligible to mediate, and the standards for mediating particular types of cases.

Arguments in favour of regulating mediation have much to do with ensuring quality of service and consumer protection. Arguments against the

regulation of mediation stem from fears that many of the early visions of mediation will be lost. While the jury is still out on the need for regulation per se, practices and procedures are being put in place by state-run mediation programs that may by default construct a regulatory scheme for certain types of disputes. The concern, of course, is that these precedents reflect the needs of state, not the need of the disputing parties, nor the needs of society at large, and are too restrictive thus, hinder the development of the field. They also threaten the grassroots nature of the work that many mediators are engaged in doing. Furthermore, it is likely that regulatory schemes would develop from “custom”. In this case, custom is likely to be defined on the basis of state-run programs, not from the range of models that exist elsewhere.

This next section presents mediation trainer-practitioners views about the regulation of mediation. As will be seen, the mediators in this study are no more in accord about the creation of norms than those found in the literature. The section also highlights some of the concerns of respondents as a result of activities they perceived to be taking place within the field.

II. Respondents Views About Regulating Mediation

In light of the current debates about regulating the practice of mediation it seemed pertinent to gather data in this study on how efforts to standardize were viewed by respondents. It also seemed warranted to ask

questions regarding some of the concerns of respondents with respect to changes they see happening within mediation. The information that follows was collected by way of the final survey questionnaire through a series of open-ended and rank-order questions. The results of these questions are reported on now rather than in the data analysis chapters of this dissertation because of their connection to the topic of this chapter. Also because of the correlation between the results and what has been painted of professionals in the extant literature.

Respondents are not in agreement about whether the practice of mediation should be regulated. When asked whether they agreed or disagreed with the idea of licensing of mediators, almost equal numbers of respondents strongly agreed (21%) as strongly disagreed (20%) with the idea³⁴. Family mediators were more in accord with the idea of licensing than any other group; three-quarters (75%) of them agreed with the idea. This was in contrast to respondents from the workplace (64%) and business (59%) sectors who did not agree with the idea of requiring mediators to be licensed. Community trainer-practitioners were split on the question. Perhaps it is not surprising to find family mediators so supportive of licensing. Since 1986, Family Mediation Canada has devoted considerable attention to the topic of certification. In April 1993, the Board of established a “Standards and

³⁴ The overall split was 52% in agreement with the licensing of mediators and 48% who disagreed with licensing.

Certification Project” to work toward developing a code of ethics, standards of practice and training and continuing education for family mediators. In 1996, Practice, Certification and Training Standards were adopted and have subsequently been implemented. As a result of these activities, family mediators are quite familiar with the idea of controlling who is eligible to practice in the field. Such cannot be said of individuals who work in the workplace, business or community sectors as organized and systematic talk about standards and certification is considerably more recent.

Individuals with business backgrounds are the most opposed to licensing (69%), while those with law (59%) and social science (55%) backgrounds tend to be slightly more in agreement than disagreement with the idea. Men (58%) are slightly more in agreement than women (46%). While neither the background nor the gender alone of an individual have a strong impact on their views about licensing, clustering their background and gender with how long they have been mediating do show considerable differences. Whereas three-quarters of newcomer³⁵ men favour the idea of licensing, less than half of veteran men do not (Table 2). A similar pattern occurs for women mediators – two thirds of this group agree with licensing while only one-third of veterans have the same opinion.

³⁵ Newcomers are those with less than 6 years of experience mediating while veterans have 6 or more years of mediation experience.

Table 2. Views on Licensing, Years and Gender

	NEWCOMER MEN	VETERAN MEN	NEWCOMER WOMEN	VETERAN WOMEN	TOTAL
DISAGREE	21% (3)	54% (13)	38% (6)	63% (15)	48% (37)
AGREE	79% (11)	46% (11)	63% (10)	35% (8)	52% (40)
TOTAL	100% (14)	100% (24)	100% (16)	100% (23)	100% (77)

77 valid cases; 11 no responses

Source: C. Picard, *A Survey of Mediation in Canada*, 1998

Newcomer lawyers and those with business and social science backgrounds agree with the idea of licensing whereas the reverse is true for veterans (Table 3). Most veterans with business backgrounds disagree with the idea of licensing mediators as do more than half of veteran lawyers and veterans with social science backgrounds. Thus, the longer individuals have been mediating the less likely they are to be in favour of controlling the field through the licensing of mediators.

Table 3. Views on Licensing, Years and Educational Background

	Newcomer Law	Veteran Law	Newcomer Social Science	Veteran Social Science	Newcomer Business	Veteran Business	Total
DISAGREE	25% (3)	60% (6)	33% (5)	52% (14)	33% (1)	80% (8)	48% (37)
AGREE	75% (9)	40% (4)	67% (10)	48% (13)	67% (2)	20% (20)	52% (40)
TOTAL	100% (12)	100% (10)	100% (15)	100%(27)	100% (3)	100% (10)	100% (77)

77 valid cases; 11 no responses

Source: C. Picard, *A Survey of Mediation in Canada*, 1998

Why is it that experience in the field leads one to believe there is less of a need for restrictions? Perhaps it reflects that over time fears about the lack of regulation become less founded. Or, could it be that the veterans' fear that they would not meet the "new requirements" a better-educated group might try to impose? Both these speculations need further study.

Respondents seem to be in more agreement on other questions relating to the regulation of mediators. Most (84%) agree that if standards are set they should be performance-based. There is also agreement (87%) that no single organization should dictate standards and that mediation associations alone should not decide who is qualified to mediate (77%). A large number of respondents (94%) agree that the number of licensed mediators should not be controlled. As well, most (80%) agree that a market-based approach is not sufficient to protect consumers.

On the topic of training, there is also considerable agreement. Most (70%) trainer-practitioners in this study believe that mediators do not need university or college training. Those who think that mediators do require university or college training come from the community and family sectors. Almost all respondents (96%) believe that a law background is not a prerequisite for becoming a mediator. The majority (75%) of respondents think that mediation trainers should be accredited, however, they do not

agree that the content of mediation training courses should be regulated - almost equal numbers of respondents said “yes” as said “no” to this question.

Opinions about training are strongly influenced by how long an individual has worked as a mediator. Whereas all (100%) male respondents with less than six years experience agree that the field is overpopulated with minimally trained mediators, only sixty-one percent of men with six to ten years experience and only half (50%) of men with more than ten years experience agree with this statement. While not as strong, a similar pattern occurs with women respondents. Two thirds of women (64%) with less than six years experience agree with their male counterparts that mediators are under trained. This is in contrast to women respondents with six to ten years' experience who disagree (58%) with this statement. Interestingly, women and men trainer-practitioners with more than ten years experience are not of like minds on this subject. Whereas half of the men in this category disagree with the statement that mediators are under trained, sixty-seven percent of women agree with it. Might it be that mediators with less experience are concerned that those with less education or training but who have more experience are getting work as mediators?

Addressing Standards and Accreditation

Trainer-practitioners were asked how they would like to see the issue of standards and accreditation addressed in Canada. The most common

response (34%) reflected the belief that the mediation community should be involved in setting broadly defined national guidelines and professional standards of practice. Little difference occurred between men (37%) and women (32%) respondents. One woman respondent suggested that:

[Standards] should be national and multi-profession based (i.e., no monopoly). Collective determinism would allow the possibility for parties to choose the background of the mediator taking for granted that all mediators are trained and accredited according to professional standards. [49/F/F/SS]³⁶

While respondents think mediation associations should take leadership in the establishment of standards, it is not always for the same reasons. Some respondents were concerned that if mediators themselves did not set the standards, other interest groups or government bodies would set them for them. Other respondents were concerned by the lack of accountability. For others, guidelines were seen as helpful to consumers. Still others believe standards will provide a means by which they can measure their competence.

Other themes emerged. Respondents said that standards should be inclusive and not restrictive; that they need to recognize that dispute resolution occurs in a broad range of contexts; that they should be minimal and flexible; and that they should be established jointly with all mediation associations, user groups, and policy makers. To cite three examples:

This is a major issue of which I believe there are no simple answers. I feel that there should be some broad standards

³⁶ Attribution codes refer to Case 49 / Female / Family sector / Social Science background.

established by a working committee, composed of governments, association and mediators representatives [with broad input]; standards should not be so restrictive as to protect established mediators but prohibit trained but inexperienced mediators; most importantly, it should not be controlled or under the direct influence of lawyers. Certain lawyers make fine mediators but many are much too prescriptive, etc. [71/M/B/SS]

Another respondent offered her views on how to address the question of standards and accreditation.

I would like to see us balance the need to set standards, with the recognition that dispute resolution occurs within a broad range of contexts. Defining a single set of standards could limit and stifle the ideals of neighbourhood empowerment and volunteerism. And yet without some sort of regulation, the field is wide open to anyone wishing to call themselves a mediator, with all the implied problems that situation causes to consumers and to the mediation field as a whole. I would like to see us recommend a set of guidelines for policy makers, trainers, associations etc. that help to organize the discussion of what in fact are the ingredients of "competence" for practitioners in the context within which they work. That is, give mediators needed training and expertise in specific areas and applications of mediation. [143/F/W/SS]

And a third respondent suggested that we educate the consumer so they can make informed decisions.

[I think we should] put resources towards public education and informed consumers, then let the market decide as is the reality in the real world, licenses/standards put consumers at a disadvantage as they tend to abdicate their responsibilities to make an informed decision [11/M/B/B]

The view of respondents' views toward regulating the field of mediation presented above depicts them as having strong and differing opinions about the direction mediation should take regarding this issue. As will become

apparent in other chapters of this dissertation they also have pluralistic and contrary understandings of mediation. It is, thus, not surprising that they would have different opinions about the direction of mediation. This is further evidenced in following section which overviews their concerns about the field.

Concerns about the Field

Mediation trainer-practitioners were asked to identify their concerns about what is happening within the field of mediation. Responses were coded into eight factors: 1) lack of work, 2) incompetence, 3) domination, 4) regulation, 5) training, 6) under use, 7) style and 8) inappropriate use. The three most frequently occurring responses were “domination” (23%), “incompetence” (21%), and “inappropriate use” (13%). Many respondents identified two or more different factors.

The coded category “domination” included fears that lawyers would take over mediation. It also included the notion that domination by any one group would exclude others and cause individuals to claim jurisdiction over certain areas causing mediators to become competitive. Respondents spoke about their fears of “*mediation cliques*” [319/M/B/L], and “*guild-like turfing behaviours*” [140/M/W/SS] forming. They also spoke of “*lawyers taking over with little or no mediation training*” [176/F/W/SS]; of there being “*a danger that various interests groups within the field will engage increasingly in the power struggle over issues of regulations and qualifications, licensing*” [290/M/W/B]

and, a fear that mediation would become “*top-down service delivery rather than community-based*”[354/F/F/SS].

Both men and women respondents have concerns about “domination” (Table 4). So too do those who have worked as a mediator ten or more years - over half (52%) of this group identified the factor “domination” as a concern. This concern lessens as the number of years an individual has worked lessens. Of those with six to ten years’ experience only thirty-five percent (35%) identified “domination”, and even fewer (29%) of those who began to work as mediators within the last six years identified “domination”.

Table 4. Concerns of Respondents and Gender

CONCERNS	MEN	WOMEN
Lack of Work	15% (6)	20% (9)
Incompetence	43% (17)	24% (11)
Domination	35% (14)	38% (17)
Regulation	10% (4)	22% (10)
Training	18% (7)	9% (4)
Underuse	20% (8)	4% (2)
Style	10% (4)	11% (5)
Inappropriate Use	10% (4)	29% (13)
None	0% (0)	2% (1)
TOTAL	47% (40)	53% (45)

Percentages based on number of responses; more than one response may have been given.
85 valid cases; 3 missing cases.

Source: C. Picard, *A Survey of Mediation in Canada*, 1998

The numbers also vary when respondents' concerns are examined by the dispute sector in which they most commonly mediate (Table 5).

Table 5. Concerns of Respondents and Dispute Sector

CONCERNS	COMMUNITY	FAMILY	BUSINESS	WORKPLACE
Lack of Work	23% (5)	14% (3)	21% (5)	13% (2)
Incompetence	23% (5)	48% (10)	21% (5)	44% (7)
Domination	23% (5)	38% (8)	46% (11)	44% (7)
Regulation	18% (4)	5% (1)	17% (4)	19% (3)
Training	5% (1)	14% (3)	25% (6)	6% (1)
Underuse	18% (4)	14% (3)	8% (2)	6% (1)
Style	9% (2)	10% (2)	17% (4)	6% (1)
Inappropriate Use	36% (8)	10% (2)	8% (2)	25% (4)
None	5% (1)	0% (0)	0% (0)	0% (0)
TOTAL	27% (22)	25% (21)	29% (24)	19% (16)

Percentages based on number of responses; more than one response may have been given. 83 valid cases; 5 missing cases.

Source: C. Picard, *A Survey of Mediation in Canada*, 1998

The most frequently occurring factor for the business and workplace sectors was “domination”. For those in the workplace sector, however, the category “incompetence” had a similar number of responses. The second most frequently occurring response after “domination” in the business sector was “training”. “Training” includes comments made about the lack of research and lack of attention being paid to developing a knowledge base and linking theory with practice. It also included responses about the lack of

apprenticeship opportunities, assessment tools, and performance related evaluation. This respondent's comment reflects the sentiments of others.

Dispute resolution as a field, is relatively new arising in response to a number of factors including overcrowded courts and disenchantment with traditional legal dispute processing mechanisms. There is a growing awareness of the essential importance of examining dispute resolution theory and methodology for cultural bias. We are a diverse, multicultural nation. Does dispute resolution theory, training and practice fit this reality? [143/F/W/SS]

Respondents working in the family sector are also concerned about “domination”, however, they are more concerned about the number of unqualified and incompetent mediators. Close to half of those who answered this question identified the factor “incompetence” as a concern. Community mediators, on the other hand, are concerned about the lack of attention being paid to cultural issues and the institutionalization of mediation (“inappropriate use”). Respondents from the community sector had three other concerns: 1) “domination” - the fear that lawyers are taking over, 2) “incompetence” - the lack of qualified mediators, and 3) the “lack of paid work”.

The factor “incompetence” included comments about there being too many unqualified mediators and trainers; that many mediators were inexperienced; and, concerns about the notion that “anyone” can mediate. Respondents expressed views about “*inexperienced or unqualified mediators doing damage, and there being errors due to lack of content knowledge*” [360/MF/B], and about how “*unqualified mediators are undermining the*

integrity of what could become a noble profession” [195/M/B/L]. For some respondents, incompetence was a reflection that incompetent mediators “do not model the skills of mediation [221/F/W/L], and that “*many mediators have not done enough work at integrating the principles of mediation (respect, awareness, honesty, genuineness) into their own lives before they turn to fix other’s*” [114F/C/SS]. “Incompetence” was of particular concern to family and workplace mediators (Table 5). It was the most frequently occurring response for respondents with a business background (50%). It was more important to men than women (Table 4), and it was more frequent a response for respondents with six to ten years’ experience.

One-third of the community sector commented on the “inappropriate use” of mediation (Table 5). In fact, this factor was the most frequently occurring response for this group. “Inappropriate use” as a conceptual category includes concerns about the lack of attention being given to cultural and ethnic issues; that mediation has come to be viewed as a panacea and as a result cases are going to mediation that should not. Other “inappropriate use” concerns have to do with the institutionalization and mandating of mediation. One respondent stated that “*organizations are using conflict resolution as co-optation for those with less power*” [176/W/SS]. Individuals in the workplace sector are also concerned about “inappropriate use”. Of those who answered this question, one-quarter of the responses indicated this to be the case. For workplace mediators, “inappropriate use” was the

second most frequently occurring concern. For them, “domination” and “incompetence” were of more concern. These figures are high when compared to family and business mediators. Only ten percent (10%) of family mediators and eight percent (8%) of the business sector mediators identified “inappropriate use” as a concern.

In addition to the three most frequently occurring concerns - “domination”, “incompetence” and “inappropriate use”, respondents also expressed concerns about “regulation” of the field, however, their concerns differed. Whereas some respondents felt that there was too much regulation, others thought that there was too little. For example, comments were made that there was an *“over emphasis on certification”* [147/F/W/SS], and that there was a *“rush to regulation, qualification and credentialling [in other words] too many shoulds”* [52/F/?/SS]. One respondent stated, *“my fear is that we over credentialize the profession and mediators become quasi lawyers”* [243/F/W/SS]. On the other hand, those in favour of regulating the field were concerned that due to a lack of standards *“anyone can put out a shingle and call him or herself a mediator”* [312/F/C/SS]. Another respondent with the same concern stated that because of *“lack of controls -- anyone can hang up their shingle -- with or without the necessary skills [which] really worries me because mediation can be destructive if not properly processed”* [327/F/C/L]. The least number of responses identifying “regulation” as a

concern came from the family sector (5%); from men (10%), from respondents with a business background (8%), and from respondents with more than ten years experience (10%).

The category “underuse” reflects respondents’ concerns about the lack of acceptance of mediation, the lack of understanding about what mediation is, and the resistance to its use. More specifically one business respondent was concerned by *the “lack of legitimacy and acceptance in public processes at upper government levels”* [297/M/B/B]. Others are concerned about *“the confusion in the public about its nature and how it differs from other dispute resolution processes”* [170/M/F/SS], and *“the lack of acceptance in the legal community”* [48/M/W/SS]. Men are much more concerned about “underuse” than women (Table 4). Trainer-practitioners with more than ten years experience are also more concerned about “underuse” than those who have been working fewer years. Of those with more than ten years experience who answered this question nineteen percent (19%) listed “underuse” as compared to nine percent (9%) of respondents with less than six years experience and seven percent (7%) of respondents with six to ten years experience. Of those individuals working in the community sector who answered this question, eighteen percent (18%) identified “underuse” as a concern compared to fourteen percent (14%) of respondents from the family section, eight percent (8%) from the business sector and only six percent (6%) of the workplace sector (Table 5).

Two other concerns were coded from the responses and are worth mentioning even though there were not all that many responses. “Style” relates to a concern about the move towards more evaluative, directive and rights-based styles of mediation. One respondent expressed her concern about there being “*pressure to mediate in short time frames through a settlement orientation, [resulting in] inadequate attention to relationship, reports and screening for domestic violence and power imbalance*” [177/F/SS]. Another respondent is concerned that “*some mediators are practicing a “head bashing” solution focused style [of mediation] thus participants have described very negative experiences*” [257/F/F/SS]. Individuals with five or less years experience were the least concerned about this factor (5%), while individuals in the business sector had some concerns (17%), as did respondents with law backgrounds (20%).

The category “lack of work” includes responses about it being hard to make a living as a mediator, that fees are low, and that too many people are being trained. On this latter point, one respondent said there are “*too many mediators for the volume of mediation required [which] leads to possible deterioration of skills when called so infrequently*” [144/M/C/L]. Another respondent was more blunt about there being too many mediators being trained saying that “*everybody and his dog are mediators*” [189/F/C/SS].

It can be said that mediation trainer-practitioners in Canada have mixed opinions with regard to regulating mediation and that they have a number of concerns about various goings-on within the field. Some of them relate to a perceived take over by the legal community. Andrew Abbott (1988) would link this activity to the legal profession defending its jurisdiction against new ways of handling social conflicts, and against new professionals expanding into areas previously reserved for law. The fear of course is that domination by the legal community would exclude others and cause mediation to become a more elitist and competitive work form.

Conclusion

This chapter has provided an overview of various sociological theories of professions along with an overview of activities taking place in relation to the regulation of mediation. Just as social science theory has changed, so too have theories of professionalization. In the period from about 1930 to 1950, theorists used structural functional, trait and process theories. During the new political climate of the 1960's they argued that professions imposed definitions of needs and services on clients thus shifting the focus to issues of power, control and dominance. By the end of the 1970's, the study of professions focused on the inherently political nature of internal professional activity, and the significance of professionalism on the wider political social structure. In more recent years researchers turned to theories of the state, political, market, system and social change theories to understand

professions. Trait-based theories would link the activities taking place within mediation to those of an emerging profession. Systems theory would conclude from the same set of activities and emphasize that there is a “turf-war” taking place between those who have traditionally claimed the right to do conflict work and those who are trying to infringe on this work claim.

The discussion of respondents’ views about regulating the field of mediation depicts mediators at this point in time as having strong and differing opinions about the direction mediation should take. In fact, there is as much disagreement about whether mediators should be licensed as there is agreement. If regulation is to occur, the opinion of respondents is that the mediation community, in conjunction with user groups and government, should set broadly defined national guidelines that are minimal, flexible, inclusive, and performance-based. Respondents in this study also commented on the apparent perception that “anyone can mediate”, giving rise to the fear that an increasing number of mediators might have insufficient training and experience. Community mediators are concerned about the lack of attention being paid to cultural and ethnic issues, while others are concerned about the trend to use more evaluative and entitlement-based styles of mediation. Finding different views and different concerns is not surprising given the many understandings of mediation found in the literature, and as will be seen, with mediators in this study. Perhaps one of the more striking insights from the analysis of mediators’ views is that with experience

fears about the lack of regulation become less prevalent. While we cannot know if this would be true of the larger population, it should tell us that we would not want to listen to only one set of voices, especially those more recent to the field. In fact, the findings in this chapter suggest that there is not a consensual voice about what the future of the field should hold nor does there appear to be one that is emerging.

In the following chapter the sample of mediators found in this study are described. It examines their personal demographics as well as differences in their incentives to mediate by gender, educational background, the dispute sector in which they work and the length of time they have been mediating, all of which give us a snapshot of current day mediation trainer-practitioners. As will be seen mediators are a diverse group.