Interdisciplinary influences on family mediation
A chronicle of colonisation foretold?

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This article contrasts the interdisciplinary enrichment of mediation as a subject of scholarly study with the often distorting even damaging interdisciplinary influences on mediation, family mediation in the UK in particular, as a practice intervention. The article identifies four historical phases of disciplinary influence over the evolutionary development of family mediation from the early welfare and therapeutic influences to those more recent pressures arising from legal practice and from the legal system itself. The article raises current concerns about the detrimental impact these pressures are having on the integrity of mediation practice in providing a genuinely alternative dispute resolution process with distinctive process and outcome benefits for the public. The article argues that lacking conceptual clarity and coherence provided by the rich interdisciplinary body of twentieth-century mediation theory and scholarship, mediation practice becomes vulnerable, unable not only to resist distorting, damaging and even destructive pressures but even to recognise them.

Keywords: ADR; negotiation; mediation; family mediation; interdisciplinary scholarship; practice
Introduction

The modern emergence of mediation in the West in the 1980s represents a profound transformation of civil disputing practice, particularly in the field of family justice, where mediation is now the officially endorsed, legally aided, ‘default’ approach for the management of family disputes. Radically different in two fundamental respects from the traditional formal approaches of litigation and adjudication, mediation is an alternative both to bilateral lawyer representation and to imposed judicial decision-making. It aims to achieve consensual joint decision-making by the parties themselves (Fuller 1971; Roberts and Palmer 2005). This relocation of decision-making authority to the parties, replacing lawyer negotiation on the competitive litigation track with collaborative party negotiation, facilitated by a non-aligned mediator, is the defining feature of mediation as a dispute resolution process. Mediation has been summarised as ‘helping people to decide for themselves’, in contrast to ‘helping people by deciding for them’ (as in adjudication and arbitration) (Meyer 1960:159 at 164).

Mediation as a subject of scholarly study is characterised by its historical depth, range and the inter-disciplinarity of its knowledge base (both classic texts and current works) which long precedes the growth of mediation practice in the late twentieth century. These classic texts constitute a distinct body of knowledge of negotiation and of mediation as well as of the broader study of conflict and dispute resolution, a theoretical resource richly informed by many disciplines including anthropology, economics, industrial and international relations, law, neuro-linguistics, political science, peace studies, philosophy, psychology, social psychology and sociology.

Seminal academic writings on mediation provide the basis of the understanding of the subject presumed in this discussion (for example, Simmel [1908]1950; Douglas 1962; Fuller 1971; Deutsch 1973; Gulliver 1979). These texts delineate empirically based features of the process of mediation that are common to all negotiations, observable across societies, fields of practice and subject matter even though no two instances are the same (Gulliver 1979). In brief, two concepts are fundamental to an understanding of mediation and of the role of the mediator:
• mediation serves a negotiation process; and
• the role of the mediator is understandable only within an understanding of that process (Gulliver 1979).

The task of the mediator is to understand the internal structure of the negotiation process and therefore to know how to set up, manage and orchestrate the necessary cyclical exchanges of communication that propel the parties through the developmental phases of the process towards an informed and mutually acceptable settlement of the dispute. The mediator acts in a non-aligned capacity ensuring that the structural and procedural requirements, necessary to achieve fairness, are in place so that the parties have the opportunity for a productive conversation not possible on their own. This is a process that must be experienced directly by the parties themselves as negotiators, participating in a dynamic process of exploration and learning, personally interacting in ‘the search process’ (Stenelo 1972).

Four fundamental principles of mediation – voluntary participation; confidentiality; the impartiality of the role of the mediator; and the procedural flexibility of the process – are presumed essential if the process is legitimately to be characterised as mediation (Fuller 1971; McCrory 1985, 1988). These combine with the principle of party decision-making authority to distinguish mediation as a discrete and autonomous process of dispute resolution, one informed by its own distinct body of knowledge and defined by its core characteristics.

Mediation as a practice intervention reveals commonalities of process, principle and features (across fields) as well as heterogeneity and eclecticism in practice approaches, models, styles and even objectives (for example, see Stenelo 1972; Princen 1992; Haynes 1993; Moore 1996; Winslade and Monk 2001; Bush and Folger 2005; M. Roberts 2007; De Girolamo 2013). Ambiguity, structural, institutional and political tensions and conflicts of function and professional interest also complicate the picture. Contemporary complexities and confusion in the sphere of the practice of mediation may be contrasted with a greater clarity and consistency of the academic literature on mediation, both in respect of its defining characteristics (observable across cultures and times) and in its relationship to other dispute resolution interventions, in particular to the primary form of decision-making, namely adjudication (Roberts and Palmer 2005).
The focus of this article is on mediation as a practice intervention, on family mediation in particular, and on those powerful pressures from different disciplines that have affected its evolutionary development in the UK over the past 40 years. This article seeks to identify four successive phases, each of which reflects the importation of different professional disciplines with an impact on family mediation practice. These interdisciplinary influences combine with prevailing political, legal, governmental, financial and commercial spheres of interest which in addition affect how mediation is conceived, promoted and practised. So the emergence in the UK of family mediation as a new, potentially creative practice intervention in the field of family dispute resolution can also be seen as the history of its struggle to protect and retain its discrete identity and unique benefits.

Phase 1: The early 1980s: The welfare professionals

This early phase of family mediation in the United Kingdom, when the primary issues being mediated related only to disputes over children (in contrast with the later introduction of a wider range of issues, including property and financial matters), reflects the influence of the dominant professions of origin of the early pioneering family mediators, namely, social work, counselling and psychotherapy (Fisher 1992; Parkinson 2011; M. Roberts 2014).

The focus on children in family mediation highlights three considerations relevant not only to family mediation but to mediation across fields of practice, namely:

- the role of third persons in mediation (i.e. those not themselves parties with decision-making authority, but who are directly affected by the process and its outcome – children, new partners, wider family members such as grandparents, etc.);
- how mediation differs from other interventions and, in respect of children, what constitutes their distinctive mediation-specific involvement in the process, compared to their involvement in other forms of interventions such as counselling, advocacy, guidance, welfare investigation, therapy and so on; and
- the tension between the ethics of mediation and the pursuit of individual rights, for example, collaborative rather than competitive, adversarial approaches to addressing dispute, consensual rather
than imposed decision-making, values of mutual respect, care and reciprocity compared to those of rights assertion and self-advance-
ment, talking rather than fighting, and so on.

There has long been a consensus in the West that, compared with litiga-
tion, the process and outcome benefits of family mediation (in appro-
priate cases) can enhance children’s interests – by encouraging parents
to focus on their children’s needs; by offering a co-operative rather a
competitive approach to dispute resolution; by improving parental com-
munication; by reducing conflict; and by parents retaining control over
their own decisions (Wallerstein and Kelly 1980; Lund 1984; Maccoby
and Mnookin 1992; Cockett and Tripp 1994; King and Trowell 1992;
Trinder, Beek and Connolly 2002; Kelly and Emery 2003; Hunt with
Roberts 2004; Kelly 2004; Birnbaum 2009). However there has also
always been, and still continues to be, controversy over the direct par-
ticipation of children in mediation – whether it should take place and if
so, when and how (O’Quigley 1999; Wade and Smart 2002; M. Roberts
2014; King 2007; Walker and Lake-Carroll 2014). Discussion of this
issue in the 1980s was characterised by two features: first, a polarisa-
tion of positions lined up for and against the direct ‘involvement’ of
children, and second, the importation, into this new and different arena
of private ordering, of the ‘child-saving’ and paternalist aspects of wel-
fare professionalism then prevailing (typically social work practice in
the context of child protection). The dominant argument then of those
in favour of direct child participation in mediation was based on the
view that separating/divorcing parents, suffering a ‘diminished capacity
to parent’ (as a consequence of stress and poor communication arising
from family breakdown), required the physical presence of their children
both to remind them of their parental responsibilities as well as to avoid
discrepant perceptions arising by obtaining first-hand information from
the children themselves (see for example, Wallerstein and Kelly 1980;
Howard and Shepherd 1987).

This debate has since raised wider questions too – for example, why
greater significance should be attached to children’s views at times of
separation and divorce when decision-making in intact families is not
questioned and when parents frequently impose their views on their chil-
dren; and why parental disagreement should act as a trigger for asserting
children’s rights (see Phase 4) (King 1997, 2007).
This preoccupation with children’s interests, in the sphere of private ordering, also highlights a potential conflict – not between parents and their children, but between parents and those professionals who claim to be better equipped to know, listen to and represent the best interests of children. This exemplifies a curious paradox in the presumption by some professionals that children will behave sensibly and reliably in the making of the serious decisions that affect them, while parents are denied that same presumption of competence.

Since then the family mediation profession, informed by research, has clarified its policy on the precise role of children in mediation and the nature of that involvement, namely, their consultation, both indirectly by parents or directly by the mediator (Garwood 1989). This addresses the policy question of how children’s perspectives can best inform a process in which the parents are the ultimate decision-makers (College of Mediators 2006b). Currently there continues to be a spectrum of views about the direct participation of children in mediation with no new British research to inform recommendations for changes in policy and practice (see Phase 4). If the question now is not ‘if’ but ‘how’ and ‘when’ children should participate in the decisions that affect them, many unanswered questions still need to be addressed for their participation in mediation to be better understood and for problems to be identified. These include, for example:

- What weight should be given to the voice of the child and who decides?
- Should there be an age when the views of children are determinative?
- What does participation of the child really mean – are children’s views considered seriously or through the adult lens of what is in their best interest?
- How is the outcome to be evaluated – the settlement of the dispute or future family relationships (Birnbaum 2009)?

Research is needed too to establish whether or not differences of approach coincide with the profession of origin of the mediator – for example, whether those with a legal profession of origin could be less inclined or equipped to consult children directly compared to those with a mental health and/or other professional background (Lund 1984; National Family Mediation 1994).
Phase 2: The late 1980s and 1990s – family therapists

Mediation and family therapy are forms of intervention that differ essentially in terms of their objectives, process, methods, and theoretical assumptions. The need to clarify and distinguish these two kinds of practice became pressing, particularly in the late 1980s in the United Kingdom, when family therapists began to train as family mediators, seeing it as an extension of their usual work. It became clear that understandings of family mediation could be seriously distorted by the grafting onto it of the assumptions and techniques of family therapy, and of family systems theory in particular.

Not only are the assumptions, methods and objectives of these two methods of intervention incompatible, but a number of hazards were associated with attempts to apply family therapy approaches to mediation, such as:

- The negotiation and decision-making process of mediation could become tainted with the stigma of family dysfunction and treatment associated with family therapy and boundaries could become blurred.
- Family disputes could be perceived as pathological or dysfunctional.
- The focus on the underlying dynamics of relationships and their interpretation – regarding the parties’ definitions of the issues as ‘presenting’ problems – privileged the meanings of the intervener rather than those of the parties. This claim to a monopoly of meaning increased the power of the therapist as knowing expert and affirmed their leadership role in contrast to the facilitative role of the mediator.
- The family systems view was that by challenging and changing behaviour, changes of perception and experience would occur. This was the reverse of the process by means of which change was perceived to be brought about in mediation – by exchanges of information leading to learning and an improvement of understanding.
- Family therapy from its earliest development in the 1950s until the 1990s was acknowledged to have been a manipulative approach using covert techniques (such as hypothesising, circular questioning, reframing techniques such as positive connotation designed to achieve systemic levelling, etc.) to manipulate the perceptions
and preferences of the parties (see for example, Walrond-Skinner 1976; Howard and Shepherd 1987; Saposnek 1983; Watson 1987; Campbell, Draper and Huffington 1989; Howe 1989).

• The loose and liberal adoption in mediation of the language and typologies of family therapy could be viewed as the attempt by one group of professionals to appropriate mediation as an extension of their activities by means of the transforming influence of their specialist discourse.

It is fair to say that by the late 1990s, the post-modern discussion of family therapy reflected a general move towards greater awareness of the ethical implications of previous approaches and a move away from asserting an expert role in the treatment process and towards working in a more open and more ‘person-centred’ way with families. It also reflected a greater focus on the impact of external social factors such as race, class and gender (Dallos and Draper 2010).

What characterised this period in the evolution of family mediation were the attempts that were made by some legal researchers and some therapists to get to grips with this then new and apparently elusive practice. The legal researchers did so by seeking to locate mediation within the framework with which they were most familiar, namely the Family Justice System. It was not surprising therefore that they found it difficult to conceive of a form of intervention that was neither part of the justice nor of the welfare system though they did in the end try to fit mediation into the welfare box (Murch and Hooper 1992). The problem lay in the fact that these authors inhabited a mental universe dominated by the now aging dyad of ‘justice’ and ‘welfare’ … [and] while there is obviously nothing wrong with either justice or welfare, mediation is about something else. It is primarily directed towards the support of private ordering in seeking to facilitate joint decision-making through party negotiations. (S. A. Roberts 1993:6)

At about the same time within the world of therapy, parallel attempts were being made to conceptualise family mediation as an extension of family therapy (filling a gap in treatment techniques specific to working with separating families) within a family systems theoretical model and operating within a traditional legal framework – ‘If conciliation
With historical hindsight it is perhaps not surprising that such attempts were made at the time, consciously or unconsciously, deliberately or through ignorance or what John Haynes termed ‘the lax importation of ideology’ (Haynes 1992:21) especially where mediation bore a superficial resemblance to those practices that were already pre-conceived or established. Yet these appropriations created the very sense of ambiguity and confusion about mediation that was being complained about. In the recommendation (Walker 1988) that the ideal, interdisciplinary, co-working model for family mediation practice should be a lawyer (to deal with legal aspects) and a therapist (to focus on the emotional and interpersonal aspects), there was also a clear attempt to avoid a struggle for supremacy between professionals and to solve the political problem of who was to have professional control of this new practice.

Phase 3: The 2000s – the legal profession

In the 1990s, a growing interest in mediation among lawyers in this country arose at a time when official consensus was reached about the nature and benefits of mediation and its relationship to the legal process (Woolf 1996; Conciliation Project Unit 1989). In addition, with endorsement given to mediation by the Family Law Act 1996, family lawyers (initially solicitors, but increasingly barristers as well) began to train as family mediators in their hundreds fearing a growing challenge to their monopoly of control as specialists in dispute resolution (Auerbach 1983; S. A. Roberts 1992). More recently, with the withdrawal of legal aid for most private law family disputes as a consequence of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, this trend has increased dramatically as has the contracting of solicitor firms (with the Legal Aid Agency) as franchised providers of family mediation, for which legal aid continues to be available.

The Law Society has proclaimed a legitimate interest in overseeing the professional standards of those mediators who are also practising solicitors. It has established its own separate code of practice for so called ‘solicitor mediators’ and its own procedure for accrediting them (Law Society 1993, 2002). Mediation is promoted as simply another area of legal specialism – another tool in the lawyer’s toolbox – and therefore
part of legal practice. The Law Society has thus abandoned the traditional, exclusively partisan, advisory and representative professional role of its members that it has historically monopolised. These same partisans (dominant experts, specialist advisors, negotiators and champions) are now presented as best equipped to be professional neutrals, (impartial, non-directive facilitators of other people’s negotiations). The Law Society claims control over a new and potentially lucrative area of professional dispute resolution, thereby challenging established professional boundaries and core understandings as to the nature both of legal practice and of mediation (S. A. Roberts 1992, 2002). The Bar Council has followed this path too, establishing its own ADR committee and public register of ‘barrister mediators’ (though not seeking to accredit its practitioners; Beldam 1991; Bar Council 2013; Roberts and Palmer 2005).

Impact of lawyers on practice

Worrying pressures are being exerted that confuse the separate roles of lawyers and mediators and hybridise functions. Examples include the following:

- The Law Society of England and Wales has authorised the practice of mediation by solicitors as part of their legal practice provided the parties to the dispute are sufficiently informed as to the solicitor’s role (Law Society 1993: Professional Conduct of Solicitors, Principle 11.01).
- The Law Society has adopted the terminology of ‘solicitor mediator’ (as problematic as the juxtaposition of ‘barrister mediator’ or ‘judge mediator’), a linkage of incompatible roles that creates confusion, especially for the public. Masking rather than clarifying critical distinctions damages both legal competence and accountability and the integrity of mediation as a discrete and distinctive intervention (see for example, Maclean 2014).
- Some lawyers endorse their practice of what they call ‘evaluative’ mediation – a directive rather than facilitative approach more in keeping with their customary role and experience (Riskin 1984; Effron 1989; Davis et al. 2000; Roberts and Palmer 2005; Kressel, Henderson, Reich and Cohen 2012). The evaluative approach involves combining features of mediation, of advice-giving and of
interdisciplinary influences on family mediation

 arbitralion. Eliciting information for the purpose of facilitating negotiation and party decision-making is quite different from a situation where information is elicited for the purpose of enabling the intervener to evaluate information in order to reach a diagnosis of the problem, issue a prescription on the basis of expert knowledge, and then attempt to persuade the parties to accept this solution. In such a process three analytically distinct and contradictory roles are conflated: that of mediator, of advisor and of arbitrator. In actual practice these different roles can shade into one another and styles and models of practice vary accordingly across a spectrum. Some argue that evaluative mediation is not mediation at all (Roberts and Palmer 2005). Others argue that as the final outcome lies with the parties, evaluative mediation may be an approach of choice for parties who might value being advised/ told what to do. Yet current Codes of Practice for mediators explicitly forbid advice-giving by the mediator, because of the potential conflicts of interest that might exist between the parties (College of Mediators 2008; Family Mediation Council 2010). In any event, the giving of legal advice, which involves an evaluation and recommendation of a particular course of action, creates a partisan relationship with the client, a relationship of loyalty, inseparable from a representative role and therefore incompatible with the mediator role (Riskin 1984).

With the advent of public funding for family mediation in 1996, externally introduced (by the then Legal Services Commission) notions of ‘success’ reflect the government priority of reducing legal aid expenditure, especially on family disputes. ‘Success’ is defined in terms of diversion from legal process and ‘cost-effectiveness’ in the form of a measurable, quantifiable outcome. This favours the more directive, evaluative approach to settlement traditionally practised by lawyers, as disposing of the legal issues in dispute becomes the primary objective of mediation. This government index of success, in rewarding quicker and therefore cheaper approaches, takes no account either of the range of issues that parties raise for negotiation in mediation (ethical, practical, personal, mostly communication and only rarely exclusively legal issues, irrespective of their legally aided status) or of the distinctive but more elusive and less quantifiable, yet no less significant process benefits of mediation – such as improved understanding and communication between the
parties, reduced conflict, and the enhanced capacity of the parties to negotiate together in the future, of particular benefit for separating families and their children (Davis and Roberts 1988).  

- Notwithstanding initiatives by the main mediation providers to establish a national mediation body to set, monitor and regulate professional standards, the Law Society insists on determining its own professional standards and accreditation procedures for its ‘solicitor mediators’ (Lester 2014). In retaining separate oversight, even as a member body of the Family Mediation Council, the Law Society undermines the national project to establish uniform standards of mediation practice that apply regardless of the profession of origin of the mediator or their sector of provision.

**Phase 4: The present – the family justice system**

Several recent developments in the family justice system confirm a growing trend to deny mediation its distinctive status as a genuine dispute resolution alternative to litigation and formal judicial determination and towards mediation becoming a form of legal process rather than an alternative to legal process, damaging to both judicial authority and party control (Effron 1989).\(^{10}\) These changes include the following:

- Severe cutbacks of legal aid for legal representation in private law cases, and though legal aid for family mediation is protected, eligibility requirements have been considerably tightened (see the Legal Aid, Sentencing and Punishment of Offenders Act 2012). Official promotion of mediation and a concomitant denial of access to legal representation has brought with it an increase in referrals to mediation of unsuitable cases (Ap Cynan 2013; Morris 2013).
- The Final Report of the review of the Family Justice System recommended in 2011 that mediation should be the preferred, the default process for those in dispute, other than in exceptional circumstances such as domestic and child abuse cases (Family Justice Review 2011). The Final Report recommends: ‘To reinforce the primary nature of these [mediation] services “alternative dispute resolution” should be re-branded as “Dispute Resolution Services”, in order to minimise a deterrent to their use.’ While mediation itself remains voluntary, a prior meeting for assessing suitability for mediation is
now compulsory for those considering legal proceedings (Children and Families Act 2014 §10(1)). A recent research report recommends too that this mediation information and assessment meeting (MIAM) be replaced by the dispute resolution information and assessment meeting (DRIAM) (Family Justice Review 2011; Barlow, Hunter, Smithson and Ewing 2014). This recommendation obscures the primary purpose of these meetings, namely to establish suitability for mediation, the only dispute resolution process where parties are not legally represented and therefore which requires essential screening for unsuitability (for example, where power imbalances are extreme such as domestic abuse or where capacity to engage is otherwise in question).

• Within 5 months of being set up, the Ministry of Justice Voice of the Child Dispute Resolution Advisory Group published its Final Report in March 2015, making recommendations, primarily for family mediation, ‘to promote child inclusive practice in out-of-court dispute resolution processes … in order to develop an effective and coherent blueprint for the future which could be adapted … by other dispute resolution practitioners’ (Ministry of Justice 2015:i). While the status of this Final Report remains unclear, and while its re-affirmation of the importance of a culture of respect for children and their views, of high quality of training, accountability, proper funding and information is uncontroversial, its core recommendations for changing mediation practice give rise to challenge and serious concern. These include a narrow and inaccurate reading of Article 12 of the UN Convention of the Rights of the Child 1989 (in particular its interpretation of the nature of participation of children and young persons in the process of decision-making); a failure to distinguish between dispute resolution processes; and the absence of any empirical evidence base for its recommendations including the conspicuous omission of any evidence reflecting the views of those children and young persons who had experience of mediation directly or indirectly. Recommendation 1 (proposing the introduction of a non-legal presumption that privileges the right of the child who consents to direct participation in the mediation process unless it would be unsafe) and Recommendations 19 and 20 (removing the multiparty consent requirements of the child, both parents and of the mediator) are of particular concern given that
these dismiss, at a stroke, the existing body of practice knowledge and expertise including rigorous, comprehensive professional standards and ethical screening criteria embodied both in the policy and practice guidelines governing the direct participation of children in mediation, as well as those set out in the Codes of Practice of the College of Mediators (2008:4.1, 4.7.3–5) and the Family Mediation Council (2010:5.2, 5.7.2–4) and the quality assurance requirements in the Government Quality Mark Standard for Mediation 2002 (R4.2). Furthermore, the varied and vague terminology deployed to describe the content of ‘child inclusive’ mediation practice covers a wide range of new professional tasks, ranging from ‘having a conversation’ with the child to those requiring sophisticated psychological and therapeutic clinical skills associated with the functions of child assessment, welfare investigation, family therapy, counselling and advocacy. This new construction of the mediator as a ‘child professional’, ‘child practitioner’ and ‘family law professional’, expected to fulfil a range of child related professional functions, misunderstands, distorts and hybridises the mediator role (Ministry of Justice 2015:§§77, 80, 205). Policy recommendations for improvements in a complex and important area of practice cannot be rushed or oversimplified for political or other reasons. Any blueprint for the future has to be compatible with the core tenets of its subject matter if it is to be ‘effective and coherent’ (Ministry of Justice 2015:i).

Conclusion

The nature of the dispute resolution process is defined by the purpose for which the intervener activates the flow of information (Roberts and Palmer 2005). Eliciting information for the purpose of facilitating negotiation exchanges between the parties leading to their own decision-making is quite different from a situation where information is elicited for the purpose of enabling the intervener to make a determination on the basis of a full assessment of the facts and to impose a decision on the parties. The move from the facilitation role of the mediator to that of imposed decision-making by the judge represents, therefore, a shift of power – from the parties themselves to that of the third party intervener. With definitional slippage and vague and contradictory terminological usages, hybrid and muddled interventions arise which compound
misunderstanding and confusion about vital aspects of dispute resolution processes, crucially those relating to the location of power and authority. That is why, if the public is to be equipped to make a voluntary and informed choice as to whether or not to engage in mediation, ambiguity about its nature and purpose is so damaging.

Contemporary complexities, including bids for professional and commercial turf, reflect the borrowings, importations (however lazy), appropriations and colonisations that have been and are taking place in this arena of practice. The North American experience warned of these dangers where ‘Lawyers tumble(d) over each other in their enthusiasm for non-legal dispute resolution alternatives’ and where ‘the relentless force of law in modern American society can be measured by its domination, and virtual annihilation, of alternative forms of dispute settlement’ (Auerbach 1983:15, 139).

Practitioners require an understanding not only of what they are doing, its limits and boundaries, but also of why they are doing it. Effective and ethical practice depends as much on how mediators think about as how they perform their role and function. All practice is inevitably informed by ideas or frames of reference that explain phenomena and provide understandings of what is going on so that, on one-level, practice can never be theory-free (McGuigan and McMechan 2005). Yet despite the acknowledged rich interdisciplinary resource of theoretical and research literature that informs ADR, and mediation in particular, the relationship between theory and practice has historically been characterised as a problematic one with criticism levelled at mediation training programmes for being devoid of explicit theories of practice, focussing instead exclusively on skills-building and practice techniques as hallmarks of good practice (Rifkin 1994). Research studies considered to have findings perceived to be threatening to practitioners – those, for example, that raise concerns about issues of justice, power, coercion or which challenge purported claims to mediator neutrality – could also account for a theory/practice divide in the field (Rifkin 1994). Equally research should be informed by the experiential and reflective input of practitioners whose contribution needs to be respected and not dismissed as inconsequential, biased or self-serving. If the practice of mediation is regarded as part of and as an adjunct to legal practice rather than as a genuinely independent process, there will be scant incentive to embrace other theoretical paradigms of understanding. The professionalisation project too, it is argued, can
create resistance to theoretical approaches with tensions arising from a lack of consensus among practitioners over what constitutes rigorous standard-setting and regulation. In the absence of implicit or explicit theoretical understandings that inform and underpin templates of practice, that practice becomes much more vulnerable, unable not only to resist distorting, damaging or even destructive influences but also even to recognise them.

So conceptual congruence on fundamental principles and purposes is essential if practitioners are to maintain professional boundaries and fulfil their difficult role and function effectively and ethically, given the demands arising both from the dynamic reality of actual practice (the powerful emotions, uncertainty, unpredictability, acrimony and turbulence associated with circumstances of conflict and dispute) as well as those involved in managing inherent tensions in the mediator role.

The transformation occurring in the late twentieth century that characterised the growth of alternative dispute resolution marks a radical shift in the traditional conceptualisation of law, with negotiation processes, and mediation in particular, replacing imposed third party decision-making as the dominant mode of dispute resolution (Roberts and Palmer 2005). A receptivity to interdisciplinary sources of knowledge and theory has the potential to enrich evolving new processes, such as mediation, in innovative and creative ways. This paper has highlighted however, some of the dangers – of co-option and domination in particular – that can also distort and even destroy a discrete and autonomous process that straddles disciplines.

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Notes


2 See, for example, the Transformative Mediation Framework, which lays claim to being a ‘qualitatively distinct’ mediation approach aimed at generating ‘transformative’ ways of being, both for the parties and in society, through inter-party ‘recognition’ and party ‘empowerment’ (Charbonneau 2001:39).

3 These phases overlap and may therefore be less chronologically distinct than as presented.

4 This article does not cover the important topic of domestic abuse nor of those other family situations which would make mediation unsuitable. For current policy and practice guidelines on pre-mediation screening for unsuitability in family mediation, see College of Mediators (2006a).

5 See also Phase 4 for more recent developments on this topic.

6 For more recent Australian, New Zealand and North American research on children in mediation see McIntosh et al. (2011), Goldson (2006), Ballard (2013) and Rudd et al. (2015).

7 For a full debate on this topic see M. Roberts (1992), Haynes (1992), and Amundsen and Fong (1993). See also Walker (1988), and Walker and Robinson (1992).

8 Another significant development in 1989 was the publication on qualifications of the North American Society of Professionals in Dispute Resolution (SPIDR Commission), which found that no particular type or degree of prior education or job experience was shown to be an effective predictor of success as a mediator, arbitrator or other professional ‘neutral’ (SPIDR Commission 1989).

9 A recent qualitative analysis of different mediator styles (confirming several prior studies) shows that facilitative mediators not only perform more skilfully than their evaluative (and transformative) counterparts, but also that disputants are found to be more satisfied with the facilitative approach than with the evaluative one (Kressel, Henderson, Reich and Cohen 2012).

10 For prescient concern about this development in this country see S. A. Roberts (1993).

11 For a fuller discussion of these concerns see M. Roberts (2015).

12 For further exploration of this topic see M. Roberts (2007).

13 These tensions include the need to settle without the power to do so, the lofty and ambiguous demands of the role itself, the intermediate position occupied between the parties, and the objectively difficult circumstances within which negotiations typically occur (see Silbey and Merry 1986; Kressel 1985).
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