

Expanding the Mediation Pie

Fast-changing attitudes create the perfect conditions for Mediation to shrug off its *alternative* label. The field's stakeholders must now act in order to benefit.

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As professionals gingerly tiptoe on the road out of recession, their travel bags need to be packed with new gear. Considered unfashionable in the past, the winds of economic hardship have blown in former style icons. Left on a hanger in the Old Economy are the hackneyed notions of “s/he who dares, wins”, “no risk, no reward” and *Dum Pendet Rendet*¹. Replacing them are 10 powerful drivers of politics, business and society - Responsibility, Transparency, Authenticity, Trustworthiness, Certainty, Competency, Humility, Sustainability, Simplicity and Frugality. If leading stakeholders in the field embrace them all, mediation will grow, everyone will gain.

These 10 norms affect everyone, not least those who experience disputes and deals. They want to see their service providers express the same attitudinal language as themselves. *Stakeholder* interests replace shareholder interests. Being *respected* is valued more highly than being feared. The ability to *collaborate* is rivalling the capacity to compete. Can-doers are replacing sceptics. Change is sweeping away status quo. The post-recession world heralds a fresh New Economy.

Client expectations of legal services are changing rapidly. Prof. Laurence J. Peter observed that *the noblest of dogs is the hot dog, as it alone feeds the hand that bites it*. The Rottweiler attorney is a dying breed. A demand for *resolvers* is replacing litigators as clients prioritize outcomes and certainty above process and risk. New client expectations will force a wider variety of skills and mindsets upon attorneys. Those unable to exhibit a fully-equipped professional toolbox of skills and mindsets will become marginalized and lose momentum. They will still have clients, but old-school 20th Century clients – the very ones that Prof. Gary Hamel was referring to when he declared – *Those who live by the sword will be shot by those who don't*.

Changing attitudes are fermenting a new, independent, profession. The profession is mediation. Until now labelled a mongrel, emerging or vicarious profession, reliant for its credentials upon the credibility of its practitioners in separate fields like business, law, psychotherapy, accountancy and many others, mediation is coming of age because clients need it. Unlike fashion, this is not a passing trend but a global phenomenon fertilized by those 10 drivers of the New Economy.

As mediators contemplate the future prospects of their practice, they need to focus on the enlargement of the overall pie – mediation as a practice – and not merely on their own slice sugared by vested networks. Although they compete head-to-head for business with the next mediator, if they fail to collaborate in the task of authenticating and validating the mediation field as a whole, their piece of the cake will not enlarge.

¹ *Dum Pendet Rendet* – While the case continues, the money flows

That is because if users, such as companies and professional firms, do not fully appreciate the value mediation can deliver to them, then the pie will remain small for everyone. JAMS, one of the leading providers of dispute resolution services, has estimated that the total billings of all US mediators in a single year approximates \$500 million – roughly the same level of billings as the 50th largest US law firm. Mediation is a small pie even in the country where its progress has been greatest.

QUALITY

Things are changing so fast it is hard to keep pace, particularly with regard to client perception of the root of all professionalism, namely QUALITY. The central thesis in George Bernard Shaw's play *The Doctor's Dilemma* was that *all professions are conspiracies against the laity*, which translates to a lack of quality. It is the worst possible indictment of any profession. So exactly what is Quality?

When applied to professionals, and mediators in particular, Quality is the interaction of 7 elements that need to present themselves like the teeth of a key to unlock the door to wider and deeper use of mediation across the world. Those 7 elements are:

1. Qualifications

Qualifications are essential in the mediation field because in most countries there are very few. People can practice as a mediator almost everywhere without having been trained, possessing a licence, having to improve their skills or being independently tested or vetted, without being regulated and without the impetus to improve their own delivery. Although the top mediators voluntarily apply these principles, their example is not followed by everyone in the field, robbing it of professional integrity. As a result, the standards set by some – perhaps many – are often variable or opaque.

There are few Codes of Ethics or Codes of Conduct applying to mediators. When they do exist, they are often merely aspirational, unsupported by disciplinary processes and lacking real sanctions for the few unprofessional enough to transgress.

One reason is that mediators have avoided defining their role. Many see mediation as a creative form that transcends categorization. Many think of themselves artists, magicians, free spirits, *a unique case*. Perhaps they are, but this tendency has resulted in mediation practice in most countries being balkanized into groups populated by competing providers. Ironically, for people skilled in the art of convening warring parties and getting them to communicate positively, mediators often do not apply among themselves the very skills they employ with their clients.

Another factor is that some providers of mediation services have low or undisclosed standards for admitting mediators to their panels and rosters. This forces users of mediation services to rely too often on unreliable hearsay, reputation, word-of-mouth and gossip, backed up where available by references, to decide who in this field is a high quality provider or mediator. The lack of a credible high-level qualification in most countries inhibits mediation being widely regarded as a true profession.

Absence of recognition as a profession restrains the field's growth. This can be changed, but mediators have so far hesitated to drive that change themselves.

2&3. Understanding and Acceptance

People rarely accept what they do not understand. Although mediation is gaining traction around the world, it has been less of a big bang and more of a *silent growl* with a lower growth curve than it deserves. This is partly because users often fail to know what mediation is or how and why it works. Poor comprehension provokes scepticism and negativism. Mediators and providers, being largely fragmented, are poorly organized as a group and therefore tend to promote themselves more than mediation as a practice. Mediation still has a strongly *alternative* feel about it – a last resort, when it ought to be the first choice. Understanding must precede acceptance.

Growth requires stronger promotion, more inheritance of skill sets that exist elsewhere, and a greater public sense of pragmatism. We are seeing now the emergence of standards in Australia, Canada, Netherlands, Austria, Mediate.com, France and elsewhere. These efforts will encourage greater acceptance of mediation long term but can also confuse the user when each adopts very different standards. Regulation also has a tendency toward bureaucracy and administration that can compromise the quest for Quality.

In my career as an in-house counsel, I have proposed mediation to many opponents. Most were rejected. I estimate that only 1 in 50-100 proposals was accepted. The counter-parties just did not understand what was involved. Mediators see the tail of cases that come to them; they rarely see or hear of those that don't.

4&5. Leadership and Inspiration

Leadership and Inspiration also go hand in hand to impact Quality. Effective leadership is a servant-based, not hero-based, phenomenon. It relies upon inspiration, frameworks and the pursuit of collective gain and encourages individual achievement by others. There are excellent provider and professional institutions and court schemes in the mediation arena. But they are generally not functioning within a common framework: they often do not coincide on practice and training standards, or on assessment and credentialing, or on promotion. Viewed from the user perspective, mediation is rather scattered, disjointed, confusing. Mediation in many countries lacks a strong sense of inspiration and a clear framework rooted in servant leadership.

Attempts have been made to address this in the world's biggest mediation market, the United States, over the past seven years, but have not succeeded, partly for lack of inspiration and framework. The demon of market fragmentation defeated them. As a result, the status quo perpetuated; user confusion continued. Growth remains flat.

All because of a bottom-up approach, infected by the nitty-gritty of service provision and competitiveness, and ungainly displays by a minority of complacency, apathy, fear, feudalism, intolerance, backyard thinking and bureaucracy. The very things the best mediators are skilled at overcoming when they mediate disputes!

Inspirational Servant Leadership needs to be separated from the marketplace. It needs to appreciate the problems but focus on the opportunities - like promoting the field, skills enhancement, extending mediation beyond dispute resolution, transformative change, elevating quality standards and capturing user belief. All need a framework.

6&7. Transparency and Yardsticks

Credibility relies upon transparency, but mediation takes place in private. The mediation process, in individual cases, can never be transparent. Often, the very fact that a mediation has taken place is non-public, and the process demands confidentiality. To try and change this would destroy the very essence of mediation.

Transparency can, however, be addressed at the other end – not the process itself, but the providers of the service – the mediators and institutions that run panels and offer services. They can give insight into their skills and the empirical processes they practice; they can share their knowledge rather than cloak it in copyright protection for use just by themselves. They can expose prospective users to the experiences of past users and generally provide more convincing information to the market.

Training and experience levels need to be more open. Continuing Professional Development could be more visible, organized and relevant; codes of ethics and conduct, linked to the prospect of disciplinary proceedings and sanctions in case of transgression, would add to credibility. All mediators can be expressive ambassadors of their field, teaching, mentoring and encouraging others, performing pro bono work, supporting new initiatives, advancing the field at conferences, being seen, understood, appreciated, and therefore generating a stronger feeling of transparency.

This can be linked to metrics: training programs with published criteria and benchmarks that prove skills, linked to independent assessments. The experience of prior users is another, more anecdotal but still valid form of measurement of experience, skills and user satisfaction. Research is also important, generating important and credible statistical evidence of the value and success of mediation.

Transparency and the ability to measure skills are all about credibility, and mediation will grow if people, especially users, not only understand it, but believe and trust in it.

Taking Steps

The management guru Philip Crosby wrote: *Quality has to be caused, not controlled*. The mediation field does not lack quality. Although not everyone makes a good mediator, the necessary skills are widely available. The quality of the best practitioners should not be regulated but can be authenticated, made visible in a credible form, found and recognized. The Internet provides the platform.

The International Mediation Institute is a foundation set up in 2007². It does not compete in the marketplace, is primarily funded by donations, and its initial role is to credential quality mediators worldwide, enabling them to be easily identified through a search engine. IMI's wider mission is to promote and encourage the field and help the mediation pie to expand on a global basis for the benefit of all stakeholders.

² IMI's founders and fund providers are the American Arbitration Association/International Center for Dispute Resolution, Netherlands Mediation Institute, Singapore Mediation Centre and Singapore International Arbitration Centre. IMI is registered as a Foundation in The Hague. IMI's Chairman is Michael McIlwrath, Senior Counsel – Litigation, GE Oil & Gas.

IMI Certification

IMI's credentialing function is a user-driven initiative. It emerged from 18 months of consultations with users, mediators and providers of dispute resolution services worldwide. Users want a reliable, impartial and credible mechanism to find quality mediators. They also need more reliable information to guide them in selecting suitable mediators. Providers and mediators want to give that information with the minimum bureaucracy and cost. IMI's scheme focused on addressing both needs.

IMI convened an Independent Standards Commission of over 50 international thought leaders (www.imimmediation.org/isc_list.html). The ISC is independent of the IMI Board and establishes the conditions, standards and criteria for IMI Certification. It represents all stakeholders – users, providers, mediators, judiciaries, educators, trainers and regulators. All dedicate their time and expertise pro bono.

Under the ISC's guidance, and for a limited period, the experienced mediators on panels of leading provider and professional bodies have been admitted to IMI Certification without undergoing a competency assessment. Thereafter, mediators can only become IMI Certified by being approved by an assessment body having a program that determines competency based on criteria³ established by the ISC.

All IMI Certified Mediators are entitled to carry their Profile on the IMI web portal at www.IMImediation.org. All Profiles run to a common format and comprise 20 fields, some obligatory and some optional.

The required fields are main practice areas, experience description, specific areas of expertise, a style statement, identification of applicable code of conduct and complaints process, professional indemnity insurance and a Feedback Digest. The Feedback Digest is a summary of feedbacks on the mediator that have been given by prior users. The Digest is prepared/updated by an identified third party - a *Reviewer* (an institution or a professional of the mediator's choice) - and uploaded by the Reviewer onto the mediator's IMI Profile. Credible marketing at last.

The optional fields provide more information about Certified Mediators - training experience, professional affiliations, fee rate information, references and publications.

The IMI search engine is open to all. Prospective users can narrow their search for a mediator by location, language capability, style, fields of practice and technical expertise. There will be links to those authorized to approve mediators for IMI Certification by assessment, where users can find more material to aid their choice.

IMI Certification is designed to address the seven elements: **Q-U-A-L-I-T-Y**
Qualifications, Understanding, Acceptance, Leadership, Inspiration, Transparency and Yardsticks.

Certified Mediators are invited to contribute a nominal funding to IMI each year to help cover the costs of developing, running and hosting the search engine, enabling IMI to apply funding sourced from other donors/patrons towards its wider mission.

³ The Criteria for Assessment Programs qualifying Mediators for IMI Certification are attached.

IMI's Wider Mission

IMI's over-riding vision is to stimulate positive change in the dispute resolution field. Establishing criteria for certifying the competency of mediators is an early element of the Mission because without identifiable, transparent Quality at the delivery end, further change will be unattainable and not worth the effort. But, given Quality, there are other critical parts of the Mission, some of which are:

Promoting to users (a) mediation, and (b) how to find competent mediators. IMI can use its position as an independently-funded non-profit body to promote both the practice and the professionals in credible ways directly with users and relevant user groups, professional bodies, government agencies and judiciaries, articles and editorials, interactive channels and other strong media. This will help mediators and providers by growing awareness and understanding of mediation among more users and avoiding duplication of effort. IMI will seek to promote mediation in collaboration with government and inter-governmental agencies, all of which can make a dramatic difference by being seen to support, encourage and fund a faster uptake while striving for high standards and Quality.

An Inter-Cultural Mediator Certification is also being developed aimed at IMI Certified mediators involving advanced knowledge and skills for handling disputes and negotiating deals involving people and issues with different cultural influences.

Providing impartial guidance and information to users of mediation services, including links to IMI qualifying institutions (Providers, Trainers and other bodies). As IMI will not provide mediation services, or benefit from mediations, IMI can be a credible source of objective information of the field. IMI's aim will be to rely heavily on existing material, adapted and translated, as necessary, into an impartial format.

Making available informative downloadable material about mediation, assisted negotiation and dispute resolution to assist and inspire users. This will include copyright-free roleplays to aid trainers, online skill assessment programs, videos of mediations taking place (which are hard to find), the latest articles and books in the field, links to online booksellers etc, links to blogs and other information sources, and a calendar of events taking place around the world. The aim is to ensure that the latest thinking and experience in the field is freely and widely accessible.

Providing support for the creation and advancement of mediation bodies in countries where mediation is unknown or poorly practiced. Materials will be offered to enable such new organizations to inherit the status quo of learning and enable them to progress quickly and with expertise.

Encouraging experience-generation schemes for newly-qualified mediators and those with limited experience and untried skills - providing links to those schemes worldwide. Many experienced mediators are prepared to seek the approval of parties to be accompanied by assistant or shadow mediators and to act as mentors for newly-qualified mediators. IMI will help establish such schemes with leading provider institutions and encourage their adoption more widely.

A Scholarship Program designed to enable aspiring mediators to be properly trained, gain experience and qualify for IMI Certification. The Scholarship Program will also provide financial assistance to enable newly-qualified and younger Mediators to gain practical experience in suitable cases as assistant mediators or co-mediators together with highly experienced Certified Mediators. At a later stage it will also aid experienced mediators from those countries to cover the costs of being assessed by IMI Qualifying Institutions as appropriate.

A convening and referral function, to help bring disputing parties together. Because IMI will not itself deliver mediations, it is in a unique position to propose to parties whose dispute has become a matter of public record that they consider mediation. The role of the convener and referrer is a difficult one, involving skill, tact, cultural sensitivity, perseverance and neutrality. IMI will be able to engage its network of prominent and experienced professionals in the field – eg those represented on its Board, Advisory Board and ISC – to assist in this endeavour.

A leadership role to help drive mediation into new fields. Examples include deal-making and negotiation, the relationships between Regulators and those regulated, class action and mass tort mediation, the use of mediation in WTO disputes and other inter-nation disputes, and online mediation.

The Road Ahead

Mediation has come a long way, but still has a long way to go. And in many places it really is on the starting blocks, with tremendous potential.

Setting high, visible, credible and consistent standards, everywhere, is a vital step, already achieved by some institutions but not by all. Once done and more widely appreciated, mediation will become more respected and its practitioners will accede to true, independent professional status as mediators.

The 10 drivers of the post-recession New Economy fit perfectly with what mediators and mediation provider institutions have to offer. The task is to keep standards high and implement all the seven marks of true QUALITY. This is an all-stakeholder activity, for they all have a shared interest in its success.

Bringing mediation out of its closet is one of the most exciting and important developments of our time. All stakeholders can play a critical role in this endeavour. If they choose to do so, they will practice an important principle preached by Mahatma Gandhi: *You must be the future you wish to see in the world.*

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Criteria for Assessment Programs Qualifying Mediators to be IMI Certified

IMI Certification is available to any experienced mediator who gains a certificate from a Qualifying Assessment Program (QAP) as a result of a performance-based assessment approved by the IMI Independent Standards Commission (ISC).

The following are key requirements for a QAP to be approved by the ISC ¹

- 1. Mediator Experience.** The QAP must include a methodology for ensuring that Applicants have demonstrated to the satisfaction of the Program's Assessors a substantial level of experience² as a mediator. The QAP must include clearly identified criteria on this requirement.
- 2. Mediation Knowledge.** The QAP must include a methodology for determining that Applicants have demonstrated a strong understanding of general mediation theory and practice which may be based on written tests, essays, reports, theses interviews and/or other testing platforms.
- 3. Mediator Skills.** The QAP must include a methodology for the evaluation of candidates' performance in terms of the occurrence and effectiveness of mediation process and mediation techniques, against high competency benchmarks.³ The Evaluations/Assessments may be based on roleplay or live action assessments, and may include videotaped and online assessments such as web dramas, self-assessments, interviews, peer reviews, user feedback and other in-practice skill evaluations.
- 4. Program Transparency.** The benchmarks and criteria applied by QAP must be published and be openly accessible on the organization's website. Details of all approved programs will be listed on the IMI web portal www.IMImediation.org and will include a direct link to the credentialing organizations' websites.
- 5. Program Integrity.** Each Assessor must have substantial experience of assessing the performance of mediators. At least one of the Assessors on each Program must be independent of the QAP.
- 6. Ongoing monitoring of Programs.** The QAP must include a process for the ongoing monitoring of the performance and practice of the Assessors. IMI will liaise closely with all recognised program organizers to maintain a sustainable quality control system.
- 7. Commitment to Diversity.** The QAP must be accessible on an equal basis to experienced mediators regardless of their professional affiliations, gender, race, ethnicity, age, religion, sexual orientation or other personal characterization.

¹ IMI will prepare guidelines to assist credentialing organizations in framing their Programs and will involve all ISC-approved credentialing organizations in the continuing process of developing and refining those guidelines and these Criteria for Qualifying Assessment Programs for IMI Certification.

² Mediators without 200 hours and 20 mediations are unlikely to be sufficiently experienced.

³ Because of the wide variety of mediation processes and styles, and to allow for innovation and creativity in the field, Program criteria will vary and consequently the ISC is not establishing fixed competency benchmarks.