



DISPUTE SETTLEMENT ACCREDITATION COUNCIL

["DISAC"]

**ACCREDITATION STANDARDS FOR
COURT BASED MEDIATION ["CBM"]**

DISCUSSION DOCUMENT

**VERSION 3
JANUARY 2012**

**PREPARED BY HENDRIK KOTZE
OBO DISAC**

TABLE OF CONTENT

1	Introduction	3
2	Overview of other Jurisdictions	4
2.1	United Kingdom	4
2.2	Ontario, Canada	5
2.3	Philippines	9
2.4	Australia	11
2.5	USA	18
2.6	Florida, USA	19
2.7	Texas, USA	20
2.8	Malaysia	20
2.9	Singapore	20
2.10	Italy	22
2.11	IMI Professional Mediator Competency Certification	23
2.12	Analysis and Conclusions	24
3	Special Skills Requirements for CBM	25
3.1	CBM is a Fundamental Culture Change	25
3.2	CBM and Access to Justice	26
3.3	Style of Mediation	27
3.4	CBM and Judicial Administration	29
3.5	Objectives and Evaluative Standards for CBM Project	29
3.6	Continued Professional Development	29
4	Other Requirements	30
4.1	Must Court Mediators be Lawyers?	30
4.2	Minimum Age Requirement?	31
4.3	Academic Qualifications & Experience?	31
4.4	Language Proficiency?	31
4.5	Moral Character?	32
5	Further Issues	33
5.1	Seniority Ranking Systems for Court Mediators	33
5.2	Assessment, Supervision and Accreditation	34
5.3	Mediation Fees & Procedures	35
5.4	Case Administration	37
5.5	Accreditation of Service Providers	39
6	A Draft Standard	40
Annexures		43
	Annexure A: Mediation Rules – Rules Board	43
	Annexure B: General Overview of other Jurisdictions	48
	Annexure C: Cultural Change	52
	Annexure D: DiSAC General Commercial Accreditation Standards	57
	Annexure E: DiSAC’s Standard for the Accreditation of Mediation Service Providers	58
	Annexure F: Comments from the United Kingdom	63

1 Introduction

The Rules Board recently published the Mediation Rules, which according to the Department of Justice, will be implemented on a pilot basis early in 2012,

The Rules provide the following with regard to the qualification and appointment of Mediators under the scheme:

12. *Qualification and appointment of Mediators*

(1) The qualification and standards of fitness of Mediators to conduct mediation referred to in these rules must be determined by the Minister.

(2) The Minister may periodically appoint mediators to serve on a Panel from which mediators may be selected to execute the functions and objectives described in these rules.

DiSAC, being representative of the mediation industry in South Africa, has a direct interest in the determination of qualifications for mediators under this scheme. Accordingly this discussion document was commissioned.

It is proposed that once the terms of the draft standard contained in this document have been considered by the DiSAC executive, this discussion document be presented to the Justice Department and the Rules Board as the basis for further engagement regarding the determination of such standards.

2 Overview of other Jurisdictions

This section provides an overview of the approach followed in other jurisdictions with regard to accreditation of mediators in court based mediation schemes.

2.1 United Kingdom

Fixed-rate mediation is available from providers listed on the government's Civil Mediation Directory (which replaced the National Mediation Helpline in October 2011). This is an online tool that helps users to locate a mediation provider for a money-based (commercial) dispute. All providers listed are accredited by the Civil Mediation Council.

The website of the Ministry of Justice in the UK states the following:

<http://www.civilmediation.justice.gov.uk/>

“Find a Civil Mediation provider

All the mediation providers listed are accredited by the Civil Mediation Council, and employ local, professional and experienced mediators.

This service provides members of the public and businesses with a simple low-cost method of resolving a wide range of civil disputes out of court.

The fees opposite are based on the total value of the dispute (claim plus any counter-claim) and the time the mediation is expected to take. Extension fees are chargeable for any extra time agreed by the participants. There may also be venue hire costs, although these are often avoidable.

On contacting your chosen provider it is important that you inform them that you have located their details via the online directory of civil mediators. In quoting this information the services will be provided on a fixed-fee basis.”

According to the CIVIL MEDIATION COUNCIL PROVIDER ACCREDITATION SCHEME, the standards of Mediator training are : “

B. Mediator Training

- (1) An Accredited Mediation Provider's mediators must have successfully completed an assessed training course.
- (2) That course must include training in ethics, mediation theory, mediation practice, negotiation, and role play exercises.
- (3) If the mediator is not professionally qualified in a discipline which includes law, the mediator must demonstrate a grasp of basic contract law if he/she is to undertake civil or commercial mediations.
- (4) For mediators who will have attended a training course up to 31st March 2011, the course and its assessment must have complied with the following requirements:
 - (i) Performance during or on completion of training must be assessed.
 - (ii) The training course will include not less than 24 hours of tuition and role-play followed by a formal assessment.

(5) For mediators who attend a training course from 1st April 2011 onwards, the course and its assessment must comply with the following requirements:

(i) Assessors are to meet the criteria of the CMC Accreditation Scheme in terms of training, observations, CPD and practice requirements. Assessors are to be separate from those delivering the training.

(ii) Performance during or on completion of training must contain at least one separate assessment phase of at least one hour where the assessment is continual, and at least two separate assessments of at least one hour each where the assessment is carried out on separate days.

(iii) Assessment criteria are as a minimum to include:-

a) an appropriate and safe environment is set by the participant-mediator which is conducive to problem-solving;

b) the role of mediator to be fully and properly articulated;

c) the principles of confidentiality, neutrality and facilitation be evidenced;

d) trust and rapport be established;

e) necessary skills to explore issues, interests and options be applied;

f) the ability to manage the parties and the process be clear;

g) the ability to advance resolution through the application of negotiation and communication skills be seen;

h) proper consideration of ethical issues as they arise.

(iv) The training course will include not less than 40 hours of face to face tuition and role-play followed by a formal assessment. Lunch and coffee breaks are excluded.

(v) The training course will include not less than 50% role plays with 50% of these supervised.

(vi) The classroom/lecture setting should not exceed 40 delegates.

(6) An Accredited Mediation Provider bears the responsibility of being satisfied that members have in fact successfully completed a recognised mediation training course and assessment. The CMC maintains a list of recognised mediation training providers and suggests that sight of an accreditation certificate from such a provider will suffice.

2.2 Ontario, Canada

Local Mediation Committee Guidelines for Selecting Mediators - Ontario Mandatory Mediation Program (see <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/guidelines.asp>)

BASIC UNDERPINNINGS OF THE MANDATORY MEDIATION PROGRAM

To be considered for the roster of mediators, applicants must agree to abide by the following provisions noted under this section.

Commitments:

Mediators who are on the mandatory mediation roster are required to make a number of commitments as a condition of being on the roster including:

- providing mediation services at a fee stipulated by regulation under the Administration of Justice Act;
- attending an orientation session and any other training that may be required for roster mediators under the Mandatory Mediation Program;
- abiding by the Code of Conduct, Complaints Procedure and any other policies and procedures under the Mandatory Mediation Program;
- maintaining with proof, professional liability insurance with a minimum coverage of one million dollars;
- agreeing to conduct up to twelve hours of pro bono mediations per year in accordance with the Program's Access Plan;
- acting as a mentor, if requested, in accordance with the Program's mentoring policy;
- participating in program evaluations as required, including providing statistical information as may be requested; and
- paying any fees that may be required.

Mediation Process:

The mediation process involves the use of collaborative techniques by a mediator who is a neutral third party. The mediator informally assists disputing parties in voluntarily reaching their own mutually acceptable settlement of some or all of the issues in dispute by structuring the negotiation, maintaining the channels of communication, articulating the needs of each party, and identifying the issues. Mediators must be committed to a process that is: voluntary; private; confidential; self-determining; creative; practical and flexible.

Mediator Skills:

Mediators are not decision-makers or judges. Generally speaking, mediators display the following attributes: patience; acceptance of individual differences; flexibility; creativity/inventiveness; practicality; task-oriented; objectivity; focus; ability to analyse; intelligence; ability to recognize and manage power; strong verbal skills; active listening skills; ability to control the process without dominating the parties; and, confidence in the ability of the process to generate a satisfactory result.

SELECTION CRITERIA:

The following criteria will be considered by Local Mediation Committees in the selection of mediators:

1. EXPERIENCE AS A MEDIATOR; TRAINING IN MEDIATION; and EDUCATIONAL BACKGROUND

Experience as a Mediator:

It is important that parties who retain mediators in the Mandatory Mediation Program have confidence in the skill and competence of the mediator. The 'Experience as a Mediator' criterion is designed to recognize direct and indirect experience in dispute resolution and to ensure an inclusive selection process. It also recognizes as suitable candidates those individuals who have experience that is closely related to mediation and which is indicative of potential success as a mediator.

Relevant factors under the experience criterion include:

- the number of times the candidate has been retained as a mediator;
- candidate's role in mediation (ie: sole mediator, co-mediator, observer or student with feedback from an instructor);
- involvement in the mediation community;
- complexity of the mediated disputes;

- types of cases mediated.

Consideration can be given to candidates with mediation experience in counseling, pastoral care, social work, law, work with or within agencies, boards, commissions or tribunals and workplace settings where dispute resolution or conflict management was part of their responsibility. Mediation experience can include paid and volunteer mediations.

Candidates must have conducted at least five mediations as a sole or co-mediator.

Training in Mediation:

This criterion is intended to identify candidates who have demonstrated a commitment to acquiring and upgrading professional skills in mediation and dispute resolution theory and techniques. Candidates will be scored on the basis of their experience in learning skills in diverse areas of dispute resolution topics.

Factors which will be considered relevant for selecting candidates to the roster include:

- the type of training program(s) taken;
- the numbers of hours of training received;
- the nature of the training -- whether theoretical, practical or a combination;
- the extent to which the training covered such topics as interest-based mediation, conflict analysis, negotiation, ethics, confidentiality, role-playing, cross-cultural sensitivity and power imbalances;
- involvement in dispute resolution mentoring or training programs, including the role of the candidate (lead, assistant etc.) and the nature and length of their involvement;
- public speaking or teaching on the issues of dispute resolution at schools, colleges, universities or in any other community forums;
- role in development of training courses and material.

Normally, candidates are to have a minimum of 40 hours of training. For individuals who may not meet this training criterion but are long-standing practitioners of mediation or trainers in mediation, the Local Mediation Committee may, in its discretion, accept those qualifications in place of the formal training requirements.

Educational Background:

This category is intended to recognize a variety of professional designations.

Relevant factors include the educational history of the candidate, the disciplines in which the candidate is trained and their connection to mediation skills.

2. FAMILIARITY WITH THE CIVIL JUSTICE SYSTEM

This criterion assesses a candidate's knowledge of civil procedure and the role of mediation in the civil justice system.

Candidates should demonstrate an understanding of how mediation supports the civil justice system. Applicants must have appropriate familiarity with the rules of civil procedure, the litigation process, the judicial system, and case management rules. Mediators selected for the roster will participate in an orientation session and receive a manual for reference purposes.

3. REFERENCES

Candidates will be asked to provide three references who can address the candidate's mediation skills and commitment to the values and principles of mediation.

CRITERIA AND SCORE SHEET FOR EVALUATING APPLICANTS FOR THE MANDATORY MEDIATION ROSTER

For the purposes of appointment to the roster, mediator qualifications will be assessed on the following criteria: experience as a mediator/dispute resolver, training, educational background, familiarity with the civil justice system and references. The maximum possible score is 100 points. Candidates should score a minimum of 60 points in order to qualify for appointment to the roster and must also satisfy the qualifications below. (Some candidates may also be asked to participate in an interview).

1. EXPERIENCE AS A MEDIATOR, TRAINING IN MEDIATION & EDUCATIONAL BACKGROUND

There are a maximum of 65 points that may be scored for the criteria in this section. To qualify for the roster, a mediator must:

1. *have conducted at least 5 mediations as a sole or co-mediator;*
2. *have a minimum overall aggregate score of 40 points out of 65; and*
3. *have a minimum overall aggregate score of 20 points out of 45 for the combined criteria (a + c) in this section of experience as a mediator and training as a mediator.*

CRITERIA	SCORE
a. Number of Mediations (score for one class only):	
• 5-10	• up to 10 points
• 11-20	• up to 15 points
• 21+	• up to 20 points
b. Role in mediations (score for one class only):	
• if 60% + of mediations done as observer or student with feedback from instructor	• up to 5 points
• if 60% + of mediations done as co-mediator	• up to 10 points
• if 60% + of mediations done as sole mediator	• up to 15 points
c. Training in Mediation (score for one class only):	
• 40 - 50 hours of mediation training	• up to 15 points
• 51+ hours of training	• up to 25 points
d. Educational Background and Related Experience:	
	• up to 5 points

2. FAMILIARITY WITH THE CIVIL JUSTICE SYSTEM

A maximum of 30 points may be scored for this criterion, and to qualify, a candidate must score at least 20 points.

CRITERIA	SCORE
a. Familiarity with civil justice system/procedures/rules:	
	• up to 30 points

3. REFERENCES

Referee's assessment of the candidate's aptitude and skill in mediating (significant involvement in the mediation community may also be considered under this criterion).

CRITERIA

SCORE

a. Referees' assessment of the candidate's aptitude and skill in mediating and Significant involvement in the mediation community:

- up to 5 points

TOTAL POSSIBLE POINTS

100 points

2.3 Philippines

“Court-Annexed Mediation, as practiced in the Philippines, is an enhanced pre-trial procedure that involves settling mediatable cases filed in court with the assistance of a mediator who has been accredited by the Philippine Supreme Court. The mediator assists party litigants to identify issues and develop proposals to resolve their disputes. Since the installation of the JURIS Project in 2003, the process has come to include the Judicial Dispute Resolution (JDR). Mediation has also moved upward from the trial court level to the Appeals Court level.

The effectiveness of court-annexed mediation rests heavily on mediators. We have professional Mediators. They undergo basic training for five days, and an Internship Program for one month under the guidance of mentors. During this period, they handle actual court cases. They are accredited by the Supreme Court. They are officers of the court when in the performance of their functions. They are bound by a Code of Ethical Standards for Mediators. They must be ready to serve pro bono, or at a reduced rate, for the financially disadvantaged in society. Only those accredited by the Court are qualified to mediate in court-annexed mediation.”

COURT ANNEXED MEDIATION (CAM) - MAKING IT WORK•THE PHILIPPINE EXPERIENCE

Hon. Ameurfina Melencio Herrera, Chancellor, Philippine Judicial Academy

7 STANDARDS AND PROCEDURES FOR ACCREDITATION OF MEDIATORS FOR COURT REFERRED, COURT RELATED MEDIATION CASES

7.1 Basic Qualifications of Prospective Mediators:

- 1) Bachelor’s degree
- 2) At least 30 years of age
- 3) Good moral character
- 4) Willingness to learn new skills and render public service
- 5) Proficiency in oral and written communication in English and Pilipino

7.2 Requirements/Procedure

- 1) All applicants must submit the following to PHILJA:
 - Curriculum Vitae with 2x2 picture
 - College School Records
 - NBI/Police Clearance
 - Certificates of good moral character from two (2) persons who are not related to the applicant
- 2) Upon submission, PHILJA and its technical assistant shall:
 - Administer a short written comprehension examination
 - Interview and evaluate each applicant
 - Schedule qualified applicants for training

- 3) All qualified applicants must successfully complete the following:
 - Basic Mediation Seminar-Workshop including a short written exercise to test their proficiency in oral and written communication;
 - Four-week Internship Program
- 4) PHILJA requests training services from other organizations or individuals, the organization or individual shall submit to PHILJA after the training of the following:
 - certification of satisfactory completion of the program;
 - summarized report on the overall performance of each trainee/applicant
- 5) Upon satisfactory completion of all the requirements, the PMC or the training organization shall prepare a report of the overall performance of each trainee/applicant for submission to PHILJA.
- 6) On the basis of the report, PHILJA shall submit to the Court its recommendation of Mediators for accreditation.
- 7) If approved by the Court, the accreditation shall be effective for a period of two (2) years. To maintain good standing, the Mediator must:
 - a) continue to be of good moral character;
 - b) render mediation services at least once a week to any PMC Unit;
 - c) participate during Settlement Weeks; and
 - d) complete refresher courses to be prescribed by PHILJA within the two (2) year period.

Failure to maintain good standing shall be a cause for the revocation and/or non-renewal of the accreditation.

VII. ACCREDITATION OF MEDIATORS

1. The accreditation of mediators shall be effective for a period of two (2) years. To maintain good standing, the Mediator must attend at least 75% of all activities conducted by the PMC, including but not limited to refresher courses, meetings and other trainings within the two (2) year period. In addition, the Mediator must fulfill his commitment to serve the PMC Unit, continue to be of good moral character, and participate in the annual Settlement Month. In case the Mediator has other commitments within which he will not be able to comply with any of the aforementioned requirements, the concerned Mediators should inform PHILJA-PMC regarding the reasons therefor at least one (1) week before the activity.
2. For purposes of upgrading the level of Mediators on the next accreditation, each case settled is equivalent to one case. When there is consolidation of cases by the trial court and the Mediator for all such cases perform only one mediation proceeding, then such consolidated cases settled are considered as only one case.
3. After the expiration of the Mediator's accreditation, the Mediator's conduct and performance shall be extensively reviewed by his respective PMC Coordinator for recommendation to the Evaluation and Accreditation Committee to determine whether the concerned Mediator can be re-accredited. With respect to the Coordinator, his conduct and performance shall likewise be reviewed by the PHILJA upon consultation with the respective Executive Judge, Clerk-of-Court and Mediators in the Unit.
4. Only PHILJA-PMC sponsored or accredited activities will be considered for the determination of official attendance. The training programs of PMFI (or the organization enlisted by PHILJA to give technical and management assistance) may be accredited by PHILJA upon submission of the proposed program before the aforesaid activity and upon submission of a report thirty (30) days after the training. Attendance in any other training aside from those conducted by PMFI (or the organization enlisted by PHILJA to give technical and management assistance) on mediation may be allowed but will not be considered as completion of the requirements for accreditation.

5. For the purpose of maintaining good standing and complying with the requirement of attending 75% of all activities conducted by the PMC, attendance in foreign trainings and conferences may be credited provided the Mediators submit the description of the program one (1) month before the said activity for assessment by PHILJA/ PMFI (or the organization enlisted by PHILJA to give technical and management assistance). If the program is relevant, attendance of the Mediators in the said activity will be considered. At the end of the program, the Mediator concerned must also submit a brief report and proof of attendance. Upon submission, PHILJA shall issue a confirmation that the program was credited.

http://pmc.judiciary.gov.ph/downloads/ADR_Operations_Manual_-_AM_No_04-03-15_SC.pdf

2.4 Australia

In **New South Wales**, section 26 of the Civil Procedure Act 2005 provides:

- (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.
- (2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.

In this section, listed mediator means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.

This provision applies to civil proceedings in the Supreme Court, the Land and Environment Court, the District Court and the General Division of the Local Court.

In the NSW Supreme Court, both private and court-annexed mediation may be arranged for most civil matters. Parties may request referral to mediation and, as noted above, the Court has the power to make a referral with or without their consent.

With court-annexed mediation, there is no charge to the parties for the mediator or the use of the room. The mediator is assigned to the dispute from among the registrars and officers of the Court who are qualified mediators. Between 1 July 2007 to 31 March 2008 the settlement rate for 287 court-annexed mediations was 49%.

With private mediation there are usually fees for the mediator and for the use of the room, and there may be other costs as well. The mediator is chosen by the parties. If the parties cannot agree on a mediator, the Supreme Court has a joint protocol arrangement with six mediation provider organisations that have agreed to maintain panels of suitably qualified mediators. If the parties are still unable to agree, the Court may appoint the mediator itself.

For both private and court-annexed mediation, if the parties resolve their dispute at mediation, they may make a written agreement and have orders made by the Court to finalise the case. The orders can be enforced if necessary.

In the District Court any civil matter in the Case Managed List (CML) is eligible for referral to mediation. When a pre-trial conference is held (usually 2 or 3 months after a statement of claim is filed) the Court will either allocate a trial or arbitration date, or refer the parties to mediation.

As in the other courts, parties may either elect to use mediators of their own choice, or those appointed by the court. Court-annexed mediation is conducted by assistant registrars. In 2007, 103 matters were referred to court-annexed mediation and 49% settled at or prior to mediation. In 2008, the Sydney District Court referred 476 matters to mediation – 133 to court-annexed mediation and 343 to private mediation.

The mediation provisions of the Uniform Civil Procedure Act do not apply in the Small Claims Division of the Local Court (where only about 10% of matters are defended). In the General Division only about 20% of matters are defended, and of these, about 50% settle.¹ The Local Court does not offer court-annexed mediation in the General Division.

As noted above, about half the matters referred to court-annexed mediators settle. It is not known how this compares with the settlement rates of private mediators, or whether court-annexed mediation alters the ratio between cases tried and settled.

It is not clear that court-annexed mediation produces significant savings. Early case management may be more efficient in encouraging the early resolution of disputes. When pre-action protocols and case management reforms were introduced in England following the Woolf report, an evaluation found that while settlement rates improved, this was not matched by a corresponding increase in the use of ADR.

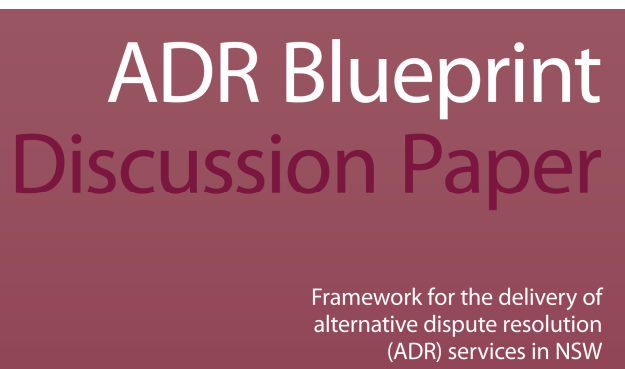
Mediator Accreditation

Until recently, there were no nationally consistent mediation accreditation standards in existence in Australia. On 1 January 2008, however, the National Mediator Accreditation System commenced operation. The new System has been introduced to enhance the quality of national mediation services, to improve the credibility of ADR, and to build consumer confidence in ADR services.

The National Mediator Accreditation System is industry-based, relying on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. Such mediator organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs), and in NSW include the Law Society of NSW, the NSW Bar Association, and the Institute of Arbitrators and Mediators. The criteria for accreditation under the National Mediator Accreditation System include, amongst other things: evidence of good character; at least 25 hours of mediation, co-mediation or conciliation within a two year cycle; and, at least 20 hours of continuing professional development within a two year cycle.

The system is voluntary for those mediators who wish to obtain accreditation. However, for example, the Bar Association and Law Society have determined that only those barristers and solicitors who are accredited under the National Standards will be selected in future for the District Court and Supreme Court mediators' panels.

Certain courts in other jurisdictions have determined that all court-annexed mediations (where a registrar or other officer of the court is the mediator) are to be carried out by a person accredited under the National Mediator Accreditation System. In order to build consumer confidence in ADR services, NSW Courts could adopt a similar approach.



New South Wales Government
Attorney General's Department

Taken from:

The National Mediator Accreditation System is provided below:

Approval Standards

1 Application

- 1) These Approval Standards apply to any person who voluntarily seeks to be accredited under the National Mediator Accreditation System ('the system') to act as a mediator and assist two or more participants to manage, settle or resolve disputes or to form a future plan of action through a process of mediation. Practitioners who act in these roles are referred to in these Approval Standards as mediators.
- 2) The Approval Standards:
 - a) specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system; and
 - b) define minimum qualifications and training; and
 - c) assist in informing participants, prospective participants and others what qualifications and competencies can be expected of mediators.
- 3) As a condition of ongoing approval, mediators must comply with the Practice Standards and seek re-approval in accordance with these Approval Standards every two years. These Approval Standards should be read in conjunction with the Practice Standards that apply to mediators.
- 4) Mediation can take place in all areas where decisions are made. For example, mediation is used in relation to commercial, community, workplace, environmental, construction, family, building, health and educational decision making. Mediation may be used where there is conflict or may be used to support future decision making. Mediators are drawn from diverse backgrounds and disciplines. Mediation may take place as a result of Court or Tribunal referral, pre-litigation schemes, through industry schemes, community-based schemes as well as through private referral, agency, self or other referral. These Approval Standards set out minimum voluntary accreditation requirements and recognise that some mediators who practice in particular areas, and/or with particular models, may choose to develop or comply with additional standards or requirements. Mediators may practice as 'solo' mediators or may co-mediate with another mediator.

2 Description of a Mediation Process

- 1) A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision.
- 2) The mediator[s] may assist the participants to:
 - a) communicate with each other; and
 - b) identify, clarify and explore disputed issues; and

- c) generate and evaluate options; and
 - d) consider alternative processes for bringing any dispute or conflict to a conclusion; and
 - e) reach an agreement or make a decision about how to move forward and/or enhance their communication in a way that addresses participants' mutual needs with respect to their individual interests based upon the principle of self determination.
- 3) Mediation processes are primarily facilitative processes. The mediator provides assistance in managing a process which supports the participants to make decisions about future actions and outcomes.
- 4) Some mediators may also use a 'blended' process that involves mediation and incorporates an 'advisory' component, or a process that involves the provision of expert information and advice, where it enhances the decision-making of the participants provided that the participants agree that such advice can be provided. Such processes may be defined as 'conciliation' or 'evaluative mediation.' Practitioners who manage such processes and provide expert advice are required to have appropriate expertise (see Section 5 (4) below) and obtain clear consent from the participants in respect of undertaking any 'blended' advisory process.
- 5) Mediation processes are a complement to, not a substitute for, the need for participants to obtain individual legal or other expert advice and support. Mediation processes may not be appropriate for all individuals or all circumstances.

3 Approval Requirements for Mediators

- 1) A mediator manages processes aimed at maximising the participants' own decision making. The mediator must have personal qualities and appropriate life, social and work experience to conduct the process independently and professionally. To be accredited, the Recognised Mediation Accreditation Body (RMAB) requires a mediator to provide the following:
- a) evidence of good character (see Section 3(2) below); and
 - b) an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements (see Section 3(3) below); and
 - c) evidence of relevant insurance, statutory indemnity or employee status (see Section 3(4) below); and
 - d) evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support (see Section 3(5) below); this may be the RMAB itself but may also include other relevant memberships or relationships; and
 - e) evidence of mediator competence by reference to education, training and experience (see Section 4 below).
- 2) RMABs require mediators who apply to be accredited to provide evidence of 'good character.' With respect to the requirement to be of 'good character', RMABs may, for example, request mediators to:

- a) provide evidence that they are regarded as honest and fair, and that they are regarded as suited to practice mediation by reference to their life, social and work experience, for example, by seeking references from two members of their community who have known them for more than three years; and
 - b) show that they can meet the requirements of a police check in the State or States or Territory or Territories in which they practise; and
 - c) show that they are without any serious conviction or impairment that could influence their capacity to discharge their obligations in a competent, honest and appropriate manner; and
 - d) show that they are accredited with an existing scheme that has existing 'good character' requirements that they comply with (for example, by referring to existing Law Institute, Law Society, Bar or Family Dispute Resolution Practitioner accreditation where relevant); and
 - e) satisfy the RMAB that they do not come into the category of a 'prohibited person' (or its equivalent) as defined in a particular jurisdiction and also not be disqualified to practice by another professional association relating to any other profession (for example, a Law Society or a Medical Association) or must explain to the RMAB the circumstances under which they have previously been removed or suspended from acting as a mediator under these standards.
- 3) The mediator must undertake to the RMAB to comply with any relevant legislation, these Practice and Approval Standards and any other approval requirements that may relate to particular schemes.
- 4) In respect of the insurance, indemnity or employed status requirements, the mediator must provide the RMAB with evidence of their current status. This may be provided in a range of ways, for example, by a letter setting out any relevant employee status, or by showing how indemnity applies, or by showing proof of membership that incorporates insurance status, or by the mediator naming their insurer, providing an insurance policy number and its expiry date or, through some other relevant document. If a mediator wishes to practice using a 'blended' model and in an advisory manner, the mediator must hold additional insurance relating to the provision of expert advice or must indicate how existing insurance, statutory or other immunities apply.
- 5) An RMAB must have the following characteristics:
- a) more than ten mediator members; and
 - b) provision of a range of member services such as, an ability to provide access to or refer mediators to ongoing professional development workshops, seminars and other programs and debriefing, or mentoring programs; and
 - c) a complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute; and,
 - d) sound governance structures, financial viability and appropriate administrative resources; and,
 - e) sound record-keeping in respect of the approval of practitioners and the approval of any in-house, outsourced or relevant educational courses; and,
 - f) the capacity and expertise to assess training and education that may be offered by a range of training providers in respect of the training and education requirements set out in these Standards.

An RMAB can be a professional body, a mediation agency or Centre, a Court or Tribunal, or some other entity.

4 Training and Education

- 1) Mediators must demonstrate to an RMAB that they have appropriate competence by reference to applicable practice standards, their qualifications, training and experience. It is not necessary for the RMAB to provide education and training to individual mediators (see Section 5 below). Training and education may be provided by organisations other than RMABs, such as, industry training providers, universities and other training providers.
- 2) A mediator is required to meet the threshold approval requirements detailed below (see Section 5 below), as well as ongoing professional education requirements. A mediator who uses a 'blended' process and provides information or advice in the context of a 'blended' process must be competent to do so and possess the appropriate skills, knowledge and expertise.

5 Threshold Training and Education Requirements

- 1) Unless 'experience qualified' (see Section 5 (3) below), from 1 January 2008, a mediator must have completed a mediation education and training course that:
 - a) is conducted by a training team comprised of a at least two instructors where the principal instructor[s] has more than three years' experience as a mediator and has complied with the continuing accreditation requirements set out in Section 6 below for that period and has at least three years' experience as an instructor; and
 - b) has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited; and
 - c) is a program of a minimum of 38 hours in duration (which may be constituted by more than one mediation workshop provided not more than nine months has passed between workshops), excluding the assessment process referred to in Section 5(2) below; and
 - d) involves each course participant in at least nine simulated mediation sessions and in at least three simulations each course participant performs the role of mediator; and
 - e) provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.
- 2) Unless 'experience qualified' (see Section 5(3) below), from 1 January 2008, a mediator must also have completed to a competent standard. a written skills assessment of mediator competence that has been undertaken in addition to the 38-hour training workshop referred to above , where mediator competence in at least one 1.5 hour simulation has been undertaken by either a different member of the training team or a person who is independent of the training team. The written assessment must reflect the core competency areas referred to in the Practice Standards. The final skills assessment mediation simulation may be undertaken in the form of a video or DVD assessment with role players, or as an assessed exercise with role players. The written report must detail:

- a) the outcome of the skills assessment (in terms of competent or not yet competent); and
 - b) relevant strengths and how they were evidenced; and
 - c) relevant weaknesses and how they were evidenced; and
 - d) relevant recommendations for further training and skills development.
- 3) 'Experience qualified' practitioners are those who have been assessed by an RMAB as demonstrating a level of competence by reference to the competencies expressed in the Practice Standards. An experience qualified mediator must either:
- a) be resident in a linguistically and culturally diverse community for which specialised skills and knowledge are needed and/or from a rural/or remote community where there is difficulty in attending a mediation course or attaining tertiary or similar qualifications; or
 - b) have worked as a mediator prior to 1 January 2008 and have experience, training, and education that satisfies an RMAB that the mediator is equipped with the skills, knowledge and understandings set out in the core competencies referred to in the Practice Standards, and who has met the continuing accreditation requirements set out in Section 6 below in the 24 months prior to making an application.
- 4) Practitioners who seek to offer advice through the use of a 'blended' process such as conciliation or advisory or evaluative mediation must also provide evidence to the RMAB of:
- a) their continuing registration, membership or equivalent within the professional area in which advice is to be given, and
 - b) completion of an appropriate degree, or equivalent qualification in the area of their expertise from a university or former college of advanced education, of at least four years equivalent full-time duration, or a VET-approved organisation to a National Framework Level 6 standards; and
 - c) a minimum of five years' experience in the professional field in which they seek to provide advice.

6 Continuing Accreditation Requirements

- 1) Mediators who seek to be reaccredited must satisfy their RMAB that they continue to meet the approval requirements set out in Section 3 of this document. In addition mediators seeking re accreditation must, within each two-year cycle, provide evidence to the RMAB that they have:
- a) sufficient practice experience by showing that they have either:
 - i) conducted at least 25 hours of mediation, co-mediation or conciliation (in total duration) within the two-year cycle; or,
 - ii) where a mediator is unable to provide such evidence for reasons such as, a lack of work opportunities (in respect of newly qualified mediators); a focus on work undertaken as a dispute manager, facilitator, conflict coach or related area; a family, career or study break; illness or injury, an RMAB may require the mediator to have completed no less than 10 hours of mediation, co-

mediation or conciliation work per two-year cycle and may require that the mediator attend 'top up' training or reassessment;

and,

- b) have completed at least 20 hours of continuing professional development in every two-year cycle that can be made up as follows:
 - i) attendance at continuing professional development courses, educational programs, seminars or workshops on mediation or related skill areas as referred to in the competencies (see the Practice Standards) (up to 20 hours);
 - ii) external supervision or auditing of their clinical practice (up to 15 hours);
 - iii) presentations at mediation or ADR seminars or workshops including two hours of preparation time for each hour delivered (up to 16 hours);
 - iv) representing clients in four mediations (up to a maximum of 8 hours);
 - v) coaching, instructing or mentoring of trainee and/or less experienced mediators (up to 10 hours);
 - vi) role playing for trainee mediators and candidates for mediation assessment or observing mediations (up to 8 hours);
 - vii) mentoring of less experienced mediators and enabling observational opportunities (up to 10 hours).
- 2) Ongoing accreditation as a mediator requires the mediator to meet the practice standards and competencies described in the Practice Standards. An RMAB has discretion to remove or suspend a mediator in circumstances where it believes, on the balance of probabilities, that there has been non compliance with the Practice Standards, other relevant ethical guidelines or professional requirements, or these Approval Standards. In relation to any removal or suspension, a mediator must be informed within 14 days of the concerns of the RMAB and provided with an opportunity to respond to the RMAB. The RMAB must have a process in place to deal with removal and suspension or must be able to provide access to a process where such decisions can be made in a procedurally fair manner.

2.5 USA

In United States, there has been no attempt to launch a uniform accreditation system. There was no national accreditation scheme either. The legislation is not unified, while some states have a quite sophisticated legislation concerning mediation, some other states only have the legislation about mediators working within the court system. With an eye towards establishing an appropriate nationwide accreditation system, the Association for Conflict Resolution (ACR) and the American Bar Association's Section of Dispute Resolution (ABA-DRS) each launched investigation task to promote the nationwide accreditation system.

The Association for Conflict Resolution (ACR) projected setting the standard for a system of accreditation, which was higher than that proposed in Australia, but the means approached the requirement level is not so strict as some of the most stringent states. Following very mixed feedback, however, the Association for Conflict Resolution protect away from the actually implementing its system of accreditation.

- Some states have fairly sophisticated laws concerning mediation. They have laws with clear expectations for certification, ethical standards and protections preserving the confidential nature of mediation by ensuring that a mediator need not testify in a case that they have worked on.
- Some states have laws that only relate to mediators working within the court system. Community and commercial mediators practising outside the court system may not be subject to the law and its legal protections.

- Although many states recommend qualifications for mediators, no state has requirements for practice of mediation.
- Rather than regulate the practice of mediation, some states have chosen to create lists of mediators meeting criteria for certain areas of practice.
- When states have guidelines or requirements for mediators who receive court referrals or appointments, judges commonly have discretion in applying these guidelines.
- Standard training courses comprise up to 50 hours.

For a general overview of requirements in all the US states see <http://www.mediationworks.com/medcert3/staterequirements.htm>

2.6 Florida, USA

Rule 10.100. General Qualifications

(a) **County Court Mediators.** For certification a mediator of county court matters must be certified as a circuit court or family mediator or:

- (1) complete a minimum of 20 hours in a training program certified by the supreme court;
- (2) observe a minimum of 4 county court mediation conferences conducted by a court-certified mediator and conduct 4 county court mediation conferences under the supervision and observation of a court-certified mediator; and
- (3) be of good moral character.

(b) **Family Mediators.** For certification a mediator of family and dissolution of marriage issues must:

- (1) complete a minimum of 40 hours in a family mediation training program certified by the supreme court;
- (2) have a master's degree or doctorate in social work, mental health, or behavioral or social sciences; be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least 4 years practical experience in one of the aforementioned fields or have 8 years family mediation experience with a minimum of 10 mediations per year;
- (3) observe 2 family mediations conducted by a certified family mediator and conduct 2 family mediations under the supervision and observation of a certified family mediator; and
- (4) be of good moral character.

(c) **Circuit Court Mediators.** For certification a mediator of circuit court matters, other than family matters, must:

- (1) complete a minimum of 40 hours in a circuit court mediation training program certified by the supreme court;
- (2) be a member in good standing of The Florida Bar with at least 5 years of Florida practice and be an active member of The Florida Bar within 1 year of application for certification; or be a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least 5 years immediately preceding the year certification is sought;

- (3) observe 2 circuit court mediations conducted by a certified circuit mediator and conduct 2 circuit mediations under the supervision and observation of a certified circuit court mediator; and
- (4) be of good moral character.

2.7 Texas, USA

Under the ADR Act, a person must have at least forty hours of training in mediation to be appointed as a mediator in the Court's Order for Mediation. The Court, however, may waive this requirement and generally lets the parties choose who they wish to use as the mediator. Thus, generally, though not always, the mediators in both types of mediation [court ordered and voluntary mediation] are chosen by the parties. They are, almost always, attorneys. The attorneys representing a party in mediation feel more comfortable having an attorney-mediator because usually, the mediation involves a lawsuit or potential lawsuit.

LC Paper No. CB(2)1574/01-02(02), COMPULSORY MEDIATION : THE TEXAS EXPERIENCE, By Jeffrey S. Abrams¹

2.8 Malaysia

Malaysian Mediation Centre (MMC)

It is established under the auspices of the Bar Council with the objectives of promoting Mediation as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolution. The ADR Committee of the Bar Council is responsible for the proper functioning and implementation of the Centre's objectives.

Mediators and accredits and maintains a panel of mediators. Currently the Centre accepts civil, commercial and matrimonial matters and intends to expand the scope to other matters at a later stage. Malaysia Mediators of the Centre are subject to a code of conduct which provides for a strict compliance of impartiality and confidentiality.

The Centre has its own rules for purpose of accreditation of Mediators. All Mediators of the Centre must be a practising member of the Malaysian Bar of at least 7 years standing. He/She must have completed at least 40 hours of training conducted and organised by the Centre and must also pass a practical assessment conducted by the trainers. The initial 27 Mediators also subsequently went through this process.

The Mediators of the Centre are now trained by either the Accord Group or LEADR of Australia. To date, we have about 300 Mediators on our panel.

2.9 Singapore

[http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_Singapore%20\(L%20Oonn\).pdf](http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_Singapore%20(L%20Oonn).pdf)

In Singapore the majority of court-connected mediations are courtbased, in that they take place in the Subordinate Courts and are part of the Primary Dispute Resolution Centre. However, the courts may refer cases to external mediation centres like SMC and the Community Mediation Centres, in appropriate cases. In such a situation, the court, on its own initiative, suggests or recommends that the parties proceed to mediation or encourages the parties to consider mediation.

The court may also refer cases to mediation with the consent of parties. In Singapore, the mediations conducted in the Family Court are examples of this category of court-connected mediation. The Women's Charter (Cap 353) imposes a duty to consider the possibility of reconciliation for parties to divorce or judicial separation proceedings.

Court-based mediation is practised in the Subordinate Courts in Singapore. In fact, a 'Singapore Courts Mediation Model' has been developed. The model was created with the diverse ethnic and cultural backgrounds of Singaporeans, and present day social conditions, in mind. The model involves a Settlement Conference presided over by a Settlement Judge. The Settlement Judge plays a pro-active role in guiding the parties and offering advice and suggestions on possible solutions. The directive and evaluative approach was adopted as it is believed that Singaporeans are less vocal in a formal setting. Given the foregoing, a greater degree of intervention is required in order to facilitate negotiations.

In Singapore, there is no national system or law to regulate accreditation of mediators, quality, standards or practice of mediation. But there is a **Singapore Mediation Centre** ("SMC"), which has an internal system of mediation training and accreditation. For those who want a formal recognition of their mediation skills, they need to attend an Associate Mediator Accreditation Course (AMAC). Therefore, successful participants will be accredited as Associate Mediators of the Singapore Mediation Centre.

To qualify as an Associate Mediator, individuals need to:

- (i) be at least 21 years old;
- (ii) possess at least a diploma, or other academic or professional qualification recognized by SMC; and
- (iii) be of good character, not been convicted of any offence and must not be an undischarged bankrupt.

All Associate Mediators must go through an assessment of their skills. They must:

- (i) have successfully completed the SMC Basic Mediation Workshop, or a similar workshop that is recognised by SMC, within the last 2 years at the commencement of the Associate Mediator Accreditation Course; and
- (ii) attend the Associate Mediator Accreditation Course. Only upon passing the assessment at the end of the Accreditation Course will the individual be accredited as an Associate Mediator.

COURT-BASED MEDIATION IN THE SUBORDINATE COURTS

<http://www.singaporelaw.sg/content/Mediation.html#Section5>

History

Court Dispute Resolution (CDR) at the Primary Dispute Resolution Centre was introduced in a pilot project on 7 June 1994. The Court Mediation Centre was established in 1995. It was renamed the Primary Dispute Resolution Centre in May 1998 as CDR expanded to include processes other than mediation such as early neutral evaluation and binding and non-binding evaluation and special forms of mediation like CDR-International, Co-Mediation with Experts, Mini-Trial and Mediation-Arbitration. Furthermore, the multi-door courthouse was established within the Primary Dispute Resolution Centre in 1999. Its purpose is to assist and direct disputants in finding the appropriate dispute resolution mechanism within or outside the court system. Also, it seeks to increase public awareness of dispute resolution processes.

Court-connected mediation refers to mediation which is held in court or conducted by a judicial officer or court official once legal proceedings have commenced. Apart from mediation under CDR, mediation may be employed within Pre-Trial Conferences. However, the majority of all court-based mediation is handled under CDR. The vast majority of cases in the Subordinate Courts undergo CDR.

Cases for Mediation

CDR has had an enormous impact on the Singapore judicial system. Since 1994 to 2004, 48,300 matters have undergone CDR. Of these, 94.6% were successfully settled. Surveys conducted by the Subordinate Courts in 1997 revealed significant cost and time savings for both the judiciary and for 96% of the disputing parties.

Generally, almost all cases at the Subordinate Courts undergo mediation. Initially, mediation was only applicable to civil cases. Today, however, a wide range of cases is mediated including assessment of damages, disputes over costs of civil proceedings, maintenance applications, applications by spouses

for personal protection orders, complaints to magistrates of offences involving neighbourhood and relational disputes and small claims.

In 1997 the civil jurisdiction of the Subordinate Courts was increased from S\$100,000 to S\$250,000. As the financial stakes in cases with claims between S\$100,000 and S\$250,000 are much higher than those in the other civil cases in the Subordinate Courts, particular effort was made to promote mediation in these cases. Special PTCs were implemented to bring the attention of the parties to all dispute resolution programmes available.

Mediators

Adapting Western Style mediation to the Asian/Singaporean culture, the Singapore Court Mediation Model was introduced by the Honourable Chief Justice Yong Pung How in 1997. In Asian culture high regard is placed on persons in positions of authority. As such, mediations at CDR are conducted by Judges. It is believed that the Settlement Judge will enjoy greater confidence and respect from parties and be able to guide the mediation more effectively. In the Singapore Court Mediation Model, the Settlement Judge adopts a pro-active stance. He guides the parties and intervenes in the process by suggesting and actively engaging in the finding of possible solutions to the dispute.

Settlement Judges are guided by the Model Standards of Practice for Court Mediators of the Subordinate Courts. Further, clause 4 of the Model Standards provides that mediators have to comply with the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore. This Code of Ethics deals with areas concerning impartiality, neutrality, confidentiality, informed consent, conflict of interests, promptness, training and qualification. The Code of Ethics enables practitioners to develop a sense of their professional responsibilities, and also informs and assists users and members of the public to have realistic expectations of the service.

Mediation Processes at PDRC

CDR Settlement Conferences are by far the most significant and widespread mode of PDRC's settlement activities. CDR sessions can be held at almost any juncture during the process leading to trial. By the use of CDR sessions, the PDRC handles the entire gamut of civil tort and contract cases filed in the Subordinate Courts. These include medical negligence and intellectual property cases. The PDRC practises differential case management for the different types of cases. CDR sessions are presided by experienced District Judges who assume the role of settlement judges. In appropriate cases, the Settlement Judge may conduct the CDR session with another person (either a foreign judge or an expert). CDR sessions are conducted in court as an integral component of the civil justice case process.

CDR is a highly evaluative or 'rights-based' form of mediation. This judge-driven CDR differs considerably in nature from many of the facilitative ADR processes. Evaluative mediation seeks to maintain an objective perspective, where the merits of the case are candidly and openly discussed. The mediator assists parties by previewing the probable outcomes of the case should it proceed to trial. Evaluative mediation operates with the applicable principles of law as its focal point, and parties have a full appreciation of the time, costs and other implications of a litigated outcome.

2.10 Italy

<http://www.lexology.com/library/detail.aspx?g=1697edab-548f-468f-a10b-2a91c794cdb5>

The long-awaited legislative decree addressing "**mediation** aimed at conciliation of civil and commercial disputes" came into effect on 20 March 2010. The driving force behind the law is to reduce the back log of civil cases pending in Italy, which has reached 5.4 million. The Italian government is strongly relying on **mediation** to eliminate at least 1 million disputes per year.

The new legislation requires parties to engage in **mediation** as a precondition to accessing the **courts** in many types of disputes. In addition, judges are granted authority to refer parties to **mediation** and enforce financial consequences on those that refuse to do so. In terms of procedure, the new legislation coincides with the requirements outlined in the European Directive on **Mediation**. The quality of the process is to be controlled by allowing only providers who are accredited and monitored by the Ministry of Justice to administer **mediation**.

Mediation provider organization registration in the Register—Mediation procedures can be handled only by public agencies and private organizations registered with the Ministry of Justice. The requirements and procedures for registration are governed by special ministerial decrees. Members of

the bar association, the chambers of commerce or other professional associations—the latter are reviewed based on competence—can form organizations to be entered, upon simple request, in the Register as mediation organizations.

Mediators—The mediation procedure can only be conducted by mediators who are listed in the Register, and who have attended and passed a special training provided by training institutions that are accredited by the Italian Ministry of Justice.

2.11 IMI Professional Mediator Competency Certification

IMI makes no specific provision for competency certification for mediators in a compulsory or Court based programmes.

To gain an IMI Certification in Professional Mediation Competency, a mediator must secure at least 100 Competency Credits from four categories:

Training.

Certified Mediators must have at least five full days training as a mediator on a program provided by an IMI Registered Educational Establishment (REE) where candidates are independently assessed. Each day of training results in 1 Training Credit. Mediators having more than 5 full days formal training may count excess days above 5, up to a maximum of 10 full training days (10 Training Credits).

Training Credit – Min 5 Credits; Max 10 Training Credits

[Note – Since many mediators pass through formal training just once, the same Training Credit will be applied annually. Subsequent training (eg. Advanced programs, Master Classes) will qualify for either excess Training Credits or as Education Credits.]

Education.

In each 12 month period, IMI Certified Mediators must have at least 20 hours of post-training education in amicable dispute resolution or assisted negotiation in a Continuing Professional Development (CPD) program recorded with an REE. Each CPD hour counts as 1 Education Credit. Mediators having more than 20 hours of CPD may count the excess hours above 20 to their total credit, up to a maximum of 25 hours. IMI's system for recording ongoing education will be based upon "Output CPD" in which IMI Certified Mediators must file a personal development plan with an REE; only education implementing that plan may count towards Credits. Some online CPD may be included.

Education Credit – Min 20 Credits; Max 25 Credits – per annum.

Experience.

Competency as a mediator can partly be assessed by user and peer feedback. IMI Certified Mediators are encouraged to seek written feedback from the parties, their professional advisers and any shadow or peer co-mediator present during the entire process. Feedback must be sent to an REE of the mediator's choice, or to a peer Certified Mediator approved by IMI, who will prepare a periodic Feedback Digest. IMI will issue guidelines for preparing Feedback Digests, including guidelines on how to handle negative feedback (which will require the compiler of the Feedback Digest to interview the provider of negative feedback; the Feedback Digest will not capture negative feedback unless repeated more than three times from different sources). Mediators will also be required to assess their own performance. For the purposes of accumulating IMI Credits, only hours spent as a neutral in a process resulting in written feedback as described above may earn Experience Credits.

Experience Credit – Min 50 Credits; Max 60 Credits – per annum.

Leadership.

All IMI Certified Mediators are expected to contribute to the advancement of the mediation profession via Leadership Initiatives. These must be recorded with an REE. Each hour spent on Leadership Initiatives each year earn 1 Leadership Credit.

Leadership Credit – Min 5 Credits; Maximum 25 Credits – per annum.

2.12 Analysis and Conclusions

Every indication in the literature is that the technical mediation skills normally required for voluntary commercial mediation are equally applicable to mediators operating in Court based mediation schemes.

Certification and training courses offered by renowned organisations such as IMI, CEDR, SMC and LEADR do not define specific skills development requirements aimed at court based mediation – though they regularly do training in these environments.

There appears to be universal acceptance that the standard 40 hour training and skills development programme is an absolute minimum standard – also for mediators in a Court Based mediation environment.

A number of jurisdictions require more extensive training and or a mentorship programme, in addition to the 40 hours training.

Important to note that this is not just developed first world economies who have such stringent requirements. The most significant example is probably that of the Philippines (a country ranked significantly below South Africa in terms of all the relevant indicators such as economic strength, income levels and infrastructure development).

As indicated the Philippines standard includes the following:

- *“The effectiveness of court-annexed mediation rests heavily on mediators. We have professional Mediators. They undergo basic training for five days, and an Internship Program for one month under the guidance of mentors.”*
- Minimum age requirements (30 years)
- Minimum academic requirements (Bachelor degree)
- Market related fees for mediators (see Chapter 5 below)
- Regular review of mediator performances

In conclusion it is proposed that:

- Training providers who want to train Court Mediators be required to submit course outlines that:
 - comply with the standards already accepted by DiSAC for commercial mediation training (see Annexure D);
 - indicate how the practical component of their courses have been adapted to simulate the CBM environment, and address the specific skills requirements that are outlined in Chapter 3
- Candidate mediators who wish to work in the CBM environment be required to complete an accredited 40 hour commercial mediation training programme that is adapted for the CBM environment
- The additional requirements discussed in Chapter 4 be included as admission requirements for such training
- That trained candidate mediators be required to undergo supervision prior to being allowed to work alone. The extent of such supervision would depend on the qualifications and experience of the mediator
- The Accredited Service Providers be required to develop continued professional development programmes to support CBM mediators operating under their auspices, in accordance with paragraph 3.6 below.

3 Special Skills Requirements for CBM

This section lists some of special skills that are considered necessary for mediators in court annexed programmes. This list is based on the literature reviewed for this discussion document.

The literature indicates that the most fundamental difference between voluntary and Court based (or compulsory) mediation schemes lies in the context within which the latter operates. **Mediators operating in Court based schemes are required to be sensitive to, and have a proper understanding of the context of Court based mediation.**

Exactly what that contexts is, is discussed in the sections listed below:

3.1 CBM is a Fundamental Culture Change

New Court based mediation schemes generally introduce a fundamental culture change.

“Among the barriers identified by the Working Group was a resistance to change on the part of those “inside the justice system” (defined as the judiciary, the legal profession, government and court services staff). This resistance is due to a comfort with the status quo, a resistance which persists in spite of widespread recognition of the problems of the current system. The Green Paper noted some support for change among these “insiders,” but also noted that “the fear and uncertainty of changing a long established paradigm dilutes this support to one of encouraging only modest change, such as reforms around the margins or tinkering with procedures. They are not prepared to entertain or support change of a more fundamental nature.”

If “change of a fundamental nature” to the civil justice system is to be possible, the resistance to change coming from within the legal community will have to be addressed. As the phrase “long established paradigm” suggests, much of this resistance relates to the deeply entrenched legal culture that underpins our justice system. This is a challenge being confronted in many jurisdictions. To quote one example, the Australian Law Reform Commission has said that

significant and effective long term reform [of the system of civil litigation] may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system. In particular, lawyers, their clients and the courts may need to change the ways in which they perceive their relationships and responsibilities.”

From Legal Culture, By British Columbia, Ministry of Attorney General, Justice Services Branch. February 23, 2005

This has several implications:

- The mediator needs to understand the old and the new paradigm at a theoretical and philosophical level, and be able to debate this (at least superficially...!)
- The mediator must be prepared to expect opposition to these changes, and be able to deal with it
- The mediator needs to be an educator - – parties, lawyers and court staff are all new to the process, and need guidance
- The mediator needs to be prepared to face the typical attitudes or approaches he will encounter from litigants and lawyers

- There are vested views that certain cases that “are not suitable for mediation” or “won’t settle” – these have to be dealt with

Preparing the mediator for these challenges is probably the biggest specific requirement in training mediators for the CBM programme.

The article by Julie Macfarlane *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program* should be compulsory study material for all mediators in Court based schemes. [A copy is attached]. In this article she:

- Makes a widely recognized analysis of the different types of attitudes or approaches that mediators are likely to encounter in the compulsory mediation scheme [See the quoted excerpt in the Annexure]
- Analyses the manner in which lawyers tend to use mediation in compulsory schemes.

3.2 CBM and Access to Justice

By becoming entrenched in the legal system, mediation starts to play a fundamental role in the way in which people perceive the justice system. If it serves to enhance access to justice, it will serve to legitimise the legal system, and vice versa. This is a big responsibility that needs to be understood and taken up.

Rawls’s theory of justice as fairness aids in understanding both the social justice promise and critique of the field of dispute resolution. To begin with the promise, much of the enthusiasm for “alternative” dispute resolution arose out of popular dissatisfaction with the courts. The costs associated with litigation and the delay in reaching trial made public adjudication virtually inaccessible to many citizens. Some citizens also questioned the legitimacy of attorneys’ and judges’ dominance over the litigation process and their control over the norms to be used for decision making.⁴⁷ Viewing these concerns through the prism of Rawls’s analysis, it could be argued that dispute resolution advocates perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties, particularly the right to trial and the right to free expression, which are essential for the achievement of political and social justice.

The courts’ embrace of mediation and arbitration may thus be seen as an attempt to find other legitimate mechanisms that would allow citizens to exercise these liberties, at least to an acceptable degree. Both mediation and arbitration offer citizens the opportunity for free expression—perhaps even freer expression than is available in the courts—and the opportunity to reason together. Isabelle R. Gunning has highlighted this connection between mediation, social justice, and procedural justice in urging that disadvantaged people “need, even more so than advantaged group members, a forum in

which their authentic voices and experiences can be expressed” and that mediation, as a forum fostering the expression of such authentic voices, offers “another locus in American political, social and legal life where ideas about equality are defined and redefined.”⁴⁸ Each mediation session thus represents a powerful, individualized opportunity for citizens to grapple directly with the law and engage in the mutual deliberation and decision making so prized by Rawls. Depending upon a mediator’s management of the disputants’ interaction, a mediation session also can offer citizens an empowering “civic education”⁴⁹ in the respect, responsibility, and dialog that “fair and equal” citizens extend to each other and that ease public deliberation and decision making.⁵⁰

Remembering the Role of Justice on Resolution: Insights from Procedural and Social Justice Theories, by Nancy A Welsh

<http://law.psu.edu/file/Welsh/Remembering%20the%20Role%20of%20Justice%20in%20Resolution.pdf>

In this context matters that require special attention in mediator training for court based schemes include:

- Understanding diversity
- Dealing with cultural and language differences between the parties

[The only special category of mediation recognised by the IMI is mediation in cultural diverse circumstances. This is the level of challenge presented here, and needs to be addressed in training]

- Dealing with party imbalances (represented vs unrepresented, sophisticated vs unsophisticated, powerful vs weak, etc)

3.3 Style of Mediation

Several matters are relevant:

Facilitative vs Evaluative

Experience in other jurisdictions show that there is competition between a facilitative and evaluative approach to mediation in compulsory schemes:

“..... mandatory mediation in Ontario was not designed as a process where a third party would offer an evaluation of the legal merits of a dispute. Instead, the goals of mandatory mediation are best achieved, and the parties know what to expect, when a mediator takes on the role of a neutral third party who facilitates communication, and takes an interest-based approach to problem-solving.

This paper further posits that the mandatory mediation process, which requires the attendance of clients as well as counsel presents a challenge for counsel who are used to the traditional adversarial structure. In particular, as a result of increased client participation, the lawyer may not have the same degree of control over the civil litigation process as in the traditional adversarial system. Several results from a recent study of lawyers’ reactions to mandatory mediation in Ontario are suggestive

of an emerging trend among lawyers to attempt to re-shape the interest-based mandatory mediation process into a more familiar adversarial process by encouraging the adoption of a more evaluative style of mediation. This response may be more comfortable for, and possibly beneficial to, members of the Bar, but it is not necessarily the approach that best achieves the goals of the mandatory mediation process in Ontario, or the needs of clients.

Facilitative Mediation: The Classic Approach Retains its Appeal, By Carole J. Brown

Time-limited mediation

It is normal that the duration of a mediation in a court based scheme is limited to a prescribed time period (subject to extension by agreement between the parties). This enhances price predictability and affordability of the scheme.

See for instance the approach followed in the UK government's Civil Mediation Directory:

Amount you are claiming	Length of session
£5000 or less*	1 hour 2 hours
£5000 to £15,000	3 hours
£15,000 - £50,000**	4 hours

* The mediator/mediation provider should agree in advance whether this should be dealt with in one or two hours. For the one-hour rate the option is available to facilitate settlement over the telephone if appropriate, and if the parties agree.

This places a special duty on the mediator to time-manage the proceedings so that real progress is made in the limited time available. These skills need to be developed in training.

Process facilitation

In compulsory mediation schemes the mediator often plays a facilitative role regarding the litigation process. Examples of this are:

➤ **Early exchange of information**

At early stage mediation of some types of claims [eg RAF claims] a thorough interest-based analysis is not necessarily the key to resolution. The early exchange of information to enable an offer of settlement to be made and considered, is all that is necessary. [The RAF arbitration pilot project was a case study in this]. The mediator can play a decisive role in this regard.

➤ **Narrowing of disputes**

Success of a mediation is not only connoted by settlement. The mediator needs to keep the eye on the second prize – where full settlement is not possible, he needs to encourage active pursuit of other agreements that will facilitate efficient conclusion of the dispute, whether by later settlement or trial. . This includes narrowing the points of dispute, getting agreement on quick determination of specific points of dispute, testing out a party's determination to litigate, etc

3.4 CBM and Judicial Administration

In a court based mediation scheme the mediator is required to work within a specific administrative framework. This has special requirements with regard to appointment, time management, reporting, fees, and related matters. All of these issues need to be included in training.

The administrative officer / service provider under whose supervision the mediator operates, will often have specific administrative procedures that also have to be mastered.

3.5 Objectives and Evaluative Standards for CBM Project

The CBM project is a pilot project – as such it will be evaluated. Its continuation and expansion depends on success. The mediator needs to understand what the key points of the project evaluation are, and how that should guide his/her role is in facilitating an overall successful project.

The likely critical points of evaluation will be:

- Reduction of costs
- Speeding up the pace of litigation
- Enhancing access to justice
- The settlement rate
- Agreement durability – re-litigation and further professional intervention
- User satisfaction with the process overall and with specific process components

The Accredited Service Providers [“ASP’s”] will carry a responsibility to ensure that mediators operating under their auspices provide quality service. In order to comply with this quality control responsibility, ASP’s should be required to implement a Mediator Monitoring Programme. This should include:

- Regular review and assessment of mediator performances by senior mediators, with remedial programmes to address deficiencies
- Customer feedback programmes on the performance of the mediators, that include formal complaint systems
- On-going mentoring and support programmes – also for accredited mediators.

3.6 Continued Professional Development

At the commencement of the CBM programme, the whole experience will be novel for all participants. Some form of support and development programme is required.

It is proposed that at minimum all Court Mediators should be required to attend very regular discussion or debriefing sessions where they can share experiences and discuss approaches to problem situations.

4 Other Requirements

A number of other qualification requirements are raised in other jurisdictions, and should be considered here as well:

4.1 Must Court Mediators be Lawyers?

Where the mediator has a solid understanding of the legal practice and of the substance of the disputes that he mediates, he immediately has more credibility and respect from the parties. This only enhances the chances of success. *This is especially true in the early adoption phase, where scepticism and opposition is more likely.*

See for instance some of the responses on LinkedIn to the following question:

"What qualities do counsel look for in a mediator?"

"I consider substantive knowledge to be extremely important, and not simply knowledge, but experience. David Plante is an well-known IP mediator in New England with many years of experience as a partner in a NY IP firm. When he speaks to our client during a mediation regarding the risks of litigation, the difficulty of predicting how a jury will respond to even the strongest of arguments, or the uncertainty of a damage demand (even in vague terms), the client knows he has been there and assigns him credibility. Someone off the street who doesn't know patent law or has little experience with it will not be viewed as credible."

"... a good mediator must have significant experience with the litigation and settlement process. Such real world experience enables the mediator to read people in terms of what is driving the litigation. But, there is no substitute for understanding that the settlement process is a little like the grieving process (denial, anger, bargaining, depression and acceptance). The process must play out for both sides and a good mediator will steward the parties through that process."

"In selecting a mediator, I am often most in need of someone who will have credibility with my opponents"

"I don't particularly care whether the mediator is a lawyer or not; I care far more that the mediator understands the substantive problem involved than that s/he has gone to law school or passed the bar exam or gotten sworn in."

"I asked a carrier representative the other day what were the most important factors in making his decision to settle.

"Other than the facts and law," he quipped.

"Yes, other than the facts and law."

"The salesman," he quickly replied."

http://www.linkedin.com/answers/law-legal/corporate-law/intellectual-property/LAW_COR_IPP/151045-48647

This raises the issue whether mediators in a compulsory scheme should be lawyers, or be required to have some legal training and or practice experience?

- In practice, other court based schemes, the mediator panels are mostly filled with lawyers. However as far as could be determined there are no rules explicitly excluding non-lawyers from participation in such schemes

- In some schemes there is specific weighting given to knowledge of the civil justice system (eg see Ontario – up to 30%)
- The Mediation Rule provides no guidance in this regard – it is left to the Minister to stipulate qualification requirements

It is recommended that:

- People with no legal qualifications be allowed to participate, but subject to demonstrating a solid understanding of the Court environment. A “career path” should also be put in place where more junior and less experienced mediators have opportunity to progress through the ranks on the basis of experience;
- Actual experience in the CBM scheme and other relevant mediation experience should count towards progression on the career path
- In all cases mediators are to indicate their level of familiarity with legal practice, litigation, the legal system, and any specific areas of expertise. This will assist an informed choice.

4.2 Minimum Age Requirement?

The Philippines requires Court mediators to be at least 30 years or older.

In South Africa an aged based requirement will probably amount to unfair discrimination. Qualification and experience requirements can however be justified in this context, and eliminates the need for an aged based requirement.

4.3 Academic Qualifications & Experience?

The Philippines require as a minimum standard a Bachelors degree. Should such a requirement be included in South Africa? Should some form of tertiary qualification be required?

It is proposed that:

- A tertiary qualification is required as a minimum entry qualification. This need not be in the legal field, but should be in a field that does provide some background education for the task at hand as mediator – ie a qualification in the field of commerce, business, or social sciences
- An additional requirement of work experience be stipulated. Mediators need to a decent understanding of general commercial affairs, of people, and of themselves. This is best acquired through experience.

4.4 Language Proficiency?

The Philippines requires both spoken and written language proficiency in as a minimum requirement.

Should such a requirement be included in South Africa, and if so, how is it to be tested?

South Africa has 11 official languages and a need for mediators in different languages. It is therefore proposed that mediators be required to stipulate that which language(s) they practise in. They then have to be able to demonstrate proficient in the stipulated language(s).

If required an independent international language standard test can be adopted.

4.5 Moral Character?

Most jurisdictions require some degree of moral character as a minimum requirement. This could range from testimonials to a requirement that the mediator should not have any criminal conviction that relates to fraud.

Should such a requirement be included in South Africa, and if so, what should it be?

As a minimum a person must not have a criminal record involving dishonesty and must not be declared insolvent, and must be independent minded;

5 Further Issues

5.1 Seniority Ranking Systems for Court Mediators

A number of factors point towards a need for seniority ranking of mediators:

- The CBM project will be implemented in the High Court as well as some Magistrates Courts
- Litigated amounts (and issues) differ vastly, usually with commensurate differentiation in the investment that parties make in lawyers and effort
- Some litigation requires specific substantive and or practice knowledge (eg IP disputes)
- It is a reality that the market of available (and soon to be trained) mediators have vastly different levels of experience

How (if at all) is this to be accommodated in a seniority ranking system? Should such a ranking system be recognised by the Council at the level of accreditation?

In this regard the following:

- Most jurisdictions acknowledge a distinction between a newly trained and an experienced mediator. Experience is normally based on proof provided during the accreditation process
- Some jurisdictions acknowledged very senior mediators, again based on experience.
- In the Philippines CBM system the system is as follows:

LEVEL
Accredited mediators who have handled less than 50 cases (Level I)
Accredited mediators who have handled more than 50 cases (Level II)
Accredited mediators who have handled more than 100 cases (Level III)

[Note that in the Phillipines the “cases handled” only counts matters mediated to a settlement]

- In all cases the entry level accreditation would require completion of the accreditation training. Most jurisdictions would in addition require some mediation experience – and/or a period of supervision or mentoring – before allowing “level 1” accreditation.

It is proposed that:

- a ranking system is probably also appropriate for South African conditions – with specific reference to the needs express above.
- for purposes of the CBM scheme the use of a 2 level system may well be appropriate, and in line with other jurisdictions

5.2 Assessment, Supervision and Accreditation

Only candidates with adequate mediation experience should be accredited as level 1 mediators. *This should be based on an evaluation of candidates* by accredited Assessors

Evaluation by accredited assessors is in any event an essential part of the 40 hours training programme. As part of this evaluation the assessors should recommend the extent to which a candidate requires additional supervised experience prior to being accredited.

Candidates with insufficient or no mediation experience should agree to participate in programme of mentoring/supervision when required. In principle this should be required for all new entrants who have little or no experience of mediation and or the litigation environment (a more detailed programme of apprenticeship will be developed by DiSAC).

The purpose of supervision of candidate mediators is to provide mentoring to these candidates, and to ensure that candidates have the requisite skills to mediate cases without supervision.

Supervision means the attendance in of mediation proceedings being conducted by a candidate mediator, by a qualified mediator. The supervisor should co-mediate the case, and will therefore be able to actively participate so as to ensure the proper outcome of the mediation proceedings for the parties in attendance. Candidate mediators would not be entitled to any fees for cases performed under supervision.

After each supervision the supervisor should:

- Provide the candidate mediator with verbal feedback and advice
- Submit a confidential written report on the performance of the candidate mediator to the Accredited Service Provider [“ASP”] regarding the candidate mediator. Such report must stipulate whether or not the candidate mediator is ready to mediate on his/her own, and may recommend additional training and mentoring, where necessary.

Once the candidate mediator has completed the required minimum number of supervised mediations, the Service Provider should review all the supervision reports, and:

- Confirm the accreditation of the candidate as a court mediator, or
- Stipulate additional supervision requirements; or
- Decline the accreditation of the candidate (provided that such a decision shall only be made after additional supervision was provided).

Where a level 1 mediator has completed the required number of cases to Level 2 accreditation, he may apply for accreditation at that level to the Service Provider. The ASP must then make a decision in this regard based on a review of his performance as mediator. Advancement is again a decision based on assessment, and not merely a numerical requirement.

5.3 Mediation Fees & Procedures

Fees and Mediator Qualifications

It must be assumed that fees will be reasonably commensurate to the level of qualification and seniority of people appointed to mediate. It is therefore impossible to finalise the debate regarding the fees for CBM mediators in the absence of clarity regarding the qualifications required for accreditation as CBM mediators. (These notes are prepared on the basis of the recommendations in this document).

Fixed duration mediations

As indicated above, it is normal that the duration of a mediation in a court based scheme is limited to a prescribed time period (subject to extension by agreement between the parties). This enhances price predictability and affordability of the scheme.

The current Rule does not prescribe this, but it is submitted that this could easily be incorporated into the Fee Annexure that remains to be finalised

In the absence of fixed duration mediations, the fee would have to be hourly based, would remain uncertain until the matter is concluded, and would (notionally at least) encourage the mediator to take his time in settling the matter.

Recognising different “Levels” of mediation

Other jurisdictions recognise different levels of mediation, and allow different fees and in some cases – different amounts of time - for each level. The basis on which the “level” is determined mostly seems to relate to the value of the amount claimed.

The UK allows four levels:

Amount you are claiming	Length of session
£5000 or less*	2 hours
£5000 to £15,000	3 hours
£15,000 - £50,000**	4 hours
If the claim is for more than £50,000, the fees will need to be agreed with the organisation providing the mediation.	To be determined

Rates paid for Different “Levels” of mediation

- In the Philippines the mediation fee is expressed as a percentage of the Court filing fees, and in monetary values, are as follows:

3.4 Mediation Fees

The mediation fee shall be a certain percentage of the filing fee, to be paid separately from the filing fee, and in accordance with the Level of Mediators and the schedules presented below:

LEVEL	AMOUNT CHARGEABLE	MINIMUM FEE	MAXIMUM FEE
Accredited mediators who have handled less than 50 cases (Level I)	20% of filing fee	P1, 000	P10, 000
Accredited mediators who have handled more than 50 cases (Level II)	20% of filing fee	P2, 000	P30, 000
Accredited mediators who have handled more than 100 cases (Level III)	30% of filing Fee	P3, 000	P50, 000

Current as at 2004 – no update could be found

[At current exchange rate these fees translate as follows:

- Level 1: R187 to R1 870
- Level 2: R373 to R5 596
- Level 3: R560 to R9 328]

➤ The fixed fee mediation under the UK scheme allows the following fees:

The cost of mediation via the online directory service

Amount you are claiming	Fees per party	Length of session
£5000 or less*	£50 + VAT	1 hour
	£100+ VAT	2 hours
£5000 to £15,000	£300 + VAT	3 hours
£15,000 - £50,000**	£425+ VAT	4 hours

* The mediator/mediation provider should agree in advance whether this should be dealt with in one or two hours. For the one-hour rate the option is available to facilitate settlement over the telephone if appropriate, and if the parties agree.

** If the claim is for more than £50,000, the fees will need to be agreed with the organisation providing the mediation.
<http://www.civilmediation.justice.gov.uk/>

Current as at October 2011

[At current exchange rate the TOTAL fee (ex VAT) translate as follows:

- Level 1 (2 hours): R2 536
- Level 2 (3 hours): R7 608
- Level 3 (4 hours): R10 778]

Towards a Fee Matrix for South Africa

It is an important principle that mediator fees are determinable upfront by parties and attorneys. It is also assumed that the Legal Aid Board will look at making funds available for indigent litigants.

In the meeting on 14 December 2011, the Rules Board indicated that the Department of Justice would cover the administration fee for court aligned mediation, however the parties

would be liable for the mediator fee. For this reason, a distinction is drawn below between the mediator fee and the administration fee.

The international practice for court aligned mediation is to limit the time allocated to the mediation. Below are recommended time allocations for mediations. The parties may agree to extend the period of the mediation in terms of Rule 8(1)(a). Should the mediation be extended by agreement in terms of this Rule, it is recommended that the parties should be liable for the mediator and administration fee associated with the extension of the mediation period.

The proposed fees for the mediator panels below are based on a careful consideration and balance of the panel standards and qualifications, the desired level of mediator that should be attracted to the panel, the tariffs in the high court and magistrate court for attorneys, and industry norms.

The proposed tariffs for mediators are –

Level Mediator	Court	Period of Mediation	Fee
Level 1 Mediator	Magistrates Court /Regional Court	4 hours	R2 500
Level 1 Mediator	High Court	4 hours	R5 000
Level 2 Mediator	High Court / Regional Court	8 hours	R12 000 (or as agreed with parties)

It is recommended that by default a level 1 mediator be appointed to a dispute, unless –

- the parties agree to appoint a level 2 mediator; or
- after consideration of the quantum of the claim, the nature of the dispute, complexity of the dispute and the court in which the matter sits, the dispute resolution officer deems it appropriate to appoint a level 2 mediator.

The above fees do not include the administration fee. The administration of the mediation is a complex and specialist field that could incorporate a wide range of services, inter alia registration of dispute, logistical arrangements, allocation and ‘matching’ of mediators, process and technical advice to parties and mediators, providing venues and facilities, document management, invoicing and receipt of moneys in trust for mediators, and reports.

5.4 Case Administration

The Case Administrators (presumably appointed from the ranks of the Accredited Service Providers) will be required to perform a range of case administration services. These will (presumably) include the following:

- Receive and register all requests for mediation proceedings
- Select the mediator, in consultation with the parties
- Appoint and brief the mediator
- In consultation with the mediator and the parties arrange all process events as may be required, and timeously notify parties of the date time and venue of such events.

- Provide all facilities and logistics for the proceedings. These include mediation rooms, break-away rooms, waiting areas, office support services (word processing, typing, copying, mailing, faxing, etc).

[It is submitted that all Court Mediations should be scheduled in facilities provided by the ASP's – and not in lawyer's chambers. The perceived neutrality and independence of the proceedings may otherwise well be affected]

- Keep a full record of events and documentation regarding the proceedings
- Obtain invoices from the mediators and verify that their billing is correct
- Submit all invoices to the parties and collect payment
- Provide (electronic) information on status and progress regarding any mediation being managed by it
- Perform any other activity that can reasonably be expected from an administrative and case management service provider

It is proposed that Case Administrators / ASP's be allowed to charge fees as follows:

- Fees should be charged on a per case basis – ie a fee for every case that is referred to the ASP for mediation
- It is proposed that fees should be charged on the following basis:
 - A Case Registration Fee, payable to the ASP by the Parties upon referral of the case. This fee should be all-inclusive and cover all the costs associated with a normal mediation process – specifically the fee should include the following:
 - All normal administrative and case management services to be provided by the ASP (as described above)
 - Use of ASP's mediation facilities for the normal scheduled duration of the mediation [ie 2 hours for Level 1, 3 hours for Level 2, and 4 hours for Level 3]
 - Additional Administration Fees payable to the ASP by the parties, where they require additional services that are not included in the Case Registration Fees. These may include:
 - Rescheduling of case events requested by the parties
 - Additional mediation sessions – over and above the initial 2/3/4 hours
 - [Note - It is standard practice in the industry for the ASP to charge a small commission on the fees of its mediators. However, this commission is deducted from the mediator's fees, and is not an additional cost to the parties.]
- It is proposed that following Case Registration Fees should range from R2000 to R3000.
- Additional administration fees should be commensurate with this rate.

5.5 Accreditation of Service Providers

DiSAC has previously published a full set of accreditation standards for Mediation Service Providers.

(see http://www.usb.ac.za/disputesettlement/dispute_settlement_accreditation_council.html)

For the sake of completeness the accreditation standard for Service Providers is attached as Annexure E. This must obviously be read in conjunction with the Code of Conduct, and other relevant sections of DiSAC's Mediation Accreditation Standards.

6 A Draft Standard

1) The recommended Accreditation Requirements are as follows:

<p>Level 1:</p>	<ul style="list-style-type: none"> • A tertiary degree or a relevant tertiary qualification (meaning any post matric SAQA accredited qualification in commerce, business, law or social sciences); • Minimum of five years work experience; • Be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent, and must be independent minded; • Must show knowledge of court systems and litigation; • Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (where such a code of conduct is part of the regulatory framework); • Have sufficient professional insurance individually or through the dispute resolution officer (if a service provider) for purposes of civil liability claims against them as mediators; • Fulfilled requirements of a 40 hour commercial mediator training programme with the required assessment and accreditation with accredited trainers and assessors (for recommended trainer and assessor requirements see Annexure B). Such training must be adapted to contain the special requirements identified in Annexure B, or a conversion course dealing such additional matters should be taken; • Adequate mediation experience. This should be based on an evaluation of candidates (with which the DiSAC accredited training and or service providers can assist); • Candidates with insufficient or no mediation experience should agree to participate in programme of mentoring/supervising apprentice mediators when required. In principle this should be required for all new entrants who have little or no experience of mediation and or the litigation environment (a more detailed programme of apprenticeship will be developed by DiSAC); and • Conduct a minimum of 24 mediations a year.
<p>Level 2:</p>	<ul style="list-style-type: none"> • Meet all the requirements for level 1 mediator; • Conducted a minimum of 100 court aligned or other mediations, with at least 20 that are deemed complex mediations; • Practiced in the field of ADR for a minimum of 5 years; • Considered a leader in the ADR industry in terms of reputation as a mediator and/or as an academic/commentator/practitioner.

For purposes of membership, mediators must specify what language they are proficient to mediate in. Their proficiency in that language must then be of a high enough standard, and this may be evaluated if necessary

It is recommended that membership to the panel in terms of Rule 12(2) be for a period of three years, which is renewable.

2) Court Mediator Training

- a) Training providers who want to accredit a Court Mediator Training Course must:
 - i) Submit a course outlines that complies with the Council's requirements for general mediation training courses; and
 - ii) Provide details to show that their course addresses the specific skills requirements of Court Mediation. The following must specifically be included:
 - (1) Preparing candidate for the context within which they will operate as Court Mediators. Course content must address:
 - The culture change brought about by the introduction of Court Mediation
 - The typical responses and attitudes that they may encounter as Court Mediators
 - The role of Court Mediation in providing access to justice
 - The challenges of providing mediation in an environment of diversity, and
 - The challenges of addressing power imbalances between parties.
 - (2) The specific challenges posed Court Mediation, with a focus on the following:
 - Styles of mediation (evaluative vs facilitative)
 - Time limited mediation
 - The need for facilitating the litigation process (narrowing points of dispute, facilitating the early and informal exchange of information, etc)
 - (3) The administrative requirements imposed by the Court Mediation Scheme, and by administrative service providers
 - (4) The goals and objectives of the Court Mediation Pilot Scheme.
 - iii) Provide details of how the practical component of their general mediation course have been adapted to simulate the CBM environment
- b) Training Providers may also accredit a CBM Orientation Course aimed at qualifying mediators who are accredited (or qualify for accreditation) under DiSAC's general mediator accreditation standard, to do CBM mediations. Such a course must address the issues raised in para 5(a)(ii) above.
- c) Trainers who want to be accredited to provide Court Mediator Training must meet the Council's requirements for training in general mediation courses, and provide proof of relevant mediation experience
- d) Assessors who want to be accredited to assess Court Mediator Training must meet the Council's requirements for assessors in general mediation courses, and provide proof of relevant mediation experience

3) Additional Requirements for Accredited Service Providers

Accredited Service Providers who have Court Mediators affiliated with them should be required to:

- a) Arrange supervision for candidate mediators who seek accreditation as Court Mediators. Mediators who provide such supervision shall do so at no charge, and shall qualify for CPD points for such
- b) Implement on-going Mediator Monitoring Programmes that include:
 - i) Regular review and assessment of mediator performances by senior mediators, with remedial programmes to address deficiencies
 - ii) Customer feedback programmes on the performance of the mediators, that include formal complaint systems
- c) Develop continued professional development programmes to support Court Mediators operating under their auspices. Such programmes shall include the monthly hosting of discussion or debriefing sessions where mediators can share experiences and discuss approaches to problem situations.

Annexures

Annexure A: Mediation Rules – Rules Board

This is the approved version of the mediation rules to be implemented in South Africa.

MEDIATION RULES

1. Purpose these rules

The objects of mediation being:

- (i) to facilitate an expeditious and cost effective resolution of a dispute between litigants;
- (ii) to assist litigants to determine at an early stage of the litigation whether proceeding with a trial or an opposed application is in their best interests or not;
- (iii) to allow litigants to return to conventional litigation should the attempt at mediation not be successful;
- (iv) to preserve relationships between litigants which may become strained or destroyed by the adversarial nature of litigation;
- (v) to provide litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers;
- (vi) to dispense with formalistic litigation procedure and rules of evidence; and
- (vii) to promote access to justice;

the purpose of these rules is therefore to regulate the procedure for the referral of disputes to mediation and the conduct of mediation in accordance with the objects set out above.

2. Definitions

In these rules unless the context indicates otherwise:

‘action’ means litigation commenced by the issue of summons

‘alternative dispute resolution’ means a process other than formal litigation, in which an independent and impartial person assists parties to litigation to attempt to resolve the dispute between them

‘application’ means litigation commenced by a notice of motion .

‘deliver’ means to serve a document on the opposite party in litigation and to file with the clerk or registrar of the court

‘dispute’ means the subject of litigation between parties or an aspect thereof

'dispute resolution officer means a person who administers and controls the alternative dispute resolution process and whose functions are set out in these rules

'litigant' means a party to litigation

'litigation' means court proceedings commenced by action or application proceedings

'mediation' means the process by which a mediator assists the parties to litigation to resolve the dispute between them by facilitating discussions between the parties, by assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute.

'mediator' means a person selected from a panel as contemplated in rule 12(2), by a dispute resolution officer, to mediate a dispute between parties to litigation.

'Minister' means the Minister of Justice and Constitutional Development

'rules of court' means the rules of court applicable to the High Court and Magistrates' courts

3. Mandatory referral of dispute to mediation

Whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the clerk or registrar of the court must refer the dispute to a dispute resolution officer to facilitate mediation of the dispute between the parties.

4. Referral of dispute to mediation by the court or litigants

(1) The court may at any stage of the litigation refer a matter to a dispute resolution officer to facilitate mediation of the dispute between the parties

(2) A litigant may at any stage of the litigation, apply to court for the referral of a dispute to mediation on such order as to costs as the court may deem appropriate.

5. Functions of dispute resolution officer

(1) The dispute resolution officer must explain to the parties the purpose of alternative dispute resolution and the meaning and objectives of mediation.

(2) The dispute resolution officer must in consultation with the parties:

(i) select a mediator to mediate the dispute between them, but should the parties disagree on the choice of the mediator, the dispute resolution officer must nominate the mediator;

(ii) fix a date for mediation; and

(iii) inform the parties in writing of the date, time and venue of the mediation session.

(3) The dispute resolution officer must in consultation with the parties allocate a time within which the mediation process must be completed, provided that the process must be completed within a reasonable time.

(4) The dispute resolution officer must forward to the mediator a copy of the summons or application by which the litigation between the parties was commenced.

(5) Upon a dispute being referred to mediation and a settlement being reached by the parties, the dispute resolution officer must, upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer for noting that the dispute has been resolved.

(6) In the event of the parties not being able to resolve their dispute or conclude a settlement agreement where the dispute has been referred to mediation, the dispute resolution officer must upon receipt of a report from the mediator, refer the matter back to the clerk or registrar of the court to enable the dispute to proceed as a defended action or opposed application.

6. Refusal of litigants to submit to mediation

(1) Notwithstanding the provisions of rule (3) a litigant may refuse to submit to mediation referred to in that rule.

(2) The dispute resolution officer must explain to the litigant refusing mediation of the consequences of refusal as provided for in these rules.

(3) The dispute resolution officer must record that a litigant has refused mediation and that the consequences of refusal have been explained to that litigant.

(4) The litigant refusing mediation must sign a memorandum recording the refusal and the fact that the consequences of refusal have been explained.

(5) Upon the refusal to submit to mediation by any litigant the dispute resolution officer must refer the matter to the clerk or registrar of the court, whereupon the matter may proceed as a defended action or an opposed application.

(6) At the trial of any action or the hearing of an opposed application where mediation was refused, should the court find that the refusal was unreasonable and that mediation may have resulted in substantially the same finding as the court, the court may make such order as to costs as it considers appropriate, against the litigant that refused mediation.

7. Suspension of time limits pending mediation

The time limits prescribed by the rules of court for the delivery of pleadings and notices, the filing of affidavits or the taking of any step by any litigant are suspended during the period from the time a matter is referred to a dispute resolution officer to the time of the outcome of the mediation process.

8. Rules applicable to mediation proceedings

(1) At the commencement of any mediation session every mediator must inform the parties to the mediation of the following:

(a) the resolution of the dispute must be concluded within the time period allocated for that purpose, provided that the parties may by agreement in writing extend the time period;

(b) the role of the mediator is aimed at facilitating a settlement between the parties in their best interests;

(c) the mediator cannot make any findings of fact, credibility or law nor may the mediator make any decision for or against any of the parties;

(d) in the event of a settlement being reached, the mediator will assist the parties in drafting the settlement agreement, which the mediator must transmit to the dispute resolution officer of the court where the litigation was commenced;

(e) all discussions held and disclosures made, whether oral or written, during a mediation session, are not binding upon the parties outside of the mediation process and are inadmissible as evidence in any court, tribunal or other forum unless reduced to writing as a settlement agreement and signed by them ;

(f) the mediator may during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure may facilitate a resolution of the dispute between the parties;

(g) no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in sub paragraph (e) above;

(h) all discussions held and disclosures made, whether oral or written, at a mediation session are confidential and cannot be disclosed outside the mediation session

(2) No party is permitted to produce at a mediation session any evidence, provided that the mediator may in his or her discretion call for evidence that may promote a resolution of the dispute.

(3) If a dispute is resolved between the parties the mediator must assist the parties in settling the terms of the settlement and reducing the agreement to writing, which must be signed by the parties.

(4) Thereafter the mediator must transmit the original settlement agreement to the dispute resolution officer of the court from which the dispute was referred for mediation.

(5) If the dispute is not resolved, the mediator must refer the dispute back to the dispute resolution officer, informing him or her of such failure.

(6) In every mediation process the mediator must within five (5) days of the conclusion of the mediation process submit to the dispute resolution officer a report of the outcome of the mediation

(7) Upon good cause being shown the mediator may postpone a mediation session. The party seeking the postponement must pay the costs occasioned by the postponement, unless that party satisfies the mediator that the reason for the postponement was beyond his or her control.

9. Settlement Agreements

A settlement agreement concluded between parties at mediation proceedings may, by consent between them or upon the application to court by any of the parties, be made an order of the court in which the litigation commenced.

10. Fees of Mediators

(1) The fees payable to mediators are prescribed in the table in Annexure A to these rules.

(2) The parties participating in the mediation process must pay the mediator's fees.

(3) The liability of a party for the fees of the mediator must be proportionate to the number of parties participating in the mediation process.

11. Representation of parties at Mediation Proceedings

(1) Parties to mediation proceedings must attend such proceedings in person and may be accompanied by legal representatives.

(2) The parties' legal representatives cannot participate in the mediation proceedings and must not interfere with, delay or obstruct the continuity and conclusion of the proceedings.

(3) Where a juristic person or a firm or a partnership is a party to mediation proceedings such entity must be represented by an official who must be duly authorized to represent the entity and to conclude a settlement and sign a settlement agreement on behalf of such entity.

(4) Where the State or an organ of state is a party to mediation proceedings such entity must be represented by an official who must be duly authorized to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity.

12. Qualification and appointment of Mediators

(1) The qualification and standards of fitness of Mediators to conduct mediation referred to in these rules must be determined by the Minister.

(2) The Minister may periodically appoint mediators to serve on a Panel from which mediators may be selected to execute the functions and objectives ascribed in these rules.

13. Application of rules

(1) These rules will apply to the High Courts and the Magistrates courts.

(2) These rules do not replace any of the rules of the High Court or the Magistrates' courts, which must continue to apply either before commencement of or after the conclusion of mediation proceedings.

(3) These rules will come into operation on a date to be determined by the Minister and for such period or periods as the Minister may determine

14. Short title

These rules will be referred to as the Mediation Rules of the High Courts and the Magistrates' Courts

[Version : 19 November 2011]

Annexure B: General Overview of other Jurisdictions

The following table provides a summary of accreditation requirements in a number of countries:

This table is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), "Global Trends in Mediations", Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research by Maria Choi, Secretary of the Sub-groups.

Jurisdictions	Training and Accreditation
Australia	<ul style="list-style-type: none"> • National Mediator Accreditation System ("NMAS") commenced on 1 January 2008. • Under the NMAS, ADR organisations called 'Recognised Mediator Accreditation Bodies' ("RMAB") are responsible for accrediting individual mediators. • The NMAS requires 5 days of initial training and education (average of 40 hours), in addition to a formal assessment and a requirement for continuing professional development. • It is a voluntary scheme and there is no requirement for people providing services called 'mediation' to be accredited under it. However, some organisations, courts and governments have indicated that they will only use mediators accredited under the system, for example the Federal Court. • Currently RMABs include courts, government bodies, bar association and law societies. • A permanent National Mediator Standards Body established in 2010, replacing the National Mediator Accreditation Committee Inc. • The Mediator Standards Body is responsible for reviewing and developing the Standards, monitoring compliance and promoting mediation. • The legal profession may have an even more important role than the courts in informing/referring members of the public to ADR. • There has been an increasing amount of ADR training provided by legal professional bodies, including law societies and bar associations. • Some law schools in Australia offer significant education about ADR as part of their core curricula for law students. • Other professionals regularly involved with ADR include architects, engineers, planners, psychologists, social workers and accountants. • Disputes may also be referred to ADR processes by business associations and consumer organisations.

Jurisdictions	Training and Accreditation
New Zealand	<ul style="list-style-type: none"> • In New Zealand, many mediators are trained by and become accredited members of the Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") and/or Leading Edge Alternative Dispute Resolvers ("LEADR"). • There is no formal national accreditation or regulatory standards for mediation. • AMINZ and LEADR provide mediators with high training standards and continuing professional development requirements. • LEADR's course is a 40 hour training course that also meets the requirements of the Australian National Accreditation Standards. • The AMINZ Associate syllabus sets out the topics which form the basis for the academic standard to be attained for Associate membership. These topics are taught at the Massey University Dispute Resolution Centre, the University of Waikato School of Law and the University of Auckland Faculty of Law.
United Kingdom	<ul style="list-style-type: none"> • Mediation in the United Kingdom developed without any form of regulation in relation to training provision. There is no 'certification' or registration system post-training that established a mediator's competence. Continuing Professional Development is not mandatory. • The Civil Mediation Council ("CMC") was set up 2003 with the support of 35 ADR providers, professional bodies, independent mediators and practitioners to focus on legal reform and education in mediation. It is now going through an internal debate as to whether or not to standardise accreditation and to act as regulator of the field. • Assessment of participants to determine their competence to mediate disputes is now an accepted part of all mediator training from the major providers in England. • No pre-requisite skills or professional background are generally required prior to attend the course, many of the skills for effective mediation being centered on practical skills. • Mostly 40-hour mediation courses with assessment.
Germany	<ul style="list-style-type: none"> • Mediators are not subject to national regulation - standards and mediation styles vary greatly. • Accreditation and practice standards development vary according to organisational/practice areas. • Private-sector training consisting of between 100 and 600 hours over one to two years are on offer. Generally, it comprises 200 contact hours spanning 2 years including clinical practice. • Amendments to the civil procedure laws provide statutory frameworks for both mandatory and voluntary court-related mediation schemes. • Accreditation programmes are being designed and offered on an inter-disciplinary basis at postgraduate level and allow students to specialise in different practice areas. • Limited offerings as part of university law studies. • Trend towards one to two years long programme consisting of intensive training modules.

Jurisdictions	Training and Accreditation
Canada	<ul style="list-style-type: none"> • The ADR Institute of Canada has drafted and implemented a national Model Code of Conduct for Mediators in June 2005 that attempts to protect the integrity of the mediation process by establishing a model ethics code for mediators who are members of the Institute. • A number of professional associations of mediators emerged nationally and provincially. • These institutes (e.g. ADR Institute of Canada) provide training and national accreditation. They may also have strict rules and procedures for accreditation and protocols for mediation. • To satisfy the requirements for accreditation, practitioners must meet education, practical experience and skills assessment requirements, pass reviews and obtain approval. • There is separate accreditation for family mediation from the Family Mediation Canada Institute.
Singapore	<ul style="list-style-type: none"> • No national system or law to regulate accreditation of mediators, quality, standards or practice of mediation. • Singapore Mediation Centre ("SMC") has its own internal system of mediation training and accreditation. • Numbers of mediators accredited each year are limited. • Accreditation lasts for one year, subject to renewal. • Re-accreditation only if participation in 8 hours of annual continuing education and mediator is available to conduct at least 5 mediations per year if requested to do so. • SMC has its own Code of Conduct which its mediators must follow.
Netherlands	<ul style="list-style-type: none"> • Court-connected mediation was introduced in the Netherlands in 1999. • All courts provide a customised service which helps parties to find the most suitable dispute resolution process for their dispute and if suitable a case is referred to a mediator. • This 'referral to mediation' system has proved a very useful and frequently applied method of resolving legal disputes. • Netherlands has one umbrella organisation <i>Nederlands mediation Instituut</i> ('NMI') which enjoys strong links with the Ministry of Justice. • It does not train mediators itself but accredits certain institutions to do so.
Scotland	<ul style="list-style-type: none"> • Accreditation on an organisational/practice area basis. • Sector-specific schemes emerging. • Training is sector-specific and mainly provided by private training organisations. • Some university courses on offer.
Austria	<ul style="list-style-type: none"> • The regulation of the training and accreditation of mediators is governed by the Civil Law on Mediation Training which sets out the content and scope of training in this field. • Training courses tend to comprise a minimum of 200 hours. • The principal mediation providers are organised under an umbrella organisation, <i>Platform fur mediation</i> and tend to be sector based, for example one covering the legal profession, another representing notaries and another tax accountants. • An Advisory Board <i>ZivMediatG</i> was set up with specific rights and obligations to the Ministry of Justice provided for by law. • Victim-offender mediation must meet requirements of the appointed ADR organisation (Neustart).

Switzerland	<ul style="list-style-type: none"> • Accreditation on an organisational/practice area basis. • Training provided by private training organisations, universities and law firms. • University Law Schools offer some mediation training courses between 75-200 contact hours.
Denmark	<ul style="list-style-type: none"> • No national accreditation scheme, but mediators in court-related mediation must be judges or attorneys with 7 days mediation training. • Private sector training bodies with courses ranging from 1 day to several weeks. • ADR courses offered in some University Law Schools. • Two-year postgraduate degrees offered at tertiary level.
United States of America	<ul style="list-style-type: none"> • Mediation appears more 'professionalised' in the United States of America where State laws regarding the use of lawyers as opposed to mediators may differ widely. • No national accreditation scheme. • Some states have fairly sophisticated laws concerning mediation. They have laws with clear expectations for certification, ethical standards and protections preserving the confidential nature of mediation by ensuring that a mediator need not testify in a case that they have worked on. • Some states have laws that only relate to mediators working within the court system. Community and commercial mediators practising outside the court system may not be subject to the law and its legal protections. • Although many states recommend qualifications for mediators, no state has requirements for practice of mediation. • Rather than regulate the practice of mediation, some states have chosen to create lists of mediators meeting criteria for certain areas of practice. • When states have guidelines or requirements for mediators who receive court referrals or appointments, judges commonly have discretion in applying these guidelines. • Standard training courses comprise up to 50 hours.

Annexure C: Cultural Change

Quote from the article by Julie Macfarlane *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*

“The variations in practice paradigms which emerged from this study may be too complex to be simplified in the form of typologies, but the following five “ideal types” offer one means of analysing the diversity of experiences and views represented by the forty interview respondents. It is important to note, however, that many respondents appeared to align themselves with more than one of these “attitudes” during the course of a single conversation, without clear reasons for the shift. This suggests pervasive ambiguity, which may in turn reflect the relatively new, changeable and unproblematized conceptualizations of mediation held by many commercial litigators.

A. The Pragmatist

The Pragmatist is generally positive about mediation, seeing it as a useful opportunity for exploring settlement in many, although not all, cases, and as making practical “sense” in the light of the extraordinary legal costs which are becoming the norm. The Pragmatist sees his clients embracing the idea of mediation for the same reasons, and this further consolidates his practical orientation towards mediation. He has always been very pragmatic about settlement - if a matter is going to settle, which it generally will, then why not get it done as quickly as possible at minimal expense?

The Pragmatist talks about his experiences of mediation in a way that suggests that his practice has not significantly changed as a result, and that he does not understand his self as doing anything very different - now he simply applies his negotiation skills to mediation. The Pragmatist does acknowledge that mediation sometimes - but only occasionally - produces significant results that come as something of a surprise, and in particular he recognises the impact of more actively including some clients at least in the negotiation itself.

This next lawyer acknowledged that mediation does take away some of the lawyer’s traditional control of the negotiation process, but otherwise his response to questions about “difference” suggest that he sees mediation not as so much as a different process as a new, earlier process. This quote also captures the essence of the Pragmatic view that mediation is a response to increasing client scrutiny about costs.

“(Mediation) does take away part of the control. On some level it also provides a forum. It introduces a new element into the process that otherwise isn’t there. (T)he usual process is that... the first time you have a serious discussion about settlement is either at discovery where the parties are there, the lawyers are there and all the paper is there and you’ve spent a lot of time and energy getting there....now more and more clients are asking for an assessment right at the top from a timing stand point, and asking you to analyse what’s the best time to get a resolution of the thing and especially with in-house counsel involved. They are very conscious of the costs and they want to know up front where the thing is going.”

Nonetheless, the Pragmatist generally assumes that he will play the dominant role in the mediation process. Pragmatists prefer to engineer mediation to take place after discoveries and are often quite dismissive of mandatory mediation which takes place before prior to discoveries.

The Pragmatist does not hanker after or covet trial work, and would do this only where necessary (he may even regard this as a self-indulgence for litigators that is no longer appropriate).

He would say that since early exploration of settlement is the way that legal practice is going, lawyers should get with it, and adapt accordingly. As he sees it, the clients set the agenda and here is an innovation that meshes with their interests.

“...mediation doesn’t mean you have to settle...(W)e just have to remember that it’s our clients who tell us what to do.”

The Pragmatist identifies real changes in client expectations, especially corporate and institutional clients, and less in the professional culture of litigators. He has a general preference for evaluative mediators, but will mix and match and acknowledges that it is occasionally useful to deploy a facilitative approach, for example where a client is particularly emotional, and/or has a weak case.

B. The True Believer

The True Believer has made a strong personal commitment to the usefulness of the mediation process which goes further than simply reorienting their practice strategies to new client expectations and requirements. The True Believer speaks about mediation in terms that suggest that it has had a significant impact on his attitudes towards practice, clients and conflict. He may even use quasi-religious metaphors like “converted” or “transformed” (“I got religion”;

“I think you’ll find that I’m a person who has now converted and I admit to being a believer in mediation” to describe this process of personal and professional change. He sees mediation as having a transformative effect on relationships, outcomes and on the role of the advocacy itself which goes beyond an instrumental use of the process. One True Believer described “... a completely different form of adversary process.”

Another in comparing mediation to traditional settlement negotiations asserted that “...(M)y role has significantly changed. All of those things are done quite differently at the mediation”.

The True Believer identifies what he thinks are signs of systemic change in the litigation environment and is perhaps more conscious or preoccupied with these than any of the other attitude types. The True Believer even sometimes takes on the role of proselytizer; for example, “I’ve got into the practice of taking on the education of the lawyers on the other side with respect to mandatory mediation”. Because of his changed perspectives on conflict resolution and the role of counsel, the True Believer sometimes experiences a strong feeling of tension between his adversarial role and his settlement role.

C. The Instrumentalist

The Instrumentalist regards mediation and mediators as a process or a tool to be “captured” and used to advance the clients’ mostly unchanged adversarial goals. This lawyer has assimilated mediation as a procedural tool to be efficiently utilised or alternatively avoided or neutralised (by showing up but not engaging). Favourite instrumental strategies include using mediation to reduce the expectations of the other side, or as a “fishing expedition” to obtain early discovery. He does not see any particular role for a client in a mediation unless heavily orchestrated by himself. He will likely have had little experience of any style of mediation other than a predictive, evaluative approach. He will move flexibly, with little effort and no apparent discomfort between an adversarial role and a more conciliatory role, regarding the second as a “game” rather than a genuine change in orientation.

Nonetheless, he is sometimes taken aback at what emerges from mediation, and in particular, acknowledges its usefulness for some clients as a cathartic process. These experiences are not, however, integrated in any way into practice norms but acknowledged in passing as a separate phenomenon.

“Mediation is the perfect opportunity for the fishing expedition, which prior to this was not available to counsel”

“You can tie everyone up and keep them further away from getting their dispute resolved through...a mediation process than anything else”

D. The Dismisser

The Dismisser regards mediation as a new “fad”, which in fact presents little different to the traditional model of negotiation towards settlement and therefore presents no special challenges to the role of counsel. Lawyers have always negotiated - at a time at which they feel that it is in the client’s best interests - and most cases have always settled (which demonstrates that lawyers must be good negotiators).

“(L)ook, we’re big people and we can settle the darn thing, what do we need a third party and why do our clients have to be there?”

The only substantive and important difference that is a result of mandatory mediation is that some aspects of file preparation occur earlier, and timelines are now set and enforced by the court (which the Dismisser generally resents, seeing this as an intrusion into counsel’s autonomy and control).

Faced with this requirement, the Dismisser complies by simply “going through the motions”. Client relationships are unchanged - just like before some get involved in the file and others do not - and outcomes are unchanged also, although results may consolidate more rapidly in some cases as a result of the new system. Mediation is probably most useful for providing clients with a “realitycheck” when they are either not listening to their lawyers or are being poorly advised. As a result, this attitude stream has a strong preference for evaluative mediators who have judge-like authority.

E. The Oppositionist

Whereas the Dismisser’s resistance to mediation, especially mandatory mediation, is somewhat passive-negative, the Oppositionist is far more vocal on the dangers and pitfalls of a shift towards consensus-building as an alternative to adjudication. The Oppositionist sees the mediation process and the role of the lawyer within that process as a distortion of the proper identity and professional responsibility of counsel. The lawyer’s central and most authentic role is to manage a war on behalf of clients. He is very comfortable in this role and experiences no role dissonance or discomfort. Conflict is inevitable, it is ugly, and the adjudicative system has been developed to recognise these realities.

He does not believe that mediation is anything other than a front for government efficiencies and clearing the court backlog. At the same time, he considers the movement towards ADR – especially where it is “touchy-feely”- to threaten the integrity of counsel’s advocacy role. He sees mediators as bogus, manipulative and unskilled - yet at the same time he feels that mediation is a risky place for himself and his clients, since it is a place where he is not fully in control.

“(I)t’s easier to settle out a case than press on principle, so then you have a watered down legal system....you’ll find mediation is going to be the way to go, but we’ll have a watered down legal system”.

So you'll find mediation is going to be the way to go, but we have a watered down legal system. Our system was built on the adversarial process and that will die, and that's great, if that's what people want but I'm not sure that's going to be the best system in the end of day. The best system should be getting the best results through some sense of adversarial process with experienced lawyers, so at the end of the day clients can feel that they got the right result, as opposed to a manufactured result that no-one's crazy about."

These five "ideal types" are referred to throughout this paper in order to illustrate the most distinctive and distinguishable versions of counsel's approaches to mediation. They represent the self-understanding of the respondents themselves, and are used to contrast some of the major differences in attitude and approach. The critical axes around which the five ideal types have been constructed include: what if any differences counsel sees between traditional lawyer-to-lawyer negotiation and mediation, and especially what impact the role of the mediator has on dispute resolution process and outcomes; how the lawyer understands the nature of his relationship with his client and the client's role in dispute resolution; his personal conception of professional role (including any role tension or dissonance experienced in mediation); the extent of attention and effort he gives to finding outcomes beyond the purely legal-adjudicative; and his preference for a particular mediator style (reflective of the understood purpose of the mediation process).

There are some assumptions built into the construction of these five ideal types which might be questioned. One is that there is a relationship of some consistency and logic between how each of these axes is handled by any one "ideal type". For example, counsel who believes that clients have a critical role to play in mediation are more likely to be searching for business outcomes beyond litigation, and so on. The ideal types do not differentiate between attitudes towards mandatory and private commercial mediation. In Toronto, counsel's opinions about mediation - including, most significantly, how much weight was attached to preparing for and participating in a mediation session - was affected by whether it was a Rule 24.1 mediation or a voluntary process. In these cases counsel would likely sound much more positive and engaged in private mediation than in early mandatory mediation. This is reflected somewhat in the differentiation between "Pragmatists" and "True Believers" - the latter are open to try mediation in almost any circumstances, whereas a Pragmatic approach would be more likely to be committed to using mediation in circumstances where counsel is in control of when and how the process occurs. Finally, the distinctions between the types themselves are naturally not watertight. Holding one attitude does not necessarily exclude holding another. Most respondents make comments which suggest at least two and maybe more of the ideal type orientations during the course of their interview. Sometimes they do this within the same sentence. As another lawyer put it,

"In mediation, one goal in my mind is to settle. Another, is to smoke the other side out"

This makes it all the more important to emphasise that in this use of "ideal types", few if any of the respondents in this study fell clearly and consistently into one "type" throughout their interview.

Instead, there appears to be significant improvisation taking place as counsel struggle to explain and rationalise their use of mediation, and some testing out of different attitudes and viewpoints. More often, one finds (as in the example below) snatches of a Pragmatic orientation, glimpses of the Instrumentalist perspective and perhaps a few lines of musing which sounds like a True Believer, all within one interview. One respondent made the following three statements - and repeated similar ideas to each of these a number of times at different points of the interview:

“(M)ediation has changed the way I practice law, it changes the way I look at things, it offers me the opportunity to look at different perspectives in a way that wouldn't have occurred to me had I been on either one-to-one negotiations with the lawyers on the other side because usually we're walking to the same world views.”

“The first job in the mediation is to intimidate the other side.”

“Why would you want to spend an extra year dealing with me and my legal bills when you can have certainty today ... In my experience, most clients would rather have certainty than uncertainly.”

Annexure D: DiSAC General Commercial Accreditation Standards

6. Accreditation of training programmes for mediators

In order to qualify for accreditation a training programme for mediators must include the following:

6.1 Programme presentation & content

- a) The programme must be conducted by a training team of at least two accredited trainers for every 18 trainees.
- b) The programme duration must be a minimum of 40 hours (which may be completed in more than one mediation workshop provided that no more than nine months have passed between workshops), excluding any written assessment.
- c) The programme must contain the following components:
 - i) Mediation theory (the Council will from time to time prescribe subject matters that are to be covered)
 - ii) Practice sessions that allow trainees to practise and develop skills:
 - Each programme participant must be involved in at least nine simulated mediation sessions and act as a mediator in at least three thereof.
 - The instructor must provide written coaching feedback in respect of at least one simulated mediation.

6.2 Assessment of trainees

- a) Assessment must include:
 - i) A written assessment that tests understanding of the theory and law of mediation.
 - ii) An assessment of the trainee's competence as a mediator (in an actual mediation, or in an applicable role play). Annexure C contains assessment guidelines that should be applied during assessment.
- b) During the assessment phase of the training, the ratio of qualified assessors to programme participants is to be no less than 1:4
- c) Each trainee must be assessed:
 - i) At least twice, and by different assessors.
 - ii) Each such assessment is to be contained in a written report (Annexure C contains guidelines in this regard).
- d) When assessing a trainee, the assessor must certify a trainee as being of a competent standard, or if this is not the case recommend additional training and practice, and re-assessment at a later date, or fail the candidate.

Annexure E: DiSAC's Standard for the Accreditation of Mediation Service Providers

1) Introduction

- a) Registration as an Accredited Service Provider ('ASP') will be open to any organisation whose principal purpose or objective is the provision of dispute resolution services (mediation, arbitration, conciliation, facilitation) and which meets the requirements of the Council.
- b) ASPs will have the ability to accredit mediators in accordance with the mediation accreditation standards set by the Council. To qualify for accreditation as a service provider an organisation must therefore be able to demonstrate its ability to properly fulfil this function.
- c) Organisations providing only training or ancillary services will not be able to accredit as service providers. They will however be able to obtain accreditation for their training programmes, trainers and assessors.

2) Annual registration

- a) Registration will be for a 24-month period: it must be renewed to remain accredited.
- b) Registration and renewal will involve the organisation meeting the registration criteria and lodging with the Council the standard registration application containing all the required registration information, and the registration fee.
- c) Registration will not be automatic following payment of the registration fee. The Council will have the right to decline an application to accredit if the ASP does not appear to meet the registration criteria or fails to lodge or continually to display the Registration Information on its website.
- d) The Council may at any time request:
 - i) confirmation of any of the registration criteria, or
 - ii) to inspect the activities of the ASP to confirm that it complies with the registration criteria.

Failure by the ASP to adhere to such request may result in refusal of its registration, or the lodging of a complaint in accordance with paragraph 15) below.

3) Details of region of operations and number of mediators

The organisation must list:

- a) The geographic area covered by its panel of mediators;
- b) The types of dispute which it undertakes.

4) Mediator management

ASPs are responsible for mediation management. This includes the following:

- a) Published standards that meet the Council's minimum accreditation standards
- b) Transparent accreditation process in line with the Council standards

- c) Expertise to perform assessment of membership applications
- d) Qualifying Continued Professional Development ('CPD') programme, or access to such a programme
- e) Performance monitoring of its panel members
- f) Process for submission of mediator details for registration with the Council

5) Standards of conduct

ASPs must:

- a) Subscribe to a **code of professional conduct** that meets Council standards
- b) Subscribe to a complaints system that meets Council standards
- c) Subscribe to a disciplinary process that meets Council standards
- d) Require mediators to subject themselves to these standards of conduct

6) Sound governance structures, and appropriate administrative resources

ASPs must demonstrate or produce:

- a) Compliance with all regulatory and statutory requirements for registration and on-going conduct of business
- b) Current tax clearance certificate
- c) Details of ownership and management including particulars of:
 - i) Shareholders and shareholding
 - ii) Directors
 - iii) Executive management
 - iv) Senior staff
 - v) Name of auditors
 - vi) The responsible person who will deal with Council matters
- d) Sufficient details of case management, administrative systems and record-keeping so as to demonstrate competency.
- e) Contact telephone numbers during normal business hours.

7) Financial viability and management of 3rd party funds

ASPs are often required to work with members' funds (for example deposits for arbitrators / mediators). For this reason the Council is obliged to consider the on-going viability of ASFs, as well as the measures in place for managing members' party funds. ASFs are therefore required to disclose the following within 6 months of their yearend:

- a) Disclosure of the process in terms of which members' funds are managed. It is required that such funds shall be kept separate from any other funds managed by the ASP.

- b) A statement by the ASP's auditors / bookkeepers that all third party funds were administered in accordance with the ASP's internal processes. If not, full details of any deviation must be supplied.

8) Transparent and published details of services and costs

ASPs must publish:

- a) A description of services (including process rules, where appropriate)
- b) Details of fee structures

9) Indemnity insurance

ASPs must have a level of professional indemnity insurance for the organisation and its officials to the satisfaction of the Council.

10) Publication of registration information

ASPs must display their registration information (see annexure A) on their websites.

11) Additional requirements

- a) ASPs may from time to time be required to meet all additional requirements that are published by the users of mediation services (for example the Department of Justice).
- b) ASPs may request the Council to investigate and certify compliance with such requirements.

12) The process of registration

- a) The secretariat of the Council (for purposes of this process called the registrar) will be the point of contact for the Council.
- b) The process will operate as follows:
 - i) The registrar will receive the application together with the prescribed fee
 - ii) The payment of the due fee will be checked and the fee banked.
 - iii) The registrar will assess compliance with the accreditation requirements
 - iv) The registrar will then present the application to the Council for approval
 - v) If the Council is also satisfied then the registrar will:
 - (1) notify the applicant
 - (2) send the applicant a high definition version of the Council logo for use on their website;
 - (3) allocate a registration number to the ASP and notify the ASP of that registration number;
 - (4) update the Council website with the organisation's name and link; and
 - (5) ensure that the ASP receives a renewal notice in 22 months time.

13) Registration difficulties

- a) If the registrar believes that an applicant has failed to meet the accreditation requirement or display on its website all of the registration information, the registrar shall in the first instance ask the applicant for the required information.
- b) If the applicant still does not in the opinion of the registrar comply then the registrar will notify the chairperson of the Council of the problem. The chairperson will approach the applicant for the required information.
- c) If the required information is not forthcoming within 14 days the chairperson will notify the Council that an application has been declined (with written reasons) and cause the registration fee to be returned in 28 days if there is to be no appeal.
- d) If the applicant wishes to challenge the decision of the chairperson it may appeal to the Council. If the appeal is dismissed the registration fee will be retained by the Council.

14)De-registration

- a) Once an organisation is accredited it will only lose registration if
 - i) It fails to renew after 24 months by reason of:
 - (1) its failure to provide the required renewal form; and/or
 - (2) it fails to pay the required fees. In every case the ASP will be sent one electronic notice to renew by the registrar 22 months after the date of its first registration (or its last renewal of registration); and, if necessary, a single reminder by the registrar six weeks later. If the organisation takes no action the Council will serve a notice of de-registration and cause its entry on the Council website to be removed. The notice of deregistration will require the organisation to cease using the Council logo. It will be copied to the Council executive.
 - ii) It comes to the notice of the Council that the organisation has ceased to trade or to operate, is wound up, or dissolved.
 - iii) It comes to the notice of the Council that the organisation has been placed into liquidation or administration, or has otherwise become insolvent.
 - iv) The organisation or its officials, officers, directors or employees in the course of their duties is or are found by a court or tribunal in any country to have or to be engaged in unlawful activities.
 - v) As a result of a finding by the Council under section 15 below that the organisation is no longer fit to be a ASP.

15)Complaint as to fitness to remain accredited

- a) A complaint under this heading can only be made on the ground that the organisation fails to comply with one of the requirements set out above for accredited ASPs. This is not a general complaints procedure. Any other complaint, for example about an organisation's service, must be dealt with through that accredited organisation's own complaints procedures
- b) Where an ASP or its officials, officers, directors or employees in the course of their duties is or are found by a court or tribunal in any country to have or to be engaged in unlawful activities, the Council Registrar shall lodge a complaint setting out details of the offence.

- c) Any person, body or organisation (including a member of the Council) may make a complaint to the Council about an ASP's fitness to remain accredited. A complaint about fitness must be made in writing and signed by (or on behalf of) the complainant. It will be addressed to the registrar.
- d) Upon receipt of such a complaint the Council shall deal with the matter in any way it deems appropriate, subject to the rules of natural justice. A complaint shall not be considered by the Council unless the nature of the complaint is likely to raise a real rather than merely fanciful question as to the fitness of the ASP to remain accredited.

ANNEXURE A: ACCREDITATION INFORMATION TO BE PUBLISHED ON WEBSITE OF SERVICE PROVIDER

A. Basic Information

- (1) the full name and business address of the organisation;
- (2) the organisation's email, website and telephone contact details for a personal contact point at the organisation for telephone calls during normal working hours;
- (3) the company/charity registration number of the organisation (if any);
- (4) the name of the person responsible for the registration information;
- (5) the year that the organisation was first accredited by the Council;
- (6) a statement that the organisation and its mediators is covered by professional indemnity insurance to the extent required by the Council from time to time;
- (7) the Region(s) covered by its panel of mediators.

B. Practice Information

- (8) a Code of professional conduct for its mediators that meets the Council recommendation;
- (9) a statement that it has adopted and follows the Council Code of Good Conduct for ASPs;
- (10) details of its internal complaints procedure;
- (11) a statement of the minimum requirements for a person to be one of its panel mediators, which shall be not less than the Council requirement of a minimum of 40 hours training together with a successful assessment;
- (12) a statement of the minimum amount of mediation-specific CPD each panel member is required to undertake, and
- (14) the types of mediation which it undertakes in line with the categories prescribed by the Council from time to time.

Annexure F: Comments from the United Kingdom

This discussion document was kindly reviewed and commented on by Felicity Steadman (mediator and CEDR and Conflict Dynamics trainer based in the UK) and Tony Allen (senior mediator and trainer attached to CEDR in the UK)

COMMENTS FROM FELICITY STEADMAN

Should Court Mediators be Lawyers?

Over the past 8 years I have mediated numerous civil and commercial disputes referred to the National Mediation Helpline (NMH) by the County Courts in London, Oxford and Birmingham. The claims have varied in size from small claims to claims well over £100 000. I am a CEDR accredited civil and commercial mediator with 22 years experience of mediation and ADR generally. I am not a lawyer. I am not required to have a legal qualification. My lack of legal qualification is not a hindrance although my experience as an arbitrator and understanding of basic contract law and legal process is helpful in this context. I don't think non-lawyers should be limited in the way that the DiSAC tiered system suggests. Court based mediation can be very challenging; it is not truly voluntary, the parties have not freely chosen their mediator and they generally have little experience of the process. Time is also limited. Well trained experienced mediators are required, having a legal qualification is not a prerequisite in my experience.

*I am not convinced about limiting non-lawyers to lower value cases. There should be better criteria than this. Lawyers are by no means the best mediators simply by virtue of their legal training and non-lawyers can be excellent mediators of whatever value case is involved. Arguably it is easier to pick up enough law to mediate well than to pick up enough mediation skills to handle legal issues in a mediation well! This links with the question of whether lawyers will be allowed to attend and advise their clients during the mediation, something which I firmly recommend should be allowed (see below in my comments on the draft rules themselves below). To have a lawyer mediator, especially one seen as expert in the specific field of the dispute, risks the possibility that unrepresented parties will assume that the lawyer will advise them of the outcome. This is wholly against the spirit of your rules and the role spelt out for the mediator as a **non**-adviser. We have a number of excellent non-lawyer mediators here, selected freely by parties, who deal with very heavy value cases. They must obviously satisfy the authorities as to their experience before being put in a court panel, but this is not at all difficult to do.*

Fixed fee mediations

Fixed fees for a pre-set periods of preparation and mediation are best in my view, with scope for extension by agreement at a published hourly rate if the time proves insufficient and the parties agree this will maximise flexibility and minimise embarrassment for the mediation who could otherwise be suspected of taking unnecessary time to earn more.

I propose that instead of having three tiers there is a simple junior / senior ranking of mediators based on qualifications and experience, and that the providers allocate mediators in relation the particular case. Also that a broader approach be taken to qualifications. It does not follow always that higher value cases are more complex or that they necessarily take

longer, although the correlation between value and time of mediation is a useful one for costing purposes.

Language proficiency

*Be careful here: parties need their lawyers to draft settlements. Mediators who draft settlement agreements need to have legal skills **and** indemnity insurance in case they are negligent*

GENERAL COMMENTS FROM TONY ALLEN

I think this is an extremely thoughtful and impressive scheme, with a degree of sophistication which sadly we have never been able to institute or afford in the UK. We have gone through four main iterations of court-annexed mediation and none have worked properly, to my mind.

- *Court schemes attached to a number of County Courts (Central London, City of London, Birmingham, Manchester, Leeds, Newcastle, Bristol, etc. These were never adequately staffed and resourced by the Courts Service, and not available to more than 20 out of the over 200 courts of this kind nationwide. There was never a court scheme for the High Court on London or for its civil sittings on circuit, and the only other Court scheme (which still exists) is the Court of Appeal Mediation Scheme (see details of this below. - it has been under-used, but remains a helpful model)*
- *To cope with nationwide availability for mediators to deal with average to low value disputes, the National Mediation Helpline (NMH) was set up by the Ministry of Justice (MoJ) with set fees for disputes measured by value. This foundered for want of State funding and measurable success, and mediators found it an unattractive scheme to work with.*
- *Probably the most successful court-annexed mediation scheme has been through the Small Claims Mediation Service, in which court staff and other employees of the Courts Service trained (by CEDR) as mediators to handle small claims (less than £5000 at stake or £1000 for personal injury claims). There is roughly one mediator to cover each of the 20 or so court regions and they get through several thousand mediations a year, handled largely by telephone for an anticipated duration of 1 hour.*
- *The current list of providers approved to frankly a fairly minimum standard by the Civil Mediation Council published by the MoJ makes the availability of an independent mediator even more remote than under the NMH. It costs the MoJ very little (to their relief when faced with a 25% budget cut across their remit) and buys a degree of respectability without any real hope that it will encourage growth of mediation use for middling claims. Providers like CEDR are growing their offerings for small claims (like their 125 low cost time-limited Scheme and having acquired IDRS from the Chartered Institute of Arbitrators now manage some very significant adjudication schemes as well, which do offer decided outcomes to parties,*

In truth, there is not much appetite among the judiciary for court-based schemes and there is certainly not enough capacity in the MoJ to stimulate it. What we do have currently is a second civil justice reform package on the way, mainly designed to cut the rampant legal costs of litigation, implementing most of the recommendations of Lord Justice Jackson. This will entail much fiercer enforcement of court case management and (possibly) better and more stringent post-issue enforcement of pre-issue obligations to exchange information and to attempt settlement, perhaps by mediation. Jackson LJ is opposed to compulsory

mediation and no one is really advocating that here, despite its clearly being authorised under EU and human rights law, subject to certain safeguards.

Judges here have been encouraged by certain legal academics to be purist about the value of publicly declared outcomes in open court which contribute to the development of the common law. The English system has always been rather squeamish about encouraging settlement through its procedures, despite Lord Woolf's best endeavours,. It is refreshing to see that the possibility of doing so might not be anathema in the same way to S African judges.

But do not underestimate the opposition to mediation that can come, unspoken but nonetheless determined and effective from an unwilling judiciary and legal profession. While no one may be uncouth enough to assert or admit that ADR means Alarming Drop in Revenue (for litigation lawyers at least), they might acknowledge that ADR is feared (totally wrongly) to represent an Alarming Drop in Responsibility for lawyers and judges alike. The best way forward to my mind lies in helping lawyers to see that a mediator may help settle cases quickly and thus improve both cash-flow and reputation among the client pool, and judges to see that weak cases capable of settlement can be weeded out of the system, leaving cases worth trying and reducing delay and time wasted on cases which settle at the court door for everyone's benefit.

As to whether a useful model can be offered from English experience, it might be useful to spell out how the Court of Appeal Mediation Scheme (virtually the only surviving court-annexed scheme here) works. Judges may recommend its use when giving permission to appeal or giving directions, or parties to appeals can ask to use it. The mediators have to apply to the Court for admission to its panel, and they have to show both accreditation and considerable experience to be admitted. Its use is not compulsory, but a party who unreasonably ignores a judicial recommendation to mediate or another party's invitation to do so may face a costs sanction. Thus an unreasonable successful party may not get the usual award of costs and an unreasonable loser may have to pay a higher proportion of the winner's costs than normal.

Once parties are recommended to try mediation the Court's Civil Appeals Office (CAO) refers the case to CEDR who have been contracted to administer the setting up of mediations. CEDR then sends out a choice of three appropriate names of panel mediators and the parties choose, or in default CEDR appoints. If within 10 weeks of referral by the CAO to CEDR the parties do not set a mediation date, CEDR reports this back to the CAO for the Court to give directions.

There is a set fee payable before the mediation (for the last 8 years it has been £850 plus tax per party). The mediator receives £500 per party and CEDR £350 per party for administering the mediation. Indigent parties can apply to the CAO for fee waiver.

Mediations under this scheme allow for 4 hours preparation and 5 hours mediation, with the option to negotiate longer hours direct if needed. Very big ticket cases may be taken out of the scheme when commercial rates may apply.

This preserves a nice balance between the Court and an external administrator. Other court schemes were largely run by court staff without wither the time or experience to do so effectively.

The only cost to the Court is to pay CEDR's admin fee for any party granted a waiver. Mediators usually waive their own fee on a pro bono basis for any fee waiver party. The scheme fee rates for mediators are low by commercial standards and there is a kind of expectation that prestige from panel membership is the compensating factor.