Alternative Dispute Resolution Task Force Report

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Lawyers as Dispute Resolution Professionals: A Discussion Paper

The Law Society of British Columbia

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"These changing ideologies of disputing – whether economic, philosophical or pragmatic or a combination of all three – are forcing changes and adjustments within legal practice. The legal profession cannot afford to be out of step with these developments. Its legitimacy (especially its monopoly status) depends significantly on its ability to develop requisite expertise to meet these new client expectations. At present commercial clients minimally expect counsel to be able to provide them with information and advice on non-adjudicative dispute resolution options and services. Increasingly this may also include expectations about the effective strategic use of ADR processes, design knowledge skills for discrete processes and excellent mediation/negotiation behaviours."

Julie Macfarlane

Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program

Law Commission of Canada 2001

"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

Lord Justice Dyson

Halsey v. Milton Keynes NHS Trust, [2004] EWCA Civ 576

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SUMMARY OF RECOMMENDATIONS

1 Insert in the Rules and *Handbook* language that clarifies their application to the broader range of dispute resolution processes generally and to mediation specifically. In particular, the *Canons of Legal Ethics* should be revised to reflect the changes in practice that flow from the increased use of mediation.

(See section 3.1, pages 15)

2 Revise rule 3(3) of the *Canons of Legal Ethics* to read:

> Clients should be advised to settle, avoid or end litigation, whether by adversarial or other dispute resolution processes, at the earliest possible time that the dispute would get fair resolution.

(See section 3.2, page 16)

3 Expand the *Handbook* Chapter 3, rule 1(b) to read:

> With respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate:
>
> (b) knowledge of the practice and procedures, including, alternative dispute resolution processes, by which the substantive law can be effectively applied, and …

(See section 3.3, page 16)

4 Add the following to the footnote to Chapter 4, rule 1.1:

> If a party who is represented by a lawyer attends mediation without that lawyer, opposing counsel must contact the lawyer for consent to negotiate directly with the party at mediation.

(See section 3.4, page 16)

5 Amend the *Handbook* to provide that the concepts embodied in Chapter 6, rules 6.3 and 6.4 (Acting against a current client) and rule 7 (Acting against a former client) also apply in mediation, e.g., if a mediation relationship exists or has existed between counsel or a member of counsel's firm with one of the parties to the mediation.

(See section 3.5, pages 17-18)

6 Adopt the 1999 National CBA resolution and insert it into the *Handbook* at Chapter 8 under a new heading "Dispute resolution processes":

> Legal counsel has a continuing obligation to canvass with each client, in a fully informed manner, all appropriate dispute resolution processes.

(See section 3.6, page 18-19)

7 Amend Chapter 8 of the *Handbook* to provide that it also applies to alternative dispute resolution processes.

(See section 3.7, pages 19-20)

8 Provide guidance to principals and to articled students about the involvement of articled students in dispute resolution processes.

(See section 3.8, page 20)

9 Expand the Articling Guidelines in the *Member's Manual* to include reference to mediation and to other alternative dispute resolution processes, including mediation by judges and non-judges in the Provincial Court.

(See section 3.8.1, page 20)

10 Amend the *Handbook* and Rules so that they apply to lawyers engaged in all types of mediation, except labour relations.

(See section 4.1, pages 23)

11 Place rules governing mediation in a new chapter of the *Handbook*, such as Chapter 8.1 ("The Lawyer as Mediator"), following Chapter 8 ("The Lawyer as Advocate").

(See section 4.1.1, pages 23-24)

12 **(a)** Define "mediation" as "a process in which an impartial third party (a "mediator") attempts to facilitate a voluntary settlement among disputing parties."

(b) Define "relationship mediation" as "mediation of issues relating to the parties' marriage, cohabitation, separation or divorce, as well as mediation of issues relating to child protection, adoption, parent and child disputes, elder care or estate disputes among parties related by blood, marriage or adoption."

(c) Clarify the scope of the definitions of mediation to exclude:

- hybrid processes, where mediation is joined with another dispute resolution process, such as mediation in the midst of an arbitration or arbitration at the end of mediation;

- facilitation, where settlement may not be the goal and which may include participants who are not "parties";

- convening, where groups are brought together to identify parties interested in a specific endeavour or dispute, and to ascertain whether and on what basis these interested parties might meet;

- negotiation and collaborative law processes; and

- negotiation and conflict resolution skills training for disputants.

(See section 4.2, pages 24-26)

13 Adopt a principle that a lawyer-mediator must be impartial and must avoid any conflict of interest or appearance of conflict of interest with respect to parties to a mediation.

(See section 4.3.1, page 26)

14 Provide guidance for lawyer-mediators when there is or has been a relationship (as counsel or as lawyer-mediator) between the lawyer-mediator or a member of the lawyer-mediator's firm and a mediation participant.

(See section 4.3.2, pages 26-28)

15 Amend the *Handbook* to require a lawyer-mediator to consider whether independent legal advice is advisable in appropriate circumstances and, when it is, encourage each participant to obtain independent legal advice before executing an agreement.

(See section 4.4.1, pages 28-29)

16 Provide no opinion about and neither prohibit nor encourage, in the Rules or *Handbook,* the giving of legal advice as part of mediation.

(See section 4.4.2, pages 29-30)

17 Allow a lawyer-mediator to take steps to help the parties implement the terms of an agreement made in mediation (such as the transfer of title to assets) if instructed to do so by all parties, and if to do so is not otherwise prohibited by the rules of the Law Society.

(See section 4.5.1, page 30)

18 Specifically allow a lawyer who has mediated a family law or separation agreement to act for both parties to a joint divorce claim if:

- all relief sought, other than the divorce itself, is to be granted by consent, and

- both parties have received independent legal advice in relation to the matter.

(See section 4.5.2, pages 30-31)

19 Require a lawyer-mediator to satisfy himself or herself, before mediation begins, that the participants in a mediation understand:

- the nature of the lawyer-mediator's role, and
- that the lawyer-mediator, throughout the mediation process, is not acting as legal counsel for any participant.

(See section 4.6.1, pages 31-34)

20 Require a mediator to consider whether or not to require that the parties to a mediation agree in writing to any or all of certain matters before mediation begins.

(See section 4.6.1, pages 31-34, for the full text of the recommendation.)

21 Require a lawyer-mediator to consider whether to obtain an acknowledgement that the parties are aware that:

- the lawyer-mediator may disclose information received in mediation if the mediator has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person; and
- in matters involving children, the lawyer-mediator must report to the Director of Child, Family and Community Services any instance arising from the mediation in which the lawyer-mediator has reasonable grounds to believe that a child is in need of protection.

(See section 4.6.1, pages 31-34)

22 Suggest to lawyer-mediators that they consider:

- whether to require as part of the agreement to mediate, particularly in family matters, a provision prohibiting changes without notice, while in mediation, to the status quo with respect to, for example, property holdings or arrangements for the care of children, that might operate to the prejudice of one of the participants;
- making an agreement as to the lawyer-mediator's rate of remuneration and terms of payment;
- making an agreement as to the circumstances in which mediation will end and providing that conclusion without settlement will be confirmed in writing by the mediator; and

- whether or not to put the matters addressed in sections 4.6.1 and 4.6.2 in writing.

(See section 4.6.2, page 34-35)

23 Confirm that Rule 4(b) of Chapter 6 does not apply to lawyer-mediators.

(See section 4.6.3, page 35)

24 Modify *Handbook* Chapter 14 paragraph 19 that currently allows family law mediators to say, in marketing activities, that they are "accredited by the Law Society of British Columbia" to apply to all "relationship mediators", as this term is defined at 4.2, Recommendation 12 (b), and to say that they "meet the qualifications required by the Law Society for practising as a relationship mediator."

(See section 4.8, page 36)

25 Add a footnote to the *Handbook* clarifying that Chapter 4, rule 1.1 does not apply to lawyers acting as mediators when they are communicating with participants in, or about, a mediation.

(See section 4.9, page 37)

26 Advise lawyer-mediators that destroying notes is contrary to best practice.

(See section 4.10, pages 37)

27 Prohibit lawyer-mediators from entering into contingency fee arrangements.

(See section 4.11, page 37)

28 For non-relationship mediations, the Law Society should

- not require formal mediation training, but
- encourage lawyer-mediators to obtain and maintain mediation skills training appropriate for the mediations that they are undertaking.

(See section 5.1, pages 38-41)

29 Continue to require mandatory training for "family law mediators" under the expanded group of "relationship mediators."

(See section 5.2, pages 41-42)

30 Abolish the rule requiring three years of legal practice to qualify as a family law mediator.

(See section 5.3, page 42)

31 Encourage lawyer-mediators to participate in relevant continuing education programs.

(See section 5.4, pages 43)

32 Work with law schools to support a comprehensive program of legal education that provides the knowledge, skills and attitudes appropriate for the provision of legal services in a multi-option justice system.

(See section 6.1, pages 45-46)

33 Continue instruction in the Professional Legal Training Course that ensures that newly admitted lawyers are able to provide effective advice and assistance respecting dispute resolution.

(See section 6.2, page 46)

34 Encourage the Continuing Legal Education Society (CLE) to provide training consistent with the recommendations of this report (in addition to the mediation training currently available) and to consider, where appropriate, an ADR component when structuring other substantive programs.

(See section 6.3, pages 46-47)

35 Engage one or more individuals with extensive training and experience in ADR, including ADR theory, to review and revise the *Practice Checklists Manual*.

(See section 6.4, page 47)

36 Re-establish the ADR column in the *Benchers' Bulletin.*

(See section 6.5, page 47)

37 Include on the Law Society website information for the general public about all available dispute resolution processes and how the public can access them.

(See section 6.6, pages 47-48)

38 Continue the development and use of informal dispute resolution processes in responding to complaints about lawyers by members of the general public.

(See section 6.7, page 48)

PART 1: INTRODUCTION

1.1 Mandate and scope of recommendations

The use of Alternative Dispute Resolution ("ADR") in the practice of law in British Columbia has increased significantly over the past 15 years.[1] The Law Society wishes to consider ways in which it should regulate lawyers advising the use of and participating in ADR. In June of 1998 the Benchers gave the Justice Reform Task Force a revised mandate, which included investigating and reporting back to provide:

- A full examination of the *Legal Profession Act*, SBC 1998, c. 9, (the "*Act*"), Law Society Rules (the "Rules") and *Professional Conduct Handbook* (the "*Handbook*") to determine what provisions are necessary to give adequate guidance to lawyers in their role as counsel to parties in ADR;

- A review of whether the current provisions of the Act, Rules and Handbook give adequate guidance to lawyers acting as neutrals in ADR;

- A further study of the Law Society's accreditation of mediators generally, including reconsideration of the current scheme of certifying family law mediators; and

- Examining methods of raising the level of lawyers' awareness of ADR and its implications for the future of the legal profession.

By 2000, that mandate was passed on to the ADR Task Force, which included throughout its existence Chair Deborah Lynn Zutter and members Bencher Ralston Alexander, QC and Jerry McHale, QC. As well, lay Bencher Wendy John was included in deliberations in the early stages. Late in 2005, Ms. Zutter left the Task Force and was replaced by Mr. Alexander as Chair. Bencher John Hunter, Q.C. and lawyer-arbitrator Stan Lanyon, Q.C. were added to the Task Force to help complete its work.

The Task Force was assisted in its work by Law Society staff Jeff Hoskins, General Counsel and Laura Cooney, Legal Assistant in the Policy and Legal Services department.

The mandate of the Task Force was to investigate and report respecting ADR generally. In fact, we have taken on a narrower task and, with a few exceptions, have limited our recommendations to a single ADR process, mediation.[2] We recognize that mediation is

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1 See Appendix A – Use of ADR by the profession.

2 ADR encompasses a variety of processes, including arbitration, neutral evaluation, fact-finding, mediation, conciliation and facilitation. The qualifications required of the third party, the nature of his or her responsibilities to the parties and the outcome to be expected vary significantly with each of these processes. To develop a comprehensive set of recommendations would be an extremely complex task requiring far more time than was contemplated by the Benchers. In any event, mediation is the dominant and the most common of ADR processes used by lawyers in BC today.

practised very differently in different practice areas and we have, accordingly, attempted to make recommendations that are general enough to apply to mediation practice in contexts as diverse as family and general civil disputes. We also recognize that mediation may be utilized in combination with other processes ("med-arb") or that mediation might be utilized in the midst of what is fundamentally an adversarial process – during an arbitration or a hearing, for example – and we have endeavoured to distinguish these variations when appropriate.

However, our recommendations do not apply to labour relations mediation as there is a well-established consensus among labour relations mediators as to what constitutes proper acceptable practice in their area. These practices differ from mediation as now practised in other legal contexts.

1.2 Sources of information

- Reports and publications (see Appendix B – Reports and Reference Materials);
- Day-long meetings with 35 lawyers in three groups in Vancouver and Victoria in May and June of 2000 (see Appendix D – The Focus Groups);
- Consultation with focus group members, ADR sections of the CBA (BC Branch) and other interested lawyers and mediators on a draft version of this report.

1.3 Current regulation

In 1984 the Law Society of British Columbia became the first law society in Canada to recognize and regulate the practice of family law mediation. Most other provincial law societies now regulate all forms of lawyer mediation. The Law Society of BC has never regulated mediation outside of family law. The current rules were initially formulated for the following purposes:

- to secure jurisdiction over, and insurance for, Law Society members by defining "family law mediation" when done by a lawyer as the practice of law;
- to create an exemption for lawyer-mediators from conflict of interest rules by allowing them to meet with parties opposed in interest for the purpose of mediation;
- to provide guidance to lawyers who are practising in this field and to promote the competent practice of mediation by making three years of law practice and completion of an approved training program prerequisites to practising as a mediator;
- to ensure that lawyers and their clients enter into mediation fully aware that the lawyer as mediator is not in a solicitor/client relationship and that some of the traditional protections of the solicitor/client relationship are absent;

- to help protect against prejudice to the rights of parties in mediation by imposing a duty on the family law mediator to actively encourage the parties to seek independent legal advice; and

- to promote clarity and consistency of practice by obliging family law mediators to enter written agreements with disputing parties to confirm, inter alia, the role of the lawyer as mediator, the absence of solicitor-client privilege, the confidential nature of the negotiations and the terms of the mediator's retainer.[3]

1.4 The basis for Law Society regulation

At the focus groups, there was considerable discussion as to whether lawyers are engaged in the practice of law when they act as mediators.

The "practice of law" is defined in section 1 of the *Legal Profession Act*.[4] That definition, together with the provisions of section 15, "Authority to practise law," has the function of setting the limits of legal work that can be done by non-lawyers. Although it is arguable that mediation can be a form of "doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages," under paragraph (c) of the definition of "practice of law," the Law Society has never treated mediation as a function exclusively reserved for practising lawyers. It is well established that non-lawyers act as mediators.

Whether or not providing mediation services is the practice of law as defined in the *Legal Profession Act*, that *Act* specifically permits the Benchers to regulate lawyers who practise as mediators.[5] In fact, for over two decades, there have been Rules and *Professional Conduct Handbook* provisions in place that limit the rights of lawyers to provide mediation services in the field of family law and to regulate their conduct when they do.

In any case, the Benchers have exercised the authority to regulate lawyers in many contexts, including their private[6] or business[7] lives, at least to the extent that their conduct is considered contrary to the best interests of the public or the legal profession or harmful to the standing of the legal profession.

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3 See Law Society of British Columbia Mediation Subcommittee *Report to the Competency Committee of the Law Society on the Regulation of Mediation and Qualification to Mediate*, April 10, 1996.

4 Relevant parts of legislation and regulation referred to in this report are reproduced in Appendix "E".

5 *Legal Profession Act*, s. 29 states in part:

> **Specialization and restricted practice**
>
> **29** The benchers may make rules to do any of the following:
>
> (d) establish qualifications for and conditions under which practising lawyers may practise as mediators.

6 Note the definition of "conduct unbecoming a lawyer" in the *Legal Profession Act*, s.1.

7 See, e.g., *Professional Conduct Handbook*, Chapter 7, Rule 6.

A member of the Law Society holding himself or herself out as a lawyer is clearly subject to the governance of the Law Society when conducting a mediation.

There is no question that lawyers are insured for professional liability when acting as mediators. If a lawyer fulfils all the requirements for insurance coverage, including payment of the annual fee, the lawyer is covered by the BC Lawyers' Compulsory Professional Liability Insurance, which insures against liability incurred while performing a number of services that are not the "practice of law" under the *Legal Profession Act*.[8]

1.5 Context and Rationale for Rules

Over the past 10 years, a variety of individuals and organizations in a number of jurisdictions have examined the problems shared by all modern common law systems. Two conclusions are common to virtually every study and report. First, it is clear that the health of our civil justice systems requires a decisive response to the identified problems of cost, delay, complexity and uncertainty. Second, ADR offers one potentially effective tool with which to attack these problems.

In his report *Access to Justice*, the Right Honourable Lord Woolf said:

> Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.[9]

There are of course also other ways to address these problems in the civil justice system and other task forces and committees are now exploring them. ADR is simply one tool that has emerged in response to the problems of cost, delay, complexity and uncertainty. The ADR Task Force presumes, as does its mandate, that ADR has demonstrated a certain usefulness and to this extent has become an established part of legal practice.

While this report notes the value of ADR to the public, the profession and the justice system, it should not be read to imply a corresponding criticism of the more traditional approaches. It is not a matter of either/or. ADR has a place in the justice system. It is not a panacea. Like any process, it can be abused, and there are circumstances, such as

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[8] The current BC Lawyers' Compulsory Professional Liability Insurance policy insures for "professional services," which is defined to include "acting as … an arbitrator, mediator or conciliator, by a member." A "member," in turn, is defined as "a member in good standing shown on the records of the Law Society."

[9] The Right Honourable Lord Woolf, Access to Justice – Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, June 1995, Chapter 2, para. 1. An electronic edition is available: www.dca.gov.uk/civil/interim/woolf.htm.

power imbalance, where extreme caution is indicated. A trial will always be necessary for some disputes, and it is only the possibility of trial that brings many parties to the bargaining table. Trials define the parameters within which disputes are mediated to settlement, and of course they are there to ensure that settlement agreements once made are performed.

This report assumes that the problems of cost and complexity have created an environment that is more open to mediation. In fact, the focus groups were clear that legal culture and practice in BC are changing in order to respond to these problems. Part of the response involves expanding the nature of legal practice so that lawyers take on new roles and skills and occupy new fields. The focus groups did not depreciate the need for adversarial skills or question the value of litigation, nor did they suggest that these would ever or should ever be displaced. However, the focus groups clearly did say that the profession is not relying as exclusively on the adversarial approach as much as it has in the past.

The focus groups said that lawyers are broadening their approaches to dispute resolution and that they do not always assume that litigation is the option of first resort. Clients seek resolutions that can be achieved as quickly and inexpensively as possible, and often with as little damage as possible to personal or commercial relationships. The focus groups expressed the opinion that a shift in legal practice is occurring in response to real market pressures. The profession has moved into the field of mediation in order to respond more effectively to the needs of clients.

Carrie Menkel-Meadow, an American lawyer and academic, describes:

> …a matrix of dilemmas presented by new forms of practice in ADR that are simply not resolved by currently existing rules of ethics for lawyers and third party neutrals, when roles played in ADR are sufficiently different and complex to require their own "rules". Dependence on lawyer ethical rules will not work first, because representatives (counsel) and third party neutrals perform different roles in ADR from traditional adversary practice and second, because there is so much variation in the roles of practicing ADR, ethics rules in ADR will have to be more sensitive to the variations of task and functions within different ADR forms and settings …
>
> …the Model Rules of Professional Conduct (still based on an adversarial conception of the advocate's, including "counsellor's", role) is not responsive to the needs, duties, and responsibilities of one seeking to be a "non-adversarial" problem solver…Rules premised on adversarial and advocacy systems, with legal decision-makers, simply do not respond to processes which are intended to be conducted differently (in forms of communication, in sharing information, in problem analysis and resolution) and to produce different outcomes (not

> necessarily win-lose, but some more complex and variegated solutions to legal and social problems).[10]

In November 2003, in its paper "Transforming Relationships Through Participatory Justice,"[11] the Law Commission of Canada also makes recommendations relating to ADR training. Recommendation number 8.3 ("strengthening a participatory culture") provides, in part, that:

> 13. Provincial law societies continue to ensure that the continuing education programs provide training for lawyers in participatory justice and should encourage all their members to undertake such training. Being able to advise clients on the suitability of selecting a participatory process, preparing clients for such a process, and representing them in such a process should be considered essential professional skills.
>
> 14. Provincial law societies review their codes of professional conduct to ensure that the role of the lawyer as an advocate in restorative or consensus-based justice processes is adequately anticipated. They should ensure that lawyers are charged with a duty to discuss alternatives to adversarial justice with their clients; that lawyers are alert to the vulnerability of some clients in such processes and take steps accordingly; and that counsel understands the basis of effective participation in such processes, including the duty to respect confidentiality.
>
> 15. Canadian colleges and universities, in particular law schools, continue to increase and encourage the teaching of participatory processes to law students.

Lawyers are now using these processes, whether called "participatory" or "alternative" or "consensus-based" — within a framework of guidelines written largely for adversarial practice. With the growth of alternative processes, existing rules and guidelines do not speak to all of what now constitutes practice for many lawyers. The focus groups said that rules for lawyers involved in mediation would assist in articulating standards and expectations. Mediation has been around long enough that there is a relatively evolved

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[10] Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities," 38 S. Tex. L. Rev. 407.

[12] See http://www.lcc.gc.ca/en/themes/sr/rj/participatory_justice/PJ_Report_toc.asp.

The Report defines the term "participatory justice" as follows:

> Frustration with an adversarial justice system has spurred the rise of alternatives such as victim–offender mediation, sentencing circles, community mediation and judge-led settlement conferencing. These alternatives are usually grouped under two broad categories: restorative justice and consensus-based justice. Restorative justice refers to a process for resolving crime and conflicts, one that focuses on redressing the harm to the victims, holding offenders accountable for their actions and engaging the community in a conflict resolution process. Consensus-based justice refers to innovative methods of resolving mostly non-criminal conflicts. Because the participation of the parties in the resolution of the dispute is an essential part of both restorative and consensus-based justice, they can both be considered forms of participatory justice.

understanding at the bar as to what ought to happen during the mediation process. The Law Society should articulate and promulgate this understanding. The focus groups felt that rules for the profession will enhance public understanding and confidence.

Other law societies in other common law jurisdictions are taking steps in this direction. The Law Society of England and Wales observed in its response to the Lord Chancellor's Department discussion paper *Alternate Dispute Resolution*, issued in November, 1999, that the Society:

> has a key role to play in setting out best practice guidelines for those solicitors wishing to offer ADR services. Similarly, the Society needs to consider best practice guidelines for the profession to ensure that solicitors are able to advise clients about the wide range of ADR options available to them and to recommend to clients the most suitable form, or forms, of ADR for the particular dispute.[12]

[12] Law Society of England and Wales, *Alternative Dispute Resolution — A Way Forward*, February, 2000: www.lawsoc.org.uk. (This is the Law Society's response to the Lord Chancellor's Department Discussion Paper, Alternative Dispute Resolution, November, 1999.)

PART 2: THEMES FROM THE FOCUS GROUPS

There was considerable commonality in the comments received from the three focus groups. This is not to say that there was unanimity on all points or agreement on all issues, however the weight of opinion typically fell in one direction or another.[13] The main points to emerge were:

- The approaches to problem solving by the profession have expanded to include collaborative approaches to dispute resolution such as mediation. This shift is occurring in response, *inter alia*, to client demand.

- Rules for lawyers involved in collaborative approaches will help lawyers to participate in this market.

- The Law Society should formally recognize the collaborative roles played by lawyers in response to their client's demands, and should define standards of conduct for the guidance of the profession in these roles.

- Articulating rules to govern lawyers in the mediation context will benefit the public because it will help to educate the public and it will manage their expectations.

- Articulating rules to govern lawyer-mediators will enhance public confidence and help to define mediation as lawyer's work.

- Regulation should occur, but at a minimal level, and where possible, the Law Society should strive to educate rather than regulate.

- Regulation must incorporate some critical values, such as self-determination and diversity.

The recommendations that follow are informed by the comments made in the focus groups, by some consultation with members of the bar on drafts of this report, and by a body of literature on the question of regulating mediation practice. This is a complicated area with little precedent to rely upon for guidance. We understand that the recommendations that follow will serve as a point of departure for a broader consultation with the bar.

[13] Appendix C contains further discussion of the views of the focus groups.

PART 3: GUIDANCE TO LAWYERS AS COUNSEL — THE REGULATORY REGIME

The Task Force was asked to provide a full examination of the *Legal Profession Act*, Law Society Rules and *Professional Conduct Handbook* to determine what revisions and additions are necessary to give adequate guidance to lawyers in their role as counsel to parties in ADR.

In this Part, the Task Force makes recommendations for amendments to the Rules and *Handbook* so that they give better guidance to lawyers acting as counsel in an ADR setting.

Guidance to lawyers acting as mediators is addressed by the recommendations provided in Part 4.

3.1 Scope of Rules and *Handbook*

Recommendation 1 — Insert in the Rules and *Handbook* language that clarifies their application to the broader range of dispute resolution processes generally and to mediation specifically. In particular, the *Canons of Legal Ethics* should be revised to reflect the changes in practice that flow from the increased use of mediation.

The *Handbook* and Rules should expressly recognize collaborative approaches to dispute resolution.[14] The concept of advocacy should be broadly understood to encompass litigation, negotiation, mediation and other forms of appropriate dispute resolution.

The recommendations that follow are not necessarily exhaustive of the changes that the Law Society may ultimately wish to make to the Rules and *Handbook* to accommodate this broader focus for lawyers as counsel.

[14] G. Sloan and S. Coley, *Lawyers and Mediation: Law Society and CLE Support for Mediation Practice in the Legal Profession*, 1999.

3.2 *Handbook* Chapter 1 — Canons of Legal Ethics

Recommendation 2[15] **—** Revise rule 3(3) of the *Canons of Legal Ethics*[16] to read:

> Clients should be advised to settle, avoid or end litigation, whether by adversarial or other dispute resolution processes, at the earliest possible time that the dispute would get fair resolution.

3.3 *Handbook* Chapter 3 — Competence, Quality of Service and Relationship to Clients

Recommendation 3 — Expand the *Handbook* Chapter 3, rule 1(b) to read:

> With respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate:
>
> (b) knowledge of the practice and procedures, including, alternative dispute resolution processes, by which the substantive law can be effectively applied, and …
>
> (addition underlined)

3.4 *Handbook* Chapter 4 — Avoiding Questionable Conduct

A party who is otherwise represented by counsel in a matter is permitted to attend mediation without counsel, but this could place the opposing party's lawyer in breach of *Handbook*, Chapter 4, rule 1.1. Therefore:

Recommendation 4 — Add the following to the footnote to rule 1.1:

> If a party who is represented by a lawyer attends mediation without that lawyer, opposing counsel must contact the lawyer for consent to negotiate directly with the party at mediation.

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[15] This recommendation is similar in spirit to recommendation 2 of the proposed Chapter IX – the Lawyer as Advocate in the 2002 National CBA report, Modernizing the CBA Code of Professional Conduct:

> Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.

[16] *Handbook*, Chapter 1, Rule 3(3).

3.5 *Handbook* Chapter 6 — Conflict of Interest Between Clients

Recommendation 5 — Amend the *Handbook* to provide that the concepts embodied in rules 6.3 and 6.4 (Acting against a current client) and rule 7 (Acting against a former client) also apply in mediation, e.g., if a mediation relationship exists or has existed between counsel or a member of counsel's firm with one of the parties to the mediation.

A proposed new *Handbook* chapter dealing specifically with mediation issues (see Part 4 of this report) could include the following provisions:

Acting against a party with whom a lawyer *has an existing* mediation relationship

A lawyer must not represent a client for the purpose of acting against the interests of a party for whom the lawyer or a member of the lawyer's firm is currently providing mediation services unless:

(a) the party for whom the lawyer is providing mediation services is informed that the lawyer proposes to so act, and both the client and the party for whom the lawyer is providing mediation services consent to the new representation,

(b) the new representation is substantially unrelated to the matter for which the lawyer is providing mediation services, and the lawyer does not possess confidential information arising from the mediation that might reasonably affect the new representation, and

(c) the consent of the party for whom the lawyer is providing mediation services can be inferred, absent contrary instructions, in those circumstances where consent would be inferred from a client by the operation of rule 6.4.

Acting against a party with whom a lawyer *has had* a mediation relationship

A lawyer must not represent a client for the purpose of acting against the interests of a party for whom the lawyer or a member of the lawyer's firm has provided mediation services unless:

(a) the party for whom the lawyer has provided mediation services is informed that the lawyer proposes to act for a client adverse in interest to the party for whom the lawyer has provided mediation services, and the party for whom the lawyer has provided mediation services consents to the new representation, or

(b) the new representation is substantially unrelated to the matter for which the lawyer provided mediation services, and the lawyer does not possess confidential information arising from the mediation that might reasonably affect the new representation.

These rules provide guidance to counsel regarding the circumstances in which it would be appropriate to act as counsel when there is a current mediation or when there has been a previous mediation relationship by counsel or a member of counsel's firm with one of the parties.

With the exception of family law mediation,[17] there is no guidance for lawyers about when they may act if they or members of their firms have acted as mediators in related matters or in disputes involving one of the parties. Lawyers have a duty of confidentiality to their clients. Lawyers also have a duty to use the knowledge in their possession for the benefit of clients — to provide undivided loyalty. Lawyers who act as mediators receive confidential information in that role and would be faced with a conflict of duties should they or members of their firms subsequently act for or against parties to the mediation.

Currently, lawyers in commercial and personal injury disputes act for or against large corporations, institutions or public bodies when other members of their firms are providing or have in the past provided mediation services to those large corporations, institutions or public bodies. This occurs in unrelated disputes, and there appears to be no practical conflict of interest.

Recommendation 5 allows for current practice. It also provides conflict of interest guidelines for all disputes.

3.6 *Handbook* Chapter 8 — The Lawyer as Advocate, part 1

Recommendation 6 — Adopt the 1999 National CBA resolution and insert it into the *Handbook* at Chapter 8 under a new heading "Dispute resolution processes":

> Legal counsel has a continuing obligation to canvass with each client, in a fully informed manner, all appropriate dispute resolution processes.[18]

The CBA resolution is consistent with the views of the focus group participants set out in Appendix C. This recommendation reflects a shift in practice from a litigation focus to a broader dispute resolution focus and recognizes that:

- there are a variety of dispute resolution processes to consider; and

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[17] *Handbook*, Chapter 6, Rule 9.

[18] CBA resolution 99-05-A, Dispute Resolution Processes, passed unanimously at the National CBA meeting in Edmonton, August 1999.

- over time, the appropriateness of a dispute resolution process for a given case may change.

Consequently, process selection must be revisited with the client as the matter proceeds towards resolution.

3.7 *Handbook* Chapter 8 — The Lawyer as Advocate, part 2

Recommendation 7 — Amend Chapter 8 of the *Handbook* to provide that it also applies to alternative dispute resolution processes.

Chapter 8, rule 1 (Prohibited conduct) should be amended so that the relevant paragraphs read as follows:

Prohibited conduct

1. A lawyer must not:

   (a) abuse the process of a court or tribunal, or other dispute resolution forum, by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of a client and are brought solely for the purpose of injuring another party,

   …

   (c) appear before a judicial officer, an adjudicator or a mediator when the lawyer, the lawyer's associates or the client have business or personal relationships with the judicial officer, adjudicator or mediator that may reasonably be perceived to affect the impartiality of the judicial officer, adjudicator or mediator,

   …

   (i) appear before a court or tribunal or in a mediation or other dispute resolution process while impaired by alcohol or a drug.

Chapter 8, rules 2 to 4 (Offering to give false testimony) and rule 6 (Inconsistent statements or testimony) should be rewritten as follows:

Offering to give false testimony

2. If a client advises the lawyer that the client intends to offer false testimony in a proceeding or make false statements in an alternative dispute resolution process, the lawyer must explain to the client the lawyer's professional duty to withdraw if the client enters on or persists in the dishonest conduct.

3. If a client who has been counselled in accordance with rule 2 advises the lawyer that the client intends to offer false testimony in a proceeding or make false statements in an alternative dispute resolution process, the lawyer must withdraw from representing the client in that matter, in accordance with Chapter 10.

4. A lawyer who withdraws under rule 3 must not disclose to the court or tribunal, or to any other person, the fact that the withdrawal was occasioned by the client's insistence on offering false testimony or otherwise misleading participants in the process. …

Inconsistent statements or testimony

6. Mere inconsistency in a client's or witness's statements or testimony, or between two proffered defences, is insufficient to support the conclusion that the person will offer or has offered false testimony. However, the lawyer must explore the inconsistency with the client or witness at the first available opportunity. If, based on that enquiry, the lawyer is certain that the client or witness intends to offer false testimony or otherwise mislead a tribunal or participants in another dispute resolution process, the lawyer must comply with rules 2 to 5. Otherwise, the lawyer is entitled to proceed, leaving it to the tribunal or participants in the dispute resolution process to assess the truth or otherwise of the client's or witness's statements or testimony.

3.8 Articling Guidelines

Recommendation 8 — Provide guidance to principals and to articled students about the involvement of articled students in alternative dispute resolution processes.

3.8.1

Recommendation 9 — Expand the Articling Guidelines in the *Member's Manual* to include reference to mediation and to other alternative dispute resolution processes, including mediation by judges and non-judges in the Provincial Court.

The Articling Guidelines in the *Member's Manual* are intended to encourage students and principals to cover a wide range of experiences during articles. Articled students have traditionally been permitted to represent clients in most matters in Provincial Court. Referral to mediation is mandatory for some disputes in Small Claims Court in British Columbia; it is optional for some family and child protection matters. Judicial mediation is also offered in small claims matters and family law matters, including child protection. It is important that articled students be encouraged to observe and learn about counsel's role in the expanding range of dispute resolution processes. Recommendations 8 and 9 facilitate this broader vision of the articling experience and clarify that articled students may represent clients in judicial mediations in Provincial Court.

PART 4: GUIDANCE TO LAWYERS ACTING AS MEDIATORS — THE REGULATORY REGIME

The Task Force was asked if the current provisions of the *Act*, Rules and *Handbook* give adequate guidance to lawyers acting as neutrals in dispute resolution.

There are many considerations that go into the question of whether and how to make rules regulating lawyer-mediators.

The dominant view expressed by the focus groups, and the conclusion of the Task Force, is that the *Act*, Rules and *Handbook* do not give adequate guidance to lawyers acting as neutrals and should be updated. The Task Force recommends incorporating a modified form of the *Handbook's* existing Appendix 2 ("Family Law Mediation") as part of a new chapter entitled, "The Lawyer as Mediator," and expanding it to include the recommendations in this Part.

In some cases, new rules are suggested for lawyers who mediate. This is because, as noted elsewhere in this report, not all of the existing rules accommodate the mediation process. For example, the fact that there is no solicitor/client relationship between a mediator and the parties to a mediation undermines the application of a number of the existing rules.

There are also cases where specific direction should be given respecting the application of existing rules to lawyers who mediate.

The Task Force asked itself, given the growing use of mediation as a dispute resolution tool by lawyers, whether the existing rules of conduct are adequate. Need lawyers be specifically, and further, regulated in their capacity as mediators? A number of arguments could be made against further regulation for lawyer-mediators:

- Regulation may limit flexibility, impede experimentation and risk bringing premature closure to practice issues that require more time to be fully understood. The usefulness of mediation may be artificially constrained by excessive regulation;

- The existing rules of conduct are adequate and to the extent there are gaps each individual lawyer-mediator can be relied upon to self-regulate. Regulations to ensure that mediators are adequately trained or sufficiently skilled are not needed. Again, lawyers can be counted on to acquire the skills and the knowledge necessary to mediate up to the standard of care. In any event, the market place will exert sufficient quality control over the level of mediation practice insofar as an unskilful mediator simply will not get much business;

- "Mediation" is too diverse and varied a process to be captured by a single set of regulations. Mediation in family cases looks quite different from mediation in general civil cases and very different from what occurs in the labour relations context. Mediation of a multi-party dispute may not at all resemble what occurs in a traditional 2- or 3-party action. Further, mediation with professional parties with previous mediation experience can be conducted quite differently from mediation involving unsophisticated parties. Given this context, there is a danger that generic Law Society mediation rules may be helpful in one mediation context but irrelevant or unhelpful in another;

- Regulation of mediation may create a disincentive for some full time lawyer-mediators to remain members of the Law Society, especially if to do so has the effect of encumbering them with rules that they could avoid by leaving the Society;

- It's not broken so don't fix it. There is no evidence of need for more mediation rules. Regulation addresses no particular mischief; there are very few complaints to the Law Society about lawyer-mediators and the incidence of formal claims against lawyer-mediators is virtually nonexistent.

In reply to this:

- The existing rules and guideline do not speak to the new roles and responsibilities lawyers are adopting as mediators.

- In the preceding 25 years mediation practice has evolved to the point where identifiable practices have emerged, and these should be formally recognized and confirmed;

- By carefully defining "mediation" and by making a number of the guidelines for mediators "recommended" rather than "required" behaviours, the risk of inhibiting the natural growth of the ADR field is mitigated;

- The mediation guidelines proposed in this report will not inhibit practice to the extent of creating a disincentive for membership in the Law Society. Rather, the recommendations contained herein are intended to encourage continued membership as they are consistent with objectives expressed by the Focus Groups of helping lawyers to meet market demand for mediation services, defining mediation as lawyer's work and enhancing public understanding and confidence in mediation;

- Conduct guidelines are not established only in response to complaints and lawsuits. Mediation is a significant and growing part of legal practice.[19] There are currently three Notice to Mediate regulations available to BC Supreme Court litigants. Mandatory mediation is in place for Small Claims construction disputes at BC Provincial Courts. Voluntary mediation is provided to litigants in child protection matters. The Focus Groups said that the rules for lawyers involved in mediation would assist in articulating standards and expectations. The Law Society has a key role to play in setting out best practice guidelines for those lawyers wishing to offer ADR services.

The Task Force has tried to strike a balance between these arguments and has ultimately resolved to recommend to the Benchers that some generic mediation rules be implemented.

4.1 Scope of regulation

Recommendation 10 — Amend the *Handbook* and Rules so that they apply to lawyers engaged in all types of mediation, except labour relations.[20]

4.1.1

Recommendation 11 — Place rules governing mediation in a new chapter of the *Handbook*, such as Chapter 8.1 ("The Lawyer as Mediator"), following Chapter 8 ("The Lawyer as Advocate").

A new rule should capture both family and non-family mediation, but they should not be treated identically. BC was the first Canadian jurisdiction to regulate lawyer-mediators in 1984 with its family law mediation rule. Since then, many other jurisdictions have followed suit, although none have limited themselves to only family law.[21]

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19 More lawyers are spending more of their time mediating. Chief Justice Donald Brenner of the Supreme Court of British Columbia observed with respect to the expanding Notice to Mediate process: "The expansion really is reflective of the changing culture, which is seeing more and more cases being resolved by methods other than formal adjudication. Canadian Bar Association, "Notice to Mediate in More Civil Cases," 13 *Bar Talk* 1, February 2001.

20 See Part 1, section 1.1 for reasons supporting this recommendation. Also see 4.2, Recommendation 12(c).

21 The *Code of Professional Conduct* of the Law Society of Alberta addresses mediation in two places: in Chapter 6, Conflicts of Interest and in Chapter 15, The Lawyer in Activities Other Than the Practice of Law.

The Rules of the Law Society of Saskatchewan includes Part 9, Mediation, comprising Rules 570 to 573, setting out qualifications and disqualifications and other rules for lawyers acting as mediators.

The *Code of Professional Conduct* of the Law Society of Manitoba includes Chapter 22, Lawyers as Mediators, which contains a single rule and six paragraphs of commentary.

The *Rules of Professional Conduct* of the Law Society of Upper Canada includes Rule 4.07, Lawyers as Mediators, consisting of a two-part rule and four paragraphs of commentary.

The weight of opinion in each of the focus groups was that there should be some form of regulation by the Law Society of all lawyers who mediate. Not least in the considerations behind this view is the expectation that the public engaging in mediation will seek out lawyers as mediators because they are subject to clear codes of conduct and ethical standards.

We also note that the rationale for regulating only family law mediators has been questioned frequently over the years.[22]

4.2 Definition of "mediation"

> **Recommendation 12(a) —** Define "mediation" as "a process in which an impartial third party (a "mediator") attempts to facilitate a voluntary settlement among disputing parties."[23]

The website of the Barristers' Society of Nova Scotia includes information on the Civil Mediation Roster, including a Code of Conduct, which can be found at www.nsbs.ns.ca/civil_mediation/code_ conduct. PDF.

[22] Over 10 years ago, and again in a report dated April 10, 1996, the Mediation Subcommittee expressed the view that the rationale for regulating one kind of mediation and not others could not or should not be supported. In her October 8, 1999 presentation to the ADR Section of the CBA entitled "Mediation, Lawyers and the Rules of Professional Conduct of the Law Society of British Columbia," Practice Advisor Felicia S. Folk comments on this point:

> British Columbia has no specific rules for alternate dispute resolution generally, or for mediation generally, only for family mediation. British Columbia is the only jurisdiction in Canada where lawyers acting as family law mediators must be accredited by the Law Society and obey specific rules set out by the Law Society while other mediators are not subject to any specific rules, other than as lawyers. This sets up a dichotomy among mediators.

In the Sloan and Coley report (*supra*, note 14) at 3, the authors observe that:

> [A]rtificial and unjustifiable dichotomies exist between family and non-family mediation. Two examples of the different standards are in advertising restrictions and conflict of interest rules. Further confusing the issue of mediation are several unwritten policy rules that the Law Society has created at various times and applied to non-family mediation.

This dichotomy was commented on by the focus groups:

> *It doesn't make sense that we have rules for lawyers who mediate family disputes but not for lawyers who mediate in other contexts.*
>
> *In family disputes, there are concerns about power imbalance and the existence of abusive relationships that may not exist in other mediation contexts. These can be addressed in some way other than a rule that is devoted solely to family law mediation.*

Generally, the comments of the focus groups supported the view that all forms of mediation should be regulated by the Law Society, not just family law mediation, and to the extent that specific guidance or different rules are required for family mediation, that guidance should be provided in the form of footnotes, commentary or by addition of a general rule.

[23] Mediation is a process involving an articulated dispute with identified or identifiable parties with the goal of settlement.

Recommendation 12(b) — Define "relationship mediation" as "mediation of issues relating to the parties' marriage, cohabitation, separation or divorce, as well as mediation of issues relating to child protection, adoption, parent and child disputes, elder care or estate disputes among parties related by blood, marriage or adoption."[24]

Recommendation 12(c) — Clarify the scope of the definitions of mediation to exclude:

- hybrid processes, where mediation is joined with another dispute resolution process, such as mediation in the midst of an arbitration or arbitration at the end of mediation;
- facilitation, where settlement may not be the goal and which may include participants who are not "parties";
- convening, where groups are brought together to identify stakeholders for a specific endeavour or dispute, and to ascertain whether and on what basis these stakeholders might meet;
- negotiation and collaborative law processes; and
- negotiation and conflict resolution skills training for disputants.[25]

At Part 5 of this report, the Task Force recommends different qualifications for mediation and for relationship mediation. Consequently, there is a need to distinguish between them.

Note that the second part of the existing definition of "family law mediation" says that it also:

> "includes one or more of the following acts when performed by a lawyer acting as a family mediator:
>
> (i) informing the participants of legal issues involved,
>
> (ii) advising the participants of a court's probable disposition of the issue,
>
> (iii) preparing any agreement between the participants other than a memorandum recording the results of the mediation,

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[24] The *Handbook* currently defines "family law mediation" as "a process by which two adult persons ("participants") attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce."

[25] The foregoing suggestions are not exhaustive; they are intended to illustrate what is excluded from the definitions of mediation and relationship mediation.

(iv) giving any other legal advice."

This part of this definition is cumbersome and was originally included in order to ensure that a lawyer engaged in mediation would be insured in that activity.[26] As this concern is addressed by the definition of professional services covered by lawyers' professional liability insurance in BC, the definitions of mediation and relationship mediation proposed by the Task Force no longer include these provisions.

4.3 Conflict of interest and disqualification

4.3.1

> **Recommendation 13 —** Adopt a principle that a lawyer-mediator must be impartial and must avoid any conflict of interest or appearance of conflict of interest with respect to parties to a mediation.

Lawyers acting as mediators should be guided in the relationship with the mediation participants in the same manner as lawyers representing clients. Chapter 7 of the *Handbook*, "Conflicts of Interest Between Lawyer and Client," applies in that lawyer-mediators must ensure that there is no confusion as to the lawyer-mediator's role in the mediation. In particular, the lawyer-mediator must avoid financial or other interests that may give rise to the appearance of a conflict of interest.

4.3.2

The guidelines recommended by the Task Force reflect the unique nature of the relationships that lawyer-mediators have with mediation participants. The intention of recommendation 14 is to avoid situations of divided loyalties and the perception of mediator bias.[27] The Task Force has also tried to harmonize the conflict rules as they relate to lawyer-mediators with the general approach taken to conflicts between lawyers and clients.

> **Recommendation 14 —** Provide guidance for lawyer-mediators when there is or has been a relationship (as counsel or as lawyer-mediator) between the lawyer-mediator or a member of the lawyer-mediator's firm and a mediation participant.

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[26] The Law Society wanted to use the *Handbook* to clarify that mediation is the practice of law in order to ensure that lawyer-mediators would be insured. Absent such clarification, there was some question, back in 1984, as to whether lawyers mediating family disputes would be insured. This concern has since been eliminated. See note 9, supra.

[27] For example, a mediator will want to be transparent about his or her relationship with participants in situations where one participant receives the mediator's services more frequently than the other participant.

The need for guidance when mediation services are requested arises in four situations:

(a) the lawyer-mediator, or a member of the lawyer-mediator's firm, **is currently acting as counsel** for or against one of the participants;

(b) the lawyer-mediator, or a member of the lawyer-mediator's firm, **has acted as counsel** for or against one of the participants;

(c) the lawyer-mediator, or a member of the lawyer-mediator's firm, **is currently providing mediation services** for one of more of the participants; and

(d) the lawyer-mediator, or a member of the lawyer-mediator's firm, **has previously provided mediation services** for one or more of the participants.

Each of the foregoing situations arguably gives rise to a conflict of interest and should be prohibited unless:

- in situations (a) and (b), these three conditions apply:

    (i) the lawyer-mediator does not possess confidential information that might reasonably affect or be relevant to the subject of the mediation;

    (ii) all the parties to the mediation consent; and

    (iii) the matter is substantially unrelated.

To illustrate, where another member of the lawyer-mediator's firm has acted in the past or is currently acting as plaintiff's counsel in an ICBC mediation and the lawyer-mediator is asked to mediate a different matter, this would be allowed provided the three criteria were met.

However, a lawyer-mediator could not provide mediation services in a family dispute where the lawyer-mediator, or a member of the lawyer-mediator's firm, was counsel for one of the parties or in a matter that was substantially related, such as counsel for a related corporation or in a matter in which one of the spouses was the client of the firm or was being sued by a client of the firm.

- in situations (c) and (d), either of these two conditions apply:

    (i) all the parties to the mediation consent; or

    (ii) the matter is substantially unrelated.

To illustrate, lawyer-mediators could provide mediation services in more than one current matter with the same party, such as a bank, ICBC or the Director of Child, Family and Community Services, provided that the matters are substantially unrelated.

A lawyer-mediator could also mediate numerous current disputes within a corporation arising from the same or a substantially related matter, provided that all the parties consent.

Furthermore, a lawyer-mediator could, with consent, provide mediation services to a couple for whom the lawyer-mediator had provided mediation services in the past.

When mediation services are provided in situation (c) or (d), the mediator may possess confidential information that may be relevant to the mediation — in fact, this may be the reason that the mediator was selected. The confidentiality provisions of the current and previous Agreement to Mediate will govern.

4.4 Legal Advice

4.4.1

> **Recommendation 15 —** Amend the *Handbook* to require a lawyer-mediator to consider whether independent legal advice is advisable in appropriate circumstances and, when it is, encourage each participant to obtain independent legal advice before executing an agreement.

As the lawyer-mediator is not in a solicitor and client relationship, he or she cannot recommend the terms of any proposed agreement between the parties. The current family law mediation rule obliges lawyer-mediators to "actively encourage each participant to obtain independent legal advice before executing the agreement." The Task Force is of the view that in a wider range of mediation contexts this particular rule would not be appropriate. At the same time it is important to draw the possible need for independent legal advice to the lawyer-mediator's attention so that he or she can consider and decide, in each circumstance, whether and how strenuously to recommend it.

Factors arguing in favor of the lawyer-mediator recommending independent legal advice include:

- one or more of the parties is relatively unsophisticated;
- there is a power imbalance between the parties;
- the lawyer-mediator has concerns about the fairness or reasonableness of the agreement;
- the subject matter of the agreement is complex or difficult and independent legal advice would operate as a helpful check on the viability of the agreement;

- the lawyer-mediator has concerns about the enforceability or finality of the agreement.

4.4.2

> **Recommendation 16 —** Provide no opinion about and neither prohibit nor encourage, in the Rules or *Handbook,* the giving of legal advice as part of mediation.

This issue is raised because there is some question among mediators as to whether they should or should not give legal advice. As noted above, the existing family mediation rule expressly provides that mediation can include the act of giving legal advice. However, that provision can best be understood in light of its purpose, which was to characterize mediation as the practice of law for insurance purposes. Giving legal advice in mediation is a practice that some lawyer-mediators have come to regard as unwise. Currently in British Columbia, some mediators commonly give legal advice or legal opinions to mediation participants, while others strictly avoid the practice. Those who avoid the practice believe it confuses their role as a neutral facilitator; those who give legal advice feel it enhances their usefulness to the participants.

Inherent within this issue is the question of what actually constitutes "legal advice"? Sometimes a distinction is made between 'legal advice' (information about the applicable law including a prediction of how a court would decide an issue and a recommendation for a course of action) and 'legal information' (a neutral description of the law without any prediction of a court's reaction or recommended action). This distinction however is difficult to sustain.

Some American jurisdictions (Virginia and Florida) explicitly allow mediators to draft settlement agreements or provide "neutral" legal information. A number of American jurisdictions are considering whether to allow this or whether to prohibit drafting and providing legal information. However, as Carrie Menkel-Meadow observes:

> There is virtually no such thing as neutral legal information … The interpretation of any law ceases to be neutral when parties and lawyers or advocates seek to assess such law's applicability to specific — "their" — facts, and seek the mediator's "information" or advice in so doing … Similarly, drafting a settlement agreement clearly may call for legal judgment.[28]

She goes on to assert that the issue of whether or not to allow mediators to give legal advice is far too complex, controversial and undecided for a generalized ethical rule at this point in time, and suggests that:

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[28] Carrie Menkel-Meadow, "In conflicts area, 'doing the least' may be the ABA's best move" 18 *Alternatives to High Cost Litig.* 127, July/August, 2000.

> … it would be far better for the ethics rules to remain silent on these issues than to wreak havoc with the use of ambiguous and arguable phrases like "legal information" but not "advice" or simply being a "scrivener" of the agreement.[29]

The Task Force agrees with Ms. Menkel-Meadow and acknowledges the issue but recommends that the Law Society provide no opinion in the Rules or *Handbook* at this time on whether giving legal advice is or is not part of mediation.

4.5 Implementing the agreement

4.5.1

Recommendation 17 — Allow a lawyer-mediator to take steps to help the parties implement the terms of an agreement made in mediation (such as the transfer of title to assets) if instructed to do so by all parties, and if to do so is not otherwise prohibited by the rules of the Law Society.

4.5.2

Recommendation 18 — Specifically allow a lawyer who has mediated a family law or separation agreement to act for both parties to a joint divorce claim if:

- all relief sought, other than the divorce itself, is to be granted by consent, and
- both parties have received independent legal advice in relation to the matter.

Often a family law mediator will be asked by the parties to take steps or to help implement the terms of the executed agreement, such as seeking an uncontested order for divorce or effecting property transfers contemplated by the agreement. Mediation clients may ask the lawyer-mediator to take these steps because:

- they know that, as a lawyer, he or she is capable of doing so,
- they have developed trust and a working relationship with the lawyer-mediator, and
- it is easy and cost-efficient to "instruct" the lawyer-mediator because he or she is fully informed.

Rule 60(11) of the Supreme Court Rules provides: "Spouses may commence a family law proceeding jointly, without naming a defendant, if they claim an order for divorce and no other orders except by consent."

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[29] *Ibid.*

In 1989 the Professional Standards Committee (now the Ethics Committee) issued an opinion that lawyers should not act for both spouses in bringing a claim for divorce. That view was reviewed by the Ethics Committee in 1998 and continued in effect until October 2002 when the Committee reconsidered the opinion and concluded that the prohibition need not apply in what it termed "special circumstances."

This is the minute of that discussion of the October, 2002 meeting:

> In April 1998 the Committee gave an opinion that lawyers should not act for both spouses in bringing a joint action for divorce. On reviewing that opinion, the Committee agreed that there are some special circumstances in which that prohibition need not apply. The Committee expressed the view that a lawyer, including a lawyer who has acted as a mediator for the spouses, may act for both spouses in a joint action for divorce provided:
>
> - all relief sought, other than the divorce itself, is by consent, and
>
> - both parties have received independent legal advice in relation to the matter.

Each focus group addressed this issue. There was resistance to the 1989 and 1998 opinions of the Ethics Committee. Members of the focus groups argued that having the capacity to file a joint claim enhances the competitive advantage of lawyer-mediators and confers a cost advantage on the parties.

The Task Force agrees with the 2002 revised opinion of the Ethics Committee and recommends that it continue to apply.

4.6 Clarification of role and retainer — Agreement to Mediate

The family law mediation practice of entering into an "Agreement to Mediate" has been widely adopted by lawyers mediating other civil disputes. This happened because practitioners recognized that the agreement has great value in clarifying the terms of the retainer and the extent of confidentiality as well as educating the participants about the unique features of both the mediation process and the lawyer-mediator's role. The widespread use of the Agreement to Mediate is an example of an established best practice.

4.6.1 Mandatory Considerations: Role, Confidentiality and Privilege

> **Recommendation 19 —** Require a lawyer-mediator to satisfy himself or herself, before mediation begins, that the participants in a mediation understand:
>
> - the nature of the lawyer-mediator's role, and
>
> - that the lawyer-mediator, throughout the mediation process, is not acting as legal counsel for any participant.

Similar provisions are required under the current Family Law Mediation rules in Appendix B to the *Handbook*. The rationale includes:

- the need to ensure that the lawyers acting as family law mediators are insured;
- the wish to protect lawyers and clients from the consequences flowing from the fact that a mediator is not in a solicitor-client relationship with the participants to the mediation.

Where the current family mediation ruling requires that the clarification of the role of the mediator be made in writing as part of an agreement between the mediator and the participants, the proposed rule would only require the lawyer-mediator to consider whether the participants understand the role he or she will play, and to ensure that they do so before the mediation begins. Many mediators will doubtless elect to continue to provide this clarification in writing so as to eliminate any doubt, but such written clarification would not be strictly required.

Recommendation 20 — Require a mediator to consider whether or not to require that the parties to a mediation agree in writing to any or all of the following matters before mediation begins:

(a) whether the parties will or will not disclose all relevant information to each other;

(b) the extent that the lawyer-mediator will or will not during the course of mediation disclose to each participant all information provided by the other participants; and

(c) whether the mediation process is part of an attempt to settle differences between the participants such that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:

- no participant will attempt to introduce evidence of the communications in any legal proceedings;
- no participant will attempt to call the mediator as a witness in any legal proceedings; and
- any non-party attending at the mediation will be required to give a similar undertaking.[30]

[30] As there have been recent attempts to compel mediators to give evidence about what occurred during mediation, lawyers and mediators are strongly encouraged to enter into Agreements to Mediate that address confidentiality and the without prejudice nature of the mediation. See *A.H. v. J.T.H.* 2005 BCSC 185 and *Rudd v. Trossacs Investments Inc.* (2005) 7 C.P.C. (6th) 7 (S.C.J.).

In respect of **Recommendation 20(a)**, some disputants prefer to conduct mediation on the basis that full disclosure of all relevant information is made whereas others choose to mediate without this requirement. Having mediators address the extent of disclosure will ensure that the disputants share a common understanding of the basis on which they are negotiating.

In respect of **Recommendation 20(b)**, the practice varies from mediation to mediation, and sometimes from mediator to mediator. Currently, the family law mediation rule (Handbook, Appendix 2, paragraph 5(b)) requires that family law mediators not withhold from one party, relevant information disclosed by another:

> 5. A lawyer who acts as a family law mediator and the participants with respect to whom the lawyer mediates shall, before mediation commences, enter into a written agreement which shall include at least the following provisions: …
>
> (b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant which is relevant to the issues being mediated,

However, in civil matters, lawyer-mediators do insert Agreement to Mediate provisions that permit the mediator to withhold information as between the parties. From the perspective of the Task Force, clients should be given the option of deciding in advance the extent to which the mediator will or will not disclose information between the parties.[31]

In respect of **Recommendation 20(c)**, paragraph 5(c) of Appendix 2, the existing family law mediation rule, requires that family law lawyer-mediators make:

> (c) an agreement that the mediation process is part of an attempt to settle the differences between the participants and that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:
>
> (i) neither participant will attempt to introduce evidence of the communications in any legal proceedings,
>
> (ii) neither participant will attempt to call the mediator as a witness in any legal proceedings,

A provision similar to the foregoing is currently used in the majority of civil mediations conducted in British Columbia. The Task Force endorses this practice both as a helpful educational tool for the parties and as evidence of intention.

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[31] There are some, but not many, statutory provisions that address mediation confidentiality. For example, in mediations conducted under a Notice to Mediation Regulation, matters of confidentiality and compellability are dealt with by the provisions of the regulation.

Recommendation 21: — Require a lawyer-mediator to consider whether to obtain an acknowledgement that the parties are aware that:

(a) the lawyer-mediator may disclose information received in mediation if the mediator has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person;[32] and

(b) in matters involving children, the lawyer-mediator must report to the Director of Child, Family and Community Services any instance arising from the mediation in which the lawyer-mediator has reasonable grounds to believe that a child is in need of protection.

Section 4.6.1 speaks to matters that must be considered before parties commence mediating on the merits. Section 4.6.2 and Recommendation 22 speak to matters that should be considered.

4.6.2

Recommendation 22 — Suggest to lawyer-mediators that they consider:

- whether to require as part of the agreement to mediate, particularly in family matters, a provision prohibiting changes without notice, while in mediation, to the status quo with respect to, for example, property holdings or arrangements for the care of children, that might operate to the prejudice of one of the participants;

- making an agreement as to the lawyer-mediator's rate of remuneration and terms of payment;

- making an agreement as to the circumstances in which mediation will end and providing that conclusion without settlement will be confirmed in writing by the mediator; and

- whether or not to put the matters addressed in sections 4.6.1 and 4.6.2 in writing. This is a matter for the lawyer-mediator to decide in each case. It is recommended as good practice in most circumstances. In particular, the less sophisticated or familiar the participants are with the mediation process (as will often be the case in relationship mediation, for example) the more advisable it will be to put these terms into a written agreement.

The practice has evolved, primarily in family law mediation, of including provisions in the agreement to mediate designed to avoid prejudice to the parties from disruption of the status quo. For example, a typical provision in family law agreements to mediate reads, "If there are assets in dispute, neither party will do any act that will operate to the

[32] This requirement is based on *Handbook*, Chapter 5 ("Confidential Information"), Rule 12.

prejudice or detriment of the interests, actual or potential, of the other party in any asset during mediation without the written consent of the other party." The Task Force recommends that a similar provision be considered in every mediation agreement.

Currently, the family law mediation rule (Appendix 2, paragraph 5) requires:

> (e) an agreement as to the lawyer's rate of remuneration and terms of payment,
>
> (f) an agreement as to the circumstances in which mediation will end.

The Task Force recommends that the lawyer-mediator consider a provision similar to paragraph (e). The Task Force also recommends that the lawyer-mediator consider a provision similar to paragraph (f), but in a modified form. The purpose of this provision is to ensure that parties are aware when and as soon as efforts to resolve the dispute by mediation have ended, so that they will know that they need to pursue an alternative remedy. The Task Force suggests that requiring the lawyer-mediator to confirm in writing when mediation is concluded without settlement removes any uncertainty for the parties about when they should be considering other processes to resolve their dispute.

There was lengthy consideration over whether or not to require that the agreement to mediate be reduced to writing in all cases, as is the current rule for family mediation. The decision to allow either option, with the recommendation that it be reduced to writing in "most circumstances," was strongly influenced by the advice of some civil mediators who said that it was neither necessary nor helpful to reduce these matters to writing in every mediation, particularly when the mediation involves sophisticated participants.

4.6.3

> **Recommendation 23 —** Confirm that Rule 4(b) of Chapter 6 does not apply to lawyer-mediators.

The *Handbook* includes a rule regarding solicitor-client privilege at Chapter 6, rule 4(b). As the lawyer-mediator is not in a solicitor-client relationship with the participants, confirmation in the *Handbook* that this rule does not apply to lawyer-mediators would be helpful.[33]

4.7 Mediating in teams with non-lawyers

The Benchers have decided not to institute multi-disciplinary practice rules that would apply to all lawyers and permit practising in firms that include partners who are not lawyers but members of other professions or occupations. This means that lawyer-

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[33] Absent a clarifying rule, there could be confusion over the lawyer-mediator's obligations, e.g., *Handbook*, Chapter 6, Rule 4(b). It would be helpful to clarify that this rule does not apply, because the lawyer-mediator does not "represent" the parties.

mediators continue to be affected by the same restrictions regarding association with non-lawyers that apply to all lawyers.

The *Handbook* rule against fee splitting (Chapter 9, rule 6) provides as follows:

> A lawyer must not split, share or divide a client's fee with any person other than a member of the Law Society in good standing.

Ethics Committee opinions have indicated that the rule as presently constituted does not impair the ability of lawyers to retain non-lawyer co-mediators on a particular file and to remunerate the non-lawyer as a disbursement chargeable to the client. With this approach, the full mediation fee is payable to the lawyer who increases the fee account with a disbursement in the amount of the agreed fee payable to the non-lawyer co-mediator.

A second approach to the same issue is to arrange for the lawyer and the non-lawyer co-mediator to be retained separately by the client, with the client being required to pay each of the mediation team members separately. There is no particular advantage to this approach from the point of view of *Handbook* compliance, although it is obviously slightly less convenient for the client.

What is not permitted in the present regime is the situation in which the lawyer-mediator and the non-lawyer-mediator split a mediation fee that is, by the agreement, only payable to the lawyer-mediator. In other words, the "hidden" payment of the non-lawyer-mediator's fee from the mediation fees payable to the lawyer is not currently permitted.

4.8 Marketing

> **Recommendation 24 —** Modify *Handbook* Chapter 14 paragraph 19 that currently allows family law mediators to say, in marketing activities, that they are "accredited by the Law Society of British Columbia" to apply to all "relationship mediators", as this term is defined at 4.2, Recommendation 12 (b), and to say that they "meet the qualifications required by the Law Society for practising as a relationship mediator."

The foregoing recommendation recognizes the additional qualifications that the Task Force proposes in Part 5 for "relationship mediators". The nature of the mediation training currently provided, and the absence of skills or knowledge testing, makes it inaccurate to say that the Law Society "accredits" family law mediators. It merely sets the qualifications that lawyers must currently meet before they can practise as family law mediators. This recommendation would require a more accurate statement from mediators in their marketing activities.

4.9 Mediators speaking with represented clients

Chapter 4, rule 1.1 of the *Handbook* provides that:

> A lawyer who has an interest in a matter, or represents a client who has an interest in a matter, must not communicate with any person regarding the matter if, to the lawyer's knowledge, the person is represented by another lawyer, except through or with the consent of the person's lawyer.

> **Recommendation 25 —** Add a footnote to the *Handbook* clarifying that Chapter 4, rule 1.1 does not apply to lawyers acting as mediators when they are communicating with participants in, or about, a mediation.

4.10 Mediator's notes

Some lawyer-mediators report a practice of destroying all mediation notes. Other lawyer-mediators keep all mediation notes on file, including flip chart notes prepared during mediation. Destroying notes would appear to be contrary to best practice. It would be advisable, for example, to have retained notes in the event that a complaint was made about a mediator's conduct or if the insurer were obliged to defend a tort claim against a mediator. Guidance is called for.

> **Recommendation 26 —** Advise lawyer-mediators that destroying notes is contrary to best practice.

4.11 Contingency fee arrangements

> **Recommendation 27 —** Prohibit lawyer-mediators from entering into contingency fee arrangements.

4.12 Trust accounts

In the course of the focus group discussions, the Task Force learned that some lawyer-mediators are firmly of the view that it is unhelpful in the regulation of the legal profession to require that insured lawyer-mediators report annually (currently in Form 48) when they do not maintain an active trust account. It was argued that the rule wrongly presumes that all lawyers have trust accounts, and the obligation to respond to a Form 47 by completing a Form 48 imposes unnecessary administrative costs on those who do not. These mediators would welcome simplified trust administration procedures.

PART 5: QUALIFYING LAWYERS TO MEDIATE

The Task Force was asked to comment on the issue of accreditation of mediators generally, including the current scheme of certifying family law mediators.

Section 29(d) of the *Legal Profession Act* authorizes the Benchers to make rules to establish the "qualifications for and conditions under which practising lawyers may practise as mediators." The Task Force considered at length whether to recommend that the established practice referred to as "accrediting" family law mediators should be extended to all mediators.[34] Although the focus groups addressed the concept of accreditation of lawyer-mediators and acknowledged the benefits of mediation education and training, they made no specific proposals.

The Task Force recognizes that disputes among people in personal relationships typically involve vulnerable individuals, such as children who are not parties but about whom decisions are being made. Power imbalances, volatile emotions and grief can have significant impact on participants during mediation. Mediators working through disputes among disputants who are also in a personal relationship need expanded training and additional skills. The current definition of family law mediation captures some, but not all disputes in which disputants are in a personal relationship.

The Task Force concludes that the existing qualification regime should, with some modifications, be continued:

- Mandatory training for "family law mediators" should continue to be required as part of the expanded group of "relationship mediators" as this term is defined at 4.2, recommendation 12(b); and

- Although mandatory training for non-relationship mediators is not recommended, these lawyer-mediators should be expressly advised to ensure that they possess the requisite skill level to mediate competently.

5.1 Qualifying lawyers to mediate non-relationship disputes

Recommendation 28 — for non-relationship mediations, the Law Society should

(a) not require formal mediation training, but

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[34] Australian law societies have established training criteria for lawyer-mediators. The Law Society of Queensland is an example. The mediators on its List of Approved Mediators have, inter alia, "attended a training program approved by the Society" and "participated in an approved top-up course once every 5 years." See Law Society of Queensland website for its list: www.qls.com.au/default.aspx?pid=787.

(b) encourage lawyer-mediators to obtain and maintain mediation skills training appropriate for the mediations that they are undertaking.

The Law Society should leave the question of mediation training for non-relationship mediators to the individual members.[35] Given that mediation involves skills that are relatively new to the profession, it should remind such members of their obligation to mediate competently.

The 1996 Canadian Bar Association *Systems of Civil Justice Task Force Report* recommended that law societies prepare lawyers for a multi-option justice system and place greater emphasis on competency standards for lawyers. It observed that:

> …public expectations of lawyers in a multi-option civil justice system will be high. The education and training opportunities available to law students and lawyers must reflect these changing expectations and responsibilities. Law societies must also be prepared to play a more active role in the regulatory and disciplinary process to ensure the competency of lawyers in the twenty-first century.[36]

The Report goes on to say that it recommends more, and in some cases mandatory, education for the legal professional in dispute resolution, and to call for a reassessment at the national level of the underlying principles of the teaching of law and for a redefinition of essential skills.

As the Report states elsewhere[37], it is not clear that traditional law school training places sufficient emphasis on a wider view of the lawyer's responsibility to achieve dispute resolution. Accordingly, the profession is encouraged to see that lawyers are trained in this wider view and the attendant skills.

In any event, the need for enhanced training has already been noted within British Columbia. Gordon Sloan, who has significant experience training lawyers to mediate in British Columbia and across Canada, writes:

> Lawyers consistently indicate that their self-confidence and skills need further improvement even after taking 40 hours of mediation training. This need for greater training is reflected in the fact that most of the applicants to the BC Mediation Roster have more than 40 hours of mediation training. It is also evident that certain areas of mediation, such as family mediation, often require

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35 It is not possible to know whether all non-family lawyer mediators have sought out adequate training, but it is known that the commercial mediation courses offered by CLE have been heavily subscribed by the profession for many years.

36 p. 72

37 p. 64

additional training in special issues such as family violence, power imbalances and the effect of divorce on children.[38]

Many focus group participants expressed the view that the mandatory education component of the existing family law mediation rule had a positive impact:

- because of it, lawyers deliver a higher standard of service to the public, and this has materially enhanced public confidence in lawyers as family mediators;
- it has played a major role in making BC lawyers, as a whole, arguably the most skilled legal mediators in the country; and
- it has helped to "brand" lawyers as mediators in the eyes of the public.

There is a broad and well-established consensus that the existing training programs are successful and have significantly enhanced the mediation capacity of the legal community.

The Task Force also heard from the focus groups, or found support in the literature and through dialogue with the Continuing Legal Education Society (CLE) and the Justice Institute, for the following propositions:

- the practice of mediation is rapidly evolving;
- the understanding of what constitutes best practices continues to change;
- the volume of mediation literature and research has grown exponentially over the last 10 years. There have been many developments and refinements in mediation theory;
- mediation training requirements are tending to escalate in most jurisdictions and there is a widely held view that 40 hours of training is insufficient; and
- mediation training programs are widely available, particularly in the densely populated areas of the province. For those areas outside the Lower Mainland, CLE is researching distance training and the Justice Institute provides distance mediation training.

In all of these circumstances, and given the expansion of mediation theory and increasingly sophisticated mediation practices, an argument can be made for mandatory training for all lawyer-mediators. However, it is the Task Force's recommendation that lawyers proposing to mediate non-relationship matters should not be obliged to seek

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[38] Sloan and Coley, s*upra*, note 18 at 5.

training or otherwise qualify, but should be encouraged to actively consider the question of their own qualification and competence to mediate.

5.2 Qualifying lawyers to mediate relationship disputes

> **Recommendation 29: —** Continue to require mandatory training for "family law mediators" under the expanded group of "relationship mediators."[39]

Historically, the rationale for requiring training of family law mediators has been the:

- greater potential for power imbalance and undue influence in family disputes;
- high incidence of spousal abuse and actual or threatened violence in the separating and divorcing population;
- greater intensity and emotional volatility of family disputes;
- higher likelihood of legally unsophisticated participants;
- involvement of and impact upon unrepresented third parties, such as children;

and the need for lawyers to be specially trained with respect to each of these relatively unique concerns.

In fact, a growing body of research emphasizes the extreme caution that must be exercised when dealing with circumstances involving potentially abusive relationships. This research concludes that the incidence of abuse[40] and intimidation in relationships may be higher than commonly suspected and that relationships involving abuse and

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[39] On February 6, 2003, the Practice Standards Committee approved a new course of study for family law mediation as an alternative to the 40-hour Family Law Mediation Course offered by CLE, and introduced family dynamics and family violence mediation training. At the time, Day 5 of the Family Law Mediation Course addressed these topics. In May 2003, the Continuing Legal Education Society (CLE) expanded its mediation curriculum to include the 24-hour Family Dynamics, Abuse and Control mediation course. Since the introduction of the Family Dynamics course, Day 5 of CLE's Family Mediation Course no longer includes family dynamics and abuse. Effectively, CLE offers 64 hours of family mediation training. This is approaching the requirements of the BC Mediator Roster Society roster of family law mediators, which include 80 hours plus 24 hours specifically on issues related to family dynamics and abuse in separation and divorce.

It is difficult to determine the appropriate minimal amount of training required of relationship mediators. The bar appears to be rising from the previous level of 40 hours, and, given the complexities of relationship mediation, the increase in training appears warranted. Rather than recommend a specific amount of hours of required training, the ADR Task Force prefers to leave this decision to the Benchers with input from the Family Law Mediation Sub-committee of the Practice Standards Committee.

[40] Abusive relationships are intimate relationships in which there is physical violence, sexual abuse, emotional abuse, economic abuse or psychological abuse as a pattern of behaviour that is used to control a partner in an intimate relationship.

intimidation may be very difficult to identify, even for professionals working in the field of separation and divorce. Recent statistics disclose an increasing incidence of elder abuse by caregivers and in disputes over the control of property owned by the elderly. Lawyers often have no training in these matters. Mandatory family law mediation training over the past 20 years has been an effective vehicle for identifying and educating about many of these concerns. More recently, CLE and the Justice Institute have delivered courses to develop skills for mediators who encounter power imbalance and abusive relationships.

Current research is leading to changes in mediation practice in the areas of abuse, safety and fairness. One study disclosed that Canadian lawyers participating in a recent mediation survey significantly underestimated the incidence of abuse among their family law clients. This survey also suggests that Canadian lawyers, including lawyer-mediators, would benefit from more education about child adjustment in the context of abusive relationships.[41]

The view of the Task Force is that the rationale that has supported mandatory training for family law mediation since 1984 continues to operate and should logically be extended to a broader range of disputes. Generally, these cases would be those where disputes between persons in personal relationships create a reasonable possibility of, or greater potential for, power imbalance, undue influence, abuse, violence, threats or intimidation.

5.3 Eliminating the minimum years of practice rule

> **Recommendation 30 —** Abolish the rule requiring three years of legal practice to qualify as a family law mediator.

The following comment is typical of the views expressed by focus group participants on the existing requirement of three years of practice to qualify as a family law mediator:

> *Rule 3-20 does not make sense. What is special about three years of unrelated legal practice in order to qualify as a family law mediator?*

In their 1996 Report to CLE, Sloan and Coley state that

> [s]ince there may be no correlation between areas of the practice of law and the eventual areas of mediation in which a lawyer mediates, this report recommends that it should not be necessary to require experience in the practice of law in order to become a qualified mediator. Instead, education and training courses in mediation should be emphasized.[42]

The Task Force agrees with these comments.

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41 The information contained in this comment relies heavily on the report of Dr. L. Neilson, *Spousal Abuse and the Legal System: Final Report for Canadian Bar Association*, Law for the Futures Fund, March, 2001: www.unb.ca/arts/CFVR/spousal_abuse.pdf.

42 Sloan and Coley, *supra*, note 18, at 5.

5.4 Continuing mediation education

Mediation is undergoing significant expansion and continual innovation.

> **Recommendation 31 —** Encourage lawyer-mediators to participate in relevant continuing education programs

Lawyers should improve their mediation skills by, *inter alia*, participating regularly in relevant continuing education programs. The Task Force believes that continuing mediation education is essential to maintain skills and keep abreast of developments in theory and best practices.

The BC Mediator Roster Society requires 20 hours of annual continuing mediation education for its members. The Task Force recognizes the value of continuing education and suggests 20 hours annually for lawyer-mediators on a voluntary basis as a minimum benchmark. "Continuing education" can be liberally interpreted to include attendance at dispute resolution courses, conferences, workshops and seminars; attendance at CBA-ADR section meetings; participation in dispute resolution discussion groups or practicums; dispute resolution reading and writing; as well as the provision of mediation training, mentoring and supervision.

PART 6: RAISING THE LEVEL OF ADR AWARENESS

The Task Force was asked to consider methods of raising the level of lawyers' awareness of ADR and its implications for the future of the legal profession.

The following quote, drawn from *Attitudes – Skills – Knowledge: Proposals for Legal Education to Assist Implementing a Multi-Option Civil Justice System in the 21st Century*,[43] supports the recommendations of the Task Force intended to raise lawyers' awareness of ADR and its implications. Although the quote restricts itself to civil justice, the comments are equally applicable to criminal justice, and, for the purposes of this report, are intended to apply to both civil and criminal justice:

> Dispute resolution processes are often described as a continuum in that there are innumerable options, ranging from avoidance, prevention, counselling, negotiation and mediation, to arbitration and litigation and even legislation that parties can use either concurrently or sequentially to try to resolve a dispute. There are innumerable combinations of these processes and conflict resolution theory suggests that a dispute resolution service provider should be able to help clients to design a process or choose a mix of processes that seem most appropriate to the particular dispute.
>
> In order to help clients use all of these options, lawyers must understand the nature of the dispute and the benefits and limits of the processes. It also means that the clients must have sufficient information about their options to evaluate the different choices. In order to provide this information and perform these functions people must have an opportunity to acquire the necessary knowledge, skills and attitudes.[44]

The focus groups were clear that the emphasis in the Law Society's approach should be "educate rather than legislate:"

- *The Law Society should encourage the law schools to include ADR for all students.*
- *Can't the Law Society require counsel to take a CLE course before counsel may attend a mediation with her or his client?*

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[43] CBA, Attitudes – Skills – Knowledge: Proposals for Legal Education to Assist Implementing a Multi-Option Civil Justice System in the 21st Century, 1999. This is a discussion paper prepared by the Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report, CBA, 1996.

[44] *Id.* at vi.

Many participants in the focus groups expressed the view that there is a need to disseminate information about ADR on two fronts: lawyer education and public information.

6.1 Law schools

The two law schools in British Columbia have made considerable progress towards integrating appropriate dispute resolution education and training with their traditional curricula.

> **Recommendation 32 —** Work with law schools to support a comprehensive program of legal education that provides the knowledge, skills and attitudes appropriate for the provision of legal services in a multi-option justice system.

An example of training requirements are those recommended to the Law Society of New South Wales by its Early Dispute Resolution Task Force in 1999:[45]

- Dispute resolution should be a compulsory and separate component of the undergraduate law program and diploma of law course and integrated into the other core and elective subject areas where relevant;

- Dispute resolution should be introduced in the "legal institutions/legal process" subject first undertaken by law students;

- Dispute resolution should remain a compulsory component of practical legal training and integrated into all the transactional subjects where relevant. Dispute resolution should also be studied in its role in organizational planning and as a prevention measure.[46]

In support of expanding the dispute resolution curriculum for law schools, PLTC and CLE, we offer an additional quote from the CBA's report, *Attitude – Skills – Knowledge*:

> Even though many disputes never reach the courtroom, they often operate within the adversarial culture in terms of the way in which the conflict and the client's best interests are described, understood and dealt with. This means that disputes or conflicts and outcomes are analyzed almost solely in terms of legal analysis — that is, an analysis of opposing legal rights as they apply to the situation. Expanding or changing the content of legal education to include an emphasis on diverse approaches to resolving disputes requires a broadening of legal analysis to encompass conflict analysis and theories of settlement. This involves an

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[45] Law Society of New South Wales, Early Dispute Resolution (EDR) Task Force Report, 1999. An electronic version of the report is available at www.lawsociety.com.au/page.asp?PartID=1445.

[46] *Ibid.* at 20. For a discussion of the merits of teaching ADR in law schools, see Carrie Menkel-Meadow, "To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum" (1993) 46 *SMU Law Review* 1995.

analytical framework for assessing strategies, risks and outcomes based on a broader range of measures. It suggests that lawyers need a more complex understanding of the dynamics involved in human conflict and the role of the law.[47]

6.2 Professional Legal Training Course

Recommendation 33 — Continue instruction in the Professional Legal Training Course that ensures that newly admitted lawyers are able to provide effective advice and assistance respecting dispute resolution.

The current standard is that each PLTC class spends one and a half days doing mediation exercises and studying theory, procedure, ethics and relevant Law Society Rules. Students engage in several practice exercises and receive feedback from their instructors and peers. They are also assigned an out-of-class ADR assignment that is marked and returned to the students with feedback. On a more general level, ADR is woven throughout the course, insofar as:

- Students are taught and expected to recommend ADR solutions or at least present it as an option and discuss it in both their written opinion letter assignment which is graded and returned with feedback, an d in their final written assessments;

- ADR is discussed extensively with the students during the interviewing/advising segment of the course;

- Considerable additional time is pent on ADR during the family law segment of the course.

Newly admitted lawyers should be able to answer the question: *What is the appropriate dispute resolution process to recommend to my client at this time?*

6.3 Continuing legal education

Recommendation 34 — Encourage CLE to provide training consistent with the recommendations of this report (in addition to the mediation training currently available) and to consider, where appropriate, an ADR component when structuring other substantive programs.

Other suggestions by focus group participants were to:

- promote to lawyers training about their role in mediation as advocates;
- be mindful about the cost of CLE for lawyers practising outside the Lower Mainland; and

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[47] CBA, *supra,* note 52 at 16.

- consider producing videos that accurately depict mediation.

6.4 *Practice Checklists Manual*

Recommendation 35 — Engage one or more individuals with extensive training and experience in ADR, including ADR theory, to review and revise the *Practice Checklists Manual*.

There is a great deal that counsel can do in advance of the mediation: prepare the client for mediation; gather the information necessary to reach resolution; provide legal advice to the client about the range of settlement options available through the court; and list associated costs.

Examples of ADR additions to the *Practice Checklists Manual* could be:

- prompts to remind lawyers to re-assess the dispute resolution process choice at regular intervals throughout the file; and

- specific checklists for preparation for mediation and preparation for relationship mediation.

6.5 The ADR column

Recommendation 36 — Re-establish the ADR column in the *Benchers' Bulletin.*

The three 2000 editions of the *Benchers' Bulletin* containing the ADR column were well received. One column was reproduced and published nationally. The ADR column provides an opportunity for an ADR expert to comment on current dispute resolution topics, to discuss ethical challenges that arise in alternative dispute resolution contexts and to provide dispute resolution information to lawyers. We encourage its continuance.

6.6 Public information

In order to make informed decisions about appropriate dispute resolution processes, the public needs access to information about these processes. The Law Society can play a significant role in providing this information by developing a publicly accessible page on its website that defines the various processes and comments on the uses and limitations of each.[48] In conjunction with this public service, the Law Society website should also provide easy web access to the standards governing lawyer-mediators.

Recommendation 37 — Include on the Law Society website information for the general public about all available dispute resolution processes and how the public can access them.

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[48] For example, Centre for Effective Dispute Resolution (CEDR) website: www.cedr.co.uk.

This is one example of the "branding" requested by the focus groups. By including access to the standards governing lawyer-mediators, a high standard of service is endorsed.

6.7 Law Society dispute resolution processes

Recommendation 38 — Continue the development and use of informal dispute resolution processes in responding to complaints about lawyers by members of the general public.

PART 7: CONCLUSION

The Task Force was asked to review the rules and guidelines that govern the legal profession in BC in order to make recommendations with respect to the relatively new but burgeoning field of ADR. The Task Force first looked to lawyers for advice and found they were both eager to engage in dialogue about ADR and clear in their message that ADR is having a significant impact on lawyers, clients and the practice of law. It is also clear that lawyers are looking to the Law Society to take leadership in providing practical and procedural guidance while assisting lawyers to capitalize on the growing market for ADR.

BC was the first jurisdiction in Canada to regulate mediation, and it is likely that this step contributed to making BC a leader, if not the leader, in the use of mediation in civil disputes in Canada.

The 1984 family law mediation rule did three things:

- provided guidance to lawyers and gave them the confidence to pursue mediation at a time when it was neither widely used nor well understood;
- helped to make the practice of mediation a legitimate part of the practice of law and established a standard for sound mediation practice; and
- created a marketing advantage by identifying lawyers with mediation in the public eye.

We can reasonably expect that similar advantages will flow to the public and to the profession now as a consequence of the more detailed, current and comprehensive set of rules recommended in this report.

APPENDIX A: USE OF ADR BY THE PROFESSION

The use of mediation by the legal profession in British Columbia has expanded significantly over the last 15 years. Lawyers are commonly involved in mediations, both as mediators and as counsel for parties. The institutions supporting the profession have recognized the growing importance of mediation. The Continuing Legal Education Society of BC led the way in Canada in the mid-1980s by developing a number of very popular negotiation and mediation training programs for lawyers. The PLTC program, University of British Columbia law school and University of Victoria law school have all integrated mediation training and dispute resolution theory into their curricula. The Canadian Bar Association now has four active ADR sections in the province. As well, many lawyers are taking advantage of mediation training opportunities available through the Justice Institute of British Columbia and the Court Mediation Practicum Program in the Provincial Court.

The reasons for this shift towards the use of mediation are well documented. In 1996 the Canadian Bar Association published its *Systems of Civil Justice Task Force Report*. The CBA Task Force had conducted an extensive enquiry into the state of civil justice systems in Canada. It concluded that the most significant public concerns about civil justice relate to the cost, delay and complexity typically associated with litigated resolutions. While stressing the essential role of the trial process, the Report called for a "multi-option justice system," that is, a system that provides structured opportunities for the early settlement of disputes by way of non-binding dispute resolution processes such as mediation.

APPENDIX B: REPORTS AND REFERENCE MATERIALS

1. American Bar Association (Section of Dispute Resolution), Society of Professionals in Dispute Resolution, and American Arbitration Association, *Model Standards of Conduct for Mediation*

2. British Columbia Justice Reform Committee, *Access to Justice – The Report of the Justice Reform Committee*, (the "Hughes Report"), presented to the Attorney General of British Columbia, 1988.

3. Canadian Bar Association (BC Branch), Recommendations of the CBA – ADR Qualifications Subcommittee.

4. Canadian Bar Association, "Notice to Mediate in More Civil Cases," 13 *Bar Talk* 1, February 2001.

5. Canadian Bar Association, Attitudes – Skills – Knowledge: Proposals for Legal Education to Assist Implementing a Multi-Option Civil Justice System in the 21st Century, 1999.

6. Canadian Bar Association, "Resolution 99-05-A, Dispute Resolution Processes," passed unanimously at National CBA meeting in Edmonton, August, 1999.

7. Canadian Bar Association, Systems of Civil Justice Task Force Report, August, 1996.

8. Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*: www.caadrs.org/studies/nationstd.htm.

9. Centre for Effective Dispute Resolution (CEDR) website: www.cedr.co.uk.

10. Centre for Effective Dispute Resolution (CEDR), "New Survey Warns Clients Want Better Mediation Advice," press release, June 9, 1999.

11. Family Mediation Canada website: www.fmc.ca.

12. Folk, Felicia S., *Mediation, Lawyers and the Rules of Professional Conduct*, presented at the ADR Section of CBA, October 8, 1999.

13. Law Society of British Columbia Dispute Resolution Task Force, *Report to the Benchers*, June 7, 1996.

14. Law Society of British Columbia Mediation Subcommittee, Report to Competency Committee of the Law Society on Regulation of Mediation and Qualification to Mediate, April 10, 1996.

15. Law Society of British Columbia Benchers meetings, minutes and materials: June 7, 1996 Benchers minutes (item 7. Alternative Dispute Resolution Committee); June 4, 1997 Interim Report of the ADR Committee to Benchers; June 5, 1998 Benchers minutes (item 7. Justice Reform Task Force Report); December 4, 1998 Benchers minutes (item 4. Justice Reform Task Force Report); November 5, 1999 Benchers minutes (item 7. Access to Justice Committee, ADR Working Group Proposal).

16. Law Society of England and Wales, *Alternative Dispute Resolution – A Way Forward*, February, 2000: www.lawsoc.org.uk.

17. Law Society of New South Wales, *Charter on Mediation Practice*.

18. Law Society of New South Wales, *Early Dispute Resolution (EDR) Task Force Report*, 1999: www.lawsociety.com.au/page.asp?PartID=1445.

19. Law Society of Queensland website: www.qls.com.au.

20. Menkel-Meadow, C., "In conflicts area, 'doing the least' may be the ABA's best move," 18 *Alternatives to High Cost Litig.* 127, July/August, 2000.

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24. Morris, C., "The Trusted Mediator: Ethics and Interaction in Mediation," *Rethinking Disputes: The Mediation Alternative*, Emond-Montgomery Publications Limited, 1997.

25. Neilsen, L., Spousal Abuse and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund, March 2001: www.unb.ca/arts/CFVR/spousal_abuse.pdf.

26. Other jurisdictions' rules of conduct for lawyers acting as mediators.

27. Queensland Law Society's Standards of Conduct for Solicitor Mediators.

28. Reeve, C., "The Quandary of Setting Standards for Mediators: Where are we headed?," 23 *Queen's L.J.* 1998.

29. Riskin, L., "Toward New Standards for the Neutral Lawyer in Mediation," 26 *Arizona Law Review*, 1984.

30. Sammon, G., "The Ethical Duties of Lawyers Who Act for Parties to a Mediation," 4 *Australian Dispute Resolution Journal*, August 1993.

31. Sloan, S. and Coley, S., Lawyers and Mediation: Law Society and CLE Support for Mediation Practice in the Legal Profession, 1999.

32. Various codes or standards of conduct promulgated by mediation organizations in common law jurisdictions.

33. Wade, J., "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" (2001) 18 *Mediation Quarterly* 259.

34. The Right Honourable Lord Woolf, *Access to Justice – Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June, 1995: www.law.warwick.ac.uk/Woolf/woolf.html.

35. CBA *Code of Professional Conduct*, 2004

APPENDIX C: ADVICE FROM THE FOCUS GROUPS

The advice of the focus groups can be summarized as follows. It should be noted that not all of the views of the focus groups are shared by the Task Force:

C.1 Legal culture — new roles for lawyers

Summary: The values of the profession are shifting to accommodate collaborative approaches to dispute resolution. This shift is occurring in response to client demand. The Law Society should help lawyers to capitalize on this market.

Every profession has its own culture. Each has a shared set of ideas, values, assumptions, language and behaviours that tend to be embraced by its members as part of their identity and that distinguish them from other groups. Historically, the dominant image of legal culture has been that of the lawyer-as-adversary aggressively championing the rights of the client in litigation.

The focus groups said that legal culture is expanding to include new roles and skills, and to occupy new fields. They did not depreciate the need for adversarial skills or question the value of litigation, nor did they suggest that these would ever or should ever be displaced. However, they clearly did say that the profession is not relying as extensively or exclusively on the adversarial approach as it has in the past. We note Chief Justice Donald Brenner's observations in the February, 2001 issue of *Bar Talk* with respect to the expanding Notice to Mediate process:

> The expansion really is reflective of the changing culture, which is seeing more and more cases being resolved by methods other than formal adjudication.

The focus groups suggested that lawyers are broadening their approaches to dispute resolution and that they no longer assume that litigation is always the option of first resort. They pointed out that clients are becoming both more sophisticated and more cautious in their dealings with lawyers and that they come to lawyers looking for solutions, not necessarily for litigation. Clients seek resolutions that can be achieved as quickly and inexpensively as possible, and often with as little damage as possible to personal or commercial relationships.

Simply assuming that "one size fits all" — that every dispute should be put on the litigation track — does not always respond to a client's needs or budget. The profession should recognize this fact and position itself to secure its share of dispute resolution business by providing clients with what they want. The focus groups observed that the shift is occurring in response to real market pressures, and they noted that from a business perspective, it is in the interests of the profession to respond to these market opportunities.

> *People want to problem solve, not litigate, and they don't see lawyers doing this so they look elsewhere.*[49]
>
> *We should define our niche in the field. This is a practical matter. Let's be pragmatic and clarify our niche … "*

The focus groups saw legal culture expanding to accommodate new approaches to dispute resolution, and they saw lawyers playing roles and assuming responsibilities that are relatively new to the profession. The Law Society should consider these new perspectives in the context of all legal practice, not only with respect to mediation.

> *Do not create a dichotomy between lawyers and mediators. There are values here that should inform more than just mediation. The Law Society should endorse these values generally.*

In fact, there is evidence that the profession in BC is already acting on a broader understanding of the notion of advocacy. Certainly, principled negotiation and mediation training programs have reached many lawyers and have influenced the way lawyers approach settlement. The existence of "mediation advocacy" courses for lawyers suggests a wish on the part of the profession to adapt its skills to the collaborative environment. The recent emergence of groups of lawyers offering "collaborative law" services for family disputes in Vancouver, Victoria, Nanaimo and Kelowna, and the offering of CLE courses on this topic, is further evidence of a shift in this direction.

C.2 Providing lawyers with guidance for new roles

Summary: The Law Society should formally recognize the collaborative roles being adopted by lawyers as legitimate, and define standards of conduct for the guidance of the profession in these roles.

The focus groups were of the view that it is incumbent upon the Law Society to ensure that the content and language of the Rules, *Handbook* and *Act* are updated to reflect this change in culture, to recognize these new roles and activities as legitimate and to define standards of conduct for the benefit of the profession and for the public:

> *We need to describe what lawyers do as mediators and give them some guidance … The current rules do not reflect very well what is going on.*
>
> *Regulation would give lawyers unfamiliar with mediation some idea of what to expect, especially if he or she has just been served with a Notice to Mediate.*[50]

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[49] All quotations from focus group participants are in italics in this appendix**.**

[50] For more information about the Notice to Mediate, see the website of the BC Ministry of the Attorney General Dispute Resolution Office: www.ag.gov.bc.ca/dro.

In addition to articulating practices that are already settled in the province, there are issues in mediation practice that have apparently not been resolved with sufficient clarity, according to focus group participants:

> *What is my obligation in a commercial mediation respecting independent legal advice? It would be helpful to get direction from the Law Society about what to do if clients will not get independent legal advice.*
>
> *It needs to be clarified whether I can, as a mediator, give legal advice. How does that differ from legal information?*
>
> *If I mediate a separation agreement, can I help implement the agreement by transferring a title for the couple? It's cheaper and easier for them if I do.*
>
> *Is mediation the practice of law? This should be clarified.*
>
> *I phoned several practitioners before coming to this meeting to get their thoughts, and everyone I surveyed thinks mediation is the practice of law.*

The *Act*, Rules and *Handbook* of the Law Society protect the relationship between lawyer and client. However, with the exception of *Handbook* Appendix 2 (Family Law Mediation), they provide little or no guidance to lawyers who are acting as mediators. In fact, some of the existing provisions are in conflict with the role of the mediator.

There was clearly a sentiment in favour of the Law Society providing some additional, formal direction to lawyers through the Rules and *Handbook*.

C.3 Clarifying new roles for the benefit of the public

Summary: Articulating rules to govern lawyers in the mediation context will benefit the public because it will help to educate the public and will clarify public expectations.

Some focus group members suggested that, when a lawyer is retained as a mediator, the lay participants in that process might only partially understand what they are getting. The lay participants probably know that the lawyer is subject to discipline by the Law Society and is insured. It is likely that lay participants appreciate that the lawyer understands legal concepts and legal processes and can help them with some of the legal consequences of making an agreement and with drafting terms of a settlement agreement. However, they may well not understand the manner or extent to which the lawyer is acting outside his or her traditional role. The participants, being most familiar with the

adversarial role, may not understand that the mediator is acting outside the partisan role, despite the disclaimers that are typically made by lawyer-mediators.[51]

By adopting practice guidelines that define roles and expectations for its members, the Law Society will also help to inform and educate the public about what it should expect from lawyer-mediators. The Law Society of New South Wales, when it adopted a charter on mediation practice for its members, said, "defining the expectations of each party improves the public's perception of the services sought and provides positive opportunities for informed feedback."[52]

The Task Force supports these views and submits that it is in the public interest that the Rules and *Handbook* clarify the roles played by lawyers in mediation.

C.4 Marketing lawyers as mediators — branding and promotion

Summary: Articulating rules to govern lawyer-mediators will enhance public confidence and help to define mediation as lawyer's work.

Why do parties choose a lawyer to mediate? What do parties expect from a mediator who is a lawyer that they would not expect in a mediator who is not a lawyer? While parties expect all mediators to bring honesty, integrity and competence to the process, they expect a depth of legal understanding from mediators who are lawyers. Participants in mediation also know that the lawyer is insured, governed by a code of conduct and subject to governance by the Law Society. The focus groups felt that, given the competitive nature of the marketplace, it is reasonable for the Law Society to establish rules that support a high level of competence of its members when they act as lawyer-mediators. Such rules would give lawyer-mediators a "leg up," insofar as it appears that no other professional body is mandated to create mediation rules of conduct for its members:

> *The Law Society is the right body to provide quality assurance, or branding, to users of dispute resolution services provided by lawyers.*

The argument that articulating rules will enhance public confidence and help to define mediation as lawyer's work is supported, in the view of some lawyers, by experience with the existing family law mediation rules. These rules have enhanced the profile of lawyers as mediators and given BC lawyers a tangible marketing advantage in the mid-1980s in the competition for family mediation business.

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[51] Such disclaimers may state, "I am not acting [as a lawyer] for any of you; I will not provide legal advice to any of you. If you require legal advice, I will refer you to legal counsel. I am neutral — I have no stake in how this dispute should be resolved."

[52] *Law Society Journal*, NSW Australia, December, 1997, p. 68.

C.5 What should rules look like?

Summary: Regulation should occur, but there should be less rather than more, and it must incorporate some critical values, including self-determination and diversity.

What should the rules look like? What values or principles should regulation of mediation by the Law Society incorporate? What limits should there be on regulating? The focus groups did not address these issues exhaustively, but did comment on the following:

- *Less rather than more:* the practice of mediation is young and evolving. A decade ago, there was one generally accepted definition of mediation, whereas now, mediators speak of different kinds of mediation (such as "interest-based facilitative mediation," "evaluative mediation" and "transformative mediation"), each involving different styles and approaches on the part of the mediator. In other words, because the field is relatively young, what constitutes mediation and good mediation practice is, in some respects, still fluid. At the same time, other aspects of mediation practice and procedure appear to be more or less settled in BC. Some core practices are now consistently taught by CLE from course to course, and some are established by statute or regulation.[53]

  The focus groups said that a balance should be struck between regulating to provide guidance on the one hand and "over-regulating" on the other. The general consensus was that any regulation by the Law Society should recognize established practices while taking great care not to inhibit mediation's ongoing evolution. Excessive regulation runs the risk of bringing premature closure to some very complex questions of practice. Less, rather than more guidance may be best.

- *Self-determination:* the focus groups frequently noted the importance of the principle of participant self-determination and said that any guidance provided by the Law Society must incorporate it. This principle includes the individual client's right to:

  - make agreements voluntarily (free from inappropriate pressure); and
  - make informed decisions.

- *Diversity: any rules made should be flexible enough to accommodate cultural diversity, diversity between mediation styles and diversity of issues to be mediated. Disputes arise within different cultural contexts. Different cultures bring different standards and expectations to mediation.* Not only are there variations in style among mediators, mediation practice varies throughout the province. The nature of the dispute itself may also influence procedure. For

[53] The Notice to Mediate regulations, for example, define practice for lawyers in their roles as advocates and as neutrals.

example, in many commercial disputes, every party will be represented by counsel at the mediation. In ICBC mediations, however, an insurance adjuster may often appear without counsel. In family law mediations, it is common in Vancouver for both parties to attend without counsel, whereas in Victoria the practice is for lawyers to accompany their clients. The Law Society Rules must accommodate each of these circumstances.

- *Other values:* there are additional values that are widely accepted by mediators. These values are reflected in various codes of ethics or codes of conduct, such as those of the BC Arbitration and Mediation Institute,[54] the Mediator Roster Society, Family Mediation Canada, the Conflict Resolution Network and the ADR Section of the CBAO. Such Codes should be reviewed and appropriate provisions considered by the Law Society for lawyer-mediators.

[54] Now the BC Branch of the ADR Institute of Canada.

APPENDIX D: THE FOCUS GROUPS

Region	Date	Location	Attendees
Vancouver Island	May 30, 2000	Victoria	Kathryn Berge, QC Sandra Harper Jane Henderson, QC Patricia Huggins Patricia Lane Hugh McCall Sandra McEwan Roderick McNeil Jane Morley, QC Paul Parsons Gwen Taylor Darrel Woods
Interior and Northern British Columbia	June 9, 2000	Vancouver	Michael Brecknell P. Terrance Brown* Kathryn Ginther C. Gordon Mamen G. Leigh Harrison, QC Terry Napora Meg Shaw Ronald Smith Richard Spilker Peter Warner, QC Kent Woodruff Barbara Young
Lower Mainland	June 16, 2000	Vancouver	Kenneth Armstrong Diane Bell Halldor Bjarnason John Campbell J. Gary Fitzpatrick Terry Harris Arlene Henry Roger Kerans Laurie McDonell D. Clif Prowse Donald Yule, QC

* Mr. Brown was unable to attend the focus group meeting for medical reasons, but contributed his views to the Task Force.

APPENDIX E: EXISTING RULES AND RECOMMENDED CHANGES

The *Legal Profession Act*, SBC 1998, c. 9

The Task Force does not recommend that the Benchers request any changes to the *Legal Profession Act*.

Definitions

1 (1) In this Act:

"conduct unbecoming a lawyer" includes a matter, conduct or thing that is considered, in the judgment of the benchers or a panel,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession; …

"practice of law" includes:

(a) appearing as counsel or advocate,

(b) drawing, revising or settling

(i) a petition, memorandum or articles under the *Business Corporations Act*, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,

(ii) a document for use in a proceeding, judicial or extrajudicial,

(iii) a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person,

(iv) a document relating in any way to a proceeding under a statute of Canada or British Columbia, or

(v) an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office,

(c) doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,

(d) agreeing to place at the disposal of another person the services of a lawyer,

(e) giving legal advice,

(f) making an offer to do anything referred to in paragraphs (a) to (e), and

(g) making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e),

but does not include

(h) any of those acts if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

(i) the drawing, revising or settling of an instrument by a public officer in the course of the officer's duty,

(j) the lawful practice of a notary public,

(k) the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the *Financial Institutions Act,* or

(l) agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program;

Authority to practise law

15(1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

(a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,

(b) as permitted by the *Court Agent Act*,

(c) an articled student, to the extent permitted by the benchers,

(d) an individual or articled student referred to in section 12 of the *Legal Services Society Act,* to the extent permitted under that Act,

(e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section, and

(f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section.

(2) A person who is employed by a practising lawyer, a law firm, a law corporation or the government and who acts under the supervision of a practising lawyer does not contravene subsection (1).

(3) A person must not do any act described in paragraphs (a) to (g) of the definition of "practice of law" in section 1 (1), even though the act is not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, if

(a) the person is a member or former member of the society who is suspended or has been disbarred, or who, as a result of disciplinary proceedings, has resigned from membership in the society or otherwise ceased to be a member as a result of disciplinary proceedings, or

(b) the person is suspended or prohibited for disciplinary reasons from practising law in another jurisdiction.

(4) A person must not falsely represent himself, herself or any other person as being

(a) a lawyer,

(b) an articled student, a student-at-law or a law clerk, or

(c) a person referred to in subsection (1) (e) or (f).

(5) Except as permitted in subsection (1), a person must not commence, prosecute or defend a proceeding in any court, in the person's own name or in the name of another person.

(6) The benchers may make rules prohibiting lawyers from facilitating or participating in the practice of law by persons who are not authorized to practise law.

Specialization and restricted practice

29 The benchers may make rules to do any of the following:

(d) establish qualifications for and conditions under which practising lawyers may practise as mediators.

The Law Society Rules

THE CURRENT RULES	RECOMMENDED AMENDMENTS
Definitions **1** In these Rules, unless the context indicates otherwise: **"Act"** means the *Legal Profession Act*, S.B.C. 1998, c. 9; **"conduct unbecoming a lawyer"** includes any matter, conduct or thing that is considered, in the judgment of the Benchers or a panel, (a) to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing of the legal profession; **"discipline violation"** means any of the following: (a) professional misconduct; (b) conduct unbecoming a lawyer; (c) a breach of the Act or these Rules; (d) incompetent performance of duties undertaken by a lawyer in the capacity of a lawyer; (e) conduct that would constitute professional misconduct, conduct unbecoming a lawyer or a contravention of the Act or these Rules if done by a lawyer; **"Executive Director"** includes a person designated by the Executive Director to perform any of the duties assigned to the Executive Director in these Rules; **"lawyer"** means a member of the Society;	**Definitions** **1** In these Rules, unless the context indicates otherwise: **"Act"** means the *Legal Profession Act*, S.B.C. 1998, c. 9; **"conduct unbecoming a lawyer"** includes any matter, conduct or thing that is considered, in the judgment of the Benchers or a panel, (a) to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing of the legal profession; **"discipline violation"** means any of the following: (a) professional misconduct; (b) conduct unbecoming a lawyer; (c) a breach of the Act or these Rules; (d) incompetent performance of duties undertaken by a lawyer in the capacity of a lawyer; (e) conduct that would constitute professional misconduct, conduct unbecoming a lawyer or a contravention of the Act or these Rules if done by a lawyer; **"Executive Director"** includes a person designated by the Executive Director to perform any of the duties assigned to the Executive Director in these Rules; **"lawyer"** means a member of the Society;

THE CURRENT RULES	RECOMMENDED AMENDMENTS
	"mediation" means a process in which an impartial third party (a "mediator") attempts to facilitate a voluntary settlement among disputing parties, but does not include (a) hybrid processes, where mediation is joined with another dispute resolution process, such as mediation in the midst of an arbitration or arbitration at the end of mediation, (b) facilitation, where settlement may not be the goal and which may include participants who are not "parties", (c) convening, where groups are brought together to identify stakeholders for a specific endeavour or dispute, and to ascertain whether and on what basis these stakeholders might meet, (d) negotiation and collaborative law processes, or (e) negotiation and conflict resolution skills training for disputants; [Recommendation 12 (a) and (c)]
	"relationship mediation" means mediation of issues relating to the parties' marriage, cohabitation, separation or divorce, as well as mediation of issues relating to child protection, adoption, parent and child disputes, elder care or estate disputes among parties related by blood, marriage or adoption; [Recommendation 12 (b)]
"Rule" or **"subrule"** means a rule or subrule contained in these Rules; **"section"** means a section of the *Legal Profession Act*;	**"Rule"** or **"subrule"** means a rule or subrule contained in these Rules; **"section"** means a section of the *Legal Profession Act*;

THE CURRENT RULES	RECOMMENDED AMENDMENTS
"Society" means the Law Society of British Columbia continued under section 2(1) of the Act; **"training course"** includes any assessments, examinations and remedial work taken during or after the training course, or an educational program required by the Credentials Committee;	**"Society"** means the Law Society of British Columbia continued under section 2(1) of the Act; **"training course"** includes any assessments, examinations and remedial work taken during or after the training course, or an educational program required by the Credentials Committee;
PART 1 – ORGANIZATION **Division 3 – Law Society Rules** **Act, Rules and Handbook** **1-50** The Executive Director must provide each lawyer and each articled student with a copy of the *Legal Profession Act*, all Rules made by the Benchers, and the *Professional Conduct Handbook*.	**PART 1 – ORGANIZATION** **Division 3 – Law Society Rules** **Act, Rules and Handbook** **1-50** The Executive Director must provide each lawyer and each articled student with a copy of the *Legal Profession Act*, all Rules made by the Benchers, and the *Professional Conduct Handbook*. **1-51** These Rules apply to lawyers engaged in professional activities, including but not limited to the mediation of all types other than labour relations [Recommendation 10]
PART 3 **PROTECTION OF THE PUBLIC** **Division 3 – Specialization and Restricted Practice** **Family law mediation** **3-20** (1)A lawyer may act as a family law mediator only if the lawyer has (a) engaged in the full time practice of law for at least 3 years or the equivalent in part-time practice, and (b) completed a course of study in family law mediation approved by the Practice Standards Committee.	**PART 3** **PROTECTION OF THE PUBLIC** **Division 3 – Specialization and Restricted Practice** **Relationship mediation** **3-20** (1)A lawyer may act as a relationship ~~family law~~ mediator only if the lawyer has ~~(a) engaged in the full time practice of law for at least 3 years or the equivalent in part-time practice, and~~ ~~(b)~~ completed a course of study in family law mediation approved by the Practice Standards Committee. [Recommendation 29]

THE CURRENT RULES	RECOMMENDED AMENDMENTS
(2) The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without qualifying under subrule (1)(a).	(2) The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without qualifying under subrule (1)~~(a)~~. [Recommendation 30]
PART 8 – LAWYERS' FEES	**PART 8 – LAWYERS' FEES** **Contingent fee agreement not allowed for mediation** **8-5** A lawyer must not enter into a contingent fee agreement in respect to mediation services. [Recommendation 27]

The *Professional Conduct Handbook*

THE CURRENT RULES	RECOMMENDED AMENDMENTS
INTRODUCTION Published under the authority of the Benchers for the guidance of members of the Law Society of British Columbia.	**INTRODUCTION** Published under the authority of the Benchers for the guidance of members of the Law Society of British Columbia. The Rules in this Handbook should guide the conduct of lawyers, not only in the practice of law, but also in their other activities, including but not limited to the conduct of mediation, other than labour relations. [Recommendation 10]
CHAPTER 1 **CANONS OF LEGAL ETHICS** **3. To the client** (3) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.	**CHAPTER 1** **CANONS OF LEGAL ETHICS** **3. To the client** (3) ~~Whenever the dispute will admit of fair settlement the c~~Clients should be advised to settle, avoid or to end ~~the~~ litigation whether by adversarial or other dispute resolution processes, at the earliest possible time that the dispute would get fair resolution. [Recommendation 2]
CHAPTER 3 **COMPETENCE, QUALITY OF SERVICE AND RELATIONSHIP TO CLIENTS** **Knowledge and skill** 1. With respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate: (b) knowledge of the practice and procedures by which the substantive law can be effectively applied, and …	**CHAPTER 3** **COMPETENCE, QUALITY OF SERVICE AND RELATIONSHIP TO CLIENTS** **Knowledge and skill** 1. With respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate: (b) knowledge of the practice and procedures, including, alternative dispute resolution processes, by which the substantive law can be effectively applied, and … [Recommendation 3]

THE CURRENT RULES	RECOMMENDED AMENDMENTS
CHAPTER 4 **AVOIDING QUESTIONABLE CONDUCT, INCLUDING IMPROPER COMMUNICATION** **Communication with clients of other lawyers** 1.1 A lawyer who has an interest in a matter, or represents a client who has an interest in a matter, must not communicate with any person regarding the matter if, to the lawyer's knowledge, the person is represented by another lawyer, except through or with the consent of the person's lawyer.[1] FOOTNOTES: 1. A lawyer who is not otherwise interested in a matter may provide a second opinion to a person with other legal representation, whether or not the lawyer is formally retained to do so. This rule is subject to a lawyer's right to contact a witness under the conditions set out in Chapter 8.	**CHAPTER 4** **AVOIDING QUESTIONABLE CONDUCT, INCLUDING IMPROPER COMMUNICATION** **Communication with clients of other lawyers** 1.1 A lawyer who has an interest in a matter, or represents a client who has an interest in a matter, must not communicate with any person regarding the matter if, to the lawyer's knowledge, the person is represented by another lawyer, except through or with the consent of the person's lawyer.[1] FOOTNOTES: 1. A lawyer who is not otherwise interested in a matter may provide a second opinion to a person with other legal representation, whether or not the lawyer is formally retained to do so. This rule is subject to a lawyer's right to contact a witness under the conditions set out in Chapter 8. If a party who is represented by a lawyer attends mediation without that lawyer, opposing counsel must contact the lawyer for consent to negotiate directly with the party at mediation. This requirement does not apply to a lawyer acting as a mediator. [Recommendations 4, 25]
CHAPTER 6 **CONFLICTS OF INTEREST BETWEEN CLIENTS** **Acting for two or more clients** 4. A lawyer may jointly represent two or more clients if, at the commencement of the retainer, the lawyer: (b) advises each client that no information received from one of them as a part of the joint representation can be treated as confidential as between them,	**CHAPTER 6** **CONFLICTS OF INTEREST BETWEEN CLIENTS** **Acting for two or more clients** 4. A lawyer may jointly represent two or more clients if, at the commencement of the retainer, the lawyer: (b) advises each client that no information received from one of them as a part of the joint representation can be treated as confidential as between them,1 [Recommendation 23]

THE CURRENT RULES	RECOMMENDED AMENDMENTS
Acting against a current client	**Acting against a current client**
6.3 A lawyer must not represent a client for the purpose of acting against the interests of another client of the lawyer unless:	6.3 A lawyer must not represent a client for the purpose of acting against the interests of another client of the lawyer unless:
(a) both clients are informed that the lawyer proposes to act for both clients and both consent, and	(a) both clients are informed that the lawyer proposes to act for both clients and both consent, and
(b) the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.	(b) the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.
6.4 For the purposes of Rule 6.3, the consent of a client to the lawyer acting for another client adverse in interest may be inferred in the absence of contrary instructions if, in the reasonable belief of the lawyer, the client would consent in the matter in question because the client has	6.4 For the purposes of Rule 6.3, the consent of a client to the lawyer acting for another client adverse in interest may be inferred in the absence of contrary instructions if, in the reasonable belief of the lawyer, the client would consent in the matter in question because the client has
(a) previously consented to the lawyer, or another lawyer, acting for another client adverse in interest,	(a) previously consented to the lawyer, or another lawyer, acting for another client adverse in interest,
(b) commonly permitted a lawyer to act against the client while retaining the same lawyer in other matters to act on the client's behalf, or	(b) commonly permitted a lawyer to act against the client while retaining the same lawyer in other matters to act on the client's behalf, or
(c) consented, generally, to the lawyer acting for another client adverse in interest.	(c) consented, generally, to the lawyer acting for another client adverse in interest.
Acting against a former client	**Acting against a former client**
7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:	7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
(a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client	(a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client

THE CURRENT RULES	RECOMMENDED AMENDMENTS
and the former client consents to the new representation, or (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.	and the former client consents to the new representation, or (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.
Acting as a family law mediator 9. A lawyer who acts as a family law mediator shall comply with Appendix 2 to this *Handbook* and, to the extent they are not inconsistent with Appendix 2, the Rules in this Chapter.	~~**Acting as a family law mediator**~~ ~~9. A lawyer who acts as a family law mediator shall comply with Appendix 2 to this *Handbook* and, to the extent they are not inconsistent with Appendix 2, the Rules in this Chapter.~~ [Recommendation 11] FOOTNOTES: 1. The requirement of Rule 4(b) does not apply to lawyers acting as mediators. [Recommendation 23]
CHAPTER 7 **CONFLICTS OF INTEREST** **BETWEEN LAWYER AND CLIENT** **Ancillary business or occupation** 6. A lawyer must not carry on any business or occupation other than the practice of law in such a way that a person might reasonably: (a) find it difficult to determine whether in any matter the lawyer is acting as a lawyer, or (b) expect that in the carrying on of the other business or occupation the lawyer will exercise legal judgement or skill for the protection of that person.	**CHAPTER 7** **CONFLICTS OF INTEREST** **BETWEEN LAWYER AND CLIENT** **Ancillary business or occupation** 6. A lawyer must not carry on any business or occupation other than the practice of law in such a way that a person might reasonably: (a) find it difficult to determine whether in any matter the lawyer is acting as a lawyer, or (b) expect that in the carrying on of the other business or occupation the lawyer will exercise legal judgement or skill for the protection of that person.

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A lawyer who concurrently practises law and carries on another business or occupation must not act for a client if the client's interests and the lawyer's business or occupational interests differ.	A lawyer who concurrently practises law and carries on another business or occupation must not act for a client if the client's interests and the lawyer's business or occupational interests differ.
CHAPTER 8 **THE LAWYER AS ADVOCATE**	**CHAPTER 8** **THE LAWYER AS ADVOCATE**
Prohibited conduct	**Prohibited conduct**
1. A lawyer shall not:	1. A lawyer ~~shall~~ must not:
(a) abuse the process of a court or tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party,	(a) abuse the process of a court or tribunal, or other dispute resolution forum, by instituting or prosecuting proceedings ~~which~~that, although legal in themselves, are clearly motivated by malice on the part of a client and are brought solely for the purpose of injuring another party,
(b) knowingly assist the client to do anything or acquiesce in the client doing anything which is dishonest or dishonourable,	(b) knowingly assist the client to do anything or acquiesce in the client doing anything ~~which~~ that is dishonest or dishonourable,
(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer that may reasonably be perceived to affect the impartiality of such officer,	(c) appear before a judicial officer, an adjudicator or a mediator when the lawyer, the lawyer's associates or the client have business or personal relationships with ~~such~~ the judicial officer, adjudicator or mediator that may reasonably be perceived to affect the impartiality of the judicial ~~such~~ officer, adjudicator or mediator,
(d) attempt or acquiesce in anyone else attempting, directly or indirectly, to influence the decision or actions of a court or tribunal or any of its officials by any means except open persuasion as an advocate,	(d) attempt or acquiesce in anyone else attempting, directly or indirectly, to influence the decision or actions of a court or tribunal or any of its officials by any means except open persuasion as an advocate,
	(e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,
	(f) deliberately refrain from informing the court or tribunal of any pertinent authority directly on point and which

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has not been mentioned by an opponent,	has not been mentioned by an opponent,
(g) dissuade a material witness from giving evidence, or advise such a witness to be absent,	(g) dissuade a material witness from giving evidence, or advise such a witness to be absent,
(h) knowingly permit a party or a witness to be presented in a false way, or to impersonate another person, or	(h) knowingly permit a party or a witness to be presented in a false way, or to impersonate another person, or
(i) appear before a court or tribunal while impaired by alcohol or a drug.	(i) appear before a court or tribunal or in a mediation or other dispute resolution process while impaired by alcohol or a drug.
	[Recommendation 7]
Offering to give false testimony	**Offering to give false testimony**
2. Where a client advises the lawyer that the client intends to offer false testimony in a proceeding, the lawyer shall explain to the client the lawyer's professional duty to withdraw if the client insists on offering, or in fact does offer, false testimony.	2. ~~Where~~ If a client advises the lawyer that the client intends to offer false testimony in a proceeding or make false statements in an alternative dispute resolution process, the lawyer must ~~shall~~ explain to the client the lawyer's professional duty to withdraw if the client ~~enters on or persists in the dishonest conduct.~~ insists on offering, or in fact does offer, false testimony.
	[Recommendation 7]
3. Where a client who has been counselled in accordance with Rule 2 advises the lawyer that the client intends to offer false testimony in a proceeding the lawyer shall, in accordance with Chapter 10, withdraw from representing the client in that matter.	3. ~~Where~~ If a client who has been counselled in accordance with rule 2 advises the lawyer that the client intends to offer false testimony in a proceeding or make false statements in an alternative dispute resolution process, the lawyer must ~~shall, in accordance with Chapter 10,~~ withdraw from representing the client in that matter, in accordance with Chapter 10.
	[Recommendation 7]
4. A lawyer who withdraws under Rule 3 shall not disclose to the court or tribunal, or to any other person, the fact that the withdrawal was occasioned by the client's insistence on offering false testimony.	4. A lawyer who withdraws under rule 3 ~~shall~~ must not disclose to the court or tribunal, or to any other person, the fact that the withdrawal was occasioned by the client's insistence on offering false testimony or otherwise misleading participants in the process.
	[Recommendation 7]
Inconsistent statements or testimony	**Inconsistent statements or testimony**
6. Mere inconsistency in a client's or witness's	6. Mere inconsistency in a client's or witness's

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statements or testimony, or between two proffered defences, is insufficient to support the conclusion that the person will offer or has offered false testimony. However, the lawyer shall explore the inconsistency with the client or witness at the first available opportunity. If, based on that enquiry, the lawyer is certain that the client or witness intends to offer false testimony, then the lawyer shall comply with Rules 2 to 5. Otherwise, the lawyer is entitled to proceed, leaving it to the court or tribunal to assess the truth or otherwise of the client's or witness's statements or testimony.	statements or testimony, or between two proffered defences, is insufficient to support the conclusion that the person will offer or has offered false testimony. However, the lawyer ~~shall~~ must explore the inconsistency with the client or witness at the first available opportunity. If, based on that enquiry, the lawyer is certain that the client or witness intends to offer false testimony~~, then~~ or otherwise mislead a tribunal or participants in another dispute resolution process, the lawyer ~~shall~~ must comply with rules 2 to 5. Otherwise, the lawyer is entitled to proceed, leaving it to the ~~court or~~ tribunal or participants in the dispute resolution process to assess the truth or otherwise of the client's or witness's statements or testimony. [Recommendation 7] **Dispute resolution processes** 23. Legal counsel has a continuing obligation to canvass with each client, in a fully informed manner, all appropriate dispute resolution processes. [Recommendation 6]
	CHAPTER 8.1 **THE LAWYER AS NEUTRAL** **Principle** 1. A lawyer-mediator must be impartial and must avoid any conflict of interest or appearance of conflict of interest with respect to parties to a mediation. [Recommendation 13] **Acting against a party with whom a lawyer *has an existing* mediation relationship** 2. A lawyer must not represent a client for the purpose of acting against the interests of a party for whom the lawyer or a member of the lawyer's firm is currently providing mediation services unless: (a) the party for whom the lawyer is

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	providing mediation services is informed that the lawyer proposes to so act, and both the client and the party for whom the lawyer is providing mediation services consent to the new representation, (b) the new representation is substantially unrelated to the matter for which the lawyer or member of the lawyer's firm is providing mediation services, and the lawyer does not possess confidential information arising from the mediation that might reasonably affect the new representation, and (c) the consent of the party for whom the lawyer is providing mediation services can be inferred, absent contrary instructions, in those circumstances where consent would be inferred from a client by the operation of rule 6.4 of Chapter 6. [Recommendation 14] **Acting against a party with whom a lawyer *has had* a mediation relationship** 3. A lawyer must not represent a client for the purpose of acting against the interests of a party for whom the lawyer or a member of the lawyer's firm has provided mediation services unless: (a) the party for whom the lawyer has provided mediation services is informed that the lawyer proposes to act for a client adverse in interest to the party for whom the lawyer or member of the lawyer's firm has provided mediation services, and the party for whom the lawyer has provided mediation services consents to the new representation, or (b) the new representation is substantially unrelated to the matter for which the lawyer or member of the lawyer's firm provided mediation services, and the lawyer does not possess confidential

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	information arising from the mediation that might reasonably affect the new representation. [Recommendations 5, 11 and 14] **Understanding by the participants** 4. Before a lawyer-mediator may begin a mediation, he or she must be satisfied that the participants in the mediation understand: (a) the nature of the lawyer-mediator's role; and (b) that, throughout the mediation process, the lawyer-mediator does not act as legal counsel for any participant. [Recommendation 19] 5. Before lawyer-mediator may begin a mediation, he or she must consider whether or not to require that the parties to the mediation agree in writing with respect to any or all of the following matters: (a) the extent to which the parties will disclose all relevant information to each other; (b) the extent that the lawyer-mediator will disclose to each participant, during the course of the mediation, information provided by the other participants (c) whether communications between the participants and between each participant and the mediator will be treated as "without prejudice". [Recommendation 20] 6. Before lawyer-mediator may begin a mediation, he or she must consider whether or not to require that the parties to the mediation acknowledge that they are aware that: (a) the lawyer-mediator may disclose information received in mediation if the mediator has reasonable grounds to

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	believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person; and (b) in matters involving children, the lawyer-mediator must report to the Director of Child, Family and Community Services any instance arising from the mediation in which the lawyer-mediator has reasonable grounds to believe that a child is in need of protection. [Recommendation 21] **Independent legal advice** 7. Before the participants in mediation execute an agreement, the lawyer-mediator must consider must consider whether it is necessary or advisable for the participants to obtain independent legal advice. In circumstances that indicate a need for independent legal advice, the lawyer-mediator must encourage each participant to obtain independent legal advice. Circumstances that indicate a need for independent legal advice include, but are not limited to, the following: (a) one or more relatively unsophisticated participants; (b) a power imbalance between the participants; (c) the lawyer-mediator's concerns about the fairness or reasonableness of the agreement; (d) a complex or difficult subject matter of the agreement that would benefit from independent legal advice as a check on the viability of the agreement; (e) the lawyer-mediator's concerns about the enforceability or finality of the agreement. [Recommendation 15]

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	Implementing an agreement 8. A lawyer-mediator is permitted to take legal steps to assist the parties in implementing the terms of an agreement made in mediation only if: (a) the lawyer-mediator is instructed to do so by all parties; and (b) to do so is not prohibited under the Rules or this Handbook. [Recommendation 17] 9. A lawyer-mediator who has mediated a family law or separation agreement is permitted to act for both parties to a joint divorce claim only if: (a) all relief sought, other than the divorce itself, is to be granted by consent; and (b) both parties have received independent legal advice in relation to the matter. [Recommendation 18]
CHAPTER 14 MARKETING OF LEGAL SERVICES **Application of Chapter** 1. This Chapter applies to any marketing activity undertaken or authorized by a lawyer in which he or she is identified as a lawyer, mediator or arbitrator. 19. A lawyer who has been accredited by the Law Society as a family law mediator may so state in any marketing activity.	**CHAPTER 14** MARKETING OF LEGAL SERVICES **Application of Chapter** 1. This Chapter applies to any marketing activity undertaken or authorized by a lawyer in which he or she is identified as a lawyer, mediator or arbitrator. 19. A lawyer who ~~has been accredited~~ meets the qualifications required by the Law Society for practising as a ~~family law~~ relationship mediator may so state in any marketing activity. [Recommendation 24]

APPENDIX 2 FAMILY LAW MEDIATION	~~**APPENDIX 2**~~ ~~FAMILY LAW MEDIATION~~
Definitions	~~**Definitions**~~
1. In this Appendix:	~~1. In this Appendix:~~
(a) **"family law mediation"** means a process by which two adult persons ("participants") attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce;	~~(a) **"family law mediation"** means a process by which two adult persons ("participants") attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce;~~
(b) without limiting the generality of the foregoing, "family law mediation" includes one or more of the following acts when performed by a lawyer acting as a family mediator:	~~(b) without limiting the generality of the foregoing, "family law mediation" includes one or more of the following acts when performed by a lawyer acting as a family mediator:~~
(i) informing the participants of the legal issues involved,	~~(i) informing the participants of the legal issues involved,~~
(ii) advising the participants of a court's probable disposition of the issue,	~~(ii) advising the participants of a court's probable disposition of the issue,~~
(iii) preparing any agreement between the participants other than a memorandum recording the results of the mediation,	~~(iii) preparing any agreement between the participants other than a memorandum recording the results of the mediation,~~
(iv) giving any other legal advice.	~~(iv) giving any other legal advice.~~
2. [Rescinded February, 1993]	~~*2. [Rescinded February, 1993]*~~
Disqualifications	~~**Disqualifications**~~
3. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is presently acting for one or both of the participants to the mediation in a solicitor-client relationship with respect to any matter which may reasonably be expected to become an issue during the family law mediation,	~~3. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is presently acting for one or both of the participants to the mediation in a solicitor-client relationship with respect to any matter which may reasonably be expected to become an issue during the family law mediation,~~

that lawyer may not act as a family law mediator for the participants.	~~that lawyer may not act as a family law mediator for the participants.~~
(b) If a lawyer has acted as a family law mediator for the participants, neither that lawyer, nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant.	~~(b) If a lawyer has acted as a family law mediator for the participants, neither that lawyer, nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant.~~
(c) If a lawyer, or a partner, associate or employee of that lawyer has acted as a family law mediator for the participants, neither that lawyer, nor a partner, associate or employee of that lawyer may act for or against any person where to do so might require the lawyer to disclose or make use of confidential information given in the course of mediation.	~~(c) If a lawyer, or a partner, associate or employee of that lawyer has acted as a family law mediator for the participants, neither that lawyer, nor a partner, associate or employee of that lawyer may act for or against any person where to do so might require the lawyer to disclose or make use of confidential information given in the course of mediation.~~
Mediator's duties	**~~Mediator's duties~~**
4. A lawyer who acts as a family law mediator must ensure that if agreement is reached between the participants and as a result the lawyer drafts a document representing the agreement reached, the lawyer actively encourages each participant to obtain independent legal advice before executing the agreement.	~~4. A lawyer who acts as a family law mediator must ensure that if agreement is reached between the participants and as a result the lawyer drafts a document representing the agreement reached, the lawyer actively encourages each participant to obtain independent legal advice before executing the agreement.~~
Written agreement	**~~Written agreement~~**
5. A lawyer who acts as a family law mediator and the participants with respect of whom the lawyer mediates shall, before mediation commences, enter into a written agreement which shall include at least the following provisions:	~~5. A lawyer who acts as a family law mediator and the participants with respect of whom the lawyer mediates shall, before mediation commences, enter into a written agreement which shall include at least the following provisions:~~
(a) an agreement that the lawyer, throughout the mediation process, is not acting as legal counsel for either participant,	~~(a) an agreement that the lawyer, throughout the mediation process, is not acting as legal counsel for either participant,~~
(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant which is relevant to the issues being mediated,	~~(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant which is relevant to the issues being mediated,~~
(c) an agreement that the mediation process	~~(c) an agreement that the mediation process~~

is part of an attempt to settle the differences between the participants and that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:	~~is part of an attempt to settle the differences between the participants and that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:~~
(i) neither participant will attempt to introduce evidence of the communications in any legal proceedings,	~~(i) neither participant will attempt to introduce evidence of the communications in any legal proceedings,~~
(ii) neither participant will attempt to call the mediator as a witness in any legal proceedings,	~~(ii) neither participant will attempt to call the mediator as a witness in any legal proceedings,~~
(d) an acknowledgment that the lawyer must report to the Superintendent of Family and Child Services any instance arising from the mediation in which the lawyer has reasonable grounds to believe that a child is in need of protection,	~~(d) an acknowledgment that the lawyer must report to the Superintendent of Family and Child Services any instance arising from the mediation in which the lawyer has reasonable grounds to believe that a child is in need of protection,~~
(e) an agreement as to the lawyer's rate of remuneration and terms of payment,	~~(e) an agreement as to the lawyer's rate of remuneration and terms of payment,~~
(f) an agreement as to the circumstances in which mediation will terminate.	~~(f) an agreement as to the circumstances in which mediation will terminate.~~ [Recommendation 11]