

# **EXPLORING THE COMMON GROUND IN MEDIATION**

**by**

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## Abstract

This study examines similarities and differences in mediation practice across sectors and considers whether variations in delivery are so wide that they cannot be regarded as the same process. The following conclusions are based on interviews with experienced practitioners from a variety of settings:

- There is far more commonality across sectors than is currently acknowledged among mediators. While there are undoubtedly variations in practice, these are found as much *within* fields of delivery as between them.
- Historically, mediation operated within communities and provided social cohesion in the face of conflict and disharmony. As a result of the ADR movement, mediation is now closely associated with the civil justice system and virtually synonymous with 'settlement'. This limits the potential for addressing ideological aspects of conflict resolution such as enhanced communication and relationship repair.
- There is an unresolved relationship between mediation and law, and an uneasy tension between lawyers and mediators. This is seen in the evolution of hybrid roles such as that of the 'lawyer-mediator'.
- The mediation profession remains disjointed and makes little attempt to engage in dialogue across sectors. Despite core principles in common, there is no one representative voice of mediation and a need for greater clarity and cohesion.



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## **CHAPTER 1 - INTRODUCTION**

Assisting disputing parties to identify the areas of common ground in the midst of their conflict is a classic mediation strategy that is taught on any basic training programme. Yet it is an approach which, when applied to the mediation profession itself, is curiously absent. In this thesis, I examine how far practitioners, across a growing number of fields, are engaging in the same basic activity when they call themselves mediators. My interest in this subject is the result of my working for over 25 years in the field of dispute resolution. In this time, I have seen the use of mediation expand substantially. The development of mediation, as it is understood today, began with its adoption in the 1990s within the spheres of family breakdown and neighbourhood disputes and was followed by its appropriation into the civil justice system as a settlement tool, forming part of the drive towards alternative dispute resolution (ADR). Since that time the use of mediation has expanded to include conflicts in the workplace, issues surrounding human rights, educational needs, questions about the environment or construction, homelessness disputes, inter-generational arguments and business disputes.

My own work as a mediator began in the late 1980s when, having completed my first degree, a BA (Hons) Degree in Theology at Birmingham University, I undertook the Diploma in Pastoral Studies, run from the same department. After a placement on this course with the Family Court Welfare Team in Birmingham, I established a connection with the Birmingham District Family Mediation Service, undertook training and began work as a family mediator. Over time I expanded my practice to include supervision and training, and then found opportunities to work in different contexts. Since then, I have moved from one delivery area to another, applying certain core principles across different fields and adapting them to suit the particular context. I began to apply

academic thinking to my practice with a European Master's Degree in 2005, run by the Institute of Kurt Bosch, Geneva.

Over the course of my professional career it has gradually become more apparent that though the areas of mediation delivery have grown and developed in different contexts, they have done so largely independently of one another. Some would argue that they exist in silos and that little effort has been made to engage in dialogue or to build a common framework. In the 1990s as training was being developed in different fields, an inter-disciplinary group sought to work collaboratively to compile a set of shared standards to which all fields could subscribe. The group included members from all the leading family mediation bodies at the time as well as representatives from the workplace, commercial and community sectors. The combined contributions of these organisations led to the creation of national occupational standards for mediators under the banner of Counselling, Advice, Mediation, Psychotherapy and Guidance (CAMPAG) which were published in 1998 by the government's National Training Organisation. The proposal at the time was that individual areas of delivery would then add their own context-specific requirements in terms of knowledge or process variation. For no apparent reason, this piece of work is now largely forgotten, though many of the standards themselves are still adhered to. This seems to me, at the very least, to be a lost opportunity for the mediation profession.

My interest, therefore, in undertaking this research has been to explore how far there are real differences between sectors and how far there is commonality. My own experience, having started working as a family mediator and moving into Special Educational Needs (SEN), suggested that the skills, principles and purpose are largely transferable. When I moved from SEN mediation to workplace disputes, I discovered

again that, while the issues that arose in mediation were much more about relationship breakdown than the allocation of resources, my role as a mediator in facilitating communication and supporting parties to find their own way forward remained unchanged. In the study reported in this thesis, I sought to find out whether certain generic features could be identified within any setting, and I collected views on this from a sample of mediators in order to assess this. The originality of this research lies in the comparative analysis of a sizeable collection of mediators' own perceptions of their values, principles and approach across a number of different settings. The findings are significant in that they highlight common ground between disciplinary areas that has not previously been found and is not openly recognised among practising mediators of different sectors. While there are undoubtedly contextual variations in the delivery of mediation, the practitioners within my sample demonstrated considerable consistency in their views concerning the central tenets of mediation practice and their role in its delivery. The fact that there are values, principles and approaches that are shared in this way has implications for the nascent profession of mediation as a vocational career in its own right, rather than as a secondary career within a disciplinary silo.

My thesis begins, in chapter 2, with an examination of the historical roots of mediation and its role in resolving conflict. Here, I describe traditional models for handling differences and disagreements within communities. Historical approaches to conflict repeatedly featured a neutral third party whose purpose was to support an early exchange of information leading to reconciliation or agreement between parties. While these processes were informal, they nevertheless incorporated an ethical code on the part of the mediator and carried an expectation on the part of disputants that they would

take personal responsibility in addressing their conflict. I explore the concept of justice in this context and examine how far individuals can be agents of their own outcomes. In the second part of the chapter, I outline the development of mediation over the last forty years. In particular, I discuss the huge impact that the Alternative Dispute Resolution (ADR) movement has had on the delivery of mediation and the implications of its close association with the civil justice system. This evolution has raised important questions about the relationship between mediation and the law, mediation and social justice, the role and responsibilities of mediators and the part that local communities may play in maintaining justice.

In approaching these issues from a practitioner perspective, I conduct a detailed examination of the academic literature concerning mediation practice itself in chapter 3. I begin with the criticism that mediation is confusing and inconsistent, claiming on the one hand to be a problem-solving tool and on the other to be an ideological response to conflict. In this chapter, I consider whether these two purposes must necessarily be regarded as mutually exclusive. I outline various approaches and styles and explore how far it is possible to identify certain generic principles of mediation.

In Chapter 4, I describe the most significant legislative developments occurring in the UK over the last five years and identify the trends that appear across sectors to increase the use of mediation and reduce the use of formal legal procedures. While several of these legislative reforms position mediation as a tool by which to achieve culture change, another motivation behind them has undoubtedly been to save time, money and other resources. As a result, the success of mediation tends to be judged according to these criteria rather than wider social outcomes such as relationship repair, personal resilience and conflict resolution. At the same time, in an effort to

encourage uptake, principles such as the voluntary nature of the process have often come under threat.

I argue in this chapter that, though the mediation profession has been established with broadly similar standards of training and continuing professional development, its lack of overall cohesion means that the process and principles can be unduly influenced by contextual demands. In some cases this has meant that the broader purposes of mediation are limited, sometimes lost, amid the practical concerns of settlement by negotiation.

In chapter 5, I suggest that the concept of mediation could be applied much more widely to fulfil its broader aims. Returning to its roots in the community, I will argue that mediation is a process that sits well within other arenas, for example, government initiatives such as the 'Big Society' and the 'Well-Being Agenda'. Considering the fundamental elements of what it means to be a member of a community, I will suggest that mediation can be used as a tool to foster community cohesion and build a sense of value and safety. Some contemporary writers view mediation as a tool that supports important social values such as civility and personal responsibility; others have described it as an educative process which allows participants to define their own norms, at one extreme, or be made aware of the relevant legislative framework in order to make fully informed decisions, at the other. I therefore discuss several ways of understanding mediation not just as a settlement option within the civil justice system, but as a genuine alternative before parties get as far as initiating a formal legal procedure. Understood in this sense, the underlying belief of mediation is that people are able to take responsibility for their own disputes and exercise civility; that people are capable of reaching fair outcomes and creating their own justice; and that



mediation can be both educative and contributive. These different possibilities point to the desirability of a variety of processes, the importance of party choice and the need for flexibility on the part of conflict resolvers.

This discussion forms the background to the empirical research I conducted, the results of which are presented in chapters 6 to 9. While a good deal has been written about mediation by both academic writers and practitioners, there is little empirical research that explores the views of mediators working in different sectors. Chapter 6 describes the approach to my empirical study. I decided to conduct semi-structured interviews with mediators from a number of different fields in order to discover how they see their roles, what they understood the purpose of mediation to be and how far these views are consistent with one another. In addition to eight pilot interviews, I interviewed 49 experienced mediators in a sample that as far as possible represented a reasonable cross-section of mediators operating in both mainstream and specialist areas.

In chapter 7, I present my analysis of respondents' views as to the purpose of mediation. This demonstrated that there is no single, simple or straightforward description of the purpose of mediation agreed among practitioners. Although context does influence purpose, this was just one of many factors including parties' expectations of the process, the nature of their relationship and their willingness or otherwise to tackle the more emotional aspects of conflict resolution or to take a practical, problem-solving approach.

I also examined respondents' understanding of the principles of mediation and how they thought these should be prioritised. Chapter 8 outlines the findings on this

question and leads to the identification of the four key principles of mediation practice that were most frequently cited by respondents in my sample: those of voluntariness, confidentiality, the self-determination of the parties and the impartiality of the mediator. While these principles can be difficult to maintain for various reasons, it was clear that mediators were prepared to go to great length to protect them. Most mediators, it seems, appreciate the value of a protected, legally privileged environment that supports a frank and honest exchange but are aware of external pressures on themselves and on parties to break confidentiality. Similar dilemmas to those expressed by academic writers were articulated by respondents with regard to party determination and impartiality. All the mediators I interviewed stressed the importance of managing a neutral environment, conducting the process fairly and monitoring their own internal responses. Specifically, they recognised mediation as unique with its emphasis on party empowerment and the opportunity it offers for facilitating creative outcomes.

As my research continued, I became increasingly aware of the significance of the use of language in different forms of dispute resolution. In particular, I noticed a number of contradictions between the way that language was used in a mediation setting and how it was used in the context of the law. This seems ironic when one observes that mediation has been absorbed into the civil justice system and has, to some extent, been taken over by lawyers who have added it to their toolkit as a settlement-seeking strategy. In Chapter 9, I consider my research findings from this perspective. I examine how far mediation and law are seeking to achieve the same purpose and how far mediators and lawyers speak the same language. My interviews indicated that those working within the civil justice system often see legal remedies as restrictive compared

to the creative outcomes that mediation might offer. I argue that mediation is fundamentally different from law in that it sets out to build an environment in which disputants can view conflict differently, develop a mutual understanding and find a fair solution. These differences are reflected in the language that mediators and lawyers use and challenge mediators to define their role more clearly.

In the final chapter, I return to my original research question: is there common ground in mediation practice and what are the variations? I make some concluding observations about mediation and the legal system and about the relationship between mediators and lawyers. In particular I outline the risks involved in limiting mediation to a tool for settlement and consider the part that the mediation profession needs to play in defining its own future. I argue that the findings from my research point to the need for the development of a cohesive professional identity among mediators. The first step in creating such an identity would be achieved through increased dialogue and enhanced understanding across sectors. A key point for consideration in this exchange, I believe, should be the feasibility of establishing a single membership organisation, with professional body status, for all accredited mediators regardless of their disciplinary specialism.

## CHAPTER 2 - A HISTORICAL OVERVIEW

“Where a thegn has two choices, love or law, and he then chooses love, that stands as fast as a doom.”<sup>1</sup>

The inevitability of conflict is beyond dispute: disagreements occur within families, communities, workplaces and between organisations and nations. They surface in the past and the present and undoubtedly, will do so the future. Conflict is an expression of difference and, while it has the potential to destroy, it also carries with it the possibility of growth and change. It is not so much the existence of conflict that is contentious, as the question of the most effective means of addressing it, whether privately or publicly. The quotation above, part of legislation that was passed by King Aethelred II early in the eleventh century, reflects a choice that people who find themselves in disagreement still face today: whether to resolve an argument independently by arriving at a mutual understanding or to take a dispute to the courts for judgment. This pre-Norman statute gives equal standing to a resolution based on ‘love’. Yet the decision is not as clear-cut as it might first appear. Independent resolution might involve a number of different methods from negotiation through mediation to conciliation and arbitration. Similarly, judgement by an external authority might be chosen or imposed, and could be delivered by the courts or by an association, guild or faith-based community. Conflict can be seen as a state within which the protagonists pass through various stages, with options at each point to resolve or continue their quarrel; by themselves, with their supporters, with independent

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<sup>1</sup> III Aethelred 13.3 and 13.4, cited by Derek Roebuck, “The Myth of Modern Mediation” [2007] 73 Arbitration (1) 105-116, 108.

facilitators, with representatives, with other professional assistance or with a combination of these. The choices made at any of these stages will be influenced by factors such as the importance of preserving a relationship, the search for justice, the cost of continuing, the desire to be proved right, the need to settle, the views of the community and the risks involved in bringing (or not bringing) the dispute to an end. In this examination of past and recent use of mediation as a means of resolving conflict, I suggest that the modern distinction between 'mainstream' and 'alternative' methods of dispute resolution is not a helpful one.

In this chapter it is my aim to give a brief historical overview of the use of mediation as a means of resolving conflicts. Mediation has existed for as long as we have records to show, and certainly before the existence of the written law. Contrary to its contemporary iteration as a modern development, the practice of mediation, with its own clearly defined purpose and ethical code, has been established for centuries. This section will include a review of the literature concerning the different forms of dispute processes. Drawing on documented examples, I consider the use of different dispute mechanisms in various historical contexts in order to understand how the concept of justice was perceived and how far these processes met expectations of how it should be achieved.

In the second part of this chapter, I examine the nature of both formal and informal processes used to address conflict over the past forty years. I argue that mediation should be viewed in the wider context of decision-making and conflict resolution rather than limited to the context of the civil justice system. It is nevertheless essential to take account of the development of the Alternative Dispute Resolution (ADR) movement since the mid-1970s and the substantial impact it had on the modern practice of

mediation, initially in the United States and latterly in this country. While firmly establishing mediation as a tool within the ADR movement, its use and purpose in relation to the law and to local communities has been, and continues to be, the subject of debate and some confusion. I comment on the effect of the language associated with negotiation, mediation and arbitration and argue that the use of words such as 'alternative', 'dispute' and 'settlement' result in a lack of clarity between the different purposes and functions of these processes. I consider how far mediation can be used as a means to achieve justice, both within and external to the civil justice system and how its absorption into that system risks a change in its purpose.

### *Mediation in Communities*

Aethelred's declaration is testimony to the fact that the settlement of disputes through peaceful means was not only encouraged in Anglo-Saxon times but carried weight. The historical evidence shows that, dating back at least as far as the second century BC, it has been recognised that, if the reconciliation of two quarrelling parties is not possible by their own efforts, their next option is to turn to a neutral or 'indifferent' third party who might help them bring their disagreement to a 'frendly and a quyett end.'<sup>2</sup> Roebuck's extensive work demonstrates the use of mediation and arbitration as two conceptually distinct but often related processes with which people have been very familiar from Ancient Greece to the present day. His study of Greek dispute resolution concludes:

"Everywhere and at all times, disputing parties considered mediation-arbitration to be a natural, perhaps the most natural, method of resolving the

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<sup>2</sup> J.P. Dawson, *A History of Lay Judges* (Boston: Harvard University Press 1960) 168.

differences they could not settle themselves, though they sometimes resorted to litigation ...when they did not get their own way.”<sup>3</sup>

In his book *Homo Mediator*<sup>4</sup>, Duss-von Werdt examines the use of mediation with a view to defining the ‘spirit of mediation’ and the nature of the mediatory role. His conclusion is that there are standards of behaviour associated with the way mediation is conducted that have been applied over two millennia and which would be recognisable to any mediator of the 21<sup>st</sup> century. Research into the settlement of disputes in early medieval Europe<sup>5</sup> shows that while there is little documentation to suggest a specifically defined process or role,

“...the drive to settle amicably was a forceful one and even in court proceedings a compromise was often reached. It was in most people’s interest to establish and preserve harmony, especially in relationships within the *plebs*.”<sup>6</sup>

Many of the arguments in this context concerned land disputes. Agreements focused on ownership and tenancy, the duration of time that land would be held and where it passed after death. Davies quotes a case, for example, of a dispute between Fomus and the monks of the Holy Saviour of Redon in AD 852. Abbot Connuoion sent three brothers to negotiate a private settlement which was successfully conducted with the express purpose of avoiding a court judgement. The same collection of essays gives examples in Italy, around the same time, of the readiness to reach an *Amica pactuacio*<sup>7</sup>

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<sup>3</sup> Derek Roebuck, “‘Best to Reconcile’: Mediation and Arbitration in the Ancient Greek World” (2000) 66 (4) *Arbitration* 275-287, 286.

<sup>4</sup> J. Duss-von Werdt, *Homo mediator. Geschichte und Menschenbild der Mediation* (Stuttgart: Klett-Cotta 2005).

<sup>5</sup> Wendy Davies and Paul Fouracre (eds), *The Settlement of Disputes in Early Medieval Europe* (Cambridge University Press 1986). This is a collection of papers describing and comparing dispute resolution processes across Europe. The research evidence is often drawn most directly from legal documentation but the use of informal processes is heavily implied.

<sup>6</sup> Wendy Davies, ‘People and places in dispute in ninth century Brittany’ in Davies and Fouracre (1986) 72. *Plebs* were small village based units.

<sup>7</sup> Chris Wickham, ‘Land disputes and their social framework in Lombard-Carolingian Italy, 700-900’ in Davies and Fouracre (1986) 122-123.

(a friendly agreement or peaceful settlement) with the help of *Boni viri*,<sup>8</sup> ‘good men’ who were ‘law-worthy’ and trusted to perform an impartial role which would have included mediation.

Miller’s analysis of the Icelandic sagas also demonstrates that, while self-help and feuding were used frequently (often violently) as responses to disputes, arbitration (which would have included mediation and negotiation) was also regularly called upon before litigation. His account conveys the picture of a number of stages through which conflicts moved. Different remedies were offered at different stages and these would be exhausted before drawing in a chieftain. Some would begin by making demands, making offers or entering into a process known as ‘self-judgement’.<sup>9</sup> Arbitration involving a third party could be initiated by the disputants themselves or trusted individuals might intervene on their own initiative. Again, this was not an institutionalised role but there were characters who had established reputations as peacemakers or *góðgjarnir menn*, men of goodwill:

“The term reveals the values associated with peacemaking; it describes the idealised intervener as a person interested in the general good, a partisan of everyone rather than a disinterested individual.”<sup>10</sup>

In my view, these examples and several others drawn by the same authors immediately raise the question of how helpful it is to consider the various remedies available to resolve conflict as ‘alternatives’. Our contemporary understanding of the

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<sup>8</sup> Wendy Davies (1986) 74.

<sup>9</sup> Self-judgement was a process whereby the wrongdoer acknowledged his or her actions to the victim and handed over power to ‘name the price.’ Effectively the wronged party took on the role of arbiter in their own dispute and made a demand based on well understood customs, and quite possibly on the basis of prior negotiation. The significance of the process was that calling on the custom of self-judgement was a concession on the part of the wrongdoer, valuable in itself because it was based on mutual respect and offered a quick solution that avoided the initiation of legal proceedings.

<sup>10</sup> William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press 1990) 264.



word 'alternative' implies a somewhat unusual path to take once legal proceedings have been initiated, generally promoted by an enthusiastic but minority group of supporters. History shows, however, that the disputing processes on offer were not presented as either/or options operating at the door of the court, but as real choices available at any stage of conflict, the vast majority of which were resolved before being taken to law. As such the outcomes of those disputes were not limited to a strict legal determination. They might take into account a range of factors such as the importance of the relationship, the history of the conflict, the perceptions of what might constitute a fair outcome in a particular context and the stakes at risk for the future. The Icelanders, for example, rarely went to law. Feuding within Icelandic society made it far too complicated to do so. Disputes continued for years, often over generations, and involved a complicated balance of attack and counter-attack where "[t]he central notion was one of requital, of repayment ... [it] involve[d] careful scorekeeping, an alternating rhythm of giving and taking, inflicting and being afflicted."<sup>11</sup> While a clear, well-established legal system was in place, an arbitrated settlement was a far more common outcome, not least because the legal remedies were so extreme: outlawing in the case of the defendant and public humiliation on the part of a plaintiff (for which revenge would later be extracted.)<sup>12</sup> In that society it was litigation that was viewed as the alternative when all else failed.

In most conflict resolution, then as now, it is possible to find a mixture of different processes at work and, in many examples cited by the authors above, the incentive to reach a fair and friendly agreement and to live a peaceful life was high. The use of the

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<sup>11</sup> *ibid* (1990) 182.

<sup>12</sup> *ibid* (1990) 275.

courts to resolve a dispute was a definite choice that people made rather than the default reaction that is more typical of today. People chose to go to court for two main reasons: firstly, to make the dispute public and in doing so to gain the support of those around (wider family, neighbours and landlords) who might not otherwise be involved; and secondly, to bring an end to the dispute where other measures had not already done so. This was not without risk and protagonists had to accept that the rules of law, based on the values of the state, would take precedence. Davies and Fouracre identify what they describe as a double role of the court, “the point where state and community met” which is sometimes “seen as a contrast between adjudication and mediation (judgement and compromise, justice and peace)”.<sup>13</sup> However, they argue that the contrast is misleading in that the processes inevitably became intertwined: “the state could mediate, just as the local community could judge.” While Davies and Fouracre state that these roles need not be in contradiction to one another and that different situations produce different results, it must nevertheless be desirable to achieve some kind of balance.

My own view is that it is unfortunate that the contemporary understanding of ADR restricts mediation to a process that seeks to achieve settlement as an end in itself, without giving full recognition to its wider potential for peace-making and reconciliation.

### *Defining Mediation*

Other historical research demonstrates not only that forms of mediation practice existed but that the role of a mediator became more clearly defined until various

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<sup>13</sup> Davies and Fouracre (1986) 236.

principles of practice emerged and were incorporated into an ethical code. The central features of mediation practice today can clearly be traced back at least as far as the 17th century. Canyameres and Salberg, developing the work of Duss-von Werdt, sought to establish the 'ethical principles of mediation practice' that were characteristic of all fields of mediation, despite differing styles and approaches. Alvise Contarini, an ambassador designated by the Republic of Venice, and Fabio Chigi, a cardinal designated by the Pope (later Alexander V11), were two mediators who, working over a period of five years, played a crucial role in bringing an end to the Thirty Years' War.<sup>14</sup> Canyameres and Salberg observe that:

“The sole objective of these two mediators was for the parties themselves to arrive at a peaceful resolution without resorting to coercion. They maintained a rigorous ethical stance of independence, impartial neutrality and absence of power to impose solutions. They believed an agreement can only be reached as a result of the ‘willingness of the parties’.”<sup>15</sup>

Some 38 years later, Abraham de Wicquefort, a Dutch author writing about the art of diplomacy, reflected on the peace treaty drawn up in 1648 and developed a theory about the practice of mediation together with a means of evaluating it. Wicquefort's account, Canyameres and Salberg suggest, provides the 'first handbook for mediators' and his writing does indeed cover several elements that are to be found on any mediation training course today. He points, for example, to the importance of a lack of decision-making authority on the part of the mediators in order to ensure that agreements are not imposed but determined by the parties themselves:

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<sup>14</sup> These mediators were closely involved in drawing up two peace agreements: The Treaty of Munster and Osnabruck (1648), marking the end of the Thirty Years' War which started as a dispute between Catholic and Protestant royalty in Bohemia before spreading across Europe, and the Treaty of Ryswick (1697) ending the Nine Years' War which involved England, Spain, the Holy Roman Empire and the United Provinces.

<sup>15</sup> Manel Canyameres and Ann Catherine Salberg, 'Historical Contribution to the Ethical and Methodological Principles of Mediation' in Faget J, (ed), *Mediation in Political Conflicts: Soft Power or Counter Culture?* (Oxford and Portland, Oregon: Hart Publishing 2011) 43.

“It can truthfully be said that it is not the Mediators that make the treaties: it is the goodwill of the parties that allows them to be concluded.”

According to Wicquefort, a mediator should be independent, should maintain confidentiality and should not judge:

“He should maintain secrecy, and only communicate to one of the parties that which the party wishes ...”

“The Mediators ... told them that they were not able to judge the content of the proposals. That the duty of the mediation allowed them only to report faithfully what was said, not to judge the fairness or righteousness of the proposals, or make proposals in order to facilitate conclusion of the treaty, as this would exceed the power of their mission.”

“[Their instructions] recommended first and above all, indifference, [so] that no partiality would be seen in his conduct, and no meaning would be attached to the words and actions of the servants.”<sup>16</sup>

At about the same time, Roebuck finds that Alexandre de la Roche, writing in Paris and addressing his manual *‘To Avoid Litigation’* directly to Louis XIV, similarly articulates the characteristics of a good mediator. De la Roche says that a mediator:

“... should never be judge, even if the parties themselves beg him to. He should remain a neutral and simple mediator, so that he does not become suspect to anyone ... He does not need ability nor eloquence, nor the grand manner; all he needs is goodwill. He should not put himself to the trouble of preparing fine harangues to persuade the litigant to make peace. His own miseries are persuasion enough.”<sup>17</sup>

“[T]o be a good mediator you need more than anything patience, common sense, an appropriate manner, and goodwill. You must make yourself liked by both parties and gain credibility in their minds. To do that, begin by explaining that you are unhappy about the bother, the trouble and the expense that their litigation is causing them. After that, listen patiently to all their complaints. They will not be short, particularly the first time round.”<sup>18</sup>

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<sup>16</sup> *ibid* 36-7, citing Abraham de Wicquefort *L’ambassadeur et ses fonction* (Venuer: La Haye 1686).

<sup>17</sup> Derek Roebuck, *The Charitable Arbitrator: How to Mediate and Arbitrate in Louis XIV’s France* (Oxford: HOLO Books: The Arbitration Press 2002) 157.

<sup>18</sup> *ibid* 197-199. Taken from Chapter XXII entitled ‘The duty of a good mediator.’

Earlier chapters in the manual outline a mediation process that has remained largely unchanged: mediators listen first to one party, understand the issues and ascertain the parties' commitment to continue, before approaching the second party and finally bringing them together. He talks about the importance of good listening and allowing both parties to express strong emotions and even makes suggestions about what appear to be recurrent problems for mediators: the refusal of parties to mediate or, perhaps worse, the use of mediation as a delaying tactic.

It is clear, therefore, that a range of measures, both formal and informal, have been available to people in conflict over the ages to help resolve their differences. Where protagonists were unable to deal with a disagreement for themselves, history indicates a natural tendency to turn to third parties for support, for guidance and sometimes, for judgement. The processes that were used and the role of designated third parties incorporated a range of possible routes through which disputants could achieve a 'just result', as Davies and Fouracre describe it. The same can be observed today. The options that are available reflect not only the fact that disagreements are of different levels of complexity and intensity and call for different interventions, but that people in conflict have different perceptions of what 'justice' might mean and how it might be achieved. Of particular interest in the context of mediation is the question of how much control parties exercise in determining the outcome of their argument: when is a just outcome something that individuals can decide for themselves and when does it require the intervention of an external adjudicator?

### *Formal and Informal Justice*

In *Dispute Processes*, Roberts and Palmer examine the primary forms of decision-making from an anthropological perspective. They compare the traditional characteristics of formal and informal justice and explore their relevance to “negotiation, mediation and umpiring.” They describe informal justice processes as those which are non-bureaucratic and locally accessible in terms of immediacy, geography and cost. They involve the two parties, with or without supporters, in a process of information exchange and negotiation. Where proceedings are conducted by third parties, such as mediators or facilitators, they are likely to be lay people who may or not be paid. Issues and outcomes are “outside the immediate scope of the official law ... based on procedural and substantive rules that are vague, unwritten, flexible and good common sense - so that the law does not stand in the way of achieving ‘substantive’ justice.”<sup>19</sup> These informal processes are characterised by the priority placed on finding a solution by the agreement of the parties, reached through an examination of the underlying issues. The preservation or restoration of the relationship between parties and their supporters is considered to be just as important as an objective judgement of ‘right’ or ‘wrong’ and the process “carr[ies] an ethic of treatment”,<sup>20</sup> as Roberts and Palmer describe it, for which third parties are responsible.

The authors argue that formal justice, by contrast, provides umpiring mechanisms that are specialised, bureaucratic and independent. Through these processes, justice is achieved by the application of an “impartial, publicly available official law” imposed on

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<sup>19</sup> Roberts and Palmer (2005) 10.

<sup>20</sup> In other words, the process is governed by the principles of party determination and impartiality as well as those of confidentiality and respect.

the parties and enforceable. The decisions reached are measurable, technically correct and delivered by trained professionals who know the law. The process, and the fact that clear and fair procedures are followed, is considered a priority and this is the means by which justice is achieved. By choosing formal justice, disputants hand over control of both process and outcome to another authority - a legal professional.<sup>21</sup>

I suggest that another way to view the difference between formal and informal justice concerns the disputants' perception of fairness and how it is to be achieved. As far as the substance or content of a dispute is concerned, formal processes offer less room for manoeuvre. The dispute is determined by the law and concludes with the protagonists being obliged to establish the validity of their claim. In other words, it is of paramount importance that the process used to arrive at that conclusion is transparent, regulated and neutrally supervised – and, therefore, perceived to be fair. Disputants who choose this route do so in the knowledge that they are taking a risk on the outcome but that the means by which to reach that conclusion will be properly conducted. Informal justice, on the other hand, allows parties to have a say in deciding what constitutes fairness. In other words, it is of paramount importance, that the issues are understood and the outcome is accepted by both – and, therefore, agreed to be fair. This is determined, not by the law, but by the particular circumstances of their situation, the factors that they consider to be important, their understanding of the norms that operate outside the realm of the law and their recognition of their own part in the conflict.

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<sup>21</sup> *ibid* 10 -11.

There are risks associated with both approaches and this is perhaps why there is always a necessary tension, as Roberts and Palmer describe it, between formal and informal dispute processes. While the law serves a function to protect society at large and lays down acceptable and non-acceptable behaviours, it is inflexible, cannot cater for every variation and may not be capable of producing a remedy that is appropriate. However, outcomes reached through informal processes are less regulated, more idiosyncratic and may present ethical challenges for mediators when proposed agreements are unbalanced or even contrary to the law. The ‘eye for an eye, tooth for a tooth’ type approach of the Icelanders, for example, may be described as ‘fair’ but also dangerous.<sup>22</sup> In my view this provides one explanation as to why the preservation of the relationship and a thorough understanding of the real issues in dispute play such an important part in informal justice.

Roberts and Palmer identify three factors that influence the level of formality in dispute processes: the presence of a third party intervener; where the process takes place and its form; and where the responsibility for decision-making lies. Negotiation, for example, is a type of communication that involves a simple bilateral exchange of information, potentially leading to common understanding and joint decision-making:

“In their simplest, bilateral form two parties in dispute approach each another without the intervention of third parties and attempt to achieve an agreed outcome through information exchange and learning. The exchange and examination of information lead to the modification or consolidation of expectations to a point at which agreement is achieved. Communication continues as long as agreement is seen by both sides as possible and advantageous. The essential feature is that control over the outcome is

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<sup>22</sup> Miller argues that, while such outcomes may not be subject to the law, they are nevertheless governed by recognised norms such as social rules about preservation, the practical need to call a ceasefire and well understood values of exchange.



retained by the disputants themselves, informed by their meanings and understandings.”<sup>23</sup>

This, the authors argue, is the fundamental basis on which other disputing processes are built. They draw on the work of Gulliver<sup>24</sup> and his cultural study of negotiation techniques in African societies to provide contrasting examples of traditional modes of decision-making. Gulliver observed that where a disagreement occurred that could not be resolved by the two people involved, an option in some societies was to call on the help of partisan supporters whose involvement influenced both the power dynamics and the outcome in which they may well have had a vested interest.<sup>25</sup> Using this form of resolution involved supporters who positioned themselves on one side of the dispute, formed a view in relation to its resolution and engaged in the negotiation process themselves in order to bring it to a conclusion.

At the next level of intervention, that of mediation, Roberts and Palmer observe that:

“ ... the basic structure of the decision-making process is changed, by the presence of a third party who intervenes from a position of at least apparent non-alignment to facilitate achievement of an outcome.”<sup>26</sup>

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<sup>23</sup> Roberts and Palmer (2005) 87.

<sup>24</sup> P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York and London: Academic Press 1979). He describes negotiation as a learning process in which parties interact together to find an agreement by exchanging information both directly and indirectly:

“Negotiation is a process of discovery. Discovery leads to some reorganization and adjustment of understanding, expectations and behaviour, leading (if successful) eventually to more specific discussion about possible terms and final agreement.”

This definition is described by Gulliver as a wide one which “embraces everything that occurs, from the initiation and recognition of the dispute proper to the final outcome and, perhaps, its practical execution.” Under the general heading of negotiation, bargaining can be recognised as a separate process which is more focused and consists of “the presentation and exchange of more or less specific proposals for the terms of agreement on particular issues.” Typically, it involves bids, offers and counter offers. See pages 70-71.

<sup>25</sup> See also P.H. Gulliver, *Social Control in an African Society, A Study of the Arusha, Agricultural Masai of Northern Tanganyika* (Boston: Boston University Press 1963). In both texts Gulliver describes the disputing patterns of the Arusha, agriculturalists living in North Tanzania, who called on support from one of three sources - the parish, the lineage or the age-set - in order to enter into settlement-directed discussion. Allegiances were often pre-determined (particularly in terms of lineage) and the concept of an impartial facilitator did not exist. Simply by virtue of their involvement and their wider interest in the successful running of the community, these actors had an impact and their views carried weight.

<sup>26</sup> Roberts and Palmer (2005) 88.

The distinctive characteristic of mediation is that, by involving a neutral third party, the protagonists hand over responsibility for the management of a fair process while retaining their own decision-making authority. In other words, the parties remain in control of determining a solution that they both regard as acceptable. As I shall discuss below, the mediator's influence over outcome may vary according to the model of mediation being used; however, disputants are ultimately able to reject any proposal they are not satisfied with.<sup>27</sup> Roberts and Palmer point out that the determination of the parties is essential:

“ ... there are limitations imposed upon third parties where they have no authority to impose a decision on the disputants ... a conclusion is only reached when the disputants themselves, however reluctantly, agree one. Therefore the role of third parties cannot extend beyond helping to achieve that agreement.”<sup>28</sup>

The third and most formal level of intervention is umpiring. While this can take many forms, its central characteristic is that decision-making authority lies with a third party. In some cases, using a process of arbitration, for example, disputants may jointly choose to place power in the hands of a neutral decision maker. In other circumstances, such as application to the court, one party initiates a claim to a higher authority to which the other must respond. Within community-based dispute resolution processes, parties might submit, not to the authority of the courts, but to trusted local figures who apply the rules and norms emanating from, for example, church law or trading standards. By whatever route arbitration or adjudication may come to be used, the ability to control both the process and the outcome then passes away from the

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<sup>27</sup> Again, Gulliver provides the example of the Ndendeuli of Southern Tanzania, who, in contrast to the Arusha, recognise the role of mediation, among other processes, in facilitating settlements. Disputants will gather a support group around them but third parties who are already recognised as having the appropriate skills and who do not have close association with either set are expected to play a role in encouraging agreement.

<sup>28</sup> Roberts and Palmer (2005) 94.

parties themselves, and the emphasis on procedural fairness demands that protagonists present their case with supporting evidence so that a decision can be made.

These three broad levels of formality provide a useful way of understanding the distinct features of mediation as a means of resolving conflict. Other scholars have observed the tension between formal and informal dispute resolution mechanisms. Auerbach, for example, in his examination of the practice of litigation and its alternatives throughout American history, points to “intriguing experiments that testify to a persistent counter-tradition to legalism.”<sup>29</sup> He explores how far it is possible to establish justice without law, examining several different communities that have been defined by race, geography, religious belief or commercial interest.<sup>30</sup> His argument is that the success of non-legal dispute settlement is dependent on strong community values that are well understood and respected by its members. The use of processes such as mediation and arbitration have “historically expressed an ideology of communitarian justice without the need for formal law” but based on mutual access, responsibility and trust. He writes:

“Utopian Christians and mercenary merchants shared the understanding that the law begins where community ends. So they developed patterns and institutions of dispute management that contained conflict within their own community boundaries.”<sup>31</sup>

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<sup>29</sup> Jerold S. Auerbach, *Justice Without Law: Resolving Disputes Without Lawyers* (New York: Oxford University Press 1983) 4.

<sup>30</sup> His study includes the New England colonists of the 17th century and the merchant guilds of the same period; the utopian religious movements of the 19th century such as the Shakers, Seventh Day Baptists and Mormons; the labour movements of the 19th century such as the Knights of Labor, established in the 1880s; the immigrant communities of the early 20th century including the Scandinavians moving from Norway, together with the Chinese and Jewish communities settling in the United States.

<sup>31</sup> Auerbach (1983) 5. It should be noted that the processes of mediation and arbitration were less conceptually distinct at Auerbach’s time of writing than they are today.

The success of mediation and arbitration depend therefore on a coherent community vision so that “[h]ow to resolve conflict, inversely stated, is how (or whether) to preserve community.”<sup>32</sup> In these terms, then, dispute resolution processes supported relationship restoration and repair. The understanding of fairness was dependent on the values defined by the community and was maintained by the individual’s investment in remaining a part of it. The role of a third party in mediation was, as someone who was known and trusted within the community, to encourage parties to reach a friendly conclusion within this value system, in the interests of both the individuals concerned and the community at large. Where parties chose ‘umpiring’ and handed over decision-making power to an adjudicating authority, they did so on the basis of the community good, again at the risk of their own needs or rights. Auerbach suggests that this results in a tension between formalism and informalism:

“To approach community by way of dispute settlement may seem idiosyncratic. But it provides access to a complex, recurrent cultural dialogue; between individual and community; between the dream of harmony and the reality of conflict; between formal legal institutions and their alternatives. Every society experiences this tension. It is important to understand that dispute-settlement preferences are not ultimate choices but shifting commitments.”<sup>33</sup>

In the historical account that Auerbach provides, the preservation of the community was paramount, offering its members both security and challenge. The consequence of continued conflict, or a refusal to respect the values of the community, ultimately ended with expulsion.<sup>34</sup> To achieve justice required a reciprocal commitment: in order

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<sup>32</sup> Ibid 5.

<sup>33</sup> Ibid 7.

<sup>34</sup> For example, there was the sorry tale of Mrs Hibbens from the Puritan community of Boston in 1640. Having got into dispute with her carpenter, she refused to resolve the issue amicably or to agree to the recommendation of two sets of arbitrators. When the dispute was taken to church, the Reverend John Cotton declared her to be a “leprous and unclean person”, not as a result of any judgement about the quality of the carpenter’s work, but because of her poor approach to communal fellowship and the lack of any attempt to reconcile. As a

to reach a fair outcome, each individual had to behave with fairness themselves towards their protagonist<sup>35</sup> and retain responsibility for behaviour that would be culturally acceptable. Since the needs of the community for harmony were regarded as being more important than those of the individual, conflict could be managed. The church, including the congregation, provided a formal process which did not have recourse to the justice system but provided a different kind of law: it drew uncompromisingly on community values and imposed sanctions when they were broken. However, these were final resorts and the preference was for disputes to be resolved at an early stage and amicably. Where communities used arbitration and mediation rather than litigation, therefore, they did so on the basis of a common purpose which was understood by its members. These were processes that were recognised as a necessary part of everyday life and they reflected the tension that existed between the interests of the individual and that of the community as a whole. They were both supportive and suspicious; intrusive but accessible; co-operative and at the same time coercive. Success relied on people conforming to norms:

“The choice of non-legal alternatives to adjudication never was a decision to replace power with love, or coercion with cajoling. It was the application of power to serve the common purpose at the expense of competing individual claims. It was, therefore, the exercise of power by the community on its own behalf. This was possible because the meaning of justice was clear to its members ... [o]nly where there is congruence between individuals and their community, with shared commitment to common values, is there the possibility of justice without law.”<sup>36</sup>

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consequence she was “cast out” and “cut off” from the community. (See Auerbach (1983) 23-4.)

<sup>35</sup> In the context of the 17th century Puritan community of Boston, this would be likely to be expressed in the context of their religious values of love, harmony and neighbourliness.

<sup>36</sup> Auerbach (1983) 16.

Further examples from the earliest merchant guilds demonstrate how, in the context of commerce and trade, this approach served to keep disputes simple and allowed an early, sensible resolution according to well understood business custom. In that community, there was an open acknowledgement that it was in everyone's interests to resolve differences with the least disruption to normal business, and little, if any, "interruption of the traffick."<sup>37</sup>

The significance of these examples for the purposes of my discussion lies in the idea that the concepts of 'fairness' and 'justice' are seen as part of everyday life within a given community. They are well known and understood by all members, rather than part of a legal system that is remote and understood by a small number of experts. Membership of the community is dependent on conformity to its values, which in turn demands individual as well as corporate responsibility. There is an expectation that disputes will be proactively dealt with at an early stage and that disputants will be both willing to look for reconciliation and retain control of how this is achieved. Auerbach documents the steady progression through American history to a concentration on individual rights, alongside the disintegration of the concept of community, both of which, he says, have contributed to the highly litigious culture of today. While it is possible to see how the use of informal processes such as mediation work well within tightly knit communities, it raises an issue as to how applicable it is in the far more fragmented nature of modern society - a question to which I will return.

These accounts demonstrate that the practice of mediation has existed in its own right, outside the exercise of the law, for centuries. What it is more, it is a defined process

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<sup>37</sup> *ibid* 32.

with a clear ethical code recognisable to contemporary mediators. The importance of a non-aligned, third party who respects the positions of the individual parties without judgement and encourages the generation of a peaceful solution of the parties' own making is historically well documented. Yet the modern portrayal of mediation, driven largely by attempts to reform the civil justice system, is as a process which provides a last minute option, at the door of the court, to reach settlement. Along with other alternatives such as arbitration, neutral evaluation and conciliation, mediation has become so closely associated with Alternative Dispute Resolution (ADR) that it is increasingly seen as operating as part of the legal system rather than as an option that is available at a number of different stages. When it is considered in this way, mediation becomes defined by its relationship to court adjudication, now perceived as the primary means of dispute resolution.<sup>38</sup>

This understanding of mediation applies not only to family and commercial disputes in the civil courts but to the jurisdiction of other decision-making panels such as tribunals that deal with employment disputes or claims concerning human rights and equality. It is worth exploring in more detail the development of the ADR movement, the arguments concerning the delivery of justice that surround it and its impact on the practice of mediation.

### *The ADR Revolution*

Despite the well-established existence of informal resolution processes, ADR itself is often depicted in the literature as a social movement that began about thirty years ago

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<sup>38</sup> It is interesting to note that in the criminal courts, victim-offender mediation, used after the crime to facilitate apology or peaceful resolution, is described quite differently as 'restorative justice', a title that openly recognises a process which, operating in its own right, is about making amends.

in this country, longer ago in the United States. The Chartered Institute of Arbitrators, for example, issues a booklet describing ADR and talks about litigation as the traditional means of managing conflict to which the ADR movement now provides a timely alternative. The Foreword states that:

“Beginning in the late 20th century ... powerful societal forces ... began to challenge the notion that courts could or even should be the primary forum for dispute resolution.”<sup>39</sup>

As I have argued above, these forces are the expression of a tension that has existed for far longer than thirty years. Auerbach, Abel<sup>40</sup> and Nader<sup>41</sup> have all observed a historical pattern of oscillation between formal and informal means of achieving justice. Nevertheless, it is possible to identify individuals and events, largely from the United States, whose influence contributed to the formation of a powerful movement from the 1970s to the end of the 20th century which sought to provide informal means of resolving disputes *within* the formal justice system. The result, in the USA and latterly the UK, is an ‘astonishing reversal’, as Roberts and Palmer describe it, where

“... ‘settlement’ is presented as the primary objective of the courts, with adjudication relegated to an auxiliary, fall-back position. So ‘settlement’ itself becomes the primary route to justice.”<sup>42</sup>

These developments sparked considerable debate among mediation practitioners, legal professionals and academics concerning such questions as the meaning of ‘justice’, the role of adjudication and exactly what kind of alternative mediation might

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<sup>39</sup> Chartered Institute of Arbitrators, ‘What is Alternative Dispute Resolution (ADR)?’ (London, 2010) ix.

<sup>40</sup> See Abel R.L. (ed), *The Politics of Informal Justice – Volumes 1 and 2* (New York and London: Academic Press, Inc. 1982).

<sup>41</sup> See Laura Nader, ‘The Recurrent Dialectic Between Legality and its Alternatives: The Limits of Binary Thinking’ (1986) 136 *University of Pennsylvania Law Review* 621-645 and, commenting in the context of the “shift in discourse” of the late 20<sup>th</sup> century in the United States, ‘When is Popular Justice Popular?’ in Merry and Milner (eds) 1995, 435 – 451.

<sup>42</sup> Roberts and Palmer (2005) 4.



provide. In the second part of this chapter, I outline the major developments that have contributed to this movement and the significant debates that have ensued. These debates, while remaining inconclusive even today, have nevertheless had a profound effect on the development of mediation and provide an important backdrop to current practice. I explore, therefore, the impact that the ADR movement has had on dispute resolution and, in particular, on the understanding of mediation and its purpose.

Dissatisfaction with the legal system in the United States was expressed by Roscoe Pound in the early 1900s. He criticised it for being inaccessible, inefficient and overly adversarial and this led, he said, to false expectations about the purpose of the law. The beginning of the ADR movement itself, or the 'legalisation of informal alternatives' as Auerbach describes it,<sup>43</sup> is widely recognised as having been established at the Pound Conference some seventy years later. Chief Justice Warren Burger was instrumental in promoting the use of other forums such as informal neighbourhood tribunals in minor cases. Frank Sander, probably the first person to coin the phrase 'alternative dispute resolution', proposed the use of dispute resolution centres, which would channel disputants into the appropriate process, whether that was arbitration, mediation, the ombudsman or litigation. Over this period of time, the rhetoric changed gradually from concern about access to justice (because of a system that was becoming costly and inefficient) to an emphasis on the benefits of settlement over adversarialism and on the development of completely alternative processes. These alternatives would, as Derek Bok observed, draw on "human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and

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<sup>43</sup> Auerbach (1983) 123.

rivalry.”<sup>44</sup> Subsequently, the language used in dispute resolution began to change, with more emphasis placed on the anthropological aspects of conflict. Disputes began to be considered more in terms of relationships that needed preserving (for example within families, between neighbours, suppliers and distributors, or landlords and tenants) rather than legal contests. There was a recognition that these kinds of disputes should be addressed through different processes and this in turn led lawyers to develop special techniques to manage clients and to take on mediation as well as other alternative dispute resolution strategies.

In the United Kingdom, these changes emerged more slowly and were limited to the family sector in the initial stages. New professionals began to appear, not from within the justice system but from the social work, therapy and community sectors. Gradually, nevertheless, lawyers began to offer mediation. In 1988 the Law Society established a new branch – the Family Mediators Association (FMA) - and mediation was extended to commercial disputes with the creation of the Centre for Effective Dispute Resolution (CEDR) in 1989, for which mediators were drawn from legal firms. As the result of a report by Lord Justice Beldam<sup>45</sup> in 1991, a scheme of court-linked mediation (later the London County Court Pilot Scheme) was set up to operate in the county courts across a wide range of civil disputes. It was during this pilot, which required mediator roles to be filled by lawyers with at least seven years’ experience, that the takeover of mediation by the legal profession began. By the end of 1997, the majority of

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<sup>44</sup> Derek Bok, ‘A Flawed System of Law and Practice Training’ [1983] 33 *Journal of Legal Education* 570, 583. Bok particularly advocated a revision of professional training for lawyers which, he said, placed inappropriate weight on the adversarial nature of the role of legal representative.

<sup>45</sup> See Lord Justice Beldam, *A Report of the Committee on Alternative Dispute Resolution*, (London: General Council of the Bar, October 1991).

commercial law firms had CEDR-trained mediators on their staff. The response of the Solicitors Family Law Association to the Family Law Act in 1996 was the introduction of the role of the 'lawyer-mediator'.

It was, however, the publication of the Woolf Reports (the Interim Report in 1995 and the Final Report in 1996) that had the most significant impact on mediation in the UK. It effectively sparked a revolution in the civil justice system and led to the prioritisation of settlement over adjudication. Echoing the criticisms of the American system, Woolf launched a major attack on the adversarial approach pointing to the delays in progressing cases and reaching settlements, and the added costs that these factors imposed. In his final report, he argued that litigation was to be "avoided wherever possible"<sup>46</sup> and that people should be encouraged to use other methods of dispute resolution, only turning to the courts as a last resort. He directed that "before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute", explicitly stating that

"... [t]here will be an expectation of openness and co-operation between parties from the outset, supported by pre litigation protocols on disclosure and experts."<sup>47</sup>

Furthermore, he recommended that judges should be able to take into account the parties' approach to resolving the dispute in their judgements. In Paragraph 9 of Section 1, Woolf says:

"The courts will be able to give effect to their disapproval of a lack of co-operation prior to litigation ... The court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into

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<sup>46</sup> Lord Woolf, *Access to Justice: Final Report* (London: Department for Constitutional Affairs 1996) Section 1, para 9.

<sup>47</sup> *ibid.*

account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.”<sup>48</sup>

Woolf therefore recommended a case management system, anticipating that fewer cases would need to go to trial and that parties would try to resolve disputes outside the court system. Woolf's recommendations aimed to keep costs proportionate to the issues at stake. Courts were to encourage the use of ADR at case management conferences and pre-trial reviews.

This was strengthened with new Civil Procedure Rules (CPR) introduced in 1999 which allowed judges to order a break in proceedings for the parties to attempt to reach settlement and introduced cost sanctions where parties ignored judicial encouragement to try mediation.<sup>49</sup> Pre-action protocols covering a range of different types of dispute were published which encouraged parties to attempt to settle using ADR before beginning court proceedings<sup>50</sup> with the threat of costs where this was ignored. The Woolf Reforms put pressure on parties to negotiate in the pre-litigation phase and insisted on rigorous case management once litigation was underway, so that cases could be disposed of as quickly as possible. These pressures also mark the beginning of the influence that ADR has had on mediation practice, calling into question the central principle of voluntary participation.

Another major appraisal was undertaken in the UK some ten years later, once the main recommendations of the Woolf Reports had been put into place. In his Review of Civil

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<sup>48</sup> *ibid.*

<sup>49</sup> Civil Procedure Rules R1.4 (2) and R26.4 outline the possibility of a stay of proceedings for settlement at the court's instigation. The factors that must be considered are “the efforts made, if any before and during the proceedings in order to try and resolve the dispute.” (Parts 1 and 44 Civil Procedure Rules). The full text of these rules is at [http://www.dca.gov.uk/civil/procrules\\_fin/menus/rules.htm](http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm) . Accessed 05 February 2015.

<sup>50</sup> The full text of the protocols is available at: [http://www.dca.gov.uk/civil/procrules\\_fin/menus/protocol.htm](http://www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm). Accessed 05 February 2015.

Litigation Costs, Lord Jackson's remit was specifically to look at the question of costs and proportionality. He drew the conclusion that costs were too high and that ADR was key to reducing them. His recommendations supported the increased use of ADR through awareness raising and the development of training materials for lawyers, judges and potential users such as the public and small businesses. It is important to note that his suggestions stopped short of mandating mediation for disputing parties.<sup>51</sup>

The developments in the latter part of the 20th century both in the USA and the UK are significant for mediation in two ways. First, there are considerable debates concerning the value, or otherwise, of settlement over judgement and of how far informal approaches to resolving disputes support 'justice'. This begs the question of how justice is to be defined: by the law or by parties to a dispute? I am particularly interested in the issue of how far the process of mediation provides a means to achieve a 'just' outcome as it is understood by the parties themselves. Secondly, there is the impact on the practice of mediation itself and the values and principles that underpin it. These issues are interlinked and lead to a further question concerning whether the apparent absorption of mediation, an informal process, into the formality of the justice system has led to its distortion.

### *The ADR Debates*

The ADR movement has prompted decades of discussion, both in the United States and in the UK. While there is considerable overlap with these debates, there are also distinct questions raised in each country which have important implications for practice.

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<sup>51</sup> Lord Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationery Office 2010) xxii. See also Chapter 4 of this thesis for a fuller discussion of the question of compulsion.

The debates in the United States about the use of settlement rather than adjudication can be organised into two main streams. The first, initiated by scholars such as Abel and Nader, questions the validity of informal institutions such as community justice centres in providing a real alternative to state justice. The scholars argue that these schemes, imposed from above, represent a covert expansion of state power. Conflicts around issues of social importance, they say, are minimalised and subverted because they are dealt with at an individual level rather than being publicly addressed. The second stream, put forward by protagonists such as Owen Fiss, argues that settlement is no substitute for judgement. Justice is the province of the law and is undermined through the use of settlement strategies which privatise individual disputes and deprive the state of the ability to discharge its duty. Legal and political values are at risk of being compromised.

Merry and Milner<sup>52</sup> have collected a number of essays from prominent scholars in the field of ADR in order to evaluate the success of the community justice centres that were so enthusiastically proposed by Burger and Sander. In particular they examined the work of the San Francisco Community Board (SFCB), which was set up to provide a local alternative to the justice system and which had a profound ideological impact on the development of the ADR movement in United States.<sup>53</sup> The SFCB project, founded by Raymond Shonholtz,<sup>54</sup> set out to demonstrate that the community

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<sup>52</sup> Sally Engle Merry and Neal Milner (eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (Michigan: The University of Michigan Press 1995).

<sup>53</sup> For a further analysis, see Sally Engle Merry in 'Sorting Out Popular Justice' in Engle and Merry (1995). Merry describes popular justice as something that exists between the state system and indigenous legal systems rooted in history. She identifies four models of popular justice, which aim, in varying degrees, either to reform the existing justice system or replace it altogether.

<sup>54</sup> See Ronald Shonholtz, 'Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program' in Merry and Milner (1995) 204-7. The project was based on Merry's third, communitarian model of popular justice. In this model justice operates entirely outside the state. Community members withdraw from society with a view to creating a new order. It was thought to work best for small groups

approach to dealing with conflict outlined by Auerbach as a feature of American history was still achievable and that 'urban residents' could, with training and support, step forward to assist neighbours by mediating in disputes at an early stage. The aim was to enable local citizens to resolve their own disputes through the organisation of a local community justice system which would "reawaken citizens to their power as disputants and dispute resolvers."<sup>55</sup> To Shonholtz, outputs from the project such as the saving of time and money and the reduction in the number of court cases were important but secondary to "the renewed, reclaimed, and restated role and function of the citizen as the primary intervener in the early settlement of conflict." The concept of party determination and local empowerment, outlined by Roberts and Palmer, was strongly in evidence in Shonholtz's description of the rationale for the project. Local people were trained to work as mediators and sit on panels that would support parties to reach their own agreements.

Critics of the SFCB project and others like it argued that it did not provide a real alternative to the justice system, instead it replicated many of the same characteristics but at a local level. Abel, in particular, was of the view that " ... [i]nformal institutions allow state control to escape the walls of those highly visible centres of coercion – court, prison, mental hospital, school – and permeate society."<sup>56</sup> In effect, he said, they

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that could operate by a moral code where local norms would prevail and lay people were in charge. Shonholtz attempted to use the model to recreate a system of civic responsibility based on consensus and community that was separate to the state:

"Community organizing was based on the rationale that in a democratic society only citizen-based conflict-settlement mechanisms could reach disputes early and provide some reasonable process for their peaceful expression and resolution. Legal institutions constrained by statutory boundaries could not prevent or diminish a conflict without first establishing some basis for intervention. Citizens, working within a local mediating structure, have no such limits." (207).

<sup>55</sup> *ibid* 205.

<sup>56</sup> Richard L Abel (1982) 6.

extended control, breaking down barriers between public and private. He argued that while informal approaches have a rhetoric of consensus, beneath them social conflict is suppressed and neutralised. Meanwhile, the procedural safeguards attached to formal processes are relaxed leaving vulnerable disputants unprotected and giving third party neutrals a free hand to coerce and manipulate.<sup>57</sup> Abel argued that informal institutions neutralise conflict by “inhibit[ing] their transformation into serious challenges to the domination of state and capital.” Informalism strengthens the position of the legally advantaged and denies the disadvantaged the protection of formality. The lack of authority means that parties, particularly the powerful, cannot be forced to participate. Meanwhile the rhetoric around interests and needs deprives weaker disputants of their rights.

Both Abel and Nader were writing against the backdrop of social reform in the 1970s when the focus was on providing a political voice for suppressed groups. Nader sees the ADR movement as something that diverts attention away from justice under the pretence of aiming for harmony and consensus rather than litigation. Popular justice movements, she says, are not *popular* in the sense of being controlled on a bottom up basis but rather they originate in centres of power which then try to establish connections with the local populations in order to control them.<sup>58</sup> In order to fully

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<sup>57</sup> See also Laura Nader, ‘When is Popular Justice Popular?’ in Sally Engle Merry and Neal Milner (1995) 435 - 451. Nader’s criticisms are equally damning. She observes that “... few people notice that alternative dispute resolution mechanisms are ‘justice’ mechanisms that are unregulated and uncontrolled.” (448) She accepts the popularity of the idea behind SFCB and identifies an ideology of harmony that resulted from it, but argues that it is one in which conflict is controlled, minimised, denied and contained, but not resolved.

<sup>58</sup> Nader (1995) says of the SFCB that:

“The concern with harmony was accompanied by the silencing of disputes: Americans were repeatedly described as too litigious. The production of harmony was to be achieved by the movement against the contentious, the movement to control the disenfranchised. The loss of concern with rights created a model of law intolerant of conflict, its causes and its expression. An intolerance for strife seeks to rid the society of those who complain, and by various means – sometimes coercive – attempts to create consensus, homogeneity, and agreement.” (441).



address social conflict, root causes must be examined and understood, and the movement must start from below.

These criticisms are important for my discussion in that they challenge the notion that 'justice' is an inevitable outcome of community-led dispute resolution and that this can be achieved through the involvement of trusted third parties who support those in conflict to reach their own solutions. The principles of non-judgemental impartiality and fairness on the part of mediators were called into question by those critics and prompted responses from the mediation community, to which I shall return below.

A second source of scepticism came from those considering the use of ADR *within* the civil justice system itself. Fiss's article 'Against Settlement' and his subsequent writing<sup>59</sup> in response to critics provided a key reference point in the early development of the ADR movement. He expressed concern that agreements reached through settlement would be coerced and that, because the process was conducted by persons with no authority and without proper trial or judgement, justice would not be done. His contention was that advocates of ADR view adjudication as a process to resolve individual disputes where relations have broken down rather than one which draws on the authority of the law for the good of society. ADR, he argued, overlooks the power imbalances existing between parties in terms of resources that an adjudicative process seeks to address (i.e. the ability to pay costs, to organise the information that will support a case or the need to 'settle for less' in order to bring the dispute to a conclusion). For Fiss this represents:

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<sup>59</sup> Owen Fiss, 'Against Settlement' (1983 – 1984) 93 Yale Law Journal 1073 and 'Out of Eden' (1984 -1985) 94 Yale Law Journal 1669.

“ ... a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgement, which knowingly struggles against these inequalities. Judgement aspires to an autonomy from distributional inequalities.”<sup>60</sup>

According to Fiss, agreements reached through settlement based on the views of disputants lack authoritative consent, whereas “the authority of judgement arises from the law, not from the statements or actions of the putative representatives.”<sup>61</sup> The outcome is that parties strike a bargain or arrive at some kind of truce. Dispute resolution, he argues, trivialises the remedial dimensions of a lawsuit and reduces the social function of the law to one of resolving private disputes. Adjudication, he says, should be understood in broader terms:

“Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates ... Their job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes, to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.”

In an angry response to Fiss, McThenia and Shaffer defended the motivations of the ADR movement and criticise Fiss for his equation of justice with law, asserting that:

“ ... the soundest and deepest part of the ADR movement ... rests on values – of religion, community and workplace ... [S]ettlement is neither an avoidance mechanism nor a truce [but] ... a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation.”<sup>62</sup>

Fiss in turn challenges the relevance of reconciliation once parties have taken a dispute as far as court and questions the altruistic nature of these motivations, pointing to Chief

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<sup>60</sup> Fiss (1983-84) 1078.

<sup>61</sup> *ibid* 1080.

<sup>62</sup> A. W. McThenia and T.L Shaffer, 'For Reconciliation' (1984-1985) 94 Yale Law Journal 1664.

Justice Warren Burger's aims for a reduced caseload and a more efficient judicial system.

The debate highlights two significant issues: first, the understanding and use of language about conflicts and disputes linked with the emergence of this movement and the processes associated with it, and, second, the meaning of 'justice' and what people are looking for as a satisfactory outcome from conflict.

Considering language, there is often, in my view, a lack of clarity that leads to confusion. It is necessary to distinguish between a conflict, a quarrel, a disagreement and a dispute. Conflict is an inescapable, everyday occurrence that highlights difference, whether it concerns values, relationships, resources or territory.<sup>63</sup> It is not so much the occurrence of conflict as the way that it is handled that is important for those involved. This is not to minimise the devastating impact that conflict can have, not least the sense of disempowerment and isolation that individuals may experience. If conflict is a state in which people find themselves, quarrels and disagreements are the means by which it manifests itself - as are discussion, debate, violence or even silence, avoidance and withdrawal. 'Disputes' are another manifestation of conflict but with the distinction that the disagreement is no longer simply an issue between two individuals or parties but is now in the public realm. It might be addressed by the disputants with or without the help of a third party, recognised representatives of the community, or a court of law. In other words, conflict is something that all people experience and have to deal with, and sometimes a disagreement may be elevated to

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<sup>63</sup> See Andrew Acland's book, *A Sudden Outbreak of Common Sense* (London: Cornerstone Publishing, Hutchinson Business Books, 1990) in which he describes four sources of conflict (chapters 7 to 9).

a dispute. Roberts and Palmer describe how conflict can accelerate through the phases of dispute resolution until finally ending up in a court:

“An individual perceives herself or himself as suffering some injurious experience, identifies this as originating in a legal wrong, blames someone for this and institutes a claim against that someone, setting in train a process that will put the matter to rights. Lawyers representing the parties then reshape the dispute into a form suitable for processing in the legal system, typically transforming it in doing so.”<sup>64</sup>

The process of taking a disagreement or argument to law, therefore, converts it from a private issue to a legal question existing in the public domain.

Disputes may of course also occur between large organisations and corporations which through their power and influence over the public can become oppressive.<sup>65</sup> These kinds of conflicts are placed within the justice system in order to achieve structural transformation. The primary aim of the justice system is to bring the dispute to an appropriate end.

In the arguments that I have been examining, the ADR movement can be understood in two ways. The first interpretation is that ADR introduces a step between the publicising of a dispute and its arrival in the civil justice system. The community boards are an example of this: they gave parties in conflict an opportunity to resolve their disputes before going to litigation, finding a ‘just’ outcome within well understood community norms and with the support of local facilitators. The second interpretation is that ADR provides disputants with alternatives once a disagreement has become framed as a legal dispute within the justice system. The main options at this point,

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<sup>64</sup> Roberts and Palmer (2005) 79.

<sup>65</sup> David Luban, ‘Settlements and the Erosion of the Public Realm’ (1994-1995) 83 *Georgetown Law Journal* 2619, 2629.

those with which Fiss and his followers were concerned, are to reach settlement or to use adjudication to end the dispute. McThenia and Shaffer's response reflects this unhelpful confusion of terms which equates settlement with reconciliation and the healing of broken relationships. It seems to me that, while the latter might well be the aim of community-based projects operating according to the norms and values that Auerbach illustrates, the primary aim of settlement within the justice system is to reach closure, albeit with a greater involvement of parties in the outcome than adjudication allows. Relationship improvement through a settlement process may well be possible, even welcomed, but is not considered to be the primary aim, as Fiss's reply<sup>66</sup> illustrated. This highlights a crucial contradiction in purpose between mediation in the sense of its early usage outlined in the first part of this chapter and the practice of ADR within the justice system.

The second significant issue concerns what people consider to be a satisfactory end to conflict. What do people understand by 'justice'? It is a difficult word to define and means different things in different contexts. I have already noted that justice can mean reaching a lawful, authoritative conclusion or promoting social equality and social change or arriving at a subjective measure of fairness. The first two involve rules and procedures and require that disputants hand over their argument to a higher authority to which they submit. The process used to end the dispute is more important than the substantive outcome. The third requires that protagonists take responsibility for their own dispute and places more weight on the content of the argument and on their ability to reach a mutually acceptable solution. It has been argued that settlement

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<sup>66</sup> Fiss (1984-85).

undermines the authority of the law, both because its outcomes do not necessarily follow pre-established rules and because the privacy of negotiations leads to a lack of transparency and challenge.<sup>67</sup> Equally, however, it has been suggested that legal justice undermines the individual responsibility and autonomy of parties in conflict and lacks flexibility. In Auerbach's account, justice can only be achieved outside the legal system if a sense of fairness is fostered and is based on well understood community norms and expectations that are respected. A community approach to conflict resolution, which encourages both individual and corporate responsibility, relies on a shared understanding of what constitutes justice. How far is this achievable today, given the changing nature of communities, the huge shift towards individual rights and litigation, and the consequent move away from individual responsibility?

The issues concerning justice and fairness have also featured in debates in the UK. In her defence of the civil justice system in this country, Hazel Genn refers to the importance of a public perception of fairness in settling disputes.<sup>68</sup> She points out that the emphasis which adjudication places on procedure offers people reassurance that the system is fair and highlights the significance of procedural fairness in ensuring that substantive rights are enforced. Due process ensures that judges have the relevant evidence to apply the substantive law to those facts. "Procedural rules reflect a sense of justice"<sup>69</sup> and as such are vital in promoting public confidence in the civil justice system. In other words, the use of the process itself ensures a 'just' outcome.

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<sup>67</sup> See Luban (1994-95).

<sup>68</sup> Hazel Genn, *Judging Civil Justice: The Hamlyn Lectures 2008* (Cambridge: Cambridge University Press 2010) 12ff.

<sup>69</sup> *ibid* 13.

It is helpful to examine the criteria that Genn uses to define procedural fairness and consider their application to mediation. While it may not involve the complex procedures of the courts, mediation is nevertheless described as a process.<sup>70</sup> Informality is considered to be one of its benefits. However, mediators follow a basic, recognisable structure, which is subject only to contextual variation.<sup>71</sup> Genn draws on research by Blader and Tyler<sup>72</sup> who propose four critical elements that contribute to perceptions of procedural fairness: the opportunity to be heard; the opportunity to influence the decision maker; the even-handedness of the decision maker and being treated with courtesy and respect. In my view these criteria can equally be applied to the mediation process in the following ways. One of the fundamental characteristics of mediation is that it is a listening process. Mediators use listening skills to get beyond the disagreements presented and to reach an understanding of the underlying issues which is non-judgemental, even-handed and accepts difference. Mediation therefore allows people to be heard. Indeed, Roberts highlights the importance of the “principle of *audi alteram partem* – ‘hear the other side’” describing it as a “necessary condition of procedural fairness”, a “vital safeguard in mediation practice” and a “requirement of natural justice in third-party decision-making”.<sup>73</sup> What is more, by utilising listening

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<sup>70</sup> See Katherine Van Wezel Stone, ‘Dispute Resolution in the Boundaryless Workplace’ (2000-2001) 16 Ohio State Journal of Dispute Resolution 467 – 489, 482 where she argues in the context of the workplace that:

“Arbitration and mediation can further the goal of providing procedural justice in the new workplace whether they are part of a pre-dispute arbitration system or whether they are made available on a post-dispute basis.”

<sup>71</sup> For example, see Genn (1999) *Mediation in Action* 23-26 where she outlines the process in some detail for potential users of CLCC scheme.

<sup>72</sup> S. Blader and T.R. Tyler, ‘A Four Component Model of Procedural Justice: Defining the meaning of a “fair” Process’ (2003) 29 Personality and Social Psychology Bulletin 747-58.

<sup>73</sup> Marian Roberts, ‘Hearing Both Sides – Structural Safeguards for Protecting fairness in Family Mediation’ (2015) 45 (6) Family Law Journal 718 – 726, 719. In this article, Roberts argues the importance of structural fairness in mediation and describes the Coogler Model which incorporates separate time with each party at the beginning of mediation sessions. This procedure is “is designed to secure fairness and achieve equal opportunities for full and confidential expression.” She points out that these “[s]tructural protections are necessary ... both to offset inequalities, pre-existing and those that can be created within mediation, and to enhance the control of the parties, the weaker party, in particular.” The model, therefore, ensures that the “central issues of party autonomy,

skills, mediators encourage parties to do the same. A primary part of the mediator role is to create an environment of respect in which the necessary conversation can take place and to ensure that parties have equal opportunity to contribute. Blader and Tyler's research, based in a financial services firm, assumes that as a component of procedural justice there is a neutral third party who makes a decision. Their second criteria places importance on being able to influence this person. While this is not appropriate to the mediator role, it is, importantly, transferred instead to the parties themselves. By engaging in dialogue together the parties have opportunity to influence each other and to engage in joint decision-making. My suggestion therefore, is that it is possible to use this model to argue that mediation too can achieve informal justice by reaching outcomes that are regarded as fair by the participants, in terms of both content and process.

Hazel Genn is a leading contributor to the ADR debate in the UK and has conducted several projects in which she has evaluated the effectiveness of mediation<sup>74</sup>. While initially supportive of ADR (and mediation in particular) as "a quick, informal and satisfactory way of settling disputes without having to go through the cost, anxiety and delay of a full trial in court",<sup>75</sup> Genn has grown more sceptical. This appears to be more a reflection of her concern for the deterioration of the civil justice system than an

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mediator authority and power, and the protection of a fair process are explicitly addressed by means of structure." (712ff).

<sup>74</sup> See various publications by Hazel Genn including *Paths to Justice: What do People Think about Going to Law* (Oxford: Hart Publishing 1999); *Mediation in Action: Resolving Courts Disputes without Trial* (London: Calouste Gulbenkian Foundation 1999) and Ministry of Justice, 'Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure', London: Research Series 1/07.

<sup>75</sup> Genn, (1999) *Mediation in Action* 35. The book is written to provide information to potential users of mediation within the civil justice system. It is based on research from the pilot scheme in the Central London County Court, started in 1996, where, though the take up of mediation was low, the experience of those who used it was positive. Genn lists among the advantages of mediation, its flexibility, the potential for creative agreements, for repairing relationships, for saving time and money and reducing stress. (See pages 15-16).



objection to mediation itself. Her Hamlyn Lectures, in 2008, paint a picture of civil justice in decline as a result of under-resourcing (due to the prioritisation of criminal justice) and undermining (due to the negative public perception of going to court and the impact of ADR in reducing the use of adjudication.) She, and others,<sup>76</sup> draw on the work of Galanter, pointing to the reduction in the number of trials in the UK and the role of adjudication in setting legal precedent and supporting social change. Like Fiss, Genn argues that the law is a statement of values which is of significance because it “fixes obligations and duties through rules governing social and economic and governmental behaviour.”<sup>77</sup> Fiss was writing at a time in the USA where the promotion of social rights for minority groups was high on the public agenda. Genn, writing some 25 years later, is considering a different context in the UK. However, both believe in the value of the authority of the law. She writes:

“The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinized and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies.”<sup>78</sup>

Genn is therefore convinced of the importance of civil remedy in achieving justice and social change. Civil justice, she argues, has both a private and public value: it brings an end to individual disputes and, by applying the law to those outcomes, it reinforces social and economic norms of behaviour and publicises the values of society. Public

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<sup>76</sup> See, for instance, Linda Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 Oxford Journal of Legal Studies 1, 59–80 and Robert Dingwall and Emilie Cloatre, ‘Vanishing Trials? An English Perspective’ (2006) Journal of Dispute Resolution 51-70.

<sup>77</sup> Genn (2010) 20.

<sup>78</sup> *ibid* 3.

trial protects the collective interest because it facilitates the important function of precedent setting, as Mulcahy observes:

“Traditionally viewed as the cornerstone of the common law, precedent is central to the way we teach and talk about the radiating effect of private litigation. The appellate courts are viewed as having an exemplary role in the cognitive and normative domains by using individual disputes to constitute and justify a particular view of how the social world we all live in is and ought to be.”<sup>79</sup>

Mulcahy endorses Genn’s view that

“While the reality is that most cases settle, a flow of adjudicated cases is necessary to provide guidance on the law and, most importantly, to create the credible threat of litigation if settlement is not achieved.”<sup>80</sup>

For both Genn and Mulcahy, the effect of the Woolf reforms and the move towards settlement has been to diminish the power of adjudication. Their concern echoes that of the early critics, that modern civil justice is increasingly portrayed as a private matter where disputes are settled on an individual basis rather than as an issue of public concern which has an influence on societal values.

In her criticism of ADR, Genn primarily focuses on mediation as the process most commonly used to achieve settlement. She argues that mediation works against civil justice by ignoring the legal rights or legal merits of a particular dispute, reiterating them instead as problems to which there are solutions. The parties’ interests and a consideration of the ways in which they can best be met is central to the discussion. Mediators, she says, are not concerned with substantive justice but with problem-solving so that “[t]he outcome of mediation is not about *just* settlement, it is *just about*

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<sup>79</sup> Mulcahy (2013) 59-60.

<sup>80</sup> Genn (2010) 21.

*settlement.*"<sup>81</sup> If this was truly all that mediators were concerned with, the criticism might well be valid, but in my view Genn equates mediation with ADR. In doing she so fails to recognise its potential and undermines the value of human capability in facing conflict and in realising just and fair outcomes. The argument is strongly made by Marion Stevenson, a practitioner and commentator, who pinpoints client autonomy as the crucial difference between mediation and 'settlement-broking': a concept that is central to the former.<sup>82</sup>

If mediation were merely an aide for lawyers in achieving settlement, it would be easy to accept this conclusion. However, I would argue that the use of these terms interchangeably is misleading. While I agree that ADR does concern itself with settlement, the purpose of mediation is much broader. Mediation, in its purest form, recognises a human ability to make balanced, well informed decisions with integrity and offers the opportunity to do so.<sup>83</sup> Adjudication takes away this opportunity and replaces it with a higher authority. At an individual level many conflicts involve misunderstanding or miscommunication and *can* be characterised as problems to which there may be solutions. Most mediators recognise that there are some circumstances in which these problems cannot be addressed and where a party must

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<sup>81</sup> *ibid* 117.

<sup>82</sup> See Marion Stevenson, 'Mediation and Settlement-Broking' (2015) 45 (5) Family Law Journal 575, and 'A Mediator's Compass' (2015) 45 (6) Family Law Journal 715, where she provides an alternative understanding of how a practitioner views mediation, settlement and the differences between them. In these two articles, Stevenson draws an important distinction between mediation and 'settlement-broking'. She argues that the difference between them lies in the concept of client autonomy. She says of settlement-broking that "[t]he question is not whether it is or is not (helpful) ... [t]he question is whether it is mediation in the sense of whether it accords with the principle of self-determination ... The fundamental basis of mediation is respect for client autonomy ... this should be our ethical test: are we taking over responsibility for outcome in a way that threatens or could undermine that authority?" (45 (5) 575ff).

<sup>83</sup> Again, see Stevenson, where she argues that mediators view parties as having 'good intent'. Though "people's expertise in decision-making may be clouded by the conflict" the purpose of mediation is to help "people to realise their better self, the self that prefers harmony and resolution." (45 (6) 716).

call on the protection of the law.<sup>84</sup> However, my argument is that there has been an increasing tendency over the last few decades to place more emphasis on the pursuit of individual rights and benefits, and this may force people down a litigation route that they may not otherwise have taken.<sup>85</sup> The result is that the opportunity for individuals to manage their own conflict through the use of processes like mediation is frequently bypassed. Conflicts and disagreements are translated into legal disputes with alarming speed. The opportunity to mediate exists outside the civil justice system as well as within. It can be argued that the process promotes other values which underpin a healthy society such as individual responsibility and corporate accountability or what Folger and Bush describe as 'civility'.<sup>86</sup>

The debates surrounding ADR have, then, raised fundamental questions about the meaning and purpose of justice. It is equally important to consider the impact that these discussions and developments have had on mediation practice.

### *The Impact of ADR on Mediation*

Scholars and practitioners alike have questioned some of the early principles articulated by de Wicquefort and la Roche. Of particular significance is the debate about how far mediators should be held accountable for the final agreement between disputing parties. Susskind, for example, argues in favour of mediator intervention in

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<sup>84</sup> In family mediation, for example, it has been established as good practice over the last 15 years, to screen for domestic abuse before beginning mediation to ensure a) that victims of abuse will be safe and b) that they can participate in a negotiation process without fear. Where these conditions are not met, and where the law offers appropriate protection, mediation does not go ahead. For further details, see Lesley Allport and Lorraine Bramwell, *Safe Solutions: A resource pack for mediators and others working with people affected by abuse in the home* (Brighton: Pavillion Publishing 1999).

<sup>85</sup> I am referring to activities such as the 'no win no fee' approach, street canvassing and cold calling, all of which are designed to incite people to take out a legal claim.

<sup>86</sup> See Robert Bush and Joseph Folger in 'Mediation and Social Justice: Risks and Opportunities' (2012) 27: Ohio State Journal on Dispute Resolution 1-51, 35ff.

the shaping of outcomes that might otherwise be unfair or that may impact on agents who are not present in the negotiations.<sup>87</sup> In doing so he implies a departure from the non-judgemental stance of those early mediators who explicitly left any resolution in the hands of the disputants. Joseph Stulberg's response to Susskind initiated a debate that still continues today.<sup>88</sup> He reasserts the importance of an agreement that is crafted by the parties themselves, stating that they alone can provide the real measure of whether justice has been achieved. Fisher and Ury<sup>89</sup> put forward a model of principled negotiation which worked on the basis of identifying needs and interests held in common by both parties. Their concept of 'win-win' settlements is one that now characterises the language of contemporary dispute resolution. Subsequent writers, notably Riskin, build upon this theme to develop the facilitative, problem-solving approach that dominates both training and practice today. In this model the mediator assumes a degree of accountability for the outcome.<sup>90</sup>

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<sup>87</sup> See Lawrence Susskind, 'Environmental Mediation and the Accountability Problem' (1981) 6 Vermont Law Review 1.

<sup>88</sup> See Joseph B. Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind' (1981) 6 Vermont Law Review 85. The arguments are developed later in debates involving Lande and Mayer: see Lande et al 'Panel Discussion - Core Values of Dispute Resolution: Is Neutrality Necessary?' (2011-2012) 95 Marquette Law Review 805; Joseph B. Stulberg 'Mediation and Justice: What Standards Govern?' (2005) 6 Cardozo Journal of Conflict Resolution 213; Bernard Mayer, 'What we talk about when we talk about neutrality: A commentary on the Susskind-Stulberg Debate, 2011 Edition' (2011-2012) 95 Marquette Law Review 859. For a more detailed exploration of these issues see also Chapter 6: Principles of Mediation - Impartiality.

<sup>89</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (London: Random House Business Books 1981) and William Ury, *Getting Past No: Negotiating With Difficult People* (2nd ed. London: Random Century Ltd 1992).

<sup>90</sup> In 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' (1996) 1 Harvard Negotiation Law Journal 7-51, Riskin develops a methodology by which to identify both the goals of mediation (to solve a narrowly defined, localised problem at one end of the continuum, or to provide an answer to broad, community issues) and the style of the mediator (from facilitative approaches that empower parties to reach their conclusions to evaluative approaches that draw on mediator expertise to arrive at settlement). Organising these components into a grid he argues that mediators largely operate out of one of a choice of four categories. Underlying the system he develops is the notion that "[The] goal is to reach an agreement that satisfies the parties' underlying interests, that is fair to the parties, and that is not unfair to affected third parties." Riskin L, et al. *Dispute Resolution and Lawyers* (3rd edn. Minnesota: West Publishing Company 2005) 334-48.

Another important line of argument from advocates of the ADR movement concerns mediators' responsibility for ensuring fairness, not just in relation to outcomes, but with regard to the discussions themselves. Moore and Haynes, among others, argued that a key part of the mediator role<sup>91</sup> is to take steps to balance any unequal power between parties. According to Moore, this involves a proactive approach that borders on advocacy:

“...the mediator's primary task is to manage the power relationship of the disputants. In unequal power relationships, the mediator may attempt to balance power...The mediator provides the necessary power underpinnings to the weaker negotiator – information, advice, friendship – or reduces those of the stronger.”<sup>92</sup>

Moore's examples include helping weaker parties to obtain and organise information, educating them in planning an effective negotiating strategy and encouraging them to make realistic concessions. Again, the debate around power balancing marks a significant shift in perceptions of the mediator's role from one of independence and neutrality, as described by de Wiquefort et al, to one which is much more interventionist in nature and includes a diagnostic element.

In the UK it has been the issue of voluntariness that has dominated the debates, with questions about confidentiality being raised too. A series of high profile cases since 2002, in which senior members of the judiciary have increasingly sought to apply pressure on parties to mediate, has prompted considerable discussion as to whether

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<sup>91</sup> See John Haynes, 'Power Balancing' in Anne Milne and Jay Folberg (eds) *Divorce Mediation: Theory and Practice* (New York: The Guildford Press 1988) 280, where he argues the importance of power balancing because

“... equality of initial power or resources ... is likely to result in an approximately equal division of outcomes, whereas differential power or resources is likely to result in an unequal distribution with [those] possessing greater power or resources demanding a larger share of the outcomes.”

<sup>92</sup> Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3<sup>rd</sup> edn. San Francisco. Jossey Bass 2003) 391 – 393.

or not mediation should be made compulsory. In *Dunnett v Railtrack*<sup>93</sup>, Lord Justice Brooke followed Lord Woolf's provision for imposing sanctions where a party unreasonably turns down an offer to mediate. He refused to order costs to *Mrs Dunnett*, who had lost the case, because *Railtrack* had declined to consider dispute resolution despite the court's recommendation. In the same year (2002) a similar judgement was given in *Hurst v Leeming*.<sup>94</sup> Mr Justice Lightman asserted that "alternative dispute resolution is at the heart of today's civil justice system" and said that there had been an unjustified failure to give proper attention to the possibilities of mediation. While parties could refuse mediation they had to provide a good reason why in order to avoid penalty.<sup>95</sup>

The drive towards compulsion was initiated after early disappointment with the rate of take up of mediation in this country. Experiments began in the late 1990s with court-based mediation projects in various parts of the country, notably the Central London County Court Scheme (CLCC), which initially set up a voluntary mediation scheme (VOL) for disputants in 1996. Some years later, another pilot, 'Automatic Referral to Mediation' (ARM), was established in the same court, operating alongside the VOL project. This was an experiment in quasi-compulsory mediation which ran between April 2004 and March 2005. The rationale for the scheme was in part influenced by the success of trials in Canada<sup>96</sup> in the late 1990s where 'automatic referral' with an option

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<sup>93</sup> *Dunnett v Railtrack* [2002] EWCA Civ 302.

<sup>94</sup> *Hurst v Leeming* [2001] EWHC 1051 Ch.

<sup>95</sup> In *Leicester Circuits Ltd v Coates Brothers PLC* [2003] EWCA Civ 333, withdrawal from mediation was seen as 'contrary to the spirit' of the Civil Procedure Rules (March 2003); *Royal Bank of Canada Trust Corporation v SS for Defence* [2003] EWHC 1479 (Ch) established that even if the case needed to go arbitration to establish a point of law refusal to use ADR was considered unreasonable. For more recent case law on the question of unreasonable refusal to mediate see Chapter 4: Mediation Today.

<sup>96</sup> For further information see Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Ontario:

to withdraw had successfully prompted a cultural shift that led claimants and respondents to change their expectations of how disputes could be settled.

Hazel Genn conducted evaluations of the two projects and drew conclusions about the impact of automatic referral and judicial pressure on the uptake of mediation.<sup>97</sup> In the very early stages, the VOL scheme was favourably received: take up was low but users' experiences were positive. The conclusions from subsequent trials, however, with the introduction of quasi-mandatory mediation, were, by contrast, negative. Genn observed that people were reluctant to go to mediation and their lawyers did not encourage them to do so. The lack of success of the ARM project in particular was, she suggested, influenced by an attempt to 'slow the tide' with the *Halsey* case.<sup>98</sup> In that case, following *Dunnett v Railtrack*, the unsuccessful claimant had requested that costs be imposed because her offer to mediate had been refused. The request was not upheld and the appeal judges made it clear that while mediation was to be generally encouraged there were circumstances in which it was not unreasonable to refuse. Lord Justice Dyson made a decisive statement against compulsion:

“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court ... it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6 [of the Human Rights Act 1998].”

The impact on the ARM project, which started in the same year, was a lack of conviction from the judiciary and less encouragement to mediate. Genn observed that:

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The Queen's Printer, 2001).

<sup>97</sup> See Genn (1999) and (2007).

<sup>98</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.



“Following the Halsey judgment, the District Judge assigned to hear objections to the scheme felt that her powers were limited to persuading rather than ordering reluctant parties to change their minds.”<sup>99</sup>

With the introduction of costs sanctions for opting out of mediation, the VOL project suffered too. Disputants who took part often did so because they feared the consequences of refusing to do so. Genn made a direct link between that and the fall in success rate and concluded that “the motivation and willingness of parties to negotiate and compromise is critical to the success of mediation.”<sup>100</sup> Moreover, the *Halsey* judgement unhelpfully confused the question of voluntary choice to go to mediation with the right of access to trial. It implied, incorrectly, that an agreement to mediate equates with an agreement to settle. In fact, if the principle of party determination is upheld, those involved remain in control of whether they reach an agreement. If not, their right to proceed to trial remains.

The principle of confidentiality within mediation has also been tested recently with the result that there is ‘conflicting authority’<sup>101</sup> on the subject. The question whether a mediator can be called upon to give evidence in legal proceedings has generally ended in the conclusion that such evidence is inadmissible.<sup>102</sup> However, there have been some cases, notably *Farm Assist v Defra*<sup>103</sup> in 2009, which have resulted in a weakening of this principle. Lord Justice Ramsey distinguished between the confidentiality of the process existing between the parties and the mediator and that of

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<sup>99</sup> Genn (2007) 197.

<sup>100</sup> Genn (2007) v.

<sup>101</sup> Michael Bartlett, ‘Mediation Secrets “In the Shadow of the Law” ’ (2015) 34 Civil Justice Quarterly 112-26, 118.

<sup>102</sup> See *Cumbria Waste Management v Baines Wilson* [2008] EWCH 786 (QB); [2008] B.L.R. 330 and *Aird v Prime Meridian Ltd* [2006] EWCA Civ. 1866; [2007] C.P. Rep. 18.

<sup>103</sup> *Farm Assist Limited v Secretary of State for the Environment, Food and Rural Affairs (no 2)* [2009] EWHC 1102 (TCC); [2009] B.L.R. 399.

legal privilege existing between the parties alone. In the first case, he said, courts will respect confidentiality except where it is in the interests of justice not to do so. *Farm Assist* was one such example. In the second he determined that legal privilege was capable of being waived by mutual agreement. The result (in a situation where the practitioner concerned only narrowly avoided having to give evidence because the parties settled) was to send mediators scurrying back to alter their contracts of engagement in an effort to protect themselves from future risk.

The debates about the ADR movement both in this country and the United States have, therefore, raised serious challenges to the core principles of mediation as they were historically understood. I would argue that these challenges have had a considerable influence on the understanding of mediation and on its practice. Marian Roberts makes the point that it is vital to understand two aspects of mediation; that “mediation serves a negotiation process... and [that] ... the role of the mediator is understandable only within an understanding of that process.”<sup>104</sup>

If negotiation is to be understood as an exchange of information, resulting in a change of view and concluding with a mutual decision,<sup>105</sup> then the role of a mediator is to support and encourage the flow of information in order that parties can move through those stages for themselves. The point that Roberts makes is that professionals such as lawyers, therapists or social workers use the same information in different ways to advise, diagnose or take protective steps, all of which, while appropriate in their own context, undermine party decision-making. “The nature of the intervention”, she says,

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<sup>104</sup> Marian Roberts, ‘A View from the Coal Face: Interdisciplinary Influences on Family Mediation in the United Kingdom’, forthcoming publication for the *Journal of Comparative Law*.

<sup>105</sup> See Gulliver (1979) and Roberts and Palmer (2007).

“is defined by the purpose for which the intervener activates the flow of information.”<sup>106</sup>

It is possible to see, then, how the discussions about accountability for outcomes, the focus on achieving fair settlements, the lean towards problem-solving, the rationale for power balancing and the move towards compulsion all contribute to the use of that information by mediation practitioners in ways that undermine party determination and the impartial, non-judgemental role of a mediator.

I would argue that the placing of mediation within the civil justice system (where it is viewed principally as an additional tool with which to achieve settlement) rather than outside that system (where it genuinely presents an alternative way of resolving disputes) throws up serious challenges to the nature and purpose of mediation as it was originally conceived.

### *The Place of Mediation*

The question of how mediation is used as a first step in dispute resolution as an alternative *to* the justice system or as an option to settle disputes *within* it is central to my discussion. From a legal-anthropological point of view, Roberts and Palmer argue that ADR places another step between mediation or arbitration and adjudication, whereby trusted representatives or experts engage in negotiation rather than rely on judgement.<sup>107</sup> They see it as a kind of pincer movement that has occurred within the justice system. On the one hand, legal professionals, taking on board the drive for settlement, have adopted mediation as an additional strategy that is available to help achieve it. On the other, both professional and volunteer mediators, whose origins are

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<sup>106</sup> Roberts (2015) forthcoming.

<sup>107</sup> See Roberts and Palmer (2005) Chapter 4.

in the community and social sectors, see mediation as their province and have sought to establish the profession in its own right. There is, however, a fundamental difference between these two groups which results in continued confusion and, as Roberts and Palmer point out, a “profound entanglement of ‘settlement’ and ‘litigation’”.<sup>108</sup> This can be seen in the debates outlined above. While legal professionals tend to see mediation as an informal means by which they can use their legal training by simply adopting the role of expert guide to support decision-making, mediation professionals, external to the justice system, are more likely to place their emphasis on facilitation, communication enhancement and relationship repair.

There has been a growing perception that this divide is reflected in the different fields of mediation delivery operating within the civil justice system today. Civil and commercial disputes, for example, can be characterised as being settlement-led. Often the primary aim is to find an agreement on a financial basis, as Genn’s findings from the pilots demonstrated. Assisted by a mediator, parties engage in a process of principled negotiation including an element of bargaining. There is anecdotal evidence<sup>109</sup> to suggest that civil and commercial mediators are more likely to use the information exchanged between parties to direct and advise. The fact that a higher percentage are likely to be lawyers who have added mediation to their toolkit makes a directive approach more likely. Relationship enhancement is regarded as a secondary benefit. Family mediation, on the other hand, cannot be quite so easily categorised, not least because, over thirty years of delivery, practice has changed and, as Roberts

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<sup>108</sup> *ibid* 45.

<sup>109</sup> See Genn (2007), (2010) 112 and 200 where she suggests that a strategy to induce settlement employed by mediators is to “constantly to remind parties of the ‘dangers’ of not settling on the day and the unpleasantness that awaits them if they continue to litigate and run the risk of proceeding through to trial.”

argues, has been subject to different disciplinary influences.<sup>110</sup> In its origins, family mediation existed as a process, outside the justice system, to assist separating parents in making future plans for their children. While relationship repair was not generally a feasible outcome, certainly the reforming of an ongoing parenting relationship was a high priority. Gradually, family mediation has been used more and more to address the financial aspects of separation and divorce and, in the process, has become much more closely linked to the courts and to settlement. The end result is that family mediation is recognised as a practice that draws on “many disciplinary skills ranging from the financial and legal to the social and psychological.”<sup>111</sup> It is, however, evolving and still lacks clarity. Robinson points out that a contemporary family mediator:

“... perhaps best presents as a polymath, a fuser of eclectic skills and knowledge base, not as a master of no trades, but as a combination of insights from different disciplines drawn to the service of particular process and outcome. And the challenge is to make the transition to something “more than” lawyer or psychotherapist, that is, to distil a new profession rather than dilute an old one.”<sup>112</sup>

Family mediation, as it exists today, reflects the confusion outlined above about whether mediation is an alternative *to* litigation or an option that exists *within* it. It is offered by a mixture of professionals: some work in the courts, others work outside them; some have legal backgrounds, others have non-legal training. This field of practice most clearly raises the question whether mediation should be regarded as an ideology or a practice, a subject which I shall explore in the next chapter.

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<sup>110</sup> Roberts (2015) forthcoming.

<sup>111</sup> John McEldowney, *Family Mediation in a Time of Change: FMC Review Final Report* (Warwick: University of Warwick 2012) para 14.

<sup>112</sup> Neil Robinson, ‘Shape shifters or Polymaths? A Reflection on the Discipline of the Family Mediator in Stephen Cretney’s World of Private Ordering’, in Probert R. and Baron C. (eds) *Fifty Years of Family Law: Essays for Steven Cretney* (Cambridge: Intersentia 2012).

The dangers of placing mediation within the civil justice system, therefore, are that it limits the scope of practice. It is influenced by considerations such as settlement, speed and low cost which are prioritised by the courts and in doing so moves away from its original purpose and some of its key principles. Menkel Meadows makes the point as follows:

“With the nascent ADR profession there is concern that the early animating ideologies of ADR are being distorted by their assimilation into the conventional justice system. Within a movement that sought to deprofessionalize conflict resolution there are now competing professional claims for control of standards, ethics, credentialing and quality control between lawyers and non-lawyers. Processes like mediation that were conceived as being voluntary and consensual are now being mandated by court rules and contracts. Processes that were supposed to be creative, flexible and facilitative are now being more rigid rule and law based ... The overall concern is that a set of processes developed to be ‘alternative’ to the traditional justice system are themselves being co-opted within the traditional judicial process with its overwhelming adversary culture.”<sup>113</sup>

The cultural shift over the last century towards the exercise of individual rights and the increased reliance on the civil justice system means that opportunities for the early and informal resolution of conflicts and disputes are rarely taken. As mediation is located more and more within the justice system, its nature and purpose change.

### *Conclusion*

This chapter has provided an overview of the historical use of mediation as a means of reconciliation and peacekeeping as well as a tool to manage disagreements brought into the public realm as disputes to a fair conclusion. It is clear that the underlying principles of practice that exist today, such as the non-judgemental, impartial stance of

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<sup>113</sup> Carrie Menkel Meadows, ‘Mediation, Arbitration and Dispute Resolution’, *International Encyclopaedia of the Social & Behavioral Sciences* (2001) 9511. The same view is expressed by Roberts (2015) who points out that “Mediation is promoted as simply another area of specialism — another tool in the lawyer’s toolbox — and therefore as a part of legal practice.”

the mediator and the facilitation of parties to reach their own outcome, have been established for centuries. However, the birth of the ADR movement during the latter part of the twentieth century has had a huge impact on the development of mediation and has posed serious questions concerning the relationship between formal and informal justice and the purpose of mediation in achieving justice at both an individual and a societal level.

In this chapter I have explored informal and formal mechanisms for dispute resolution and argued that the lack of clarity in terminology contributes to the confusion surrounding the meaning of justice and mediation. Critics have highlighted several difficulties with respect to using mediation as a means of achieving justice at different levels. If the aim of social justice is to arrive at a relative balance of wealth, power, access and privilege between different groups and classes in society<sup>114</sup>, mediation is perceived to work directly against it by privatising disputes and subverting social issues. At the same time, if the purpose of justice is to enforce the law, the informalism of mediation means that agreements arrived at are not subject to legal scrutiny and can favour a more powerful party resulting in an unjust outcome. In addition, the pressure on mediators and their perceived responsibility to the court to ensure that cases reach settlement means that they are more likely to influence agreements, thereby undermining party determination. Folger and Bush summarise these challenges as a lack of confidence from the critics that mediation can achieve formal

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<sup>114</sup> See Bush and Folger (2012) where they put forward a definition of social justice as it has been understood in the context of the debates around mediation. Within this context social justice is seen as:

“ ... a means of achieving relative equality of conditions (not just opportunities) as between all groups or classes within the society. Since the absence of such equality often results from social and organizational structures or systems – such as educational systems, housing markets, employment markets, etc. – rather than individual behaviour, social justice is understood as the absence of structural injustice or inequality.” (3).

justice as recognised by the law, either at an individual ('micro') level or a societal ('macro') level but nevertheless argue that mediation can achieve both.<sup>115</sup>

These debates have sought to establish the place that mediation has within the ADR movement and within civil justice. I have argued that a clear distinction needs to be made between understanding mediation as an alternative to civil justice and viewing it as an option within that system. Most significantly, the latter carries the danger of labelling mediation as 'ADR' thereby limiting it to a vehicle for settlement rather than viewing it as an opportunity for individuals to exercise their own human ability to deal with conflict. In my view, mediation offers a transparent process which allows a thorough airing of underlying issues and meets criteria that are regarded as important for achieving a fair or just outcome.

The debates prompted by the ADR movement both in the United States and in this country have undoubtedly had an impact on mediation practice. I have shown how the question of mediator accountability for ensuring a just outcome (as the law would recognise it) affects party determination. The use of quasi-compulsion in an effort to reduce caseloads in court can affect the motivation of parties using mediation and emphasises the priority of the civil justice system to dispose of cases quickly and cheaply. The result is that mediation has become equated with settlement and its success is increasingly measured in these terms. Whereas some disputes, primarily

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<sup>115</sup> *ibid* 4. Micro level justice is concerned with the individual and their particular situation. Macro level justice is concerned with social inequality. The authors state that:

“... social justice can be understood to encompass two “levels” at which equality among groups can be affected, for better or worse – the micro and macro levels. Ultimately the social justice goal aims for equality at the macro level. But micro-level effects on justice for individuals ... can also produce macro-level changes in social justice. Thus, while social justice generally means equality between groups, and justice at the aggregate level, justice done between individuals in particular cases can also contribute to social justice.”



those concerning a financial transaction, may require little more than this, the risk is that the potential of mediation to address communication and to repair relationships is lost.

A further consequence of the ADR movement has been the substantial growth in the number of lawyers training to use mediation skills with the effect that mediation is seldom regarded as a profession in its own right. With that development the boundaries between advice giving and impartial facilitation have become blurred. There is seen to be significant variation in both principle and practice between different fields of mediation, leading to perceptions of difference within the profession. While mediation still serves as a mechanism to promote information exchange, a mediator's intervention to use that information to influence outcomes alters its purpose.

In the next chapter I examine the practice of mediation itself in order to consider how far it is a process that leans towards the establishment of peace and relationship repair or towards settlement and the formal justice of the courts.

## CHAPTER 3 - MEDIATION: IDEOLOGY AND PRACTICE

“Mediation is seen as both an ideology (of peace-seeking, transformative conflict-resolving human problem solving) and a practice (of task oriented, communication enhancing dispute settlement).”<sup>1</sup>

As the words above illustrate, mediation is a process that can be viewed in very different ways. While some regard this as an advantage, critics such as Hazel Genn have argued that it creates a “divergence, if not polarisation of view” which leads to “controversies about [mediation’s] appropriate definitions, forms and boundaries.”<sup>2</sup>

There is no doubt that mediation as a form of dispute resolution is delivered with increasing variety. It extends beyond the context of Alternative Dispute Resolution (ADR) in which Genn is writing, to a plethora of other areas of practice from families to neighbourhoods, workplaces to schools, from homelessness to restorative justice. Within these different settings, the meaning and purpose of mediation vary, and this, in turn, affects the process, style and approach of the mediator. Though mediation is well established in many areas, different sectors have grown up largely independently of one another, developing their own definitions and professional standards of practice to varying degrees.

Whether the effect of this diversity amounts to polarisation is not clear. What is apparent is that it is not until relatively recently that there has been any significant dialogue between practitioners across these areas of mediation delivery. The opportunities to identify generic principles of practice, or even to understand how and

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<sup>1</sup> Carrie Menkel-Meadow, Lela Porter Love and Andrea Kupfer Schneider, *Mediation: Practice, Policy and Ethics* (New York: Aspen Publishers 2006) 101.

<sup>2</sup> Hazel Genn, *Judging Civil Justice: Hamlyn Lectures 2008* (Cambridge: Cambridge University Press 2010) 83.

why mediators work in different types of dispute, have been limited. As Acland observes, “So often I discover that legal mediators are completely unaware of mediation being done in schools or communities or environmental issues outside their remit.”<sup>3</sup>

Some years ago, Marian Roberts collected the views of several prominent practitioners working in different contexts. Though her book is very much the exception, it provides an important starting point. In her conversations with these practitioners, Roberts found that:

“Perspectives converge not in any view about *the* purpose of mediation, that is, that one purpose fits all mediation situations, but in the view that there is a spectrum of possible purposes ranging from the most idealistic to the most pragmatic depending, predominantly, on the particular *context* of practice.”<sup>4</sup>

In this chapter, I explore the idea that mediation is both an ideology and a practice and consider how far this presents a problem for the mediation profession and its commentators. I examine how far the understanding of conflict influences whether mediation is seen as a practical problem-solving tool or an activity that operates within a wider ideological framework. I identify various mediation styles and approaches and consider the influence of context on mediation practice.

In my view, mediation can and should be seen as both an ideology and a practice. Rather than leading to divergence, these two aspects present vital elements of diversity and flexibility which characterise the mediation field. Nevertheless, it is important that there are shared ‘definitions, forms and boundaries’ in order to prevent

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<sup>3</sup> Andrew Acland cited in Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (London: Jessica Kingsley Publishers 2007) 201.

<sup>4</sup> Roberts (2007) 70.

the polarisation which Genn refers to and which otherwise might result in examples of practice that are barely recognisable from one context to another. My aim is to establish core principles of mediation practice operating across style, context and approach and to see how far it is possible to arrive at a generic definition. To do this I reflect on the impact of recent legislation, drawing on the mediation literature and the insights of practising mediators. I conclude that, though not without its difficulties, the tension between ideology and practice is both a necessary and a natural one for a profession that is still in its infancy.

### *Mediation as a Response to Conflict*

Whether mediation is defined as an ideology or a practice is influenced by how conflict itself is understood and how it is dealt with. From one perspective, conflict can be seen as a struggle over resources and materials which are limited. Arguments are framed in terms of needs or rights and there is an element of competition. At best the resources are distributed in a way that is regarded by both parties as 'fair'. At worst, there is a 'winner' and a 'loser': one side gains the resources, the other does not.<sup>5</sup> Taking this understanding of conflict, the purpose of mediation is to address the issue of how these resources are distributed fairly and reasonably between the parties, as closely to their mutual satisfaction as can be achieved. This understanding of conflict lends itself to the practical, "task-oriented, communication enhancing dispute settlement" that Menkel-Meadows refers to as the 'practice' of mediation.<sup>6</sup>

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<sup>5</sup> Lesley Allport, 'Supervision in Mediation: Linking Practice and Quality' (unpublished Master's thesis, Institut Universitaire Kurt Bosch 2005) 13.

<sup>6</sup> Carrie Menkel-Meadow, Lela Porter Love and Andrea Kupfer Schneider, *Mediation: Practice, Policy and Ethics* (New York: Aspen Publishers 2006) 101.

In his book 'Culture and Conflict Resolution', Kevin Avruch writes about conflict in an international context.<sup>7</sup> He suggests that struggles over scarce resources can be addressed through negotiation at one level or, at the extreme, by one powerful party simply coercing the other. In order to manage or contain conflict and protect parties from risk or chaos, Avruch identifies the need for a 'broad' or 'realist' approach, the purpose of which is to bring an end to the dispute. Philip Naughton works in the arena of civil disputes but his words illustrate this understanding of mediation:

"I think it is very important to recognise that the principal function of mediation is simply to improve the prospects of succeeding and resolving a dispute through settlement negotiation. And in very few cases, I'm afraid, is one significantly adding value in the aspects which are so loved by those who eulogise about mediation as a process. It's pretty down to earth."<sup>8</sup>

Those who eulogise about mediation, however, may well subscribe to an alternative understanding of conflict, that is, as something that occurs as a result of a perceived divergence in beliefs. This may be based on real differences or on misperceptions and misunderstandings. Whichever it is, these differences can lead to a breakdown in communication and create a downward spiral within which misperceptions are reinforced and become entrenched. This understanding of conflict lends itself more to a view of mediation as an ideological response, the purpose of which is to restore peace, build bridges, transform relationships and foster well-being. Acland, cited again by Roberts, makes this meaning clear:

"One of the things I would like to say to any commercial mediator or matrimonial mediator, [is] that every time you help people to resolve a dispute by non-adversarial means, you are actually advancing the cause of

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<sup>7</sup> Kevin Avruch, *Culture and Conflict Resolution* (Washington: United States Institute of Peace 1988).

<sup>8</sup> Philip Naughton, cited in Marian Roberts (2007) 77.

civilisation, because you are teaching people how to resolve conflict without belting each other round the head. This is the moral cause.”<sup>9</sup>

The further development of an ideology around mediation was significantly influenced by the work of Folger and Bush in their book ‘The Promise of Mediation’.<sup>10</sup> The authors were writing in response to a growing movement in America of mediation approaches that were oriented towards reaching the kind of practical settlement described above. In their analysis of conflict, Folger and Bush describe the importance of two aspects that are essential for human beings if they are to function effectively: that of autonomy (a sense of ‘self’) and social connection (a sense of ‘the other’). Conflict poses a threat to both of these. People are forced to question themselves, as a result of which their self-confidence is shaken. In an effort to reassert a sense of self, ‘I’ or ‘my position’ becomes all-consuming and a sense of the ‘other’ is lost, to be replaced by a feeling of isolation. Unless it is possible to re-establish these senses and create a positive interaction which allows the examination of underlying differences with understanding and respect, the impact of conflict can be a debilitating one. The Transformative Mediation Approach outlined by the authors is an ideological response to this understanding of conflict, in which the mediator aims to restore autonomy and social connection through ‘Empowerment’ and ‘Recognition’.<sup>11</sup>

Avruch similarly identifies a second approach which goes further than the management or containment of conflict, looking instead to a resolution of deeper underlying differences which can achieve a transformation in the relationship between conflicted

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<sup>9</sup> Acland cited in Roberts (2007) 73.

<sup>10</sup> Robert A. Bush and Joseph P. Folger *The Promise of Mediation* (San Francisco: 2nd edn, Jossey-Bass 2005). The first edition, published in 1994, was significantly revised in 2005. The second edition reviews the growth of transformative mediation practice over the ten year span.

<sup>11</sup> *ibid* 22 – 26, 75-78.

parties. The approach requires an examination of underlying meaning and explores ways to understand and deal with difference.

A number of commentators writing in different contexts describe an ideological response to conflict which addresses human interaction and communication. John Paul Lederach, for example, emphasises the importance of responding to conflict by maintaining social connection:

“The moral imagination that rises beyond [conflict] has ... two tributaries: taking personal responsibility and acknowledging relational mutuality ... recognition that ultimately the quality of our life is dependent on the quality of life of others.”<sup>12</sup>

Others support an ideology that recognises conflict as an occurrence within a system. Kenneth Cloke describes the impact of conflict within organisations. Isolated disputes that are specific to individuals may emerge and can be addressed, to some extent, using a problem-solving approach. However, these disagreements can also be indicators that the whole system is not functioning well.<sup>13</sup> To agree a solution at a local level only addresses part of the problem:

“Mediating dangerously means approaching the heart of dysfunctional systems and facilitating conversations that allow people to change them. Instead of approaching conflicts as merely isolated, personal, and unique, mediators also need to invite parties to recognise the context of their conflicts and discover how to transform the systems that fuel their disputes.”<sup>14</sup>

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<sup>12</sup> John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (New York: Oxford University Press 2005) 34.

<sup>13</sup> Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass 2001) 193. Cloke states that:

“Conflict is ... the voice of a new paradigm, a call for change in a system that has outlived its usefulness.”

This is similar to Avruch’s distinction between the containment of conflict and transformation at a deeper level.

<sup>14</sup> *ibid* 197.

Elsewhere, Cloke talks about mediation as “a search for the invisible bridge that connects every living being with every other.”<sup>15</sup> He highlights the difference between settlement (“communicating superficially to settle your conflicts”) and resolution (“communicating deeply to resolve or learn from them”).<sup>16</sup>

Mediation is also viewed as both an ideology and a practice in the context of community mediation. Disputes between neighbours over issues such as boundaries and noise can often be addressed individually but equally need to be seen in the wider context of the community and the social norms operating within that community:

“... community life is fermented by solidarity, and encoded social rituals are underpinned by a richly textured rapport and dialogue which moulds collective identity ... community mediators provide a very important process for individuals who find themselves undergoing a process of societal change ... The urban community mediator is someone who can work with individual values while helping neighbours process societal change collaboratively.”<sup>17</sup>

Although my examination is not exhaustive, it is clear that mediation is viewed as both an ideology and a practice and that this is influenced by the underlying understanding of conflict. Genn views this ‘divergence’ as problematical from both perspectives:

“... both the ideology and practice of mediation can encourage a zealot-like adherence among recent converts – perhaps weary of adversarialism. New recruits to mediation often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated, while mediation offers a nirvana-like vision of a world rid of conflict, with only peace. For passionate adherents, there is no value in judicial

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<sup>15</sup> Kenneth Cloke, “What are the Personal Qualities of a Mediator?” pp49 – 56 in Daniel Bowling and David Hoffman (eds), *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (San Francisco: Jossey-Bass 2003) 51.

<sup>16</sup> Kenneth Cloke and Joan Goldsmith, *Resolving Conflicts at Work: Eight Strategies for Everyone on the Job* (San Francisco: 2<sup>nd</sup> edn, Jossey-Bass 2005) xxxi.

<sup>17</sup> Graham Waddington, “Community Mediation in an Urban Setting” pp85 - 95 in Marian Liebmann (ed) *Mediation in Context* (London: Jessica Kingsley Publishers 2000) 90.



determination; there are no legal rights, only clashing interests and problems to be solved.”<sup>18</sup>

There are responses to be made to both suppositions. Subscribers to an ideological understanding of mediation rarely propose that conflict should be removed from the world, seeing it instead as an inevitable occurrence through which differences emerge. When properly explored and understood, conflict is a vehicle through which change can occur. The writers referred to above are far more concerned with how people deal with conflict constructively and view mediation as a means by which to do so.<sup>19</sup> At the same time practitioners who advocate a problem-solving approach do not necessarily deny the value of judicial determination. They would, however, argue that there are situations where parties in dispute retain an ability to determine their own fair and mutually satisfactory outcomes. Marian Liebmann, writing in the context of community and neighbourhood mediation, points out that people are more likely to uphold arrangements which they understand, have been party to and which are tailored to meet their own situation. Mediation has more potential to ‘get to the root’ of the problem and address the complexity of conflict, including aspects that do not come within the remit of the law. But Liebmann also recognises the limitations and inherent risks to mediation. Some circumstances require legal judgement.<sup>20</sup> Mediation offers both ‘choice and voice’ to those who find themselves facing conflict.<sup>21</sup>

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<sup>18</sup> Hazel Genn, *Judging Civil Justice: Hamlyn Lectures 2008* (Cambridge: Cambridge University Press 2010) 83.

<sup>19</sup> In *Resolving Conflicts at Work*, for example, Cloke outlines strategies for addressing conflicts at work, one of which is ‘journeying to the eye of the storm’. Lederach discusses the need to embrace complexity, to take risks and to recognise and accept the place of one’s enemies in the web of interdependent relationships in which we all find ourselves. Folger and Bush outline a mediation approach which aims to improve the quality of dialogue between people in dispute rather than remove it – there is no presumption in their model that ‘differences’ go away.

<sup>20</sup> Marian Liebmann (ed), *Community and Neighbour Mediation* (London: Cavendish Publishing Limited 1998) 9 - 10, ch 8.

<sup>21</sup> Carrie Menkel-Meadow et al. (2006) 94.

Rather than being problematical, the suggestion that mediation is both an ideology and a practice implies that it can be used flexibly in a number of situations. The two concepts do not need to be mutually exclusive. Rather than an either/or, it is more helpful to imagine a continuum along which a number of mediatory interventions can be made, with the potential to 'settle' at one end or 'resolve' at the other. The role mediation might play in any given situation will be influenced by the circumstances and the needs and wishes of the parties involved. A mediator might therefore use different styles and approaches depending on the circumstances.

#### *Diversity of Style, Approach and Context*

As a commentator on the development of public dispute management over the last forty years, Simon Roberts<sup>22</sup> has observed the variations in style and approach to mediation which Genn describes as potentially divergent. He points out that the culture of settlement has been influenced by three factors. The first is the emergence of a new body of professionals operating outside the court system in a number of contexts. Second is the active engagement within the English judiciary in case management, heavily influenced by the Woolf Reports in the mid 1990s which explicitly emphasised the importance of reaching early settlement. Finally, there is the defensive response of legal professionals to embrace dispute resolution as a significant strand to their work, including the practice of mediation. Roberts observes that:

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<sup>22</sup> See several commentaries by Simon Roberts that track the development of Settlement within the court system since the early 1990s including: 'Mediation in the Lawyers' Embrace' (1992) 55 (2) *Modern Law Review* 258; 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (1993) 56 *Modern Law Review* 452; 'Decision-Making for Life Apart' (1995) 58 *Modern Law Review* 714; 'Institutionalized Settlement in England: A Contemporary Panorama' (2002) 10 *Willamette Journal of International Law and Dispute Resolution* 17; "Listing Concentrates the Mind": the English Civil Court as an Arena for Structured Negotiation' (2009) 29 (3) *Oxford Journal of Legal Studies* 457.

“As mediation is evolving as a professional practice in England, two analytically distinct forms of intervention, with quite different processual shapes, are emerging concealed beneath the shared label. One involves a primarily facilitatory role, setting in place the communication arrangements between parties, thus enabling them to negotiate. The other is a more embracing role, under which the mediator acts as ‘expert’ in relation to the management of the dispute as well as seeking to facilitate communications.”<sup>23</sup>

These two forms of intervention result in different approaches. Mediators who see themselves as delivering the first are likely to be less prominent in the process, supporting the conversation rather than directing it. Mediators who see themselves primarily as legal experts are likely to use their knowledge and experience to guide and direct people towards an ‘appropriate’ outcome.

Folger and Bush explore these distinctions further by identifying four possible ideologies that influence mediation practice in different ways. They outline the four ‘stories’ of the mediation process<sup>24</sup> and what they might achieve. While they are proponents of the Transformative Story described earlier, they nevertheless recognise the congruency of other ideologies and approaches. The importance of these varying interpretations lies in the fact that “purpose drives practice.” Mediators behave differently and have different goals according to the ‘story’ to which they subscribe. The understanding of the purpose of mediation determines the approach a mediator might adopt. As they put it:

“These ideologies are value-laden and they shape mediators’ professional and personal orientations to conflict and conflict management ... They undergird what mediators believe conflict is and how mediators think it is best to manage conflict productively.”<sup>25</sup>

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<sup>23</sup> Simon Roberts, ‘Institutionalized Settlement in England: A Contemporary Panorama’ (2002) 10 *Willamette Journal of International Law and Dispute Resolution* 17, 19.

<sup>24</sup> Bush and Folger (2005) 9.

<sup>25</sup> Joseph P. Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in*

There is also the question of 'style,' influenced to some extent by personality, but principally by how mediators understand their role in achieving the end goal. Mediator style calls on the use of different skills and strategies to work towards a particular purpose.

The first of the stories identified by Folger and Bush is the 'Satisfaction' story which views mediation as a powerful tool for satisfying human needs and reducing suffering. Mediation is flexible, informal and based on consensual decision-making. It allows a full examination of the issues, reframing contentious disputes as mutual problems. Mediators create a level playing field within which discussions can take place and potential solutions, unlimited by legal rules, can be explored. By taking an integrative, collaborative problem-solving approach, mediation can "produce creative, 'win-win' outcomes that reach beyond formal rights to solve problems and satisfy parties' needs in a particular situation."<sup>26</sup> The aim is to reach an agreement that satisfies both parties, and mediators prioritise this using a 'settlement led' approach. This emphasis on reaching settlement can be recognised in a significant proportion of commercial and family disputes in the UK. In these contexts mediation has increasingly become characterised as an 'alternative' to a court decision.

Even within this approach, it is possible to identify different styles. Riskin<sup>27</sup> identifies different mediator orientations both in terms of purpose (or 'focus' as he refers to it) and in terms of style (or 'role') which bear close resemblance to those discussed by

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*Purpose and Practice* (Eagleville PA: Institute for the Study of Conflict Transformation 2008) 2. Also published in (2008) 84 (3) North Dakota Law Review.

<sup>26</sup> *ibid* 10.

<sup>27</sup> Leonard Riskin, 'Mediator Orientations, Strategies and Techniques' (1994) 12 *Alternatives to High Cost Litigation* 111.

Simon Roberts. Where mediators adopt a 'narrow' focus, they assume that parties have come for help in solving the problem and to get direction on how to divide a limited pot where 'whatever one gains, the other must lose'. Alternatively, taking a 'broad' focus, mediators believe that the parties will benefit by looking further than the legal issues to take account of their wider interests and needs. Regarding style, the mediator might lean towards an 'evaluative' role, providing direction as to 'appropriate' settlement and likely court outcomes and drawing on expertise and knowledge of the law. This is a typical example of the application of mediation as a practice. Alternatively, the mediator might adopt a facilitative style which assumes that parties are able to work intelligently together and understand their situation better than the courts, their lawyers or the mediator. A facilitative mediator sees it as inappropriate to give opinions, working instead from an ideological standpoint to enhance communication between parties and enable them to make decisions.

Bush and Folger's second interpretation is that of the 'Social Justice' or 'Harmony Story'. Conflict is viewed as the disruption of a valued and vital social order that sustains and defines a larger community or group. It threatens the vital network of relationships within the community. Mediation is an "effective means of organising individuals around common interests and thereby building stronger community ties and structures."<sup>28</sup> It assists parties to see the problem from different perspectives, encourages the recognition of common ground and seeks to restore essential relationships. The result, as they put it, is that "... mediation can strengthen the weak by helping establishing alliances among them."<sup>29</sup> This approach leans towards an

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<sup>28</sup> Bush and Folger (2005) 11.

<sup>29</sup> *ibid* 12.

ideological view of mediation. Although there is still a concern with meeting needs and avoiding suffering, the emphasis is on promoting equality between individuals, or conversely, reducing inequality. The Social Justice Story attempts to address the structures that permit inequality or the aspects of societal change that affect people unfairly.<sup>30</sup> Mediators see their role as promoting harmony. Settlement is less important than the facilitation and organisation of views and opinions that build relationships and support solidarity.<sup>31</sup>

The third model, the “Transformation Story”, mentioned above, sees conflict as a crisis in human interaction that threatens both autonomy and social connection. By expressing, exploring and clarifying personal views, people feel empowered and a sense of self-determination is restored. It becomes more possible to recognise ‘the other’, and to understand and acknowledge their position. The interaction between parties in conflict therefore transforms into a positive experience rather than a negative one. Transformative mediators see their main role as maintaining a focus on the quality of the interaction between people and supporting them to achieve recognition and empowerment. This takes precedence over reaching a solution or the restoration of the relationship, both of which would be the choice of the parties. A constructive conflict dynamic could equally result in a better understanding of differences.<sup>32</sup>

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<sup>30</sup> As suggested by Waddington, “Community Mediation in an Urban Setting” in Liebmann (2000) 90.

<sup>31</sup> Disability conciliation can be seen as an illustration of this. Outcomes agreed through conciliation may well have a wide reaching effect that goes beyond the individual. For example, there may be an agreement to build a ramp that will assist wheelchair users in general to enter a particular building. At the same time the social values of equality and access have been promoted and reinforced.

<sup>32</sup> Other models place similar emphasis on the quality of the conflict dynamic. The “Interactive Approach”, outlined by Crawley and Graham, does not downgrade settlement to such a secondary position, but starts from the premise that a breakdown in communication has occurred, which can be restored and improved by supporting a constructive dialogue in conflict rather than a destructive one. See John Crawley and Katherine Graham *Mediation for Managers: Resolving Conflict and Rebuilding Relationships at Work* (London: Nicholas Brealey Publishing, 2002).

The fourth story differs from the other three in that it is written more as a warning against mediation by its critics<sup>33</sup> than as a description of its potential. The 'Oppression' Story sees mediation as a tool that increases the power of the state over the individual and the power of the strong over the weak.<sup>34</sup> The informality and consensuality of the process mean that it can be used as a quick, cheap adjunct to formal legal processes 'extending the control of the state into previously private domains of social conduct.' Moreover, the 'posture' of neutrality adopted by the mediator means that she is powerless to prevent coercion and manipulation. According to Folger and Bush, those who are sceptical of mediation therefore say that

“ ... in comparison with formal legal processes, mediation has often produced outcomes that are unjust – that is, unjustifiably favourable to the state and to stronger parties.”<sup>35</sup>

In a sense the pictures painted by Folger and Bush of mediation in the Social Justice Story and the Oppression Story can be viewed as two sides of the same coin. The experience of the San Francisco Community Boards, for example, described in the previous chapter, was interpreted through both lenses by different protagonists in the debate. The success or otherwise of the Boards can only be determined by the particular understanding of their purpose in the first place – and it is clear that the same situation was viewed differently.

In any case, it is important to note that mediation can present inherent dangers for specific groups and individuals, particularly those in need of protection. For example,

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<sup>33</sup> See, for example, the writing of Richard Abel, *The Politics of Informal Justice* (New York and London: Academic Press, 1982) in which he warns against the risk of 'informal justice.'

<sup>34</sup> See, for example, the arguments put forward by Abel and Nader against the San Francisco Community Board Project, as outlined in Chapter 2.

<sup>35</sup> Bush and Folger (2005) 15.

women seeking a divorce who have experienced domestic abuse are often seen as being at further risk through the use of mediation. Feminist critiques of family mediation argue that the process encourages mutual responsibility for mutual problems rather than recognising the potentially criminal behaviour of one party. It also raises concerns that mediation can force agreements that may be based on fear.<sup>36</sup>

These are not of course the only models to emerge within the mediation field, although they do highlight some of the main differences in style and approach. Depending on how mediators view the purpose of mediation, they may be 'settlement led', aiming principally to lead parties to agreement, or they may work transformatively, focussing on the quality of interaction between parties. The needs and interests of individual parties may be prominent or the emphasis may be on the maintenance of the whole community. Styles also vary according to whether mediators regard their own knowledge and expertise as an influence on the outcome or whether they see their primary role as creating an environment that is conducive to discussion and exchange.

Other writers take the question of style and approach one step further by considering the essential attributes of the mediator. Again there are variations in understanding which can lean towards either a perception of the mediator operating within an ideological framework or a skilled professional applying practical tools and techniques. Rather than seeing these as exclusive, Lang and Taylor view them as developmental stages along a career path, describing the 'journey' a mediator makes as "... a process

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<sup>36</sup> Steps are, of course, taken within the mediation field to address such risks and to consider, in what circumstances, mediation can also provide a safe opportunity for empowerment. The late 1990s, for example, saw the development of policy, training and best practice guidelines in the family sector. See Lesley Allport and Lorraine Bramwell, *Safe Solutions: A Resource Pack for Mediators and Others Working With People Affected by Abuse in the Home* (Pavillion Publishing 1999). Also Lesley Allport and Lorraine Bramwell, 'Domestic Violence and Mediation', (1998) 28 Family Law 110.



of exploring and testing the range and application of professional knowledge and skills.”<sup>37</sup> The journey involves moving from the position of novice to apprentice to practitioner, before then going on to achieve ‘artistry’, described as “... a mind-set – a commitment to curiosity and exploration, to excellence and learning.”<sup>38</sup>

Michael Jacobs, a mediation practitioner in the UK, talks about mediator ‘identities’ which reflect the difference between ideology and practice. He contrasts the identity of the ‘mystic’ (someone who works with intuition and perfects the ‘right’ intervention which “... arises out of an ever more subtle ‘atunement’ to both inner and outer perceptions”) with that of the ‘mechanic’ (who, “like an accomplished engineer, has a strong sense of how the ‘technology’ of the mediation process operates”).<sup>39</sup>

A final influence affecting the purpose of mediation is the nature of the relationship between the parties. A primary consideration is whether the parties in dispute will continue to be in some kind of relationship once their dispute is addressed. This highlights a further distinction between a practical understanding of mediation and a more ideological view. In the first, the problem is solved, any adjustments are made and the parties leave, possibly without ever seeing or hearing from one another again. In the second, a wider exploration of the underlying issues and the impact of the conflict potentially provides parties with the tools to handle their differences more constructively in the future, and without the help of a third party. As Genn puts it:

“What you might hope to accomplish in the fraught and fractious context of family mediation where heartbreaking struggles occur over, for example, how

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<sup>37</sup> Michael D Lang and Alison Taylor, *The Making of a Mediator: Developing Artistry in Practice* (San Francisco: Jossey- Bass 2000) xi.

<sup>38</sup> *ibid.*

<sup>39</sup> Michael Jacobs, ‘On Mystics, Mechanics and the Lingering Smell’ (unpublished paper 2012).

often and when a child will spend time with a parent, is different from the kind of relationship tussle that may take place in the context of a commercial partnership breakdown. It is also different from what one might need and hope to accomplish in a dispute between warring neighbours. But it is also very different from what one might need and hope to accomplish in a dispute between a house owner and a builder who has wrecked the kitchen, where there is no desire for the relationship to continue. All that the house owner wants is compensation, to get the problem fixed and to get on with her life.”<sup>40</sup>

Many civil disputes are between strangers (e.g. victims and perpetrators of accidents) or people who are not in personal relationships (e.g. employers and employees, businesses firms and consumers) where, as Hensler says, “... the traditional remedy is monetary compensation.”<sup>41</sup> The distinction may not, however, be as clear as these two writers suggest. There is a risk that the personal impact of any dispute, even in a commercial relationship, can be underestimated. In his *Review of Civil Litigation Costs*, Lord Jackson acknowledges the importance of mediation in personal injury claims and recognises the multiple benefits that extend beyond financial compensation. He refers to achieving ‘closure’ for claimants, of having “a chance to say what impact the accident has had” and of receiving “a response from the defendant delivering some acknowledgement.”<sup>42</sup> Transon also acknowledges the value of apology, exploration and acknowledgement of distress in mediation.<sup>43</sup> These are outcomes that one would associate with human interaction rather than settlement, even if the relationship is not to continue into the future. Conversely, while Genn argues that family mediation addresses the trauma of family breakdown, it also deals with the settlement of the

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<sup>40</sup> Genn (2010) 91-92.

<sup>41</sup> Deborah R. Hensler, ‘Suppose It’s Not True: Challenging Mediation Ideology’ (2002) *Journal of Dispute Resolution* 81, 82.

<sup>42</sup> Lord Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationery Office 2010) 359.

<sup>43</sup> Brenda Transon, ‘Mediation Orders: Do the Arguments Against Them Make Sense?’ (2006) *Civil Justice Quarterly* 412, 416.

monetary aspects of separation and divorce. Increasingly, the work of a family mediator is settlement-led.

These examples give an indication of the complex nature of conflict and both the impossibility and undesirability of solely viewing mediation either as a practice or as an ideology. Instead, the principal question is how to understand these two aspects in conjunction with one another. I have described a variety of approaches and interpretations which often lean towards one view without excluding the other. I have also pointed to additional factors such as mediator style, the relationship and the needs of the parties themselves which affect how outcomes might be achieved. It is apparent that there is not so much a divergence of understanding, which might place mediators on opposing courses, as a diversity of application. This variety in form and practice demonstrates the breadth and flexibility of mediation as a tool. Even so, a degree of commonality and shared understanding is required in order to prevent 'mediation' becoming a label that is liberally applied to any dispute resolution activity, including counselling, therapy or the giving of legal advice. The philosophy that "purpose drives practice" is also a risky one if it drives, for example, a settlement-led mediator to disregard aspects of human interaction that could provide an important step towards settlement, or, for that matter, a transformative mediator to take no heed of the parties' desire to find a solution.

Where does the common ground lie? In my view it is the core principles of mediation that provide a vital link between ideology and practice. They define how the ideological concepts of mediation are translated into reality. But how far does commonality exist across the different areas of mediation delivery?

### *The Core Principles of Mediation: Linking Ideology and Practice*

As we have seen, the concept of mediation is by no means new. Roberts observes that “the modern emergence of mediation represents the new and evolving application of an ancient method of settling quarrels.”<sup>44</sup>

Yet within its development over the last 25 years, the need to define mediation more precisely has become increasingly pressing. Straightforward, non-contentious definitions of the process are not hard to find. The following description provides a typical example:

“Mediation is a process in which an impartial and independent third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to a dispute to assist them to reach a mutually acceptable solution.”<sup>45</sup>

However, attempts to understand mediation cannot be confined to simple descriptions of this kind or even to more detailed explorations of its aims and approaches. Some consideration must also be given to the core principles that inform the delivery of mediation in all its contexts. Roberts, writing about family mediation and its emergence in the 1970s, provides two distinguishing features which would be recognised by mediators across all contexts:

“First, the objective of mediation, retaining decision-making authority with the parties, was based on certain core values – equality, autonomy, and respect, in particular – that justified its use, both for disputants and for those who chose to become mediators ... Second, in pursuit of this objective, the intervention of the mediator – however powerful, complex, and paradoxical its impact – requires an unobtrusive and modest stance, in contrast to the usual role of the professional, that of the dominant expert.”<sup>46</sup>

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<sup>44</sup> Marian Roberts (2007) 17.

<sup>45</sup> Mediators Institute of Ireland, ‘Home Page’, <http://themii.ie> Accessed 08 June 2012.

<sup>46</sup> Marian Roberts, ‘Family Mediation: The Development of the Regulatory Framework in the United Kingdom’

Attempts to define these principles have taken place in the United States and across Europe. Various directives from the European Union resulted in a European Code of Conduct for Mediators in 2008. In his exploration of the relationship between mediation and the civil courts across Europe, George Applebey points out that the range of dispute resolution processes across Europe is so large and varied that harmonization within the European Union is an unrealistic objective. Instead the European Commission sets out as its aim “the establishment of minimum standards and the identification of shared principles and values.”<sup>47</sup> The Code, intended for “all kinds of mediation in civil and commercial matters” sets out a number of principles “to which mediators can voluntarily decide to commit, under their own responsibility.”<sup>48</sup> The preface to the Code indicates that national legislation needs to be considered, that organisations may wish to develop more detailed codes specific to the context of mediation and that mediation providers might require mediators to receive training and make a commitment to work according to the principles outlined. These principles are listed under four main headings;

- i. Competence and Appointment of Mediators (including competence; appointment; advertising/promotion of the mediator’s services)
- ii. Independence and Neutrality (including independence and neutrality; impartiality)
- iii. The Mediation Agreement, Process Settlement and Fees (including procedure; fairness of the process; the end of the process; fees)
- iv. Confidentiality

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(2005) 22 Conflict Resolution Quarterly 509, 509-10.

<sup>47</sup> George Applebey, “ADR and Special Procedures Within Courts” in Remco van Rhee and Paul Oberhammer (eds), *Ius Commune Cases and Materials on Civil Procedure Law* (forthcoming) 37.

<sup>48</sup> European Code of Conduct, launched by the European Commission Justice Directorate (Brussels, 2004).

In its attempt to acknowledge the diversity of practice among Member States and to provide a generic set of principles to which all mediators might subscribe, the European Code avoids some key issues including the role of the mediator in providing solutions and the degree to which parties can be compelled to go to mediation. Looking to the mediation literature, it is generally recognised that there are “core functions located within [the] ideology or belief system, held by most theorists and practitioners of mediation.”<sup>49</sup> An examination shows that attempts to define these central principles more closely includes some or all of the characteristics listed below. That mediation is:

- Consensual (both in the sense that disputants participate equally and that they reach agreement).
- Voluntary (disputants can decide whether or not they wish to participate).
- Confidential (discussions in mediation are protected).
- Facilitated by an impartial third party who is external to the dispute and has no vested interest in the outcome.
- Based on reaching solutions which are by mutual agreement and which take into account fairness to both parties.
- A process in which parties themselves are directly involved (i.e. they are not ‘represented’ in mediation but speak for themselves).
- An opportunity to build mutual understanding of the other parties’ needs and interests.

It is difficult to find detailed, definitive descriptions of the principles of mediation that can be universally agreed. However, the importance of the independence and impartiality of the mediator and the need for parties to reach an agreement that is mutually regarded as fair are elements that are generally acknowledged as

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<sup>49</sup> Carrie Menkel-Meadow et al (2006) 102.

fundamental.<sup>50</sup> Other principles, such as voluntariness, the emphasis on building mutual understanding and the involvement of representatives are more open to debate. I focus here on three of the more contentious principles – those of voluntariness, party determination and confidentiality.

### *Voluntariness*

Voluntary participation in mediation is concerned with parties' ability to make a free and informed choice to mediate based on their willingness to explore issues openly together and commit themselves to any agreements reached. However, the debate about the benefits or otherwise of compulsory mediation rages periodically among practitioners and policy makers alike as they struggle to understand the lack of take-up of mediation and wonder whether compulsion is a viable answer. Voluntary entry to mediation comes under challenge in both the civil arena and in family disputes. The Government proposal in early 2012 in relation to small claims (i.e. civil claims below £5,000) in the county courts to introduce 'automatic referral' to a mediator provides one illustration. Whether parties to a civil or commercial dispute should be compelled to mediate continues to be the subject of much debate. Since Woolf, the drive to relieve the burden on the courts and reduce costs has resulted in increasing pressure for parties to engage in ADR. The use of mediation has been strongly encouraged but the debate centres around how far that encouragement should go. The landmark cases described in chapter 2, such as *Dunnett v Railtrack Ltd* (2002) and *Halsey v Milton*

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<sup>50</sup> Simon Roberts, for example, refers to the 'non-aligned standpoint' of the mediator and the aspect of 'other people's decision-making' as two uncontroversial, core characteristics of mediation. Roberts (2002) 19.

*Keynes General NHS Trust* (2004), have moved the discussion backwards and forwards. Lord Jackson was clear in his view:

“In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct parties to meet and/or discuss mediation; (c) to require an explanation from the party which declines to mediate ... and (d) to penalise in costs parties which have unreasonably refused to mediate.”<sup>51</sup>

However, Masood Ahmed argues that the last clause calls the principle of voluntariness into question and points to case law to support this:

“... despite the express rejection of the concept of court compelled mediation, judicial attitudes, government policy, recent empirical research, and the structure of the Civil Procedural Rules indicate that the powers of the courts and judicial attitudes towards alternative dispute resolution processes (in particular mediation) have the inevitable consequence of compelling parties to engage in alternative dispute resolution processes. This compulsion is largely driven by existing court powers which allow it to punish a party in costs for failing to participate.”<sup>52</sup>

Ahmed also points to the importance of parties' ability to participate 'in good faith'. Though it is a point that is often overlooked, mediation requires the willingness and commitment of both parties in order to be effective. It is a contradiction to suppose that people can be forced to reach agreement and therefore the consensuality of the parties is a major factor in its success. Ahmed observes that the civil justice system falls short of addressing this and says that there “appears to be a dichotomy between the acknowledgement that courts have the powers to order mediation but that they should not when dealing with unwilling parties.”<sup>53</sup>

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<sup>51</sup> Lord Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationery Office 2010) 361.

<sup>52</sup> Masood Ahmed, “Implied Compulsory Mediation” (2012) *Conflict Resolution Quarterly* 151, 152.

<sup>53</sup> *ibid* 164.



The concept of voluntariness has also at times been unhelpfully linked to the outcome of mediation and confused as a consequence with that of party determination. Lord Justice Dyson's argument against compulsory mediation in *Halsey* was that to impose mediation on disputants denied them the protection of the courts.<sup>54</sup> However, this failed to recognise that the principle of party determination safeguards the right to a court judgement. To go to mediation, even under the pressures outlined above, is not to guarantee a solution. For parties who do not reach agreement, the path to an assisted negotiation, and ultimately to court adjudication, is still open.<sup>55</sup>

But how effective can mediation be if the parties are unwilling to take the opportunity it offers? Genn's research into court-annexed mediation schemes<sup>56</sup> and her observations in her Hamlyn Lectures (2008) indicate that mediation works best when people want to do it. Mediation relies on participants' commitment to the process. The sustainability of any agreement reached is likely to be greatly reduced in circumstances where disputing parties are not making a free and informed choice to mediate.

### *Party Determination*

The advent of mediation as part of the lawyer's range of interventions has a consequence for party determination. As Roberts points out:

“Combining ‘advice’ with the less intrusive project of help with communication and so claiming to be an authoritative specialist, knowing better than the parties how the issues confronting them are to be resolved, an intervener

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<sup>54</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 Weekly Law Reports 302.

<sup>55</sup> Charlie Irvine writes in response to the Scottish Civil Courts Review (2009) conducted by Lord Gill:

“[A]n attempt at mediation is just that. No-one is compelled to settle, or even to complete mediation. If it is unsuccessful, no-one loses their right to a hearing.” (Charlie Irvine, ‘The Sound of One Hand Clapping: The Gill Review’s Faint Praise for Mediation’ (2010) 14 (1) Edinburgh Law Review 85, 90.

<sup>56</sup> Hazel Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report* (Department for Constitutional Affairs 1998).

thus significantly alters the universe of meaning within which any agreement is reached, coming to share control over the outcome with parties.”<sup>57</sup>

A combination of factors makes practical, evaluative approaches to mediation much more likely within a court setting. In family mediation, the principle of party determination has been more closely guarded, influenced perhaps by the high proportion of practitioners in the early days who did not come from a legal background and had less expectation of what a court would rule. Added to this, there is the very personal nature of the issues at stake in the context of family breakdown. Concern for the impact on children of separation and divorce, and a recognition of the parents’ expertise in knowing how best to meet their needs contribute to the principle that divorcing couples should retain control “over their own lives, of which only they can have any real understanding.”<sup>58</sup>

Nevertheless, there has been a similar trend in family mediation towards ‘strong encouragement’, linked again to costs. For over a decade, low income families going through separation or divorce have been ‘required’ to attend a meeting with a mediator before being able to access public funding to apply to court. The Family Justice Review<sup>59</sup> extends this requirement to privately paying clients through the introduction of a Pre-Application Protocol. Any individual making an application must demonstrate that he or she has already attended a Mediation Information and Assessment Meeting (MIAM) and ruled out the possibility of mediation.

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<sup>57</sup> Simon Roberts, ‘Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship’ (1993) 56 *Modern Law Review* 452, 456.

<sup>58</sup> Katherine Stylianou, ‘Challenges for Family Mediation’ (2011) 41 *Family Law* 874, 877.

<sup>59</sup> Ministry of Justice, *Final Report of the Family Justice Review* (London: Department for Education and the Welsh Government, 2011). This is referred to as the Norgrove Report.

The same principles are important in the context of workplace mediation. In a comparative study of eight organisations, all with an established internal mediation facility,<sup>60</sup> Latreille examines the importance of party determination, describing how it provides the opportunity for the parties to speak directly to one another rather than through representatives. Research participants pointed out that the presence of representatives can inhibit exchange between parties, leading Latreille to conclude that:

“...the imperative of self-determination at mediation is a dominant consideration, so that any support occurs outside the mediation or is limited to the accompanying person being purely a ‘companion.’”<sup>61</sup>

### *Confidentiality*

Latreille identifies two ‘canons of practice’ named by all those interviewed: that of voluntary participation and confidentiality. Participants commented that the “whole purpose of mediation was that it was voluntary and confidential so that people could be open and frank.” Others said that mandatory participation would not be helpful “...because we think that people have to buy into it, and that they have to feel that ... between them, they are coming up with the solution for their problem.”<sup>62</sup> But this was not always so straightforward in reality. Those acting in a gatekeeping role<sup>63</sup> described the need to persuade many parties to take part, sometimes almost to the point of coercion. In some instances, systems resembling the civil and family arenas have been put in place, whereby the ‘offer’ of mediation is mandatory though the decision lies with

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<sup>60</sup> Paul Latreille, *Mediation: A Thematic Review of the ACAS/CIPD Evidence*, (ACAS Research Paper Ref 13/11, 2011).

<sup>61</sup> *ibid* 32.

<sup>62</sup> *ibid*.

<sup>63</sup> That is, staff members who, while not acting as mediators themselves, might be the first people to discuss the use of mediation with potential parties.

the parties. While in the workplace the imposition of costs for failing to participate is highly unlikely, the implication that potential parties will be seen as obstructive for refusing mediation can provide a strong incentive.

Confidentiality was also regarded as 'crucial for the credibility' of mediation in order to allow people to discuss the situation freely, without the fear of note-taking or of a record placed on file. However, this also presents its own practical challenges. Agreements reached may well affect other people or require the sanction of authority. Confidentiality then becomes a matter of fine negotiation between the mediator and the parties about what can be shared and with whom.

By contrast in the civil courts, the proposal that the unreasonable behaviour of the parties in mediation should be considered in the ordering of costs has met with resistance. The principle of confidentiality was tested in the case of *Farm Assist Ltd v DEFRA* (2009) when a mediator was called on to give testimony in court after a case which had reached resolution subsequently broke down. The mediator refused on the grounds of confidentiality, saying that she did not store records of mediation meetings. The judge respected her right to maintain confidentiality but decreed that this was overridden in the particular case by the interests of public safety. Applebey argues that this undermined "one of the main advantages of mediation as a form of dispute resolution." However, after an examination of practice in the UK, he concludes that "English law provides a general backing of confidentiality in mediation"<sup>64</sup> and that this is largely reflected elsewhere within Europe.

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<sup>64</sup> George Applebey (forthcoming).

These core principles of voluntariness, party determination and confidentiality are part of the 'rhetoric' of mediation, as Irvine puts it,<sup>65</sup> though how far they are adopted in practice is subject to debate. The continuing discussions within various fields of mediation demonstrate that they remain difficult to ignore. This reflects a need for the mediation profession to articulate more clearly the ideological principles to which it subscribes. These principles need to be balanced with the reality of practice and the challenges encountered by each context. The incorporation of mediation into the civil justice system presents just this kind of challenge.

### *Legislation and its Influence on Ideology and Practice*

I provide a detailed examination of the recent legislation in the following chapter. However, it is important to note here that changes in the law have had a significant impact on the delivery of mediation in a variety of settings and, I suggest, encouraged an over-emphasis on its use as a problem-solving tool rather than as an ideological response to conflict.

As we have seen, the push towards mediation within the civil justice system has gathered momentum in the last 25 years. The Woolf Report in 1996 was a landmark in establishing 'settlement' at the earliest possible stage as an explicit, official objective of the courts. But it is worth recognising that, beneath the broad banner of Alternative Dispute Resolution, there are distinct processes in operation and there are different professionals associated with those processes. These differences affect where decision-making authority lies. A mediator, for example, helps parties to reach a

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<sup>65</sup> Charlie Irvine, 'Mediation and Social Norms: A Response to Dame Hazel Genn', (2009) 39 Family Law 352.

resolution through collaborative agreement by facilitating their discussion as an impartial third party. Outcomes are individualistic, often creative and rely on parties' own perceptions of fairness. Lawyers, by contrast, represent their clients and engage in a process of assisted negotiation on their behalf in order to move towards a settlement that is recognisable within the framework of the law. This process, therefore, relies on legal norms and lawyers' familiarity with those norms. Only when these possibilities are exhausted, and increasingly rarely, even where proceedings are issued, will cases proceed to adjudication by a judge. While judges remain impartial, decision-making authority is removed from the parties and outcomes are determined on the basis of the law. In the current climate, almost 20 years after Woolf, mediation provides, for the most part, an alternative to lawyer-assisted negotiated settlement. Where this has not been achievable, Woolf's reforms introduced a 'case management' system to ensure that cases proceeded promptly to a final hearing.

The Family Law Act 1996, with its emphasis on mitigating the consequences of divorce for the parties and their children, gave family mediation a central role in the process of separation and divorce. Later, when the Family Law Act failed, the encouragement to use mediation was incorporated into the Access to Justice Act 1999, together with the introduction of legal aid and the requirement to meet with a mediator to find out about mediation. In the workplace setting, the Gibbons Review<sup>66</sup> followed in 2007 with similar recommendations to build informal resolution into workplace protocols as an alternative to the Employment Tribunal. Behind these drives are a series of consistent themes: relieving over-burdened courts or tribunals; providing quicker, cheaper

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<sup>66</sup> Department of Trade and Industry, *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (London: Department of Trade and Industry, 2007).

alternatives; automatically considering mediation as an option; parties reaching amicable, creative solutions that they have crafted together.

Recent reviews have continued in the same vein. Lord Jackson (2009) in particular supported the increased use of mediation. In 2011 several government consultations in the civil and commercial, family and workplace settings reinforced the need to foster early, informal means by which to resolve disputes. These moves are noteworthy for their ideological aspirations to bring about culture change in the management of conflict. The Family Justice Review (2011) proposed to remove the 'alternative' from dispute resolution. It supports a move out of court, with mediation as the default option and court as the last resort. A third consultation in 2011, conducted by the Department for Business Innovation and Skills,<sup>67</sup> highlights the importance of making early dispute resolution more accessible and sets out steps to achieve that by giving priority to "our mediation initiatives, which we believe can help change the whole culture."<sup>68</sup>

The common strands running through all of these consultation processes include the emphasis on the use of mediation as a first option, the move away from the arena of the courts and legal processes and the efforts to make it accessible and easily understood by potential users. Ironically, it is often these initiatives which threaten the core principles of mediation and jeopardise the balance between practice and ideology.

One example is the increasingly strong pressure to use mediation which only just stops short of compulsion in many contexts. Some jurisdictions seem to have had some

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<sup>67</sup> Department for Business Innovation and Skills Response Paper, *Resolving Workplace Disputes: Government Response the Consultation* (London: Department for Business Innovation and Skills, 2011).

<sup>68</sup> *ibid*, Foreword.

success with the introduction of mandatory mediation. In Canada,<sup>69</sup> for example, pilot studies have demonstrated that compulsory attendance altered disputants' perceptions of the 'normal' dispute processes they were likely to follow, resulting in an expectation that mediation was, by default, the first option. In Italy too, it was found that the implementation of mandatory mediation had a knock-on effect in terms of an increase in voluntary uptake.<sup>70</sup>

The pressure on parties to mediate, therefore, is not only occurring within the UK but across Europe and beyond, albeit to varying degrees. A review of the EU Mediation Directive 2008 and its implementation, conducted by Giuseppe De Palo in 2014<sup>71</sup>, considered the question of compulsion at length in the light of statistical evidence which demonstrated a consistently low uptake of mediation across Europe. It was noted that "undoubtedly, the 2008 Mediation Directive has helped to advance the mediation discourse across Europe... [and to] generate a genuine 'ADR Movement' in the EU". Nevertheless, the objective outlined in Article 1 and set out below, has not been achieved. It states that the aim of the Directive is to:

"... facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings." <sup>72</sup>

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<sup>69</sup> For more detail on the findings of the pilot see Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Ontario: The Queen's Printer, 2001).

<sup>70</sup> For more information, see Giuseppe De Palo, "*Rebooting*" the Mediation Directive: *Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (Brussels: The European Parliament, 2014).

<sup>71</sup> De Palo (2014).

<sup>72</sup> Council Directive (EC) 52/2008 of the European Parliament and of the Council on certain aspects of mediation in the civil and commercial matters, OJ L136, p6, art 1.



With the exception of Italy, no EU countries had achieved the anticipated number of mediations, though the UK appeared among the top four countries in terms of usage, with an increase in numbers year on year. While a majority of the 816 respondents in the study advocated some element of compulsion in order to address the lack of usage, De Palo concluded that forms of ‘mitigated’ mandatory systems may be more effective. He describes approaches which allow participants to either “opt-in” or to “opt-out” once they have been given information about the process. These are not dissimilar to the approaches that have been incorporated into the legal system and other formal processes in the UK, as I describe below.

De Palo found that the extent to which the objectives within the EU Directive had been incorporated into the law of member states, including the UK, was variable. It is interesting to note that a number of the comments that he makes concern the safeguarding of other mediation principles discussed in this chapter. He observed, for example, that “confidentiality is key to the concept of mediation” and that courts in the UK have “generally been unwilling to pierce the mediator’s veil of confidentiality”, subject only to one or two exceptions.”<sup>73</sup> He noted the lack of clarity existing in relation to legal privilege<sup>74</sup> and its application to parties only (that is, to the exclusion of mediators), together with the imposition of costs sanctions in cases of unreasonable refusal to mediate.<sup>75</sup> Although the debates have gone backwards and forwards, the case law in the UK in general demonstrates the judiciary’s reluctance to insist that

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<sup>73</sup> See, for example, *Farm Assist Ltd v DEFRA (No. 1)* [2008] EWCH 3079.

<sup>74</sup> For a more detailed discussion of legal privilege, see Chapter 8 of this thesis.

<sup>75</sup> Cases include *Dunnett v Railtrack Ltd* [2002] EWCA Civ 3030; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Rolf v De Guerin* [2011] EWCA Civ 78; *PGF II SA v OMFS Company & Anr* [2012] EWCH 83; *Swain Mason & Ors v Mills & Reeve* [2012] EWCA Civ 498. Unreasonable refusal to mediate is discussed further in Chapter 4 of this thesis.

people go to mediation. This is echoed by Karl Mackie, the Director of the Centre for Effective Dispute Resolution, who stated in 2015 that:

“In any future action by the EU, the Centre for Effective Dispute Resolution is not in favour of formal compulsion or mandatory mediation – this creates a problematic atmosphere for negotiation – but we do believe that sanctions and incentives have not been used enough across member states to ensure that mediation is given due attention and consideration.”<sup>76</sup>

De Palo also discusses the enforceability of mediation agreements and refers to the possibility of making a Mediation Settlement Enforcement Order (MSEO) in the UK with the consent of both parties.

The concluding remarks in the report are largely concerned with the question of how far mediation should be mandatory. As a consequence, it places stronger emphasis on examining the uptake of mediation rather than its success. In my view, it is important to recognise that compulsion can have a significant impact on outcomes. I would argue that the use of mandatory mediation risks undermining both the principles of voluntariness and of party determination. Party determination, for example, is immediately compromised if parties are instructed that they must use a particular process. In other words, as commentators such Menkel-Meadows and Bush and Folger argue, in its purest application, party decision-making extends not just to outcomes but to the choice of process itself. The fact that parties exercise a voluntary choice to enter mediation facilitates, crucially, their commitment to what is a consensual process. In order to fulfil its ideological purposes, mediation requires that participants enter the process with the possibility of change, both in themselves and

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<sup>76</sup> Karl Mackie, ‘Response to the EU Mediation Directive Consultation’ *Law Society Gazette* (London, 30 November 2015).

each other, and in the hope of an outcome that is an improvement on the current situation. They need, therefore, to be willing to make an investment in the process and to take responsibility for their part in the conflict. It is my view that participants who are forced to go mediation are likely to place more weight on settlement and to be less willing to address the more ideological aspects of improved communication and relationship repair. This in itself reduces the likelihood of sustainable agreements resulting from the process. The success of mediation outcomes, arrived at through co-operation and collaboration, relies on trust, communication and the willingness to implement agreed solutions. Mediation, in its ideological sense, goes beyond the dispute to the underlying conflict.

In the contexts I have been discussing, parties are still being strongly encouraged to take up mediation rather than being forced to do so and, therefore, the principles of voluntariness and party determination do, in theory at least, remain intact. What is more, the introduction, in many arenas, of initial conversations with a mediator to find out more about the process, can be regarded as positive. Nevertheless, it is important to be mindful of the risks to mediation principles when, for example, costs are incurred where there is no justifiable reason for not mediating (as in the civil / commercial context) or where legal representation as an alternative is not affordable for many (as in the family context) or where a formal process such as a disciplinary action or a tribunal hearing is looming (as in the workplace or SEN context). In these circumstances, the decision to mediate can seem less than voluntary for those involved.

Legislation also exercises considerable influence over mediation in the matter of outcomes. Increasingly law courts, organisations and government policies measure

success in terms of their own criteria. As settlement becomes paramount in order to avoid the time and expense of a court or tribunal hearing, so the original purposes of mediation become less clear. As the mix of different professionals claiming to use mediation as part of their remit increases, so the boundaries and principles of mediation practice begin to blur. As the drive to settle cases quickly and cheaply intensifies, so the ideological responses to resolving conflict are obscured. Mediation practice becomes resource-led.

The Mediation Quality Mark (MQM), devised by the Legal Services Commission (LSC) in 2001 to ensure the delivery of high quality, publicly funded family mediation, provides a good example. The MQM was beneficial in introducing coherent, consistent systems by which providers could deliver mediation and in establishing the basis for the funding of mediation services. However, the introduction of contractual relationships between mediation services and the LSC meant that resources began to dictate aspects of mediation practice such as the length of time a mediation should take and how successful individual mediators should be at ‘converting’<sup>77</sup> cases to mediation or bringing them to settlement. As Roberts observed:

“Public funding of mediation has brought ... [the] ... dilemmas of external regulation. The onerous administrative demands of the annual audit ... notwithstanding an express purpose to reduce bureaucracy – combine with growing pressure on those services to accept an externally introduced notion of “success” defined in terms only of cost-effectiveness, that is, measurable, quantifiable outcomes. This notion reflects the government priorities of reducing expenditure, particularly on family disputes.”<sup>78</sup>

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<sup>77</sup> That is, sufficiently engaging parties at an information meeting so that they choose to go ahead to mediation.

<sup>78</sup> Marian Roberts (2005) 522.

It can be argued that these are measures of success that encourage mediators to be more settlement-led in their practice and foster the problem-solving approach that Genn criticised. The fundamental principles of mediator impartiality and independence may therefore be put at risk. Katherine Stylianou observes that:

“As family mediation becomes important to the government’s plans for reforming family justice, the pressures that may emerge as a result of these transitional times could create challenges to family mediation principles. This is a time to focus on the rationale for these principles.”<sup>79</sup>

Stylianou asserts that the principles of mediation define the boundaries beyond which mediators should not go. She describes them as “the only safeguards to the process for all concerned” and points out that their observance relies on the skill and integrity of the mediator. For Stylianou, the key boundary is that the mediator is not a decision maker. There is no need, for example, for mediators to take sides if there is clarity about the fact that they do not have authority or responsibility for the outcome. While voluntariness and confidentiality are important so that participants are not forced into negotiation and are free to exchange practical and emotional information, these are principles that support the central, non-decision-making role of the mediator. This reveals perhaps the greatest misunderstanding for clients of mediation as well as for those who commission it. Parties often look for advice, information or direction, but Stylianou explains mediators do not get involved in decision-making:

“Evaluations, advice, opinions about the way forward, interpretations can be wrong. They can change – like the law frequently does - and experts can hold different views – like two or more judges can when looking at the same case. The difference is that the judge is accountable, as is the expert when giving advice or opinions. A mediator is not accountable.”<sup>80</sup>

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<sup>79</sup> Katherine Stylianou, ‘Challenges for Family Mediation’ (2011) 41 Family Law 874.

<sup>80</sup> *ibid* 874.

She highlights the risk that mediation, despite this non-judgemental, non-advisory role, is nonetheless judged by the criteria of success adopted by the courts. Decision-making processes in this setting, where third parties make judgements based on evidence, are reliant on due process to safeguard rights and ensure that the parties have an opportunity to present their evidence. The fact that mediators do not need to be rationally persuaded of the validity or otherwise of either party's position is what makes mediation different. Unlike judges or arbitrators, mediators are not concerned with the rightness or wrongness of a party's argument but with moving disputants away from these positions to talk about their interests and needs, thereby enabling negotiation to take place.

Legislative changes in several different contexts have, without question, had an impact on the development of mediation over the last two decades. The civil justice policies of successive governments have reflected an increased awareness of the benefits of resolving disputes of all types informally and at an early stage, and have encouraged disputants to recognise this as the first option rather than an alternative. These legislative developments at one level endorse mediation both as a practical, problem-solving tool and as an ideological concept. However, the reality is that the thinking behind civil justice policy leans more towards supporting mediation as a practice and to measuring success according to criteria that are 'outcome' and 'resource' led. Policy has an inevitable impact on the actors operating within the system (lawyers, judges and increasingly mediators) and on their approach to what they do. As they attempt to implement policy, the risk is that these roles become more and more blurred: large numbers of lawyers have trained as mediators and use these skills as an additional tool to induce settlement; judges faced with a significant rise in the number of litigants

in person find themselves having to facilitate communication; mediators working with the increased expectation of settlement, sometimes assisting lawyers even, rather than parties, may lose sight of their more ideological aspirations. Government initiatives have resulted in a greater uptake of mediation. Funding is provided (in some cases) and referral systems have been introduced to ensure disputants are aware of the possibility of using mediation. These policies have undoubtedly had an impact on the development of mediation practice. But so too have the interpretations and approaches of the actors involved.

As the roles of these various actors become blurred and the boundaries between professionals become more fluid, the core principles of mediation practice may be undermined and the ideological aspects of the process marginalised.

#### *The Development of Mediation as a Profession*

These changes underline the need for mediators to create their own professional identity – one which is distinct from other dispute resolvers. Roberts (2005), discussing the development of a regulatory framework within the family mediation in the UK, identifies three hallmarks of any profession:

- a recognised and distinct body of knowledge
- mechanisms for transmitting that knowledge (training, approval of providers, good practice guidelines)
- the means for self-regulation and evaluation (disciplinary, complaints).

Family mediation has progressed furthest along this route, with well-established principles and guidelines for practice, recognised training programmes and post training qualifications in place. The formation of the UK College of Family Mediators

(UKCFM) in 1996 was a crucial step that brought together family mediators from the voluntary and private sectors. With more public funding, family mediation moved from voluntary self-regulation to the more formal framework provided through the Mediation Quality Mark<sup>81</sup> which is still in operation today. Other fields of mediation have similar bodies of knowledge and experience as well as training programmes through which to impart that knowledge. However, post-training qualifications are generally not so well established and processes for managing complaints and disciplinary issues are only in place to varying degrees. The profession of mediation has grown at different rates within the commercial, family, workplace and community sectors and quite independently, with little collaboration or cohesion. The closest to a joined up approach occurred in the 1990s when a multi-disciplinary task group known as Counselling Advocacy Mediation Psychiatry Advice Guidance (CAMPAG), comprising the representatives of different mediation groups, produced a set of generic occupational mediation standards by which mediators would have to demonstrate their skill through evidence of actual practice. Each mediation context was to add its own specific requirements though it was only the family mediation sector that did so. Later, in conjunction with the Legal Aid Board (LAB)<sup>82</sup>, these criteria formed the basis of the competence assessment process that exists today.

There is no one professional body for mediators which can claim to embrace all aspects of mediation practice or to speak for all mediators in the UK. An examination of standards in different sectors shows both similarities and differences. As part of my

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<sup>81</sup> This was monitored through the Legal Aid Board (subsequently the Legal Services Commission and now the Legal Aid Authority) for those mediation providers that were contracted to offer publicly funded mediation.

<sup>82</sup> The LAB supported the formation of the UK College of Family Mediators and also required that all family mediators working with legally aided clients would work to a uniform standard.



research, I carried out a comparative study of four national organisations, each with some element of regulatory function and each setting out to attract mediators working across sectors.<sup>83</sup> The results of this study showed that, while these bodies are at different stages of development, they have some core elements in common. All adopt a definition of mediation and a code of practice which have the same central features and which closely resemble the principles outlined in the European Code of Practice. The variation between them lies in the level of detail and this reflects the extent to which each body sees its primary role as a lobbying one to promote mediation to the outside world or a regulatory one to support mediators and their practice.

To apply the three characteristics of professionalisation identified by Roberts, we can see that there is (a) a clear body of knowledge and experience within each of these bodies; (b) training is a well-established requirement, and essential characteristics of provision such as the content, duration and style of training courses do not differ substantially and (c) those bodies that prioritise individual membership set out detailed guidelines for good practice and have well developed systems in place to deal with complaints and disciplinary action.

The most significant areas of difference lie in the measures taken to monitor practice and to promote professional development. Again, those organisations that regard themselves as a professional body for individual mediators require members to complete a post-training qualification to a certain level of competency, maintain professional development and reflect on their practice through supervision. Those whose primary role is lobbying do not have these requirements. The significance of

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<sup>83</sup> The Civil Mediation Council (CMC); the College of Mediators (COM); the Mediators Institute of Ireland (MII); and the Scottish Mediation Network (SMN).

this lies in determining where responsibility rests for safeguarding the core principles of mediation practice: with mediators themselves, with a regulatory body or with a combination of both.

The existence of a number of different regulatory bodies creates inconsistency and risks the kind of divergence of ideology and practice criticised by Genn. From the outside, the profession can be perceived as disorganised, which in turn undermines its credibility and lowers standards. In the light of recent legislative changes, this lack of clarity could prove to be a risk that the government is not prepared to take, preferring to provide its own regulation instead. In family mediation, for example, the Family Justice Review (2011) comments on the role of the Family Mediation Council (FMC) <sup>84</sup> and highlights this as an important issue:

“We recommend that government should closely watch and review the progress of FMC to assess its effectiveness in maintaining and reinforcing high standards. Government should if necessary create an independent regulator to replace the FMC.”<sup>85</sup>

While government regulation might bring consistency, there is a danger that standards are externally imposed according to the criteria discussed above rather than agreed by practitioners operating at the grass roots. A main aim of my research has been to explore further the feasibility of identifying shared aims and generic principles of mediation and the desirability of establishing a single coherent regulatory framework.

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<sup>84</sup> The Family Mediation Council is a council of providers of mediation and mediation training including ADR Group, the College of Mediators, the Law Society, National Family Mediation, Resolution and Family Mediators Association.

<sup>85</sup> Norgrove (2011) Recommendation No 115.

## *Conclusion*

I have argued in this chapter that mediation can be described as both an ideology and a practice. Within this broad generalisation, there is a range of mediation activity. Mediators at one end of the spectrum see their main purpose as supporting effective communication where misperception and difference have prevented this happening. They seek to create an environment that is conducive to meaningful exchange and pay close attention to the quality of interaction between parties in conflict. At the other end of the spectrum, mediators see their role as assisting parties who are competing over resources to negotiate a financial arrangement that is as fair as possible and will bring an end to the dispute. They use their knowledge of the subject, and perhaps the law, to inform and influence parties in reaching an 'appropriate' solution. There are, of course, a range of variations between these two positions. Where practitioners place themselves along this spectrum will depend on their understanding of conflict and how mediation can respond to it. At an ideological level, mediation is a response to a crisis in human interaction, whether that manifests itself between individuals or among communities. Its purpose is to assist people to manage that crisis for themselves by helping them to engage in a positive dialogue which enables them to understand their differences and supports them to rebuild and restore relationships. At a practical level, mediation is a response to a problem about resources. This can be addressed in a private environment in which, with the benefit of the knowledge and experience of a third party, disputants can craft their own solution to meet their needs. Personal style and approach also affect where mediators place themselves along this continuum, but, no less important, so do the expectations of the parties and the nature of their relationships.

So why should this diversity and flexibility in the application of mediation across a range of different settings present a difficulty, as Hazel Genn has suggested? The answer lies in the lack of clarity and definition that mediators give to their work. This not only results in confusion for those looking at the mediation profession from the outside, but a lack of cohesion and dialogue from within. As early as 1993, Simon Roberts observed that ADR practices within the civil justice system were at risk of being seen as ‘a fugitive label attached to a range of disparate and contradictory, but entangled projects’.<sup>86</sup> He points to the initial difficulties of bringing together two different sets of professionals; the non-aligned facilitator who supports other people’s decision-making and the partisan legal expert who embraces mediation as part of a range of tools under the banner of ‘case management’. In her comparison of professional bodies regulating the legal and mediation professions, particularly with regard to divorce matters, Lisa Webley makes a similar observation. Her research concludes that “the very nature of professional practice as a family law solicitor and as a family mediator is being transformed into a form of hybrid practice that draws upon two radically different epistemological traditions.”<sup>87</sup> Within the context of family and civil courts, these differences have still not been properly addressed and, unless they are, might well lead to the ‘divergence’ to which Genn refers.

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<sup>86</sup> Roberts (1993) 452.

<sup>87</sup> Lisa Webley, ‘Gate-keeper, supervisor or mentor? The role of professional bodies in the regulation and professional development of solicitors and family mediators undertaking divorce matters in England and Wales.’ (2010) 32 (2) *Journal of Social Welfare and Family Law*, 119 – 133, 119. Webley considers the ‘cross-fertilisation’ of four different groups: solicitors with no specialist training in family law; solicitors with training and expertise in family law; family mediators with legal training; family mediators with no legal training. She points out that “at any one time it would be possible to fall within three of those four groupings.” (120).

Genn suggests that mediators have no interest in justice and fairness.<sup>88</sup> While many mediators might initially disagree with that assertion, it is reasonable to suppose, as I have already discussed in chapter 2, that they may understand those terms differently. What is clear is that the mediation profession as a whole has not defined these concepts in relation to mediation practice. Irvine argues that the time has come to do so and that mediators need to articulate more clearly how they see their role and the values that lie behind their interventions. Folger too observes that mediation, as a young profession, is “still establishing its identity within the alternative dispute resolution movement” and is looking for a more coherent profile. He argues that, as a first step:

“... the field must overcome its reluctance to acknowledge and explore core differences among the major frameworks of mediation practice ... If essential and incompatible differences among models of mediation are fully recognised, practitioners and stakeholders need to decide what their core goals and objectives are in using mediation, and which framework is consistent with these objectives. “<sup>89</sup>

My own view is that it is also helpful to look for models and definitions that might contribute to that identity outside the ADR movement as well as within it. In Chapter 5, I explore this further and put forward suggestions as to how mediation might be viewed as a real alternative.

I have argued in this chapter that the core principles of mediation - those of impartiality, party determination, voluntariness and confidentiality - which form the basis of mediation ‘rhetoric’ should have a central place in discussions that attempt to define more clearly what mediation is and what it aims to achieve. Mediation is both an

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<sup>88</sup> Genn (2010) 117ff.

<sup>89</sup> Folger (2008) 25.

ideology and a practice but, unless these two aspects are viewed together as part of a continuum, there is danger of divergence rather than diversity. The core principles of mediation are the means by which ideology and practice stay aligned. The challenge for the mediation profession is maintaining this balance in the face of rapid change.

## CHAPTER 4 - MEDIATION TODAY

“What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance.”<sup>1</sup>

In this chapter I describe in detail the most significant legislative developments in the UK in relation to mediation over the last five years. Similar patterns emerge from a number of consultations and reforms across several different sectors of mediation provision. One of the most notable is the perception of mediation as a means by which to achieve a culture change in the way that disputes are handled. Recent legislation affecting several fields of delivery has attempted to position mediation as the default process which encourages informality and individual responsibility, with adjudication as the exception when all else fails.

But these aspirations have not been realised. The take-up of mediation has been relatively low and this has led to debates about whether it should be mandatory. Research evidence suggests that mediation works best when undertaken voluntarily,<sup>2</sup> but, while usage is low and lack of awareness is high, the arguments for compulsion have an immediate appeal. Furthermore, there are concerns in each context about reducing cost and saving time to the exclusion of the more ideological aims of conflict resolution and relationship repair. Practitioners increasingly emphasise the importance of ‘process pluralism’ and the notion of matching the right dispute resolution process to the needs of the individuals concerned. However, the most powerful barrier to culture

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<sup>1</sup> Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales Consultation Paper CP6/2011*, Foreword 6.

<sup>2</sup> See Genn (2007) who concluded, on the basis of her empirical study of two court based mediation schemes, one voluntary and the other involving automatic referral to mediation, that information and encouragement were more effective than compulsion.

change is the lack of awareness and understanding of the process among potential users and referrers alike. Despite its ubiquity, mediation is not a process with which the public is familiar. Nor is it considered as an automatic first step when disputes arise.

Conflicting interests and expectations have therefore resulted in a lack of clarity, and repeated attempts have been made in the various arenas to establish a mediation provision which meets the needs of individuals in dispute as well as those of the civil justice system, public sector funders and the government.

In this chapter, I argue that a lack of clear definition and cohesion within the mediation community has meant that those who control policy and funding have made decisions about mediation provision which have led to further confusion and a lack of enthusiasm among potential users.

### *Mediation and Legislation*

Family mediation has been heavily influenced by several major pieces of legislation over the last two decades resulting in rapid change in this sector. The Family Law Act 1996 proposed to dispense with the idea of fault-based divorce and encouraged parties to use mediation in order to reduce acrimony and encourage collaborative decision-making before reaching court. The first part of the Act was never implemented and, eighteen years later, the most recent legislation, the Children and Families Act 2014, finally repealed the 'no-fault' divorce. Nevertheless, the principle of encouraging the use of mediation was transported to the Access to Justice Act 1999, which also established the Legal Services Commission (LSC) and introduced legal aid to cover the costs of mediation.



It was at this time that an element of compulsory mediation appeared within the family context with those eligible for public funding required to attend a meeting with a mediator in order to find out about the process before they could access funding for legal representation. As a result, mediation providers expected an increase in uptake. However, while a contractual relationship with the LSC promised a steady income, it also brought the expectation of settlement within time limitations and fixed case fees. This had an inevitable impact on practice, both in terms of the voluntary engagement of parties and the introduction of new pressures on mediators to reach settlement.

Despite these developments, the uptake of family mediation has been disappointing. Several possible reasons for this can be identified. The route into mediation for those who were publicly funded effectively placed legal representatives in a gatekeeping role. Yet a report by the National Audit Office in 2007 showed that between October 2004 and March 2006 parties went straight to court with no involvement from a mediator in 52 per cent of cases. In a survey of legal aid recipients during that period, 33 per cent said that they had not been made aware by their adviser that mediation was an option.<sup>3</sup> In addition, judges responded inconsistently when faced with applicants who had not considered mediation, some preferring to move the process on rather than incur further delay. Parties themselves were reluctant to mediate, whether because of the intensity of the issues, the late referral into the process or a general resistance to quasi-compulsion. Mediators found that they were having to 'sell' the process rather than working with people who had themselves initiated an approach to mediation, and this did not sit well with principle of voluntariness.

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<sup>3</sup> National Audit Office, *Legal Aid and Mediation for People Involved in Family Breakdown* (London: The Stationary Office, 2007) 4-5.

Over the next decade, various adjustments were put in place to address these issues until a review of the family justice system, conducted in 2011,<sup>4</sup> pointed to a series of problems in terms of delay, cost, overlapping processes and a lack of cohesion. The Norgrove Report recommended the establishment of a Family Justice Service with a single family court, stating that “[t]he emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible.” (para. 4.6). This underlined the importance of trying mediation, and interestingly, in the light of my discussion in chapter 2, implied that the use of the word ‘alternative’ was unhelpful:

“It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service. To reinforce the primary nature of these services ‘alternative dispute resolution’ should be rebranded as ‘Dispute Resolution Services’, in order to minimise a deterrent to their use. Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard.” (para 115).

The idea of mediation as a means by which to achieve culture change has, therefore, been made quite explicit in the family sector over the last few years. The Norgrove Report reinforced this by requiring that those going through separation and divorce undertake a meeting with a mediator (known as a ‘MIAM’ – Mediation, Information and Assessment Meeting), and extending this to fee paying parties too. A Pre-Action Protocol issued on April 6<sup>th</sup> 2011 reinforced it again, although the attendance of those not qualifying for public funding was stated as an expectation rather than a requirement. This remained the case until 2014 when the Children and Families Act made the meeting mandatory for both applicants and respondents regardless of their income. This provides a clear example of a contradiction in priorities whereby one

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<sup>4</sup> David Norgrove, *Family Justice Review Final Report* (London: Ministry of Justice, the Department of Education and the Welsh Government, 2011).

perceived method by which to achieve culture change (i.e. introducing quasi-compulsion so that it becomes the norm) compromised the fundamental principle of voluntariness. It was not helped by a lack of publicity or clear information which did nothing to contribute, therefore, to public awareness.

The 2014 Act implemented many of the recommendations of the Norgrove Report, establishing the Single Family Court, introducing Child Arrangement Orders,<sup>5</sup> naming the support services of the family court as Dispute Resolution Services and sending a clear signal that the continuing involvement of both parents in children's lives after divorce is expected. Again, the changes attempted to support a cultural adjustment so that divorcing couples would reach decisions outside of the family court, only using the latter as a last resort.

Yet while the reforms urged the use of mediation as a first option, the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) had the opposite effect. It revealed another clash of principles, since the Act prioritised the need to save time and money and to reduce the burden on the courts. With the withdrawal of legally aided representation<sup>6</sup> for all but the most exceptional cases, the Act had a devastating impact on the uptake of mediation. While public funding for mediation itself remained in place, the changes overlooked a fundamental feature of the system that had been operating over the previous decade: the gatekeeping role of

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<sup>5</sup> Child Arrangement Orders replaced the previous orders for Contact and Residence. They employ much more neutral language, using phrases such as who a child 'lives with' or 'spends time with.'

<sup>6</sup> This provision came into force in April 2013. The Act also abolished the Legal Services Commission, a non-departmental public body and replaced it with the Legal Aid Agency, a new executive agency of the Ministry of Justice.

the family lawyer who had become the major source of referral for a large percentage of mediation providers.<sup>7</sup>

With a lack of clear information (for example, that public funding for mediation remained in scope), the anticipated increase in the uptake of mediation simply did not occur. Indeed, the report from the National Audit Office (NAO) in 2014<sup>8</sup> showed that the number of people attending initial mediation assessments fell dramatically by 56 per cent (17,246), while the Family Court saw a massive rise of 30 per cent (18,519) in the number of cases where neither party was represented.

The report identified several consequences in the administration of those cases which resulted in the need for additional financial support for those acting as litigants in person.<sup>9</sup> Legal aid statistics published by the Ministry of Justice in June 2014<sup>10</sup> also demonstrated a reduction in the number mediation cases started in the year 2013 – 2014. The largest number of cases started occurred in 2011-12. However, though there was a reduction the following year, the figures in the year after that (i.e. when the LASPO Act was implemented) show a huge fall of almost 50 per cent over the two year period. The NAO report also published the anticipated rise in both assessment

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<sup>7</sup> Under the previous arrangements, lawyers were not able to access public funding to represent their clients until they had a certificate from a trained mediator to indicate that a meeting had taken place but that mediation was not proceeding or, they were able to satisfy one of the exemptions to this rule. With the removal of public funding, the incentive to refer therefore disappeared, to be replaced, by a number of lawyers, with offers to settle through negotiation at rates that were competitive with mediation providers.

<sup>8</sup> Ministry of Justice and Legal Aid Agency, *Implementing Reforms to Civil Legal Aid* (London: National Audit Office, 2014). See Key Facts, Summary and Findings p 4-8.

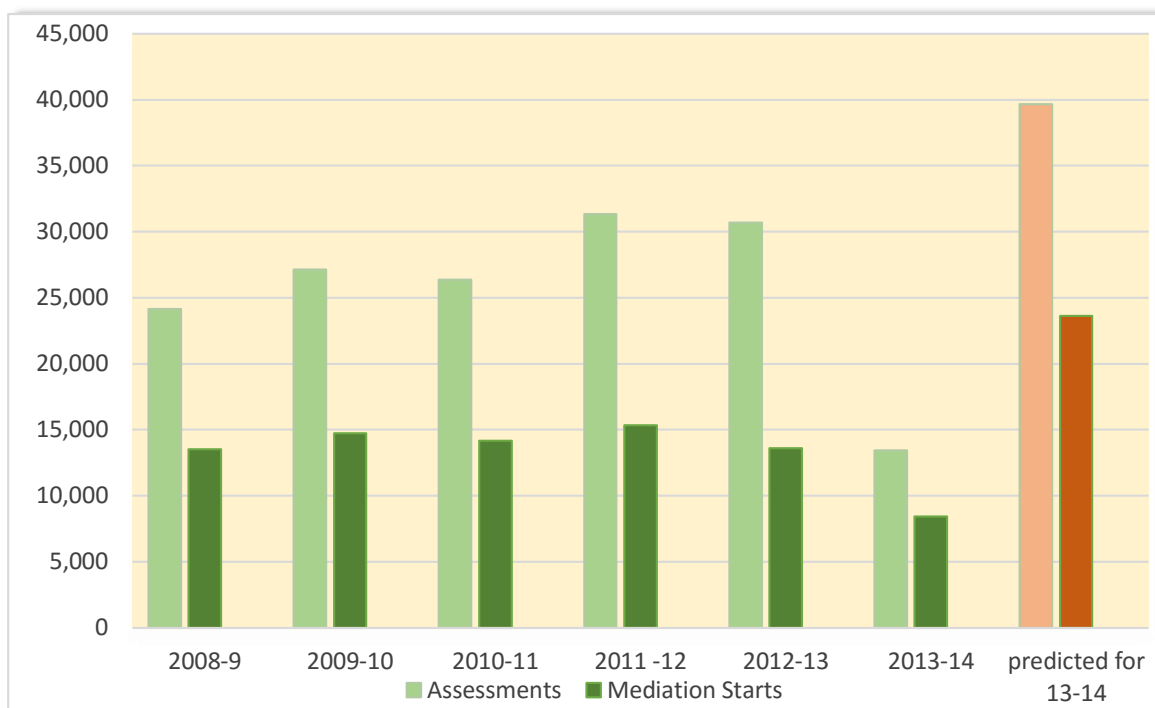
<sup>9</sup> Paragraph 1.20 of the Report identifies the following impacts as a result of the increase in litigants in person who:

- “• are less likely to settle cases outside of court hearings;
- are likely to have more court orders and interventions in their cases;
- tend to lack the knowledge and skills required to conduct their case efficiently; and
- create additional work for judges and court staff, which can make court listing processes less efficient”.

<sup>10</sup> Ministry of Justice, *Legal Aid Statistics in England and Wales* (London: Legal Aid Agency 2013-2014).

meetings and mediation cases starting. The predictions demonstrate that the impact of the withdrawal of legal aid was seriously misjudged. The table below illustrates the decline in uptake.

**Figure 1: Comparison of Assessment Meetings & Mediation Starts 2009 – 2014**



This table is based on figures from the MOJ’s Legal Aid Statistics.<sup>11</sup> The columns to the far right (in orange) show the rise in numbers predicted in the NAO report at the time LASPO was introduced, as compared to the actual figures for that year (the columns immediately to the left).

Several research studies and reports reiterate the astonishing impact of LASPO on the uptake of mediation. Kneale et al<sup>12</sup> noted the ‘precipitous decline in numbers’ in both

<sup>11</sup> *ibid.*

<sup>12</sup> Dylan Kneale, Chris Sherwood, Patrick Sholl and Janet Walker, *Engaging Both Parties in Mediation within a Changing Funding Climate* (Doncaster: Relate, 2014). The study compared statistics gathered from April to September over two consecutive years (2012-13 and 2013-14) through Relate services offering mediation. The figures illustrate a drop of over 52 per cent in publicly funded MIAM meetings (over 26 per cent in privately funded cases). In terms of publicly funded cases going ahead to mediation, the number was down by 37.5 per cent (over

MIAM meetings and mediation itself. In May 2014 a report from the Judicial Executive Board commented that one impact of LASPO had been to increase the time taken to process cases “therefore eating up savings introduced by the reforms.”<sup>13</sup> The authors stated that:

“.... The absence of pre-proceedings advice in the tribunals’ jurisdictions has resulted in an increase in unmeritorious claims and, almost certainly, some meritorious claims never being brought.”<sup>14</sup>

A report of the Bar Council, published some months later, confirmed these observations and raised concerns about access to justice for vulnerable members of society pointing to “a significant increase in litigants-in-person, more delays in court, and growing difficulty for individuals in accessing legal advice and representation.”<sup>15</sup>

The reforms pushed some sectors of family mediation provision into crisis, particularly services situated in low income areas that were dependant on funding from legal aid contracts. The Norgrove Report had also highlighted the need for self-regulation of the profession and this set in train research and proposals for reform.<sup>16</sup> With a real risk

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18 per cent in private cases). Kneale et al suggest a number of reasons for this. They point out the lack of signposting from family law professionals; a diversity of providers (i.e. some placed within legal firms, others in the voluntary sector, others operating as private suppliers, some with legal training, others with social work, counselling or therapeutic backgrounds) which creates confusion; a lack of compulsion for respondents to attend a MIAM; a lack of judicial consistency in applying the pre-action protocol; a lack of public awareness of funding for mediation and little co-ordination between mediators and family lawyers.

<sup>13</sup> See ‘Judges warn of adverse impact of legal aid reforms’ (2014) 164 New Law Journal 7606, 5.

<sup>14</sup> *ibid.*

<sup>15</sup> See ‘LASPO Leaves a Legacy of Delays’ (2014) 164 New Law Journal 7615, 4. See also Kim Beaston, Caroline Bowden and Ellen Lucas, ‘Family Law in Crisis: Pt II’ (2014) 164 New Law Journal 7627, 11-12, where the authors illustrate the difficulty that has been experienced in obtaining legal aid even in cases that are considered to be exceptional and have been directed by the court. Jon Robins, ‘Tough Times’ (2014) 164 New Law Journal 7634, 7, also cites the report of the National Audit Office which discusses the hidden, unforeseen consequences of the Act stating that, aside from mediators, other professionals outside the court system have noticed an impact. Citizens Advice reported a substantial difficulty in being able to refer people to publicly funded legal advice, even in cases that warranted it. The organisation commented that “[t]he length of time it takes to get legal aid means people’s situations often become far worse than they would have had there been earlier intervention.” For further information, see Jon Robins, ‘A Devastating Momentum’ (2014) 164 New Law Journal 7616, 7.

<sup>16</sup> The Family Mediation Council (consisting of member organisations representing key mediation providers: Family Mediators Association, National Family Mediation, the College of Mediators, ADR Group and Resolution) commissioned Professor John McEldowney to critically review its arrangements (see John McEldowney, *Family*

that the provision of family mediation was about to fall apart, a Family Mediation Task Force was set up by the government in 2014 to investigate these trends and develop a more innovative approach to family dispute resolution (DR) services. Drawing on their study of practices in other jurisdictions, Barlow and Walker<sup>17</sup> note that an important influence in achieving culture change is an increase in the level of co-operation between lawyers and mediators. They highlight this as a barrier in the UK:<sup>18</sup>

“The drive towards better partnerships suggests that legal advocacy, legal advice and legal information that are supportive of child-focused information sessions conducted by family relationship practitioners at FRCs, and supportive of child-sensitive DR, have good prospects of achieving satisfactory outcomes for post-separation parenting disputes. The levels of cooperation legal and family relationship practitioners encourage their clients to achieve for the sake of their children have been reflected in similar levels of cooperation between lawyers and mediators.”<sup>19</sup>

While the Norgrove Report recommended a more integrated approach from professionals linked to the civil justice system generally, the relationship between

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*Mediation in a Time of Change: FMC Review Final Report* (University of Warwick, 2012). The report led to the development of a self-regulatory framework which has introduced a Professional Standards and Accreditation Board in an attempt to streamline training, assessment, accreditation and professional development of family mediation within the private and not-for-profit sectors. For further information, see the reports of Stan Lester in three editions of the Family Law Journal: ‘Professional Organisation and Self-Regulation in Family Mediation in England and Wales: Part 1: Background’ (2014) 44 (9) Family Law Journal 1338 - 1341; ‘Professional Organisation and Self-regulation in Family Mediation in England and Wales: Part 2: The 2014–15 Reforms’ (2014) 44 (10) Family Law Journal 1472 - 1475; ‘Professional Organisation and Self-Regulation in Family Mediation in England and Wales: Part 3: Issues, Implications and Future Challenges’ (2014) 44 (11) Family Law Journal 1610 - 1613.

<sup>17</sup> See Anne Barlow and Janet Walker, ‘Changing the Dispute Resolution Landscape’ (2014) Family Law, 1412-1419. Barlow and Walker were members of the Task Force and, examining the experience of other jurisdictions, found that Canada and Australia had what they called an “implementation gap”. Both countries identified several aspects of good practice which eventually enabled culture change to occur. These include good information provision, one-to-one support, a change in the use of language and better planning and decision-making. In Australia, Family Relationship Centres (FRCs) provide a point of entry within the community and, since mediation is free in these centres, there are strong incentives to mediate out of court. The result has been “a significant decrease in the number of court applications for final orders in child and property matters.” (Barlow and Walker (2014) 1416.)

<sup>18</sup> See D. Kneale et al. (2014) 4, who observe the “apparent disconnect between the stance taken by lawyers, whose role is to represent each party’s individual needs, and mediators who emphasise the importance of the couple reaching agreements.” Listed among their recommendations is the need for better inter-agency coordination (5).

<sup>19</sup> Barlow and Walker (2014) 1416 -17. The resource centres are also actively in touch with a range of other support services and “... interdisciplinarity is a key concept.”

lawyers and mediators has never been specifically addressed. Yet it is a relationship characterised by tension and conflict of interest.<sup>20</sup> I explore the respective roles of the two professions in chapters 2 and 8 but it is important to note here that, far from increasing co-operation, the effect of LASPO has been to aggravate even further a relationship that was, in many instances, already a competitive one.

The government continues to encourage the use of family mediation as a means of achieving culture change. Simon Hughes, former MP heading up the Task Force, pointed to the success of those cases going ahead to mediation, two thirds of which reach agreement, stating that “[m]ediation works and our objective is to see more people resolving issues on their own terms through mediation.”<sup>21</sup> The work of the Task Force led to the funding of first mediation meetings (where at least one party is publicly funded)<sup>22</sup>, greater promotion from government for the public<sup>23</sup> and materials for mediators to use to promote themselves locally. The use of mediation has begun to increase again. The indications are that 2015 and 2016 will prove to be vital years in the evolution of family mediation.

While legislative changes in the civil, commercial and workplace sectors have not been so rapid or so revolutionary, mediation has nevertheless been consistently encouraged. There are some striking parallels across fields, and it is notable that many

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<sup>20</sup> See Lisa Webley, ‘Gate-keeper, supervisor or mentor? The role of professional bodies in the regulation and professional development of solicitors and family mediators undertaking divorce matters in England and Wales.’ (2010) 32 (2) *Journal of Social Welfare and Family Law*, 119, 128ff. The article points to a tension that pre-dates these legal changes and discusses how the different professions are led to compete for market advantage by extolling the virtues of what they are trying to achieve (for example, the benefits of legal protection over self-determination and vice versa).

<sup>21</sup> Simon Hughes, ‘Bold Reforms’ (2014) 164 *New Law Journal* 7629, 9.

<sup>22</sup> While this has encouraged an increase in uptake, it has meant a loss in income for mediation providers. An increased pressure to ‘settle’ within one free meeting also creates unreal expectations and potentially undermines informed decision-making.

<sup>23</sup> See the Ministry of Justice website (accessed 26 February 2015) to view a promotional video [www.gov.uk/moj](http://www.gov.uk/moj)



of the same issues have been raised as a consequence of new legal requirements, in particular the question of compulsion. Significantly, the outcome of various initiatives in many of the settings under discussion has been the requirement to attend a MIAM or its equivalent. In other words, disputants (particularly those initiating proceedings) are obliged to attend an information meeting in order to make a decision about whether to proceed. The principle of voluntary engagement in mediation itself is therefore protected in theory, though in practice, as I have already argued, this can be subject to pressure.

The Children and Families Act 2014 also had relevance for disputes concerning provision for children with Special Educational Needs. The Act strengthened a precedent that had been set for some years with the introduction of a Code of Practice in 2001 which stated that local authorities had a responsibility to appoint independent facilitators in order to avoid or resolve disagreements between authorities and parents, or schools and parents.<sup>24</sup> The most recent legislation goes further and makes a distinction between Disagreement Resolution (which can be used at any stage, though preferably early, and is voluntary for all concerned) and Mediation<sup>25</sup> (to be used as a direct alternative to a tribunal.) In this context the encouragement to use mediation is one element of a culture change in which parents and young people are being strongly

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<sup>24</sup> See section 2.2, Department for Education and Skills, *Special Educational Needs (SEN) Code of Practice* (London: DfES, 2001). Paragraph 2:26 states that “the aim of informal disagreement resolution arrangements is to prevent the development of long-term problems thus reducing, in time, the number of appeals going to the SEN Tribunal.” Paragraph 2:27 goes on to say that:

“[i]t is envisaged that a facilitator will bring together all of the parties in a non-threatening environment, to seek to resolve the disagreement through discussion and negotiation. The facilitator is not there to determine the outcome. Rather all parties need to openly discuss the issues and the full range of options available, and seek to agree how to resolve the disagreement. ... The purpose of disagreement resolution is not to apportion blame but to achieve a solution to a difference of views in the best interest of the child.”

<sup>25</sup> Children and Families Act 2014, Part 3, 51-57. See [www.legislation.gov.uk](http://www.legislation.gov.uk) Accessed 01 March 2015

encouraged to take more control in terms of budgeting and resources to meet special needs as well as in handling disputes when they arise. The provisions of the Act introduce an element of compulsion that is similar to the family context in that parents must have a conversation with a mediator and obtain a certificate before they are able to file a claim with the tribunal. While parents are under an obligation to find out about mediation, they retain the choice not to use it. By contrast the local authority must engage if a parent wishes to proceed.

In the workplace context, the current requirement to explore conciliation as an option represents the conclusion of a process that has gone full circle. The Employment Act 2002 was informed by the findings of a significant consultation<sup>26</sup> which set out to improve dispute resolution processes within the workplace (thereby reducing the number of cases heard by employment tribunals). It established three principles: access to justice; fair and efficient tribunals and a modern user-friendly public service. The Dispute Resolution Regulations came into effect in 2004 and, in a bold move, implemented a compulsory three-step disciplinary and grievance procedure for both employers and employees, the purpose of which was to exhaust alternative means of dispute resolution before formal proceedings were initiated. The Gibbons Review, conducted some three years later, found that, though sound in principle, the changes had most often had a negative effect. Davey and Dix observed that:

“ ... they had formalised disputes to such an extent that it was difficult to resolve problems informally, and the processes were too time consuming for managers, and stressful for employees. The presence of the procedures was

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<sup>26</sup> Department of Trade and Industry, *Routes to Resolution: Improving Dispute Resolution in Britain* (London: Department of Trade and Industry, 2001).

perceived to be creating expectations that disputes would end in an employment tribunal claim.”<sup>27</sup>

With a marked similarity between the family and commercial sectors, Gibbons argued that:

“ ... fundamentally, what is needed is a culture change, so that the parties to employment disputes think in terms of finding ways to achieve an early outcome that works for them, rather than in terms of fighting their case at a tribunal.”<sup>28</sup>

Findings from the Gibbons Report resulted in a further consultation in which measures were proposed to encourage early, speedy informal resolution of disputes through mediation and conciliation. The Disagreement Resolution Regulations were repealed in the Employment Act 2008 and the Advisory, Conciliation and Arbitration Service (ACAS) published a statutory Code of Practice on discipline and grievance. A helpline administered by ACAS was put in place and Pre-Claim Conciliation was introduced as an option where litigation was likely. An explicit purpose, more clearly stated in this context than elsewhere, is that of preserving relationships:

“The review reiterated the key aim of settling disputes earlier, reducing disruption to business’, time and costs spent, and stress. It also suggested that earlier resolution could involve outcomes not available through the tribunal system, for example an apology, or changes in behaviour, and suggested that earlier dispute resolution may also preserve the employment relationship in some instances.”<sup>29</sup>

The theme of culture change and the potential of mediation to “lead to a major dramatic shift” in employment relations was picked up again in yet another consultation

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<sup>27</sup> Barbara Davey and Gill Dix, *The Dispute Resolution Regulations Two Years On: The ACAS Experience* (London: ACAS Research and Evaluation, 2011) Section 3.

<sup>28</sup> Michael Gibbons, *A Review of Employment Dispute Resolution in Great Britain* (London: Department of Trade and Industry, 2007) 38.

<sup>29</sup> Davey and Dix (2011) 3.

conducted by the Department of Business Innovation and Skills in 2011.<sup>30</sup> The government response introduced the idea of Early Conciliation (implemented in 2014) as an alternative to litigation. Again there is a parallel with other contexts whereby potential disputants must explore alternative options. Early Conciliation requires that prospective claimants submit their details to ACAS which offers conciliation as a first option. If either party rejects conciliation or there is no agreement, a claim can subsequently be filed at the tribunal.<sup>31</sup>

Research in this area suggests that mediation does have an impact. A seminar series held in 2012-2013 brought together researchers from six different universities.<sup>32</sup> Their studies have shown that mediation can improve working relationships, avoid litigation, prevent long-term sickness and bring about savings in money and staff time.<sup>33</sup> The indications are that the ACAS Code of Practice led to the simplification of policies and procedures and a greater emphasis on informal resolution. Disputes have, it seems, been dealt with more efficiently, effectively and creatively, particularly where in-house mediation schemes have been established.<sup>34</sup> But other evidence implies that these benefits may be short-term. Saundry et al have identified a risk that “mediation could

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<sup>30</sup> Department of Business Innovation and Skills, *Resolving Workplace Disputes: Government Response to the Consultation* (London: BIS, 2011) 13, para 25.

<sup>31</sup> The ACAS definition of conciliation is similar to that of mediation generally (in that it is voluntary, confidential, facilitated by an independent third party and leaves parties in control of decision-making). In the case of Early Conciliation it is offered as a first step in going to an Employment Tribunal, whereas issues taken to mediation may be broader and less formal. For more information, see the website [www.ACAS.org.uk](http://www.ACAS.org.uk) where there are guides on both processes. Accessed 23 April 2015.

<sup>32</sup> For an overview of the contributions and findings see Richard Saundry, Paul Latreille, Linda Dickens, Charlie Irvine, Paul Teague, Peter Urwin, Gemma Wibberley, *Reframing Resolution – Managing Conflict and Resolving Individual Employment Disputes in the Contemporary Workplace* (London: ACAS Policy Discussion Papers, 2014).

<sup>33</sup> See Paul Latreille, *Workplace Mediation: A Thematic Review of the ACAS/CIPD Evidence*, (London: ACAS Research Paper 13/11, 2011) and Richard Saundry and Gemma Wibberley, *Workplace Dispute Resolution and the Management of Individual Conflict — A Thematic Analysis of Five Case Studies* (London: ACAS Research Paper 06/14, 2014).

<sup>34</sup> Saundry and Wibberley (2014) 6 and 30ff.

be used to shift the responsibility for conflict from the organisation to the individual by reinterpreting unfair treatment as a personal issue.”<sup>35</sup> Overall findings from the research series broadly recognised the benefits of mediation, particularly regarding individual empowerment, but suggested that the government aspiration for it to achieve culture change is too ambitious unless other measures are in place to support it. The authors state that:

“ ... mediation alone is unlikely to affect the type of transformational change to the culture of conflict management envisaged by government. This hinges on the development of good employment relations practice – providing skills to line managers and effective structures of employee voice and representation – and the pursuit of more innovative approaches to conflict resolution. This, in turn, is dependent on workplace conflict being recognised by organisations as a strategic issue... [F]or many organisations conflict is simply viewed as a transactional issue that does not extend beyond the handling of disciplinary and grievance issues. Thus there is a need to broaden the terms of the public debate to emphasise the potential value of effective conflict resolution processes in underpinning workplace justice, trust and employee engagement, and ultimately organisational performance.”<sup>36</sup>

These findings have significance for other sectors too. The implication is that, while mediation can influence specific situations positively, the wider benefit of achieving culture change can only be realised when all the stakeholders have shared priorities, are agreed on approaches to conflict and have similar perceptions of what justice means and how it can be met.<sup>37</sup> Similarly, public engagement depends on clear information from professional mediators about the role that they perform alongside other services that support dispute resolution.<sup>38</sup> The available research indicates that

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<sup>35</sup> Saundry et al, *Reframing Resolution* (2014) 9.

<sup>36</sup> *ibid* 13-14.

<sup>37</sup> In the workplace, for example, this might be addressed through a ‘Dignity at Work’ policy which advocates values such as respect and equality of opportunity.

<sup>38</sup> In workplace settings managers will often play an early, unstructured role in helping to resolve conflicts between staff members. Trade Union Representatives and Human Resources Officers also offer a range of services, from support to active representation, and in some organisations a First Contact Officer, or similar, will give information and advice to those who find themselves in a conflictual working relationship.

a number of different processes must be available to meet different needs. I would argue, therefore, that, in order to go beyond individual empowerment, it is necessary to put in place strategic interventions which foster the generation of community norms and universally understood approaches to conflict.

The Access to Justice Act 1999 had a huge impact on the civil and commercial sector. The legislation provided public funding for mediation in non-family civil disputes and indicated that disputants should try ADR options before accessing legal aid for representation. A refusal to do so could risk the funding application being turned down. In the following years, the Legal Services Commission published various Funding Codes<sup>39</sup> which re-emphasised the benefits of mediation both as a problem-solving tool and as a means by which to promote a collaborative future. Lord Jackson's Review of Civil Litigation Costs endorsed mediation even further, describing it as 'the most important form of ADR' among a number of other alternatives.<sup>40</sup>

One of the main issues facing the civil and commercial sector, as in other contexts, has been the lack of awareness of mediation as an option among the general public, court users, lawyers, businesses and the judiciary as well as a lack of consistency in its referral and use. Lord Jackson recognised the benefits of mediation, saw that it could be more widely attempted at the pre-litigation stage, but stopped short of compulsion. He echoed the Government's ambitions for the use of mediation in the workplace, calling to the "need for culture change, not rule change."<sup>41</sup> The theme was

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<sup>39</sup> For example, see the Legal Services Commission Funding Code 2005.

<sup>40</sup> Lord Jackson, *The Review of Civil Litigation Costs 2009* (London: The Stationary Office, 2010). Jackson described mediation as one of a series of settlement processes including lawyer negotiations, joint settlement meetings and early neutral evaluation. See Chapter 36 Alternative Dispute Resolution, Introduction paragraphs 1.2 – 1.4.

<sup>41</sup> Jackson's recommendations include awareness raising: a serious campaign, proper information for judges and

picked up in the government consultation that was initiated in the following year. Its report stated that:

“What unites all our legal reforms is our ambition to equip people with the knowledge and tools required to enable them to resolve their own disputes, by working problems through in a non-adversarial manner. We want them to be better able to craft durable solutions that avoid further conflict. What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance.”<sup>42</sup>

The government response to the consultation the following year omitted the aspiration to culture change but again stressed the need for awareness, information giving and an automatic referral to mediation for small claims. A mandatory requirement to go ahead with mediation was not implemented. As I discussed in Chapter 2, *Halsey* (2004) established that courts cannot insist litigants use mediation against their will, arguing that to do so would be counter-productive in terms of both costs and access to justice. Nevertheless, it highlighted a clear role in strongly encouraging the use of mediation as a settlement tool. This balance between encouragement and compulsion is one that the court continues to struggle with today. Meggitt argues that, following other jurisdictions, it would be better to dispense with this ambiguity and make a clear-cut decision. He observes that:

“[T]he courts appear to pushing parties towards mediation without expressly admitting that they are doing so and with the apparent sole intention of saving money. If there is to be compulsory mediation, then such a policy should be openly declared and discussed.”<sup>43</sup>

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lawyers and the preparation of a handbook providing details of mediation providers. See *Review of Civil Litigation Costs* (2010) Chapter 36, Section 4, 4.1 – 4.2.

<sup>42</sup> Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales Consultation Paper* (London: The Stationery Office, 2011) Foreword 6.

<sup>43</sup> Gary Meggitt, ‘PGF II SA v OMFS Co and Compulsory Mediation’ (2014) 33(3) *Civil Justice Quarterly* 335-348, 348.

However, despite considerable debate in the eleven years since *Halsey*, such clarity still does not exist and the question of compulsion is in fact subject to ever increasing ambiguity. A significant outcome of this case was the stipulation that unsuccessful parties might be awarded costs if they could prove that the successful party had been unreasonable in their refusal to mediate. In other words, litigants who win their case without attempting mediation may still be subject to costs if it is considered that the process could have been used with a fair chance of success. The consequence was an increased pressure to mediate and the identification of a series of factors that might justify these costs.<sup>44</sup>

Several subsequent cases have contributed to this debate.<sup>45</sup> However, two are notable for the fact that they extended the understanding of ‘unreasonable refusal’ to mediate still further. In *Carleton v Strutt & Parker* (2008), Judge Jack observed the behaviour of the parties in mediation and formed the opinion that the claimant had never taken the intention to settle seriously. He concluded that:

“[A] party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate.”<sup>46</sup>

In *PGR vs OMFS* (2013), Lord Justice Briggs commented on the lack of response to an invitation to mediate and considered that this too should be treated as a justifiable factor to take into account when awarding costs. He said:

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<sup>44</sup> These factors became known as ‘The Halsey Guidelines’ and included the nature of the dispute, the merits of the case, use of other methods to reach settlement, the cost of the mediation, any delay that using mediation might bring about, the likely success of mediation and the impact of any encouragement the court makes.

<sup>45</sup> For a detailed account of the relevant cases see A.K.C. Koo, ‘Unreasonable Refusal to Mediate: The Need for a Principled Approach - PGF II SA v OMFS Co 1 Ltd’ (2014) 33(3) Civil Justice Quarterly 261-265.

<sup>46</sup> *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2008] EWHC 424 (QB) at [72].



“Silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage ... might have been justified by the identification of reasonable grounds.”<sup>47</sup>

Koo recently examined the question of unreasonableness at some length<sup>48</sup> and argued that it was important to maintain a voluntary decision to mediate on the grounds that it strengthens the role of civil justice in upholding social norms and ensures that mediation does not become a substitute for judicial decision-making. He pointed out that the growth of mediation and the use of other settlement options means that the role of the courts now extends to the case management of ADR options and to narrowing down those issues that cannot be decided other than by judgement. Koo calls for further review of the Halsey Guidelines arguing that, while they bring flexibility, they are also limited:

“First, no single factor will trump the others. The applicability of all relevant criteria to the particular facts of each case will be heavily contested at the costs stage of litigation. Secondly, the non-exhaustive list is subject to infinite extension, such as unreasonable conduct within a mediation and silence in face of invitation to participate in mediation.”<sup>49</sup>

The reality is that the issue of unreasonableness and the question of whether or not to use mediation can itself lead to further argument, thereby exacerbating the dispute. The circumstances of individual cases that come under scrutiny mean that definitions of what constitutes a reasonable or an unreasonable refusal to mediate are constantly shifting. Koo points out that the list is still not exhaustive. What happens, for example, if both parties refuse on grounds that are considered unreasonable, or if one or both

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<sup>47</sup> *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288 at [34].

<sup>48</sup> See A.K.C. Koo, ‘Unreasonable Refusal to Mediate: The Need for a Principled Approach - *PGF II SA v OMFS Co 1 Ltd*’ (2014) 33(3) *Civil Justice Quarterly* 261-265 and ‘Ten Years after Halsey’ (2015) 34 (1) *Civil Justice Quarterly* 77- 95.

<sup>49</sup> A.K.C Koo (2014), 264.

misuses the process by entering into it with no real intention of negotiating a settlement? Koo calls for a principled approach and for the guidelines to be extended by considering factors such as the timing of mediation, the terms of the mediation proposal and the response to the proposal.

While government initiatives over the last four years might have aimed to achieve culture change at one level, it is clear from other reforms that this has not been the only motivation and that reducing the expense of the civil justice system and increasing its income is also of primary importance. In the political context of austerity measures imposed on public services, a recent consultation on court fees emphasised the drive for efficiency and for court users to pay more for filing claims in non-divorce cases. In the Foreword to the government response to a consultation on court fees, Shailesh Vara, Minister for the Courts and Legal Aid at the time, stated:

“There is ... only so much that can be achieved through cost efficiency measures alone. If we are to protect access to justice, and all the benefits that brings, I am convinced that there is no alternative but to look to those who use the courts to contribute more towards their running costs where they can afford to do so.”<sup>50</sup>

In 2015, the government raised the cost of filing a claim to 5 per cent of its value for all claims for over £10,000.<sup>51</sup> Critics are concerned that claimants will not be able to afford to file a claim and that this will undermine access to justice. While in theory this might lead to an increase in the uptake of mediation as an alternative to initiating a claim, the experience of family mediation is that this is by no means guaranteed.

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<sup>50</sup> Ministry of Justice, ‘Enhanced Court Fees: The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation’ (London: The Stationery Office, 2015) Foreword, 3.

<sup>51</sup> This represents a 600 per cent increase in some cases.

It is clear that legislative changes across several contexts have, in recent years, set out to encourage the use of mediation to resolve disputes rather than resort to more formal, adjudicative processes. Where, then, do these developments leave the professional mediation community in terms of a sense of shared purpose and identity?

### *The Mediation Community*

In the UK, mediation has developed independently within the various contexts that I have been examining, with little cross-over between sectors, considerable perceptions of difference in practice and a strange reluctance to engage in dialogue. Mediation is established as a profession in so far as training is a recognised requirement and training providers largely adopt an approach that is predominately skills-based, offering courses that are not dissimilar in length.<sup>52</sup> In each sector there is some level of regulation from national bodies that require members to have complaints procedures in place and to be adequately insured. However, there is no one professional body that unifies the mediation community so that standards of practice, policies and guidelines vary widely. The family field in particular has a long tradition of requirements such as supervision and continuing professional development. These were strengthened with the introduction of the Mediation Quality Mark, contractual arrangements with the LSC and, more recently, the recommendations of the Norgrove Report which called for further, more consistent regulation. While the community sector has largely adopted these standards, the civil, commercial and workplace sectors are only just beginning to consider them and not without resistance. The family sector now requires a post-training accreditation based on experience; the community field recognises this as an

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<sup>52</sup> Courses usually last in the region of 40 hours.

option; while the civil, commercial and workplace settings have yet to introduce the concept.

One factor that may go some way to explaining these kinds of inconsistency is the extent to which mediation is viewed as a vocational career in its own right or as an additional skill set that supplements another profession (such as law or human resources). The family sector has presented the clearest opportunities for primary employment as a mediator. In the community sector, it is usually only the managers of neighbourhood services who are paid<sup>53</sup> and in the civil and commercial sector there is a very small minority of well-established mediators who undertake the vast majority of the work.<sup>54</sup> Even the family arena has experienced divisions, with increasing numbers of family lawyers training to be mediators as a secondary part of their mainstream role. The recent decline in the family sector may, in any case, prompt a change in vocational openings, with increased demand but reduced funding. Vocational mediators of the future will have to be prepared to develop the skills and knowledge to work across sectors.

Most importantly, there is no one voice that represents the mediation community as a whole. There is very little discussion or collaboration across sectors. Instead, there is distrust and competition. These factors, in my view, add to the confusion experienced by users and referrers alike.

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<sup>53</sup> The majority of neighbourhood mediators work on a voluntary basis.

<sup>54</sup> The number of civil and commercial cases going to mediation is audited annually by the Centre for Effective Dispute Resolution (CEDR) through a member survey which also identifies the level of work of each respondent. This audit has been conducted since 2008 and the results are publicised annually. More information can be found on the website: [www.cedr.com](http://www.cedr.com) . Accessed 04 May 2015.

## *Mediation Wars*

At a rare inter-disciplinary conference of mediation trainers held earlier this year, Sir Alan Ward, the current chair of the Civil Mediation Council, pointed out that “the greatest difficulty for the mediation community is their great failure to mediate their own disputes.”<sup>55</sup> Addressing conflict constructively is challenging even, it appears, for those who encounter it on a professional basis every day. Attempts to work collaboratively across delivery areas have largely been unsuccessful. A prime example was the merger, in 2003, of National Family Mediation and Mediation UK,<sup>56</sup> two umbrella bodies operating in the voluntary sector to bring together family and community mediators. The merger collapsed acrimoniously a matter of months later as the interests of the two bodies proved to be incompatible.

Even within sectors, finding ways to cater for conflicting professional motivations has proved to be difficult. In 1996 the UK College of Family Mediators (UKCFM), incorporating the three main providers in the UK,<sup>57</sup> was set up as a single professional body intended to perform a regulatory function for all family mediators, whether their background was law, social work or counselling. The College permitted individual membership on the basis of training and the demonstration of professional competency. It also sanctioned independent providers or ‘approved bodies’ which were

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<sup>55</sup> Alan Ward, ‘Key Note Address’ (2<sup>nd</sup> AMATI Conference: ‘Moving Over’, Warwick, March 2015.) See also a recording of an interview conducted by Aled Davies of the Mediator Academy where Sir Alan discusses his vision of a single regulatory body for mediation. This can be viewed at <https://mediatoracademy.com/interview/uniting-mediation-in-the-uk-with-the-cmc> Accessed 27 May 2015.

<sup>56</sup> Mediation UK was an umbrella organisation establishing practice standards for community mediation services in the voluntary sector that folded a few years later. National Family Mediation (NFM) still exists and forms a network of not-for-profit mediation providers. NFM was founded in the early days of family mediation and took a lead in formulating practice standards and policing guidelines which later provided the basis of the UK College of Family Mediators policy framework.

<sup>57</sup> National Family Mediation, the Family Mediators Association and Family Mediation Scotland.

authorised to carry out the recruitment, selection, training and supervision of their own members. This meant that objective standard setting and monitoring could be kept separate from selection, training and provision.

The establishment of the College “marked the formal arrival in the UK of family mediation as a new profession”<sup>58</sup> but sadly not its unity as such. Broadly speaking, its formation had brought together practitioners from the private sector who were acting as lawyer mediators and those from the voluntary, not-for profit sectors who were more likely to have come from the caring professions. From the outset there were differences in professional approach<sup>59</sup> and by 2006 competing interests had surfaced. As more approved bodies joined, it became apparent that expectations concerning standard setting varied and that there was a difference of view as to the feasibility of combining a regulatory function (objective setting and monitoring of standards) with that of service provision (income generation). Individual members who saw mediation as an addition to their primary career had no wish to meet two sets of professional requirements. In 2007 the UKCFM split apart. As a result the Family Mediation Council (FMC)<sup>60</sup> was formed with a lighter-touch regulatory function, followed by the College of Mediators which retained the original standards and expanded to cater for a wider membership including community, workplace and potentially members from other sectors. Since then the FMC has become recognised as the representative voice of family mediation and therefore acted in dialogue with the Ministry of Justice during the recent legislative

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<sup>58</sup> See Marian Roberts (2005) 516 for a fuller account of the history.

<sup>59</sup> The requirement for supervision is an example. While this was a concept that was familiar to counsellors and social workers, it was alien to family lawyers. The term ‘Professional Practice Consultant’ emerged as an agreed outcome following lengthy debates to find an acceptable way to describe the role.

<sup>60</sup> The FMC comprises National Family Mediation, the Family Mediators Association, ADR Group, Resolution, the Law Society and the College of Mediators.

changes. Paradoxically, the calls for greater self-regulation outlined in the Norgrove Report were therefore directed to this body.

The Civil Mediation Council (CMC) provides a level of regulation for civil and commercial providers. Traditionally, trained practitioners belonged to a panel of mediators accredited by the CMC. It was the responsibility of the accredited panel to ensure that their members were adequately trained and experienced. In 2009 the CMC extended its membership to providers of workplace mediation. More recently, the CMC is encouraging individual membership too. The requirements for membership include evidence of training, casework and ongoing professional development. But standards in terms of practice guidelines, supervision and competence assessment are not yet in place. While the CMC appears to recognise the importance of a more unified approach, its claim to be “the recognised authority in the country for all matters related to civil, commercial, workplace and other non-family mediation”<sup>61</sup> is challenged and seen as over-ambitious by other regulatory bodies whose views have not been sought. At the same time the claim maintains the divide between family and other types of mediation.

By contrast Scotland and Ireland have taken a different approach. The Mediators Institute of Ireland (MII), established in 1992, is principally a membership body for individual mediators in both the Republic of Ireland and Northern Ireland. The MII stands out, in contrast to both the College and the Civil Mediation Council, in its active promotion of all forms of mediation and the adoption of a generic approach. Rather than perceiving mediation practice as radically different depending on the context, it

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<sup>61</sup> This was taken from the Home page of the CMC website: [www.civilmediation.org](http://www.civilmediation.org) Accessed 29 April 2015.

assumes as its starting point a common understanding of the process, which may then be subject to contextual variations. The Scottish Mediation Network (SMN), a registered charity established in 1990, also recognised the generic aspects of mediation and involved practising mediators across a number of areas of delivery in defining their own terms of reference.

### *Conclusion*

Legislative changes since the publication of the Woolf Reports have persistently sought to challenge the idea that disputes should be disposed of through formal, adjudicative processes. Settlement and mediation have been encouraged as ways of resolving disputes. The motivations for this, however, are mixed. Speedy, cheap resolutions to disputes are very attractive to policy makers: a primary incentive in many contexts.<sup>62</sup> While the potential for mediation as a tool to achieve culture change has been recognised and promoted, the early research evidence suggests that it is unrealistic to assume that a process primarily geared towards individuals can achieve this in isolation. Culture change also requires the corporate commitment of the wider system (whether that be the workplace, the court system, a school, a local community or society at large) together with a variety of other measures in place if it is to be successful.

The concept of culture change begs the question of a reappraisal of approaches to conflict and the public recognition of values such as the acceptance of personal

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<sup>62</sup> For example, in a tendering process in 2014 to secure contracts to deliver SEN mediation with the Local Authority, one region used an online auctioning system whereby prospective suppliers were asked to compete in successive rounds, bidding for the lowest amount that they were prepared to work for. The process that was used revealed that cost saving was the priority, rather than quality of service.



responsibility and the willingness to address difference, or ‘civility’ as Folger and Bush would describe it. These are not values that can be imposed but are arrived at through clear information, choice, inter-agency co-operation and the demarcation of professional roles. Whereas the shift away from adjudication has introduced an element of compulsion in many settings which threatens the principle of voluntariness, researchers and practitioners argue for the importance of process pluralism.<sup>63</sup> I would add that this breadth of choice should extend to opportunities to resolve conflict outside the justice system as well as within it.

The encouragement of mediation across sectors has largely been driven by legislative change. Separate fields of practice have responded and developed but there is little cohesion as a profession. Standards and guidelines are inconsistent and there are different perceptions about what mediation is trying to achieve and how the role of a mediator is to be understood.

In the following chapter I will explore the value of adopting a broader understanding of mediation, separating it from its current close association with ADR, and positioning it instead as a process which can be used to build and maintain community norms and to foster civic responsibility.

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<sup>63</sup> This concept is described in more detail in the next chapter.

## CHAPTER 5 - MEDIATION AS A GENUINE ALTERNATIVE

“Mediation rests on the premise that people have the capacity to make their own decisions about the issues that confront them, that people can and should assess their own risks, abilities, and limitations in making decisions and addressing issues.”<sup>1</sup>

I have argued in earlier chapters of this thesis that mediation demonstrates considerable commonality across the different delivery contexts, both in terms of purpose and principles of practice. These commonalities, however, are relatively unexplored by practitioners who tend to assume that styles, models and approaches differ from sector to sector. As we have seen, the growth of the ADR movement has led to the increasing association of mediation with ADR and civil justice in a way that limits its potential for relationship-enhancing, conflict resolution and results in an emphasis on practical negotiation and settlement. While mediation undoubtedly has a valuable place within the justice system, its application need not be restricted to this setting. In my opinion, the further development of the mediation profession would benefit from a collaborative reappraisal of purpose and practice. I would argue that it is essential to develop a common framework, recognised by all areas of mediation delivery, which stands in its own right, independently of the justice system and other formal processes that place a disproportionate weight on settlement. I am not alone in this view. Acland, for example, has pointed out:

“Our vision of mediation and of the role of mediators and the deployment of their skills has been curiously unambitious. By nestling in our various ghettos we have perhaps overlooked the greater possibilities for what we do. For the last 15 years or so we have been working hard to bring ADR into the mainstream of legal life. The time has now come to go a step further and bring it into the mainstream of public life. We should start by creating an

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<sup>1</sup> Bush and Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 Ohio State Journal on Dispute Resolution 1, 49.

organisation, or developing the remit of an existing organisation, to end the artificial divisions between mediators operating in different spheres so that we start talking to each other -- and learning from each other -- on a regular basis.”<sup>2</sup>

In this chapter I explore the perspectives from which mediation can be viewed outside the ADR context, in which, as Irvine suggests, it is often unreasonably “portrayed as a kind of rogue process: unregulated, private, informal and, potentially, unfair.”<sup>3</sup> In particular I return to Auerbach’s consideration of mediation and its role within communities and explore ways in which this might be relevant today. I argue that its application could extend far more widely into the public domain, though its versatility makes it even more imperative that mediators define what they do with much greater clarity and consistency.

### *Mediation and Community*

In *Justice without Law*,<sup>4</sup> Auerbach explores an ideology of communitarian justice and considers how far it can be applied without the need for formal law. As he describes it, success is dependent on well understood community values that are defined and respected by its members, each of whom is committed to these values because they have an investment in maintaining their community. Since conflict can be destructive of both individuals and communities, finding effective mechanisms with which to resolve it becomes central to the functioning of healthy communities. Membership demands that disputes are proactively dealt with at an early stage and that disputants

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<sup>2</sup> Andrew Acland, ‘From Private Process to Public Engagement’ (2007) *Arbitration* 6, 10 -11.

<sup>3</sup> Charlie Irvine, ‘Mind the Gap: Mediation and Justice’ [www.mediate.com/articles/IrvineC5.cfm](http://www.mediate.com/articles/IrvineC5.cfm) Accessed 13 February 2015.

<sup>4</sup> J. S. Auerbach, *Justice Without Law: Resolving Disputes Without Lawyers* (New York: Oxford University Press, 1983). For a fuller explanation see Chapter 2.

take responsibility for doing so. Auerbach's conclusion is that our preoccupation with individual rights and formal justice makes this more and more difficult to realise. I have already raised the question as to how this might be achieved when, with increased social mobility, communities are much harder to define. Nevertheless, I think it useful to explore ways in which modern concepts of community may be understood, the role that mediation plays and the link that this may have with government initiatives other than those associated with the reforms of the civil justice system.

In the context of community education, Clark attempts to understand what 'community' means. He identifies three fundamental components, those of Significance, Solidarity and Security. A sense of community goes hand in hand with a feeling of belonging or togetherness. "Solidarity," he says "encompasses all those feelings which draw and hold people together – sympathy, loyalty, gratitude, trust ..." <sup>5</sup> and it incorporates shared purposes, implying a state of consensus. 'Significance' is described as the awareness of a valuable role to play within a community accompanied by sentiments of worth and achievement. 'Security' is concerned with safety and dependency both materially and psychologically, without which the community itself cannot survive. Clark states that:

"The strength of community within any social system is revealed by the degree to which its members experience a sense of security, of significance and of solidarity within it." <sup>6</sup>

Conflict, as Auerbach's account demonstrates, is a threat to these components and can result in divisions, the loss of social connection and consequent feelings of insecurity and low self-esteem. Mediation aims to mitigate these threats by providing

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<sup>5</sup> David Clark, *Schools as Learning Communities: Transforming Education* (London: Cassell 1996) 43.

<sup>6</sup> *ibid* 49.

a safe environment in which to address differences. By creating the space for parties both to be heard and understood non-judgementally, the mediation process gives validity to each participant and builds a sense of significance that is not dissimilar to the two themes of empowerment and recognition that Folger and Bush describe. It affords parties the privacy they need to explore their disagreement without fear of reprisal. With its focus on building mutual understanding, mediation encourages a sense of collaboration rather than competition. Folger and Bush also talk about the importance of recognising mediation as a process which promotes values that are as important as those associated with social justice. Mediation, they say, fosters civility and in doing so offers an educational opportunity that builds community. As they put it:

“Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And *that in itself* is the public value that mediation promotes.”<sup>7</sup>

In contemporary society, they continue, people suffer learned dependency, mutual alienation and distrust which results in civic weakness and division. In Clark’s framework this is the result when communities are not functioning well. Folger and Bush observe:

“ ... [p]ersonal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value – and this is precisely what the process of mediation provides.”<sup>8</sup>

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<sup>7</sup> Bush and Folger (2005) 81-82.

<sup>8</sup> *ibid.*

The concept of 'civil society' has its origins in Aristotle's *Politics*<sup>9</sup> where he refers to "koinōnía politikḗ" (κοινωνία πολιτική). He describes a Greek city-state ("polis") which is defined by a shared set of norms and beliefs, in which free citizens are placed on an equal footing, living under the rule of law. The aim of civil society is to achieve common wellbeing or 'Eudaimonia.' Plato also describes the ideal state as being a just society in which people are committed to the common good, and demonstrate this through the practice of civic virtues such as wisdom, courage, moderation and justice.

But do these concepts still exist in contemporary society? In 2010, the Conservative Party manifesto promoted the idea of the 'Big Society' as an ideology which proposed to integrate the free market with a theory of social solidarity that would empower local people and communities, taking power away from politicians. It was based on the idea that by voluntarily contributing to their community, people would invest in it and have some control in shaping it. The concept does present an opportunity to build solidarity, security and significance. Although it was dropped three years later, some of the ideas have nevertheless been developed in other political initiatives. In particular the idea of 'eudaimonia' forms a central part of the Well Being Agenda.<sup>10</sup> This is a cross-party initiative exploring ways to measure the success of society other than through Gross Domestic Product (GDP) and has a specific focus on taking account of the wellbeing of its citizens. A report published in 2014 "lays out the case for using wellbeing as the

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<sup>9</sup> Aristotle, *Politics*, Book 1: 1252a1-6 (335-323 BC.)

<sup>10</sup> Gus O'Donnell, Angus Deaton, Martine Durand, David Halpern and Richard Layard, *Well Being Policy: Executive Summary* (London: Legatum Institute, 2014). The report can be viewed at <http://li.com/programmes/the-commission-on-wellbeing-and-policy> Accessed 02 June 2015.

overall measure of prosperity, and therefore as the yardstick for public policy.”<sup>11</sup> It considers how wellbeing can be quantified using three main measures:

- “• How do you feel (i.e. how happy are you)?
- How do you evaluate your life (i.e. how satisfied are you with your life)?
- Do you feel your life is worthwhile (i.e. the so-called eudaimonic measure)?”<sup>12</sup>

The report states that family life, community life, values, and the environment are crucial social determinants. It is clear that conflict can occur in all these areas and it is not difficult to see, therefore, that it has a direct impact on personal wellbeing.<sup>13</sup> In my view, this is an agenda in which mediation, with its ideological aspirations to promote personal responsibility, empower individuals, restore relationships and encourage social connection, could be well placed.

As well as promoting civility, Folger and Bush outline a second benefit to mediation: the educational opportunity it offers in dealing with conflict constructively. This provides another perspective from which to view the role of mediation. Its educative value goes beyond both the current dispute (i.e. it equips people to deal with conflict better next time) and the individuals involved (it incorporates a sense of shared commitment to the community.) This educative value of mediation is also discussed by Ellen Waldman. Out of the confusion of the debates in the United States surrounding the role and function of mediators, Waldman puts forward an alternative framework which attempts

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<sup>11</sup> *ibid* 1.

<sup>12</sup> *ibid*.

<sup>13</sup> The What Works Centre for Wellbeing was set up as a result of the Commission’s recommendations and is funding research in collaboration with the Economic and Social Research Council into four main areas concerning wellbeing: Cross-cutting; Work and Learning; Community; Culture and Sport. For further information see [www.whatworkswellbeing.org](http://www.whatworkswellbeing.org) Accessed 02 June 2015.

to take account of the role that social norms play in three different mediation models. In the *norm-generating* model, mediators encourage parties to decide their own standards of fairness without imposing norms on them, social, legal or otherwise. “The only relevant norms,” she says, “are those the parties identify and agree upon.”<sup>14</sup> The model implies that the conflict is both specific and individual. It will have very little impact on the community at large, is of little consequence legally, or is one in which there is no societal consensus.<sup>15</sup> She suggests that this approach:

“... is well-suited to conflicts in which the goals of enhancing disputant autonomy and preserving relationships are paramount. In these conflicts, the particular outcome reached is less important than the parties' active participation in its construction. Often, empowerment and relational concerns are primary because the competing goal of ‘doing justice’ through the application of legal or social norms may not be possible, sensible or conclusive.”<sup>16</sup>

In the *norm-educating* model, the parties remain in control of the outcome; however, the mediator will bring relevant social and legal norms to their notice in order to “enhance autonomy” and support well informed decision-making. The model is one that applies particularly well where mediation operates as an alternative to an adjudicated agreement since it draws on features such as legal precedent or case law.<sup>17</sup> The mediator “... is active in ensuring that disputant negotiations are informed by relevant legal and social norms, either by educating the parties himself or by

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<sup>14</sup> Ellen Waldman, ‘Identifying the Role of Social Norms in Mediation: A Multiple Model Approach’ (1997) *Hastings Law Journal* 703 – 769, 718.

<sup>15</sup> An example might be a workplace dispute in which there is a breakdown in communication or a difference in working style.

<sup>16</sup> *ibid* 720.

<sup>17</sup> For example, in family mediation parents remain in control of their own arrangements, but will nevertheless be influenced by the expectations such as that children will spend time with each of their parents or that assets will be fairly divided on the basis of need.



ensuring that they are educated by retained counsel.”<sup>18</sup> Waldman suggests that the significance of this model is in its application to disputes which:

“... invoke norms that embody certain societal conclusions about what is just and unjust and confer entitlements on those who might otherwise remain disadvantaged and marginalized in private bargaining.”<sup>19</sup>

While parties may not necessarily act on these norms, the importance is in being made aware of them rather than making a decision in ignorance.

Waldman’s third model is the 'norm advocating' model, often used in rights disputes that rely on legal and social norms, but where there are grey areas for negotiation. These kinds of disputes benefit from the informality of the mediation environment but are not appropriate to the first two models because:

“... the conflict implicates important societal concerns, extending far beyond the parties' individual interests ... and ... [where] one party is so structurally disenfranchised that allowing her to negotiate away legal rights and entitlements would make the mediator complicit in her continued oppression.”<sup>20</sup>

Mediators using this model facilitate communication and understanding but take active steps to ensure that relevant norms or legislation are built into the agreement and that ethical codes are not breached.<sup>21</sup>

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<sup>18</sup> Waldman (1997) 732.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid* 754.

<sup>21</sup> See, for example, Varda Bondy, Linda Mulcahy, Margaret Doyle and Val Reid, *Mediation and Judicial Review: An Empirical Research Study* (Kent: The Public Law Project, 2009). The researchers examined the use of mediation in judicial reviews conducted in cases where an allegation has been made against a public authority for not upholding obligations or not following due process. The cases examined in the study were largely concerned with individuals who had particular needs (in their health care or educational provision) and who felt that the authority had deprived them of resources to which they were entitled or made decisions that infringed their rights. Working within the framework of legal obligations, mediators nevertheless managed an environment where claimants felt empowered to voice their opinions and all parties were able to contribute to the drafting of more creative, detailed agreements.

These models reinforce several of the ideas under discussion in this and previous chapters: in particular, that people are able to take responsibility for their own disputes and exercise civility when using mediation; that people are capable of reaching fair outcomes and creating their own justice; that mediation can be both educative (i.e. it informs decision-making) and contributive (i.e. it builds and reinforces the values of communities and society). This implies that different kinds of dispute require different processes and outcomes and that participants and practitioners alike have choices to make about what mediation can achieve in their specific situation. Those choices will also affect mediator behaviour and so, I suggest, they still need to be considered alongside the core principles of mediation practice. However, Mayer proposes that these principles, though important, should be viewed as aspirations: they are “tactics or stances we can take, but not essential defining characteristics of who we are.”<sup>22</sup> Instead, he places emphasis on setting up the right process<sup>23</sup> and creating the environment that allows parties to achieve the outcome they are looking for. He encourages mediators to define themselves by their expertise as conflict resolvers:

“Any attempt to define ourselves by what we do - by our methodologies, procedures, or systems of intervention - will inevitably run into the incredibly broad variety of approaches that we take ... But we can, perhaps, identify some elements of a common knowledge base that define our field. While there are areas of particular knowledge we need depending on our particular role and area of expertise, as a field we can identify certain common areas of knowledge that we either have or should seek to have. These common areas include conflict dynamics, negotiation, communication, power dynamics, cultural practices, systems theory, intervention processes, and intervention roles.”<sup>24</sup>

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<sup>22</sup> Bernard Mayer, ‘What we talk about when we talk about neutrality: A commentary on the Susskind- Stulberg Debate, 2011 Edition’, (2011-2012) 95 Marquette Law Review 859, 866.

<sup>23</sup> John Lande, Bernard Mayer, Joseph Stulberg and Lawrence Susskind, ‘Panel Discussion - Core Values of Dispute Resolution: Is Neutrality Necessary?’ (2011-2012) 95 Marquette Law Review 805, 812-816.

<sup>24</sup> Mayer (2011-2012) 868 – 9.

Mayer underlines the role of an expert in conflict resolution which, in practice, may take many forms depending on the situation. Waldman's approach also points to the desirability of having a number of resolution processes on offer that take account of the context, the aims of those involved and any legislative or policy framework to ensure appropriate decision-making.

Both writers, therefore, reinforce the notion of 'process pluralism' which is one that has gained credibility among practitioners and scholars. Carrie Menkel Meadow,<sup>25</sup> building on the work of Lon Fuller who placed great weight on the adoption of the appropriate procedure to meet a particular objective,<sup>26</sup> asks "What human problems are best resolved, handled, or solved by what processes?"<sup>27</sup> She, like Fuller, recognises that "ends or goals depend not only on rationality but on emotions, intuitions, and feelings of what is right or fair."<sup>28</sup> A variety of processes exist, some of which are driven by reasoning, others by interests, yet others by emotion. Some are open, some closed, some led, some facilitated. The key point is in ensuring that parties are aware of the options available to them and can therefore make a well informed choice.

Bondy et al provide a good example of process pluralism in action in their study of mediation in judicial review cases.<sup>29</sup> In this context, the issue of human rights is central, disputes are not about personal relationships (often involving an individual against an

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<sup>25</sup> See generally Carrie Menkel Meadow, 'Peace and Justice: Notes on the Evolution and Purposes of Legal Processes: Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure' (2005-2006) 94 *Georgetown Law Journal* 553 – 580.

<sup>26</sup> See Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing 2002). Fuller examined various procedures including contract, adjudication, mediation, legislation and administration.

<sup>27</sup> Menkel Meadow (2005-2006) 565.

<sup>28</sup> *ibid.*

<sup>29</sup> Bondy et al (2009).

authority) and a judgment is required.<sup>30</sup> Despite this the authors point out that several different procedures are offered within judicial review, with discussions and negotiations, ombudsman, early neutral evaluation and mediation all being identified as separate options within the pre-application protocol. However, even though it is located in a context that is driving settlement, the authors found that mediation offered specific benefits. Their empirical evidence helps to define some of its distinguishing features. It gave aggrieved individuals an active voice and contributed to their sense of procedural fairness in a situation where they can often feel overlooked. The authors of the report state:

“This sense of empowerment can in itself be regarded as a form of positive outcome. Research in this area suggests that procedural justice (process) is often perceived as being as important as substantive justice (outcome) and that satisfaction with both process and outcome can be interrelated. So, for instance, a disappointing result can be more acceptable to a party if it is reached in a way that is perceived as fair, or when a disputant feels heard and understood.”<sup>31</sup>

Mediation gave an opportunity for respondents in the study to exercise some control in the shaping of outcomes and highlighted more options than simply legal remedies. It offered a different, less intimidating environment for dialogue and time to pay attention to detail. Most of all it provided a platform for human interaction.<sup>32</sup> The report concludes that, whereas the opportunity to use mediation in judicial review is quite

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<sup>30</sup> Although the authors observe that because the outcome of cases is so stark - generally rights have been breached or they have not - there is a culture of settlement and this is often apparent at an early stage, particularly where authorities find themselves at fault.

<sup>31</sup> Vardy et al (2009) 38. See also Hazel Genn, 'Tribunals for Diverse Users' (2006) DCA Research Series 1/06, 194 whose research is referred to in this quotation.

<sup>32</sup> For example, Case Study 7 gives an account of a severely disabled woman in a long term NHS facility whose intimate care routine was about to be taken over by a male nurse. Bondy et al state that:

“Marion’s solicitor believed strongly that by meeting her client and hearing her tell her own story the PCT was made aware of the day-to-day reality of her disability and the depth of her concern about who should provide her intimate care. It was suggested that being faced with a human being made all the difference to the PCT’s attitude.” Bondy et al (2009)78.

limited, it can, in a certain number of cases, be very beneficial. The authors make the point that unquestioning enthusiasm for mediation in all circumstances does not win the confidence of sceptics and suggest that:

“... mediation enthusiasts and lawyers alike must each be able to incorporate into their own perspectives the insights gained from the others’ experience rather than set up litigation and mediation as mutually exclusive alternatives one of which is good and the other bad.”<sup>33</sup>

Effective process pluralism is, therefore, dependent on transparency and clarity of definition if disputants are to make good choices about what they want from a particular process.<sup>34</sup>

Other scholars have also attempted to describe multiple purposes of mediation operating outside the justice system. Katherine van Wezel Stone, for example, considers the place of norms specifically within organisations. She proposes three conceptions of dispute resolution in workplaces. In the first, processes such as mediation and arbitration are viewed as ‘techniques’. They provide a faster and cheaper way of handling disputes and the goal is to avoid conflict. In the second, the ‘public policy view’, mediation and arbitration are seen as vehicles by which policy and law can be implemented on a more informal basis. Similar to Waldron’s norm educating model, third party interveners have a role in ensuring that substantive rights are not

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<sup>33</sup> *ibid* 89.

<sup>34</sup> The attempt to make a clear distinction between the different processes has been made in other jurisdictions. In the Netherlands, for example, there is a recognition that factors such as the level of escalation of a particular conflict or the nature of the dispute (i.e. whether personal or commercial) have an influence on the most appropriate resolution tool. Judge Machteld Pel describes how court based mediation programmes formed part of a wider approach which included an initial conflict diagnosis before users were directed to a particular resolution process. For further information, see Machteld Pel, *Referral to Mediation: A Practical Guide for an Effective Mediation Proposal*. (The Hague: SDU Uitgevers, 2008).

lost. The final concept is that of self-regulation. Dispute resolution processes are seen as:

“... method[s] for applying norms and resolving non-justiciable disputes that arise within a self-regulating, normative community. In the self-regulation view, the distinctive value of arbitration [and mediation] is not that it can enforce laws, but that it can enforce fairness norms that are not presently embodied in law. This view is based on the insight that face-to-face communities generate their own fairness norms.”<sup>35</sup>

This last perspective places value on the use of mediation in establishing and maintaining the cultural norms of a community, in this case within the workplace. Saundry et al also point out that perceptions of fairness, justice and trust, together with organisational support, are crucial to the success of these kinds of informal processes. Once again, ‘justice’ is understood to be a concept that applies not only to outcome but to process and the quality of interaction:

“Justice does not simply relate to the outcome of a decision (distributive justice) but critically to the way in which that decision was arrived at (procedural justice) and how this was dealt with by managers and/or colleagues (interactional justice). Accordingly, where decision and actions are seen to be ‘just’, employees are more likely to co-operate and reciprocate with increased discretionary effort.”<sup>36</sup>

Wezel Stone also makes the connection between the delivery of ‘justice’, as it is described above, and its impact on ‘organizational citizenship behavior’ (OCB). Today, providers of workplace mediation training and dispute resolution services<sup>37</sup> set out a philosophy which is not just about training mediators to facilitate disputes within the organisation, but supports managers and the whole of the organisation to promote a

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<sup>35</sup> Katherine van Wezel Stone, ‘Dispute Resolution in the Boundaryless Workplace’ (2000-2001) 16 *Ohio State Journal of Dispute Resolution* 467 – 489, 470.

<sup>36</sup> Richard Saundry, Paul Latreille, Linda Dickens, Charlie Irvine, Paul Teague, Peter Urwin, and Gemma Wibberley, *Reframing Resolution – Managing Conflict and Resolving Individual Employment Disputes in the Contemporary Workplace* (London: ACAS Policy Discussion Papers, 2014) 11.

<sup>37</sup> For an example, see CMP Resolutions Ltd [www.cmpresolutions.co.uk](http://www.cmpresolutions.co.uk)

culture that is confident to deal with conflict. In other words, communities and organisations can foster norms that in themselves recognise and acknowledge difference and encourage people to address it positively.<sup>38</sup> The same possibility exists within what Wenger has called ‘communities of practice’, or “groups of people who share a concern or a passion for something they do and learn how to do it better as they interact regularly.”<sup>39</sup> Similarly, in their book *Change, Conflict and Community*, Kenton and Penn explore at some length the idea of the workplace as a community of practice which is “effective in enabling people to learn through change and conflict” and is “dependent on the self-determination, fluidity and openness” of its members.<sup>40</sup>

The value of establishing these norms is that, if they work effectively and, more specifically, if they are developed in relation to the managing of conflicts, dispute resolution becomes something more like dispute prevention. Martin Burns describes the increasing use of early intervention strategies by industry bodies in an effort to avoid the escalation of minor disagreements into disputes and to manage difficult commercial relationships. This is a good example of contemporary movements to embed cultural norms within communities of practice, particularly in the construction industry, which can be supported by early interventions such as mediation.

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<sup>38</sup> The CMP Resolutions website states:

“A conflict-competent workplace minimises the cost of workplace conflict.

Taking a strategic approach means having the values, aims, processes and skills you need to cut the financial and human costs of conflict. If you plan for, and manage, your dispute resolution activities, you’re better able to identify what works, where you’re losing money, and where to target your activities for best results.

If you introduce conflict management strategies which are cost-effective and employee-friendly, you will manage and retain your key talent, and ensure managers and leaders play their part in building strong employee engagement and productive teams.”

[www.cmpresolutions.co.uk/conflict/competence](http://www.cmpresolutions.co.uk/conflict/competence) Accessed 17 February 2015.

<sup>39</sup> Etienne Wenger, <http://wenger-trayner.com/wp-content/uploads/2013/10/06-Brief-introduction-to-communities-of-practice> Accessed 17 February 2015.

<sup>40</sup> Barbara Kenton and Suzanne Penn, *Change, Conflict and Community: Challenging Thought and Action* (Oxford: Elsevier 2009) 148ff.

Recognising that “the reality to commercial relationships is that conflict is always possible”, Burns talks about the main objective of dispute prevention being “to focus minds on how potential problems will be resolved, and doing it early enough to avoid escalating into full blown disputes.” He observes that:

“[T]here is an increasing desire for culture change in the way disputes are handled. I see more and more evidence of attempts by decision makers and influencers within the construction industry to develop innovative techniques for managing relationships, reducing conflict and ‘nipping in the bud’ issues that could otherwise snowball their way into courts. There are a number of early intervention techniques that are currently being explored and adapted by industry bodies. Contracts are being amended to include ‘rules of engagement’ for dealing with potential conflicts as they arise. Procedures are being written into contracts with the intention of encouraging parties to sort out their problems straight away, and not let them drift into positioning and eventually entrenchment.”<sup>41</sup>

It is interesting to observe that the developments within the trading sector seem to mirror the efforts of the original merchant guilds which successfully created and implemented their own trading rules. Within the education sector too, the legislative changes contained within the Children and Families Act (described in Chapter 4) present the opportunity to establish a norm of early prevention. ‘Disagreement Resolution’, as it is described in the new SEN Code of Practice, is distinguished from mediation as an early, informal and completely voluntary option that can be used at any stage. The distinctions being made in the use of these two different terms are not concerned with process or structure but with the stage at which these processes are used.

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<sup>41</sup> Martin Burns, ‘Nip it in the Bud’, (2014) 164 New Law Journal 7634, 15. Martin Burns is head of ADR Research and Development, Royal Institute of Chartered Surveyors.



## *Conclusion*

In this chapter I have explored ways of understanding mediation from different perspectives, particularly as a process that can be used within communities of work, communities of practice and communities of interest, to support and build the fundamental elements of solidarity, significance and security. Through party determination and individual validation, mediation is a process that supports people to participate in the creation and implementation of community norms that can be experienced as just and fair. Critics such as Hazel Genn<sup>42</sup> have argued that mediation within the ADR context is seen as providing an alternative to adjudication and is now largely concerned with settlement. In that sense it should be described more accurately as *another* alternative. However, considering the use of mediation within communities as a means by which to establish and maintain norms of justice and fairness provides a genuine alternative to civil justice. Described in this way, mediation can contribute to the kind of culture change to which recent governments in the UK have aspired. This is not to say that additional support measures are not also required or that mediation can replace the need for trial and adjudication where norm generation or education are inappropriate. In my view these are perspectives that present a more rounded view of mediation and its ideological aspirations as well as its practical application. For that reason they are worthy of more detailed exploration by the mediation community.

In the preceding chapters, I have given an historical account of the development of mediation, particularly over the last forty years with the advent of the ADR movement. I have considered the views of scholars whose views reflect a variety of approaches

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<sup>42</sup> Hazel Genn, 'Civil Mediation: A Measured Approach?' (2010) 32 (2) *Journal of Social Welfare and Family* 195ff.

to understanding the purpose and function of mediation, ranging from its use as a practical, problem-solving tool to one with ideological aims to resolve conflict and repair relationships. I have described the legislative changes beginning in the mid-1990s that have resulted in a close association between mediation and settlement. Finally, I have suggested that there would be benefit in re-examining the use of mediation in communities as a way to foster well-being and build a sense of significance, solidarity and security in the face of conflict and disagreement.

In my own study, I seek to explore these ideas further by examining the views of experienced practitioners working across different contexts. I want to see how mediators understand the purpose of what they are doing, whether they see themselves as problem solvers or conflict resolvers and how they position mediation in relation to justice and law. Lastly, I want to discover how far there are core elements of purpose and practice that are common to the delivery of mediation in any context.

## CHAPTER 6 - THE RESEARCH METHODOLOGY

### *Introduction*

This chapter outlines my main aims in conducting the empirical stage of my research, the methods I used and my reasons for taking the approach I did. I describe how I used a pilot phase to test the decisions I had made and to refine my research materials. The chapter incorporates an outline of what happened when I conducted the fieldwork itself and concludes with my reflections on both the effectiveness and the limitations of adopting the approach I did.

The basic aim of my research is to identify the similarities and differences in the practice of mediation across a variety of fields of delivery. I am seeking to establish how far there is an understanding of the practice of mediation, its purpose, the way it is delivered and the principles by which it is governed that would be recognised and shared by mediators regardless of the context in which they work. While many writers have debated and defined the process and principles of mediation,<sup>1</sup> little research has been conducted in which the views of practitioners have been canvassed. Some writers have sought to define models of working and to give a picture of how these models might work in practice.<sup>2</sup> Others have identified the impact that personal style and approach can have on the mediation process.<sup>3</sup> However, what is not clear is how

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<sup>1</sup> See generally Chapter 2 of this thesis which refers to a number of writers on this subject.

<sup>2</sup> See, for example, the work of Bush and Folger (2005) who outline the 'Transformative Approach', and Winslade and Monk (2000) who define a 'Narrative Approach'. See also Deborah M. Kolb (ed), *When Talk Works: Profiles of Mediators* (San Francisco: Jossey-Bass, 2001) and Eric R. Galton and Lela P. Love (eds), *Stories Mediators Tell* (Chicago: American Bar Association, 2012).

<sup>3</sup> Leonard Riskin (1994), for example, identifies different 'orientations' that mediators might choose to work with: adopting a 'narrow' focus or a 'broad' focus; working with an 'evaluative' approach or a 'facilitative' approach.

far mediators in general draw on these styles and models and incorporate them into their practice.

Some commentators have examined the views of small samples of prominent practitioners who describe what happens in mediation.<sup>4</sup> However, there is little empirical evidence that sheds any light on whether their experiences and insights are generally shared with practitioners in the field. As has already been seen, the profession of mediation is still in its infancy, and the dialogue across the various areas of provision is limited. What is more, after training, the requirement to regulate or monitor individual practice is almost non-existent.<sup>5</sup> As a consequence, we know very little about what mediators actually do or say when working in the room with conflicting parties. Neither do we know how far context influences the practice and delivery of mediation, how far individual style and approach have an impact on how it is delivered or how it is experienced by those participating in it.

While this last aspect goes beyond the scope of my research project,<sup>6</sup> the other gaps identified above were ones which I hoped to begin to address through the fieldwork. My main aim was to speak to a sample of practising mediators working across a spectrum of mediation activity in order to build a picture of the delivery of mediation and to discover how far mediators working in different contexts have the same view of what they are aiming to achieve. How do they set about fulfilling those aims? What styles and approaches do they draw on? And how far does the context influence

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<sup>4</sup> See, for example, the work of Marian Roberts (2007), Bowling and Hoffman (2003) and Lang and Taylor (2000),

<sup>5</sup> Family mediation is the only field of delivery where the requirement for supervised practice is a stipulation for membership of a professional body.

<sup>6</sup> There is a huge lack of research into users' experience of mediation that is vital to the sustainability of the profession.

these features? I was particularly interested in the question: How far are the purpose, behaviour and approach of mediators influenced by the context in which they work or are these aspects determined by individual style or personality?

Therefore, my purpose in conducting the interviews was to build up a picture of mediation as it is currently practised by drawing on the experience of a reasonable cross-section of mediators. In my study, I conducted a series of semi-structured telephone interviews in order to gather views from respondents about their practice. It should be noted from the outset that this research did not include any observation of actual practice and therefore relies on mediators' own perceptions and memories of what they do and say while they are mediating.

In conducting these interviews, I was acutely aware of my own influence, as a professional mediator myself, on the nature of the questions asked and my interpretation of the responses. I was conscious of the risks associated with conducting research in one's own area, particularly in making pre-judgements and losing objectivity. What is more, I was conscious that I have practised in some of the areas of mediation delivery I wanted to examine, but not all. While it can be helpful to have inside knowledge in drawing up the right questions to ask and engaging respondents, I realised I would have to be alive to the dangers. At the same time I was keen to discover more about other areas of practice and respondents' understanding of them.

These considerations meant that I would be using an 'interpretative' model. Thomas (2009)<sup>7</sup> defines this approach as one which recognises the world as being different for

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<sup>7</sup> Gary Thomas, *How to do your Research Project* (London: Sage Publications 2009) 75.

each of us 'with words and events carrying different meanings in every case.'<sup>8</sup> He says that working in this way requires an interest in people and the way they inter-relate, 'what they think about the world and how they form ideas about the world.'<sup>9</sup>

I concluded that this approach was the most appropriate for my research. While I realised that I would need to be very careful that I remained fair and balanced, both in the questions I asked and the way I asked them, I hoped that my experience of mediation itself, with its emphasis on impartial, non-judgemental working, would help me to achieve this. In a semi-structured interview, I could participate in a conversation with respondents and gain insight into their understanding of practice, establishing rapport by using my own experience and the skills that I draw on as a mediator.

The data I collected was therefore mainly qualitative in nature although that did not exclude quantitative analysis of the materials I collected. I wanted to conduct interviews with a sizeable sample of mediators so that I could discern patterns that linked, for example, a particular context to a particular style of working. Oppenheim discusses the importance of identifying different types of variable (experimental variables, dependent variables, controlled and uncontrolled variables)<sup>10</sup> in advance, and suggests using these to inform the design of interview questions before starting the pilot phase to test their validity.<sup>11</sup> The main experimental variable in this research project was the context in which the respondents were working. However, I could also

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<sup>8</sup> As distinct from a positivist approach which specifies that we can learn about the world through observation and measurement. This approach states that, by following the scientific method, we can isolate variables and identify differences, develop and test hypotheses and draw conclusions.

<sup>9</sup> Thomas (2009) 75.

<sup>10</sup> A.M. Oppenheim, *Questionnaire Design, Interviewing and Attitude Measurement* (London: 2<sup>nd</sup> edition, Continuum International Publishing Group 1992) Chapter 2.

<sup>11</sup> *ibid.* See Chapter 4: Pilot Work and Chapter 7: Questionnaire Planning.

see that certain variables might have an influence on respondents' views: for example, whether they worked full time as mediators, whether their clients paid them to mediate for them, and what professional background they came from before working as a mediator. I therefore determined that the first part of the interview would consist of a limited number of background questions designed to provide biographical information about respondents. The second part of the interview consisted of a series of more open-ended questions about mediation practice which allowed respondents to consider and reflect on their practice.<sup>12</sup>

### *The pilot interviews*

Before embarking on the main body of the research, I drafted an interview schedule with a view to conducting a small number of pilot interviews. The main purposes of the pilot interviews were to ensure that I was asking the right questions, eliciting information of relevance to my research and ensuring that these questions were properly understood by respondents. I wanted to see whether it would improve the quality of the interviews if I gave respondents sight of the questions beforehand. I wanted to find out whether it was feasible to conduct the interviews over the telephone and transcribe the results. There were a number of other questions to consider too: How structured should the interview be? Would a semi-structured approach encourage respondents to talk more freely about their work and motivation? What role ought I to play in the interviews? How could I avoid the risk of my influencing people's the responses? I recognised that there was a balance to be struck between being responsive to answers, prompting respondents and putting my own ideas into people's

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<sup>12</sup> The interview schedule is reproduced in Appendix A.

heads. I wanted to find out how long the interviews would take bearing in mind the need to transcribe them. Finally, I wanted to get some feedback from respondents at the pilot stage about their experience of the interview so that I could amend questions in the light of what they had to say.

I approached eight practising mediators who were known to me and invited them to participate in the pilot stage. Two mediators were drawn from each of the practice areas that I wanted to examine in the main fieldwork: family, civil and commercial, community and workplace. They were all busy practitioners who were mediating regularly and whom I knew personally. With their wealth of experience they were exactly the kind of people I wanted to interview in the main part of my study.

Questions in the draft interview schedule were divided into two sections: Biographical Data and Practice Questions. The Biographical Section covered areas such as the training respondents had received, their area of work, whether mediating was their substantive role and their previous professional background. In the Practice Section, I wanted to find out how respondents understood the purpose of what they were doing, what they were aiming to achieve, how they approached mediation, and how the principles of mediation worked in practice. This section used more open-ended questions to invite reflection on respondents' current practice and included a generic question concerning the feasibility of mediators working to the same code of practice, regardless of their areas of practice.

Two immediate difficulties presented themselves. As I conducted the pilot interviews, I realised that they took far longer than the thirty minutes I had anticipated. Secondly, I found that the 'multiple choice' questions I had formulated were difficult to put to



respondents unless they had the choice of answers in front of them. This led me to think that I should send them the questions in advance, although I didn't want to stifle respondents' spontaneity or make the conversation too stilted. I decided therefore to refine the questions and to make them more focussed. I also decided to send the questions in advance to half of the pilot group in order to determine how much difference that made. I suggested to the other half in a covering letter that a pen and paper would be helpful in the interview.

I sent a covering letter to all eight respondents outlining the nature of the research, assuring them that the interview was confidential and that it would be conducted according to the ethical standards laid down by the University. I also informed them that the interview would be recorded. (For this purpose, I purchased a digital voice recorder which plugged directly into the telephone line.) My intention was to use voice recognition technology in order to convert the downloaded recording into text. I hoped that, with some editing, I would be able to process the material efficiently in this way.

I conducted the eight interviews. With the first four respondents I did not send the questions in advance but simply read out the multiple choice questions during the interview before asking them to comment. Feedback from these respondents suggested that they were unclear about what I was looking for and what the questions were driving at. Two commented that the questions could be more succinct and focussed. For example, in Question 6 I asked 'Which factors are most influential in achieving a successful outcome?' and included a list of factors to choose from. One respondent recommended having more open-ended questions rather than providing multiple choice answers and expressed the view that sending the questions in advance would be beneficial. Another respondent felt she could have done with time to reflect

because some of the questions where she was asked to prioritise were too difficult to answer on the spot.

I wondered myself whether my interview technique contributed to the confusion that people experienced. It can be difficult to determine when one should prompt or summarise in order to draw people out. I found quite quickly that it was very easy to get drawn into in conversation, particularly if a respondent said they had not understood what I was asking or needed further explanation. I realised I needed to strike a balance between using interview skills to establish rapport and encouraging respondents to express themselves freely while maintaining an objective position as a researcher. In terms of the questions themselves, I was pleased to find that they produced a great deal of valuable information of the kind that I was seeking. However, I felt uncomfortable reading out the multiple choice answers and wanted to find a way to improve this.

For the second group of respondents, I made some changes, refining the questions themselves and reducing their number. I removed the multiple choice element of Question 1 in the Practice Section, asking instead a simple open-ended question: 'What is the main purpose of mediation?' I thought that sending the questions in advance would go some way to address my concerns about a lack of clarity. I also felt clearer in my own mind about what I was asking and when it was appropriate to summarise and prompt in order to elicit more information without engaging too much in the interview and expressing my own views.

Feedback from the second group of respondents was on the whole more positive. None complained about the clarity of the questions although most said they found that

some were difficult to answer. In particular, being asked to prioritise the principles of mediation proved to be challenging and many did not provide a clear response. I considered the question again and concluded that, while it might not be useful to ask people to number the principles from 1 to 8, the question had nevertheless yielded valuable insights and had encouraged respondents to think carefully before answering. In my view it was therefore worth retaining. On the whole the second group thought the questions were clear though there was sometimes confusion about terminology, especially where this derived from my own area of practice within family and workplace mediation. For example, I had used the term 'collaborative working' as a principle of mediation. For one respondent working in the community sector, this meant inter-agency working. Similarly, the principle of 'respect' had associations with the 'Respect Agenda'<sup>13</sup>. Another respondent misunderstood 'party determination'. All this led me to define some terms more clearly.

I also noted that, where respondents had clearly prepared their answers beforehand, this did not seem to result in any lack of spontaneity on their part. Other respondents who had glanced at the questions prior to the interview said that their first impression was that the interview would be quite dry but that it had been more interesting than they expected. One person commented that the interview had also helped him to reflect on his practice and that he felt had benefitted from it. This feedback led me to think that I had improved my approach to the interview. For my part, although I was not

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<sup>13</sup> The Respect Agenda was a government initiative launched in September 2005 by Tony Blair when he was Prime Minister. He described it as being about "putting the law abiding majority back in charge of their communities". Its aim was to help central government, local agencies, local communities and citizens to work together to tackle anti-social behaviour more effectively.

entirely comfortable reading out questions that people had in front of them, I could see that this had helped with the remaining multiple choice questions.

In terms of the technical aspects of recording and transcribing the interviews, the digital recorder worked extremely well. However, the voice recognition technology was a disaster, producing text that can only be described as 'gobbledygook' and this was quickly abandoned. On reflection, however, I found there was a huge value in transcribing the conversation manually since it necessitated listening to the interview for a second time in greater depth and giving people's comments more consideration.

The length of the interviews in the pilot phase as a whole varied between 40 and 70 minutes. Though they were longer than anticipated, I was happy that they had produced qualitative material that was both relevant and useful even if the questions could be refined further. The amount of time needed to conduct and transcribe the interviews made me think that I needed to keep the number of interviews in the main stage of the study under review.

When I started to transcribe the interviews, I took a literal approach, writing down respondents' answers word for word. However, I quickly discovered that this led to a huge quantity of superfluous detail and was very time consuming. I concluded that I would need to exercise my own judgement about what to include, paraphrase, omit or write out *verbatim*. I realised that there were several things I could do to improve the transcriptions, including summarising factual information, omitting unnecessary detail and repetition, disregarding colloquialisms and only transcribing *verbatim* where a respondent had expressed something cleverly or said something that was particularly

interesting, important or significant. I determined that quality rather than quantity should be my main priority in transcribing future interviews.

The pilot phase therefore provided a number of valuable lessons as I approached the main body of the research. It made me feel much more confident about conducting the interviews and I felt that the questions worked well. The revisions that I made to the interview schedule in the light of the pilot work and the feedback I received from respondents helped to make the questions more focussed and clearer. Conducting the pilot interviews also helped me to improve my own approach to the interviews and to reflect upon the skills I would need to conduct them effectively. I realised that it was important to strike a balance between sustaining respondents' interest and maintaining my objectivity as a researcher. But the semi-structured approach seemed to work well and it was clear that it was useful for participants to have some information in advance. Given the length of some interviews, I realised that I would have to make greater efforts to manage time better and to limit the number of interviews to make the research manageable.

### *The fieldwork*

Another important consideration was to ensure that the interviewing conformed to the appropriate ethical guidelines. I needed to give respondents a clear idea of what the research was setting out to achieve, what kind of commitment it would require on their part, how the information would be used and how it would be stored. I consulted Birmingham University's Code of Practice for Research and submitted my application for approval to the University's Ethical Research Committee. I was aware that respondents would want to be assured of the confidentiality of the interviews,

particularly since this is such an important principle within mediation practice itself. It would also be important for them to make a free choice to participate and to withdraw at any stage if they wished. I therefore decided first to approach respondents by email inviting their participation. On receiving an expression of interest, I sent a covering letter with general information about the research project. Once respondents had agreed to go ahead, I scheduled an interview time with them and sent a document giving a general outline of the content and of the questions with a multiple choice answer.

My aim in conducting the main body of the research was to interview practitioners from across a spectrum of mediation contexts. In light of my experience in the pilot phase, I decided that a sample of between fifty and sixty respondents would be manageable. I also wanted to ensure that I had a good mix of mediators from the community, family, workplace and civil / commercial fields in particular and that the respondents formed, as far as practicable, a representative cross-section of practising mediators.

Deciding how to select the respondents for the fieldwork posed a considerable challenge, however. From the outset it was clear that it would be very difficult to obtain a representative sample because the mediation profession is so disparate. I decided, as an initial step, to approach the four national bodies that I had contacted earlier<sup>14</sup> to ask if they would provide a random sample of their practitioner members whom I might contact. These national bodies were the College of Mediators, the Civil Mediation Council, the Scottish Mediation Network and the Mediators Institute of Ireland. By approaching these bodies, I could attempt to stratify the sample to some degree since

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<sup>14</sup> The details of my study of these four organisations are given in Chapter 4.

the criteria for membership of those organisations meant that they had undergone a recognised training course, had substantial experience in mediating and were in current practice. These are recognised standards within the mediation profession and also met my own criteria for the type of mediator I wished to interview. In addition, all of these organisations draw their membership from a variety of sectors. I also felt it would be beneficial to seek the support of these national bodies in conducting the study.

When I approached the organisations, I discovered various hurdles that needed to be overcome. The College of Mediators was initially concerned about handing over contact details of its members because of data protection and preferred to contact respondents initially themselves, in effect acting as a 'go-between'. However, I felt that this would have undermined the independence of the research and the representativeness of the sample. This was addressed when I realised that the annual membership renewal form specifically asks a question about willingness to participate in research. The College therefore provided me with a list of those members who had previously indicated in general terms that they were prepared to be involved in research and I was able to take a random sample from this list.

I found that both the Mediators Institute of Ireland and the Scottish Mediation Network operate systems that made my approach to their members relatively easy. Registers are published on-line with contact details of practising mediators, their area of work and their level of experience. I was able to make random selections of mediators from both of their websites ensuring a good cross-section of practitioners from different contexts.

Finding respondents from the Civil Mediation Council proved more difficult since membership tends to be by organisation rather than by individual. The organisations listed as Accredited Mediation Providers on its website supply a named contact. I wrote to several of these contacts but none responded. Eventually I was able to engage respondents from this sector by approaching mediators whom I had identified through the websites of these providers on an individual basis.

This left two important groups under-represented in my sample: community mediators and in-house workplace mediators.<sup>15</sup> I approached the Midland Mediation Network<sup>16</sup> and CMP Resolutions<sup>17</sup> and they agreed to provide me with names of mediators with whom they were in contact or had trained.

The response rates from those I invited to participate were somewhat disappointing. Table 1 gives the number of invitations to mediators broken down by organisational affiliation and the level of response. I had chosen to make the first approach by email since, for the majority of the mediator population, this would be their most regular form of communication. However, one limitation of email is that it is not always possible to know whether a message has been received or blocked, whether it has been received directly by the intended recipient or whether the email address supplied is up to date. Two people replied to say that they were no longer practising as mediators and therefore could not take part. There were no responses from anyone specifically

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<sup>15</sup> Individuals who have been trained to work within their organisation as mediators, alongside their substantive role.

<sup>16</sup> An informal affiliation of community mediation services operating in the Midlands area.

<sup>17</sup> A private company that provides mediation training to organisations wishing to establish their own in-house facility.



declining to take part. For the rest, that is 34 of the 85 mediators that I approached, I simply had no reply to my initial email.

**Table 1: Response rates according to organisational affiliation**

<i>Mediation Organisation</i>	Number of invitations	Number of responses	Response rate %
<i>College of Mediators</i>	25	14	56
<i>Civil Mediation Council</i>	16	12	75
<i>Mediators Institute of Ireland</i>	20	8	40
<i>Scottish Mediation Network</i>	10	4	40
<i>CMP Resolutions</i>	9	8	89
<i>Midland Mediation Network</i>	5	3	60
<b>Response rate</b>	<b>85</b>	<b>49</b>	<b>58</b>

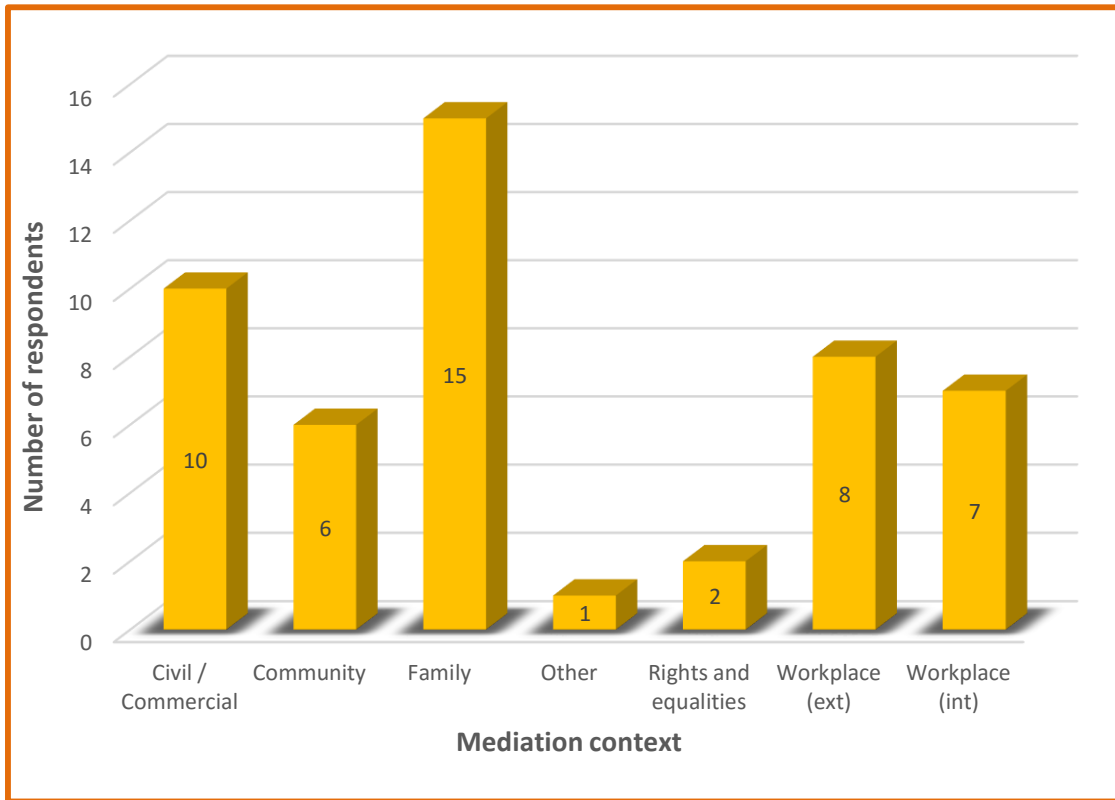
### *Profile of the Sample*

My initial aim had been to conduct interviews with a sample that contained a good spread of mediators working in the four main areas: family, community, civil/commercial and workplace. For the most part, this objective was achieved. Although the number of practitioners working solely in the community sector was under-represented, several of those now mediating in another primary area of practice had

undertaken their initial training in community mediation, before moving on to work in other fields. Some were still involved in delivering community mediation as their secondary or tertiary field of practice. I was therefore satisfied that the views of community mediators were adequately represented in the sample.

The chart below shows the composition of respondents broken down by their primary area of mediation practice. For the purposes of analysis, I divided the workplace mediators into those working internally for their organisation and those working externally, that is, going into the organisation when called upon in an *ad hoc* capacity and being paid accordingly. I felt these two categories would have different experiences of mediation practice which might influence their responses. It is important to note that this chart shows only the primary area of mediation delivery. While 20 respondents worked solely in one field, the remaining 29 worked either in two fields of practice (14 respondents) or three or more fields of practice (15 respondents). It was helpful to have such a large percentage of respondents with varied experience since my main research question concerned the similarities and differences across contexts. Three of the respondents I approached were primarily mediating in contexts other than family, workplace, community or civil / commercial mediation. Their areas of work (human equalities and medical disputes) were more specialist. I felt that this was a benefit since it widened the scope of the responses further and persuaded me to add these two categories to my original four.

**Figure 2: Respondents by primary area of mediation practice**

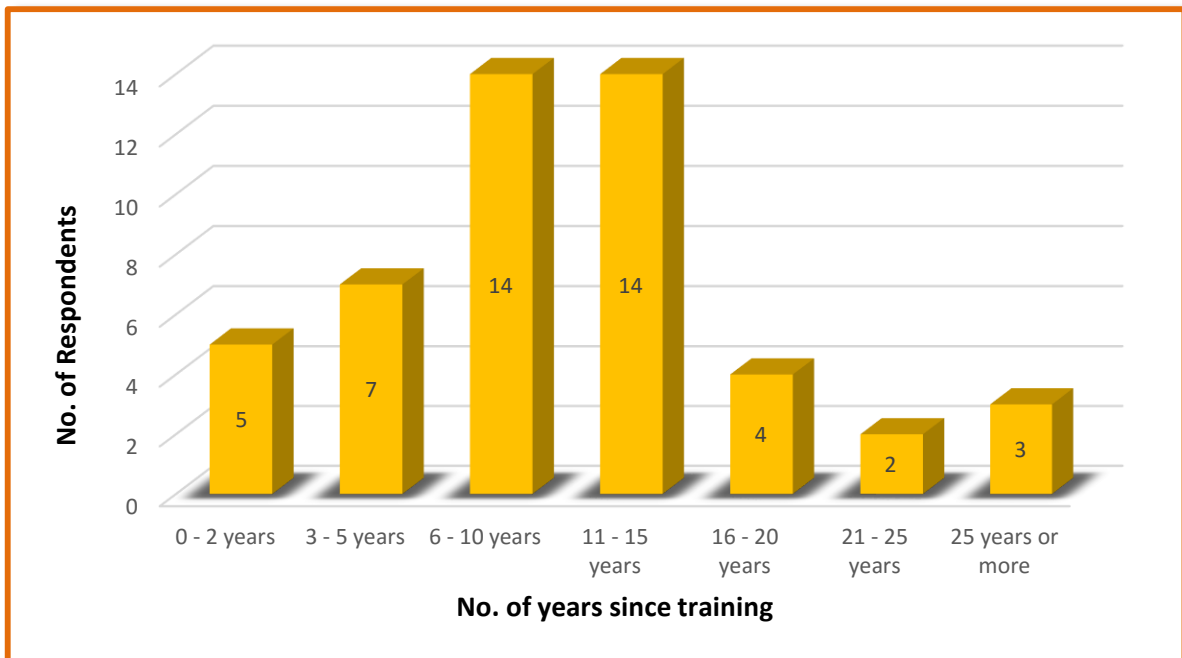


In the final sample, 35 respondents (71 per cent) were working in the field of dispute resolution as their main occupation. This classification is not restricted to mediating since many practitioners develop a portfolio of services which extends to training, conflict coaching and supervising. Of those not working in dispute resolution as their main occupation, seven were working as internal workplace mediators and were therefore mediating alongside another substantive role. A sizeable majority of respondents in the sample, therefore, spent all of their time working in the field of dispute resolution in one way or another.

My aim had been to talk to practitioners with a significant level of experience and one question I asked was when they had received their initial training. The great majority said that they had trained over five years earlier and some had been in practice for

over 25 years. The chart below shows the number of years since training of the final sample.

**Figure 3: Time since initial training of respondents**



I also gathered information from respondents on how the kind of mediation in which they were involved was funded and whether it was an alternative to a formal judgement, such as in a court of law or a tribunal. 10 per cent of respondents said that mediation was not a direct alternative and a further 31 per cent said that this was sometimes the case. For 59 per cent of respondents, therefore, the mediation they deliver is a direct attempt by parties to settle disputes before an adjudicated outcome is imposed. Roughly a third of practitioners (almost exclusively in the family and commercial sectors) worked on cases where the parties themselves funded the mediation. For other respondents, the mediation was publicly funded by the state or a local authority, or was resourced by their organisation. For the remaining two thirds, therefore, mediation was free at the point of delivery to the user.

It is right to acknowledge, in concluding this chapter, that the sampling procedures I adopted had certain important limitations. It was not straightforward to select a representative sample and approaching the various organisations proved to be rather messy and unsystematic. Although I had endeavoured to use textbook sampling procedures, this proved to be very difficult in practice, largely because of the way the mediation profession is organised and because the national bodies do not have complete records of the mediator population. This made it impossible for the sample to be truly random or representative.

While the procedures I adopted had their limitations, I considered that I managed to achieve a good cross-section of mediators working in different sectors. The interviews also produced a rich body of qualitative material about practitioners' views in civil and commercial, workplace, community, and family mediation, several of whom worked across more than one area of practice. It was particularly important to include these mediators since they were well placed to talk about the central question to my research - the differences and similarities in practice across sectors. My sample also included mediators who had experience in more specialised fields such as Special Educational Needs, Disability Conciliation, Health Mediation and Peer Mediation. While these areas of practice were not my original focus, some useful insights emerged from these interviews. Even within sectors, there was a wide mix of experience. Within the civil and commercial sector, for example, the sample included respondents who were mediating in settings as diverse as small claims, the construction industry, religious and political conflict and disputes of huge financial significance within the oil industry.

## CHAPTER 7 - THE PURPOSE OF MEDIATION

In chapter 3, I examined the literature that deals with the meaning and purpose of mediation. From one perspective, mediation is seen as a means by which to address the potentially damaging effects of conflict by building understanding and restoring relationships. At the other end of the scale, mediation can be seen as a problem-solving exercise that enables people in dispute to reach a fair settlement by agreement. A central question is whether either of these two purposes necessarily excludes the other. In this chapter, I explore that issue further by examining the views expressed by the 49 practitioners in my sample who worked across diverse areas of mediation delivery. To my knowledge, this is the first empirical study of its size in which the views of practising mediators have been gathered and compared in this way. At a time when the growth of mediation is increasingly subject to external influences, these views from practitioners concerning the purpose of what they do, and the principles to which they work, are crucially important.

In the interviews I conducted, I wanted to discuss respondents' views on what mediation is trying to achieve, how far this varies from context to context and what they would regard as a successful outcome. Linked to these questions, respondents were also asked to contribute their observations of how parties in dispute experience conflict. My intention in asking these questions was to build a picture, from a practitioner perspective, of how far perceptions of the purpose of mediation vary. Is it, in essence, the same across different fields of mediation delivery?

In this chapter, I set out the findings from these interviews and argue that respondents understand the practice of mediation as one which serves many purposes. Their

responses reflect perspectives of mediation both as an ideology and a practice and they highlight a variety of positions within this spectrum. There were marked similarities and differences in perceptions of the purpose of mediation. It is clear that context influences purpose, although I shall argue that my findings show that this is just one of a number of factors that have an impact. Not least among these is the relationship between the disputing parties, a factor which was often referred to by respondents. The importance of improved communication was a frequently recurring theme in the interviews, especially highlighted in situations where the parties are engaged in an ongoing relationship. The opportunity that mediation offers to repair and rebuild future relationships was often seen to be central. However, even where this was not the case, respondents recognised that an acknowledgement or an apology can be a vital element of the mediation which can prove to be a turning point.

These findings led me to conclude that the parties themselves, their expectations of the process and their definitions of success or otherwise are far more influential than the context. While certain fields might lend themselves to particular kinds of relationships<sup>1</sup>, this does not necessarily dictate what mediation might achieve or the nature of the exchange between parties engaged in mediation. For example, a commercial mediation can often be characterised as a ‘salami slicing’<sup>2</sup> exercise. In reality it may afford a genuine opportunity for exchange and understanding, and pave the way for a more effective working relationship. On the other hand, a workplace

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<sup>1</sup> The commercial context, for example, typically involves a business relationship between companies or between consumers and suppliers. The workplace context revolves around working relationships, whether between colleagues, managers or employees.

<sup>2</sup> A term frequently used to describe the process of arriving at a financial settlement through principled negotiation, by gradually decreasing the gap in the offers made by parties. The neutral third party, in this case a mediator, carries the offers backwards and forwards between parties until agreement is reached.

mediation, where parties often need to work together in future, may result in no more than an 'agreement to differ' and a tentative commitment to act professionally when their paths cross in future.

From the views expressed by the respondents in my study, I conclude in this chapter that mediation is a party-led process which, while allowing for contextual differences, such as differing levels of technical knowledge or practical adaptations of the step by step process, offers a similar range and scope for resolution in any context. The responses indicate that a major determining factor in what is achieved within that range is the parties themselves and how they are prepared to use the process.

#### *Respondents' views on the purpose of mediation*

The question I put to respondents concerning the purpose of mediation elicited a variety of responses and pointed to a range of mediation outcomes. This was often accompanied by an open acknowledgement that there is no single, straightforward description of the purpose of mediation, as these two examples show:

"There is not one answer. I assume that people come to mediation with a whole range of ambivalence and contradictory motives and feelings. One can use a simplified, minimalistic explanation: that it is an alternative to court, it saves money, [people] go to participate in making decisions and all those well used phrases that we might use. I think it is much more complicated and idiosyncratic and nuanced than that in reality. But from my perspective – how do I define what the purpose of mediation is? I think it is really to give a peaceful, neutral space to people in transition, who are riddled with ambivalence and contradictory feelings and all the rest of it, to help them try and make some decisions and become clearer about their trajectory and what they can do about it." (B08, family and commercial mediator.)

"It is several things: Providing people with a forum to air their issues - they may not have had that before. They may not have had the opportunity to sit face to face with each other and simply tell their story ...we provide people with a good chunk of time, a few hours, to sit down round the table and discuss matters. It is a safe environment to air issues and concerns. Also it



allows people to be in the driving seat – and this is any mediation really, it doesn't have to be education. Because if they go to tribunal, the panel will make the decision. If they go to mediation, the mediator doesn't make the decision; the Local Authority doesn't make the decision for anyone; people have to come together to make agreements that everyone round the table can live with." (C15, Special Educational Needs mediator.)

This combination of space to talk and to be heard, together with the possibility of taking control of decision-making was a view expressed by many respondents. It reflects the idea that I have already discussed which sees mediation as both an ideology and a practice. An ideological interpretation of mediation is that it aims to restore autonomy through the empowerment of the individual, which then leads to a recognition of the other party.<sup>3</sup> It can be argued therefore that those respondents who refer to the importance of 'seeing the human face of the other party', endorse this view of mediation as an ideology. For example, a family mediator spoke very strongly in these terms:

"Mediation is a context in which our humanity is challenged and we can either rise to the challenge or not. Mediation is designed to help people be grown up: How am I going to stay human while not demeaning your humanity? That, for me, is the highest context of what mediation can do. In that, there is also something of a sense of participatory artistry on the part of everyone who is engaging in the process. So that there is a way of making something quite 'beautiful, good and true' in that platonic sense." (A07, family and workplace mediator.)

This respondent also recognised other purposes of mediation which are less idealistic and more about "getting stuff done and dusted and leaving it behind. It's about making agreements so that people can get on with lives and don't have to be obsessed about it anymore." While this description goes some way towards seeing mediation in more down to earth terms, it does not quite convey the practical, problem-solving approach at the other end of the continuum. From this viewpoint mediation is viewed as a

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<sup>3</sup> The approach is originally articulated by Baruch Bush and Joseph Folger in their book 'The Promise of Mediation,' second edition (2005), which is discussed more fully in chapter 3.

practical tool with which to reach a practical solution. The purpose is to reach a final settlement through principled negotiation which all parties regard as fair.

Many respondents expressed the view that elements of both of these interpretations are important, and neither to the exclusion of the other. For the following community and workplace mediator, the question was less an either/or and more where the starting place might be:

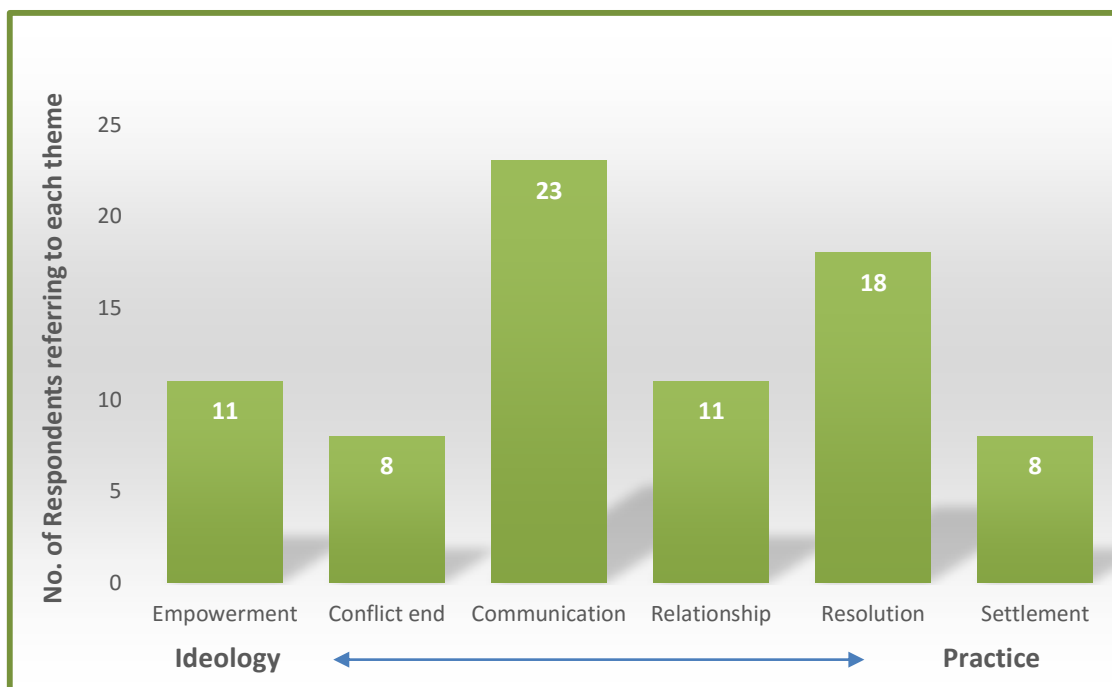
“I think it is a mixture between a healing process and a problem-solving process. I don't think it is one at the exclusion of the other. It is seeking to restore a relationship wherever that is possible, but obviously there is often a tangible and real issue that needs to be resolved. Yes, I would apply it to all areas. There is nearly always a problem to solve and a relationship to resolve. It is not always the case that, if you are dealing with a community dispute, you have to focus on the relationship and, if you are dealing in a commercial dispute, you have to focus on the problem - it's much more of a dance than that. We discovered from experience that you sometimes cannot get to problem-solving without doing some work around the relationship: listening and working through hard feelings. On the other hand there are times where people cannot get to a place of working on issues and relationships until they have seen some progress on a tangible issue.” (C16, community and workplace mediator.)

This response illustrates the broad potential that mediation offers and corresponds to Menkel-Meadows' discussion of ideology and practice.

By comparing responses to the question of the purpose of mediation and what it is trying to achieve, I identified several themes that can be placed along the broad spectrum of 'healing' and 'problem-solving'. The chart below gives a picture of how these themes emerge. This shows 'Empowerment' as most closely aligned to an ideological approach and 'Settlement' as most clearly reflecting a problem-solving approach. Bearing in mind that some respondents identified more than one purpose, the chart indicates that the emphasis was on improved communication, relationship repair and the involvement of parties in resolving their own issues. As my analysis

demonstrates, even those who place greater emphasis on settlement as a primary purpose recognise the necessity of addressing communication in order to achieve the desired outcome.

**Figure 4: Respondents' views of the purpose of mediation organised by theme**



### *1. Empowering Parties*

The first of these themes, referred to by 23 per cent of respondents, is 'empowering parties'. Empowerment is described by respondents in several ways: providing space to be heard and to listen; allowing people to 'get clear', to take personal responsibility and employ 'a basic right to self-determination.' One respondent saw it as providing a process of 're-humanising' where conflict has turned people into enemies. The importance of empowering parties points to the supportive role of the mediator in creating the space for disputants to have the difficult conversation that they need to

have before determining for themselves what, if anything, happens next. As this practitioner said:

“I feel quite passionately that the purpose is to empower people to take control of their own lives and their own choices. So the purpose of mediation is to provide an environment and coach people to a place where they are able to handle things and then to dialogue themselves.” (B04, community and family mediator.)

Following the tradition of transformative mediation, the respondents who talked in terms of empowerment saw the quality of dialogue and the opportunity for exchange as their primary goal rather than a specific outcome. Indeed, whether or not there *is* a tangible outcome, or settlement, was seen as an aspect of the process which lies within power of the parties themselves to control. As one mediator described it, his job wasn't to push people into something or even necessarily to 'slow them down' but to make sure they have the conversation 'completely ... wherever that takes them.'

## *2. Ending the Conflict*

This was the second theme that emerged in these interviews and it was regarded by 17 per cent of respondents as an important function of mediation. Mediation, they said, enables parties to address the dispute, put it on one side and get on with their lives. The significance of this is underlined by respondents' observations of approaches to conflict. When asked the question about how people view conflict, the overwhelming response from 82 per cent of the sample was that conflict is viewed negatively. People are fearful, take steps to avoid or deny that the conflict is there or become so consumed by it that they feel 'trapped', 'under siege' and 'stuck'. Practitioners see mediation as a means by which parties to conflict can end the cycle and move forward. One respondent described the process of going over individual frustrations in some detail

so that people can get clear of the past ‘come to the present moment and say “OK, so how do we move on?”’ In other words, mediation was seen by respondents as cathartic or healing in some way - an interpretation which clearly links to the concept of mediation as an ideology.

### *3. Improving Communication*

This was the theme most frequently referred to by the mediators participating in the study. 47 per cent of those interviewed, talked about the vital importance of supporting communication between parties. Generally, the perception among practitioners is that the conflict has caused such misunderstanding, hurt and upset that communication has become very difficult or broken down altogether. Sometimes the context has an influence. In the workplace, for example, a power imbalance between a manager and an employee may prevent an honest conversation. Equally a policy or a procedure may block communication. In other circumstances, for example in the context of special educational needs or equalities work, the parties (perhaps a parent and a local authority officer) may have never met before. For some respondents, this is the primary goal of mediation and, having supported the re-establishment of communication, they consider that the rest is ‘up to the parties’. For others it is the first factor that needs to be addressed, and the rest then follows. Whatever the field of delivery, communication is of central importance as the following four quotations from mediators working in a range of different contexts show:

“The purpose as far as I am concerned is to facilitate two parties who for whatever reason have not been able to communicate - whether that is [because of] circumstances or personality or power imbalance – to give them a forum and to give them a process and a structure and a framework that will enable them to take an opportunity to communicate productively if they want to.” (B09, family mediator.)

“It depends on context but generally the purpose of mediation is to give people the opportunity to have a safe and focussed discussion about the issues that they have in dispute with each other. I think in some contexts the purpose is to give them the opportunity to actually reach a settlement of that and close it down really, reach closure and resolution. But that is not always the primary purpose because in some contexts they just simply haven’t had an opportunity to discuss the issues.” (C01, equalities mediator.)

“A change in perspective of a particular person can help you to deal with that person again and maybe other people as well. I definitely see mediation as being more about helping change their perspective as opposed to resolving tangible aspects of the dispute. It’s about giving people a chance to look at things differently and to communicate in a more productive way. If you can give them the skills, they can go and do the rest themselves. I don’t see the role as necessarily negotiating where somebody might park or how loud they should play their music.” (C06, community mediator.)

“I believe absolutely firmly that mediation is all about the people in the room at the time, even when it is a huge international shipping dispute. It is up to the mediator’s skill in building the rapport with the parties in front of him, and it is their interaction with each other, in terms of their mutual respect, or how they work on that day, that decides whether that mediation will settle. Even when there are multi millions involved, I still think it is primarily a people-orientated process.” (C08, commercial mediator.)

#### *4. Relationship Repair*

Linked closely to improved communication is the fourth theme that I have called ‘Relationship Repair.’ This was recognised as a crucial element of the purpose of mediation by 23 per cent of respondents, particularly in those contexts where there is an ongoing relationship between parties. In the context of separating parents, one respondent identified the value of using mediation rather than an adversarial process since the latter can ‘deepen rifts’ between two people who still need to be able to communicate about their children. Mediation fosters ‘co-operation as opposed to litigation’. One family mediator described this in terms of a ‘rectification, post-conflict, of a parental relationship’ which achieves the purpose of ‘acclimatising [them] again to working towards solutions as separating parents.’ Similarly, in the arena of neighbourhood disputes, mediation can address a situation in which a housing

association or local authority has given a formal judgement but failed to resolve the key issue, namely the relationship: “They still have to live next door to each other and are very sensitive to what’s happened and potentially what could happen.” For many practitioners in the workplace, using mediation to re-establish some kind of working relationship was central, not only for the parties but also for the organisation and its commitment to dignity at work and healthy working relationships. One workplace mediator described a tangible shift that she recognised in the interaction between parties: “I listen out for language; where people move from the ‘I’ to the ‘we’ and ‘us’.” Responses from practitioners working in the civil and commercial arenas were more mixed. A few civil mediators engaged in small claims cases stated that an ongoing relationship was often not a factor and that parties would be far more anxious to reach a settlement and move on without any further contact.

I will return to the question of parties being in an ongoing relationship more fully below, but even in situations where they are not likely to have anything further to do with one another, respondents talked about the importance of apology. The significance of this is frequently overlooked in my view. In his *Review of Civil Litigation Costs*,<sup>4</sup> Lord Jackson acknowledged the value of apology and the opportunity that mediation offers to explore and understand the distress that one or both parties may have experienced by the actions of the other. Even if the relationship is unlikely to continue, this is an important human interaction which can go some way towards reparation by drawing the relationship to a reasonable close, bringing an end to the conflict and allowing people to move on.

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<sup>4</sup> Lord Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationary Office, 2010) 359.

Some mediators working in the private commercial sector pointed to the need for businesses to retain a productive working relationship, whether they are small locally run contractors or large multi-national companies. The following quote illustrates indicates the crucial significance of a continuing relationship in cases that they had mediated:

“An element of a continuing relationship happens more often than you think, especially if people have fallen out in a building contract or any other contract. The chances are they have worked together before - you do work with people in business that you like and that you trust and get on with and that makes the job easier. I had a case where a concrete supplier had worked with a builder for donkey’s years – they were pals. They had a fantastic relationship and they never used anybody else. They got one bad job where the concrete went wrong for whatever reason. The point was that they were pals and this was destroying their friendship as well as their commercial relationship. And because in a mediation you can actually come up with any sort of agreement that you want, as opposed to being imposed with a decision from another party, we ended up where they agreed they would divide the costs of the remedial works in a certain way and that they would continue to work together and that the concrete supplier would discount the concrete by X per cent over a period of X months. Which meant that they kept the relationship, they kept in business together, they sorted the dispute out and they didn’t have to go to court.” (C11, commercial mediator.)

In equalities work, relationship repair was also recognised to be of consequence, but with an interesting variation. In this context, as two practitioners commented, the relationship may not even have existed before the dispute. Dealings between parents and a local authority over a child with special educational needs, for example, might previously have been by email or phone and might have involved several people at different times. A disabled person hoping to improve accessibility to a local supermarket may be meeting with a manager whose role would not otherwise involve meeting members of the public. As the following respondent pointed out, mediation affords the opportunity for a relationship to be established in these circumstances:



“With an education dispute, it is very feasible that the two people coming to mediation have never clapped eyes on each other before in their lives. There has not been any relationship whatsoever. There has just been a series of letters from ‘someone’ and it has been quite impersonal. The beauty, when it works well, of the mediation is that you can introduce a form of relationship because suddenly parents have a name and a face, and have had a conversation, and quite an intense conversation, with someone. Quite often part of the agreement will be how communication is going to work from this stage onwards. Often the senior representative from the local authority will offer to be a continued point of contact and an ongoing relationship has been established.” (C15, equalities mediator.)

The themes that I have explored so far imply that mediation can be seen as a means by which to address two things: the individual and his or her need to find a way out of conflict, and the relationship between the parties and how it might be restored. They bear a close relation to the two key elements of the transformative mediation approach which is based on an ideological understanding of conflict as a threat to personal autonomy and social connection. These perspectives lean towards an understanding of mediation as a peace-seeking, conflict-resolving ideology, as Menkel-Meadow describes it.

The remaining themes - *Resolving Issues* and *Reaching Settlement* - are best placed towards the other end of the continuum, viewing mediation as a much more practical, task oriented process which settles disputes. These might appear at first glance to be similar, but the mediators’ responses gathered in this research reveal some important distinctions.

### 5. *Resolving Issues*

37 per cent of those interviewed talked about parties ‘resolving their issues’ with a strong emphasis on the parties themselves arriving at their own solutions. These respondents stressed that outcomes would be arrived at amicably through

collaboration, that they would be mutually acceptable and in both parties' interests. Agreements are not imposed by the mediator but are negotiated by the parties themselves. This ensures a high level of satisfaction for both clients. These solutions do not have to invoke a formal decision, nor are they restricted to legal remedies. Mediation, these respondents said, offers the opportunity for parties to raise issues that are more wide-ranging than points of law. The way that they spoke about parties resolving their disputes implied their active involvement in arriving at solutions that were personally crafted. A commercial mediator summarised it well:

“In a mediation they are able to have a real chance to speak, bring up any issue which *they* want and feel is really important and get very practical outcomes. They can get apologies; they can get references for their jobs. If you look at it like that, the court is a very blunt instrument which really deals in money, frankly... whereas in mediation it is the practicality or the ‘power to the people’ angle that I think is really important. I think if only more people understood that, many, many more people would opt to mediate.” (C8, commercial mediator.)

### *6. Reaching Settlement*

By contrast, when respondents spoke about reaching settlement, it was often described in terms that were less personal and more business-like. Just under 17 per cent of the sample saw settlement as the main purpose of mediation and all of these respondents were from the family and commercial fields. This is not surprising since mediators in these sectors are often operating at the door of the courts where ‘settlement’ is the expectation. One mediator in the civil and commercial sector said:

“Actually I see the main purpose of mediation as to get the parties away from the long and tortuous slippery slope of litigation and court rooms. I think it is as simple as that. It is to avoid the alternative to settlement – which is warfare really.” (C11, commercial mediator.)

No respondents in the sample saw settlement as the exclusive purpose of mediation though some viewed it as its primary aim. One commercial mediator defined this clearly in terms of his own relationship with the parties and their purpose in appointing him:

“What they want is a settlement to end the ongoing trauma and move on. That is their contract with me – that I help them settle the case. I do say, in my private sessions, it would be quite nice if they went away shaking hands and that does happen. [When it does] they feel that they have had a better ending and that does make it a better outcome. But the bottom line is they’ve employed me to help them reach a settlement.” (C05, commercial mediator.)

This respondent also described how ‘seeing the human face of the other party’ was an important element in getting to the point of settlement. For him this was ‘not just that their stories have been heard but that their feelings have been understood’. As a first step it was part of his role as a mediator to demonstrate this. The best outcome, however, as he identified it, would be for the other party to be able to do that too.

The expectation to reach settlement was viewed, in some cases, as a pressure which potentially limits the scope of mediation and what it can achieve. One family mediator described how the expectations of the courts and the Legal Aid Authority (LAA) have influenced the focus of mediation meetings significantly and have dictated which cases can be mediated. A contract between a mediation provider and the LAA requires that there is “a clear legal dispute for us to go ahead and mediate and that obviously then determines the nature of a lot of the disputes that we might get involved with.” This restricts what mediation can be used for, particularly as far as the more ideological purposes are concerned, and can exclude conversations of enormous benefit to those going through separation and divorce.

Respondents who saw settlement as a primary aim of mediation nevertheless viewed other goals such as improving communication and restoring a future relationship, as

important. My conclusion is that this largely comes down to a matter of emphasis. For some, the perception of mediation is that it provides a framework within which a relatively business-like discussion can take place in order to address the current issue. Once this is dealt with, it can also pave the way for the future relationship to be addressed. As the two following commercial mediators observed:

“Often in a commercial mediation where parties are quite sophisticated it is a formalised way of doing negotiation that provides a structure around what they would be doing anyway. [It is a principled negotiation] with a bit of help getting over difficulties. The people I deal with are used to negotiating multi million pound issues so it’s helping them with the structure - and if you can clear the problem, they can go on working together. I have certainly worked on commercial cases where resolving the dispute has enabled the parties to work together on a worldwide basis. Had they not resolved the dispute, they would have stopped trading with one another. [However,] the purpose of mediation is to fix the problem. If the problem is not fixed, it’s not been a success ... If the problem is still the same as when you started, it is no good saying ‘Yes but we had a really good exchange of views’ because it is [of no] use.” (C13, commercial mediator.)

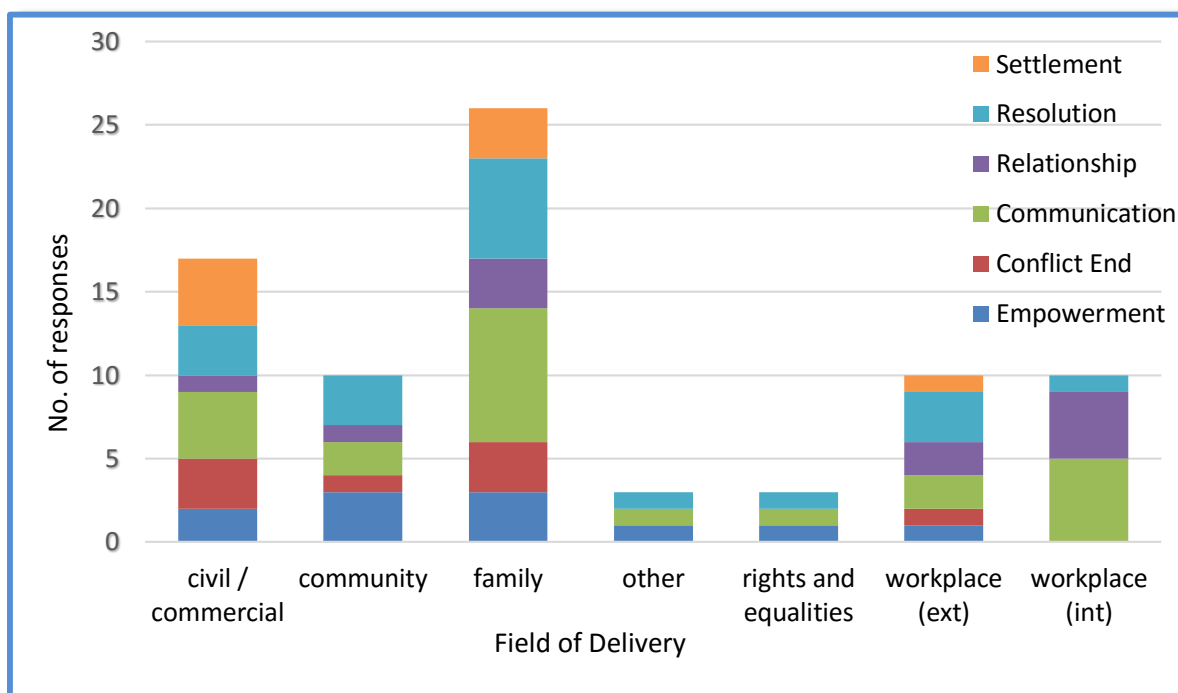
“In the court cases, it is a lot about transaction and a fair or ‘seen to be fair’ resolution but more like a principled negotiation. You are facilitating a negotiation, I would say, in order to get to some sort of monetary resolution - it’s always about money really, in the courts.” (E08, civil and commercial mediator.)

### *Discussion*

I have identified the main themes that emerged from respondents’ views about the purpose of mediation. What conclusions can be drawn from these different views? While the expectation of settlement is stronger in contexts that operate in parallel with the courts, there is nevertheless a consistent recognition amongst all respondents of the importance of improving communication and, in many cases, repairing relationships. Bearing in mind my initial research question, it is clear that differences of purpose do exist in mediation practice but these are just as likely to occur *within* sectors as across them. The chart below takes the different themes discussed above

and organises respondents' views on the purpose of mediation by field of practice. The individual columns represent all of the mediation contexts under discussion. The key in the top right hand corner lists the themes identified above by colour. Each column is then broken down into the number of respondents from each field who identified these themes as a purpose of mediation. It is important to bear in mind that many respondents often identified more than one purpose.

**Figure 5: Respondents' views of purposes of mediation by field of delivery**



The chart demonstrates that within individual fields of practice, particularly in the civil / commercial, community, family and external workplace settings, respondents recognised that mediation can serve a number of different purposes. At the same time it is possible to observe contextual influences and these are worth commenting on. The family and civil / commercial sectors placed a higher emphasis on settlement, whereas this was absent from the community, rights and equalities, internal workplace and other sectors. The internal workplace mediators identify relationship repair and

communication as by far the most important aims. There was less variety in the responses from this group and this, together with the lack of reference to settlement, suggests the early, informal use of mediation in this setting. By contrast, external workplace mediators, who are more likely to be called upon at a later stage as an alternative to formal proceedings, demonstrated an awareness of the requirement to settle. This may also be a reflection of the contractual arrangements that are in operation in this context: the organisation is, in effect, the client of the mediator, who is contracted with an expectation that mediation brings an end to the dispute. The community sector demonstrates a variety of purposes but with the notable exception of any reference to settlement. Mediators working in this setting are working away from the civil justice system and again, at an early, informal stage of the dispute.

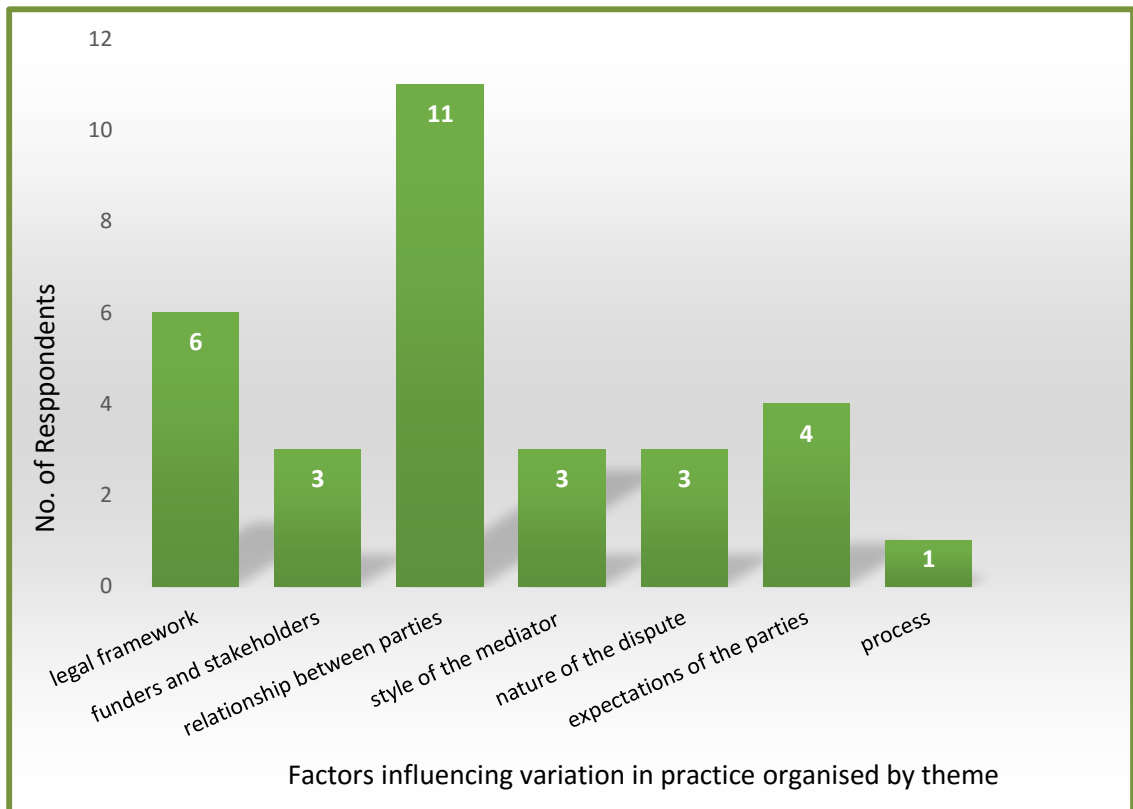
For me, the significance of these figures lies in the clear variety of purpose that exists within these sectors in general, and in the family and civil spheres in particular. These are findings that challenge some of the perceptions of 'difference' held by mediators about the work of colleagues operating in other fields. Assumptions are often made, for example, that civil or commercial mediation simply focusses on cutting a financial deal; family mediation is categorised as being concerned with emotions and relationships. These findings demonstrate that, in reality, these assumptions are too simplistic. They do not make adequate allowance for the variety of different purposes that mediation can achieve, as understood by the participants in my study.

It is worth noting, in passing, that the question of cost was barely mentioned by respondents. Only three referred to mediation as a cheaper alternative, even though cost-saving has been a primary motivation in the legislative developments and funding initiatives of the last few years.

Having described respondents' views on what mediation is trying to achieve in their own sectors, I was also keen to build a picture of how far they thought the same purposes apply across all fields and, if not, where the differences in practice lay. Forty five per cent of those interviewed considered the purpose of mediation to be broadly the same in any context. A further 16 per cent recognised both similarities and differences and 4 per cent gave no opinion. This means that 35 per cent of the sample (17 respondents) took the view that there were significant variations across fields of delivery.

Respondents' perspectives produced some valuable information and enabled me to identify several factors that influence the purpose of mediation. These are set out in the chart below. Again, respondents sometimes identified more than one factor. Two headings are particularly worth noting. The first and largest grouping refers to the relationship between the parties and reinforces its central importance to mediators. The second relates to the legal framework and the impact that this has on what mediation is trying to achieve.

**Figure 6: Respondents' views on factors influencing variations across sector**



*The significance of the relationship between the parties*

In the first part of this chapter, I argued that the purpose of mediation, whatever the context, was closely linked to two major themes: improved communication and relationship repair. Even those practitioners who emphasised other objectives, recognised these as important factors. However, the question about the differences across delivery contexts elicited further information about the significance of the relationship between parties and its influence on the discussion in mediation sessions.

There were two key factors about the party relationships that emerged from my analysis: the intensity of the relationship and its likely duration. Regarding intensity, respondents commented that conflict can be viewed in very personal terms in some settings while not in others. For large multi-national companies regularly finding



themselves in dispute, there may be very little at stake on a personal level: the focus is very much on conducting a business transaction. By contrast, for separating parents who are negotiating about their home, finances and children, much more is involved. The intense personal emotions experienced at the end of a relationship are combined with the need to make life-changing, rational decisions. Workplace mediators acknowledge that relationships may have a highly stressful impact on the health and well-being of the parties and the whole organisation. Some pointed out that relationships at work can also be intense by nature. When relationships go wrong and communication breaks down at work, people can experience a crisis of confidence that may result in illness and depression. This level of intensity affects how the mediation is managed and where the focus of the discussion lies.

The most significant perceptions of difference with regard to the nature of relationships came from among commercial and family mediators. The following quotations give a flavour of the views they expressed:

“I think for family mediation it’s slightly different – it’s avoiding potential irreparable damage to kids and relationships, and that is a totally different thing to going off to court.” (C11, commercial mediator.)

“One of the reasons I don’t do family mediation is that it is a different concept. If I am helping to mediate between an oil company and a contractor over the building of an oil rig, there may be a lot of money involved but it is just a commercial dispute, it isn’t life and death. If you are negotiating over the custody of children it is a bloody sight more important than half a million on an oil rig. I think the solutions you are trying to come up with are more complex and more important so you are trying to help people resolve their personal animosities maybe, whereas in the commercial side there often isn’t any animosity it’s just a disagreement. Sometimes they hate each other with a deep and abiding hatred but quite often people are quite happy with each other as people and just can’t agree on the numbers.” (C13, commercial mediator.)

“If I was to compare that with say, my knowledge of employment tribunal conciliation or civil and commercial mediation I would say that the family

mediation that I am used to is far more relationship based. It's not an alternative to being adversarial or being litigious but just doing it in a different way; it's a fundamentally different process which is based on relationship and conversation. I would think that the areas of mediation that it is most similar to would be those that are closest to peace making and relationship building. So, potentially neighbourhood mediation, elder mediation, workplace mediation perhaps. And when my own work strays into the civil sphere it is always on the basis that it is the relationship based models that interest me." (B11, family mediator.)

While commercial relationships may, as a general rule, be more business-like and family relationships more intense and personal, it is dangerous to generalise and there are exceptions. As I have argued earlier, variations within sectors are as likely to emerge as across them. The same family mediator continues:

"It's maybe too much of a generalisation - I could imagine a divorce mediation without children and without any plan for any future continuing relationship which you could run entirely along commercial lines. And similarly I think that one of the areas that is very underutilised is using the family relationship model say, in cohabitation disputes and inheritance disputes. In legal terms they lie within the civil jurisdiction and tend to be dealt with by civil mediators but actually they are predominantly based on relationship and conversation." (B11, family mediator.)

These responses suggest that the personal nature of the conflict and its intensity influence the starting place for mediation. Whether a relationship is expected to continue into the future can also be important. One respondent observed that "... there is a much wider range of considerations when you are dealing with a mediation where the parties are going to continue to deal with each other, than one where they are not."

Others identified, for example, that where there is an ongoing relationship there are two elements to address: resolving the immediate issues and equipping parties with the skills to address future differences more constructively. There is, therefore, both a present and a future aspect to the discussions. Workplace mediators identified unanimously that the restoration of a healthy working relationship, or an improvement

in communication, are seen as priorities and also saw conflict coaching role as part of their role. This was just as important for community mediators as the following quote shows:

“... two people make an agreement together to help them in the future. It gives them a plan in their head that is there to take out and to use should something else happen in the future. [It is not just about the current dispute] it is all about what would happen if there is a further conflict as well. Yes we do want to talk about what’s happened but you can’t change what’s happened - you *can* look forward to doing things differently.” (C04, community mediator.)

Family mediators made the same observation of separating couples where, ironically, while two partners are ending a marriage they still often need to invest in a future relationship as parents.

The greatest variation on this issue was to be found within the civil and commercial sector. Some practitioners, like the following mediator working in small claims, were quite emphatic that relationships are largely impersonal and require little in the way of future investment:

“If I think of what I am doing in relation to the court work, it is really reaching a pragmatic resolution. These are very much at a transactional level. People don’t want to go to court, they do want to have it sorted out. There is no ongoing relationship in the main. A lot of it there is a pragmatic resolution of a dispute that they can both live with.” (E08, civil mediator.)

However, others were of the view that even if the primary reason for the mediation might be to resolve a point of law, the emotional content remains a major point to address before progress can be made. The following respondent commented:

“There is a great deal of emotion attached to these things no matter how much lawyers might say there isn’t. I think the classic is with building disputes because it’s someone’s home so there is always that business about somebody has been in their space and it’s not how they would like it to be and how they feel invaded – so there’s a lot of that going on. And then, from the builder’s perspective there will be the feeling about the rejection of the value of his work and whether or not he’s been appreciated. So all that

tends to come out and it helps to get it out before people get to the point of 'well are we going to finish it, are we going to sort this out with money? I think if it were just a question of trading over 'how much?' and 'when?', that would have been done before they got to mediation – it's because the other stuff is there." (C02, civil mediator.)

In conclusion, we should note that respondents working in the civil and commercial sector showed the greatest variation in assessing the significance of the type of relationship between disputing parties. These mediators may well find themselves working with intense emotions where the relationship issues need to be addressed at some level. Equally they may find themselves brokering a deal in an impersonal business transaction that relates to a difference over legal interpretation.

Undoubtedly the nature of the relationship between the parties influences the purpose of mediation. However, while there may be certain expectations about the intensity and duration of relationships occurring in different contexts, it is hazardous to generalise too far. This practitioner sums up the complexity well:

"A lot of the fundamentals with workplace mediation are about relations. It might not be family relations but they are very important relationships because it is in your fundamental workplace domain and that is important in being able to move on with your career or with self-esteem generally. With civil and commercial it depends on the type of dispute. If it is a very 'arm's length' commercial dispute, emotions may not be involved in it really at all. If it is a partnership dispute, a small business owner in dispute with another colleague or a boundary dispute, it is very relationship-based and emotional-based and again it is about processing those emotions. The type of process is different in a commercial mediation but actually it gives an opportunity on a one-to-one basis with a mediator to vent some of those feelings and receive a neutral, objective response and look for practical resolution." (B10, family and workplace mediator.)

### *The Legal Framework*

Comments about the legal framework were most closely linked to those contexts that operate within the courts, particularly family and civil/commercial mediation. Here the

legal framework influences how cases come into mediation, expectations of whether or not parties will use the process and how it is conducted if they do. In these settings a referral may well have been made by the court and hearing dates may be already set or imminent. Delivering mediation within the shadow of the law in this way means that it can be subject to pressures such as the time available to spend in mediation and the expectation that the case will settle.<sup>5</sup> One practitioner observed that the 'legal agenda' is about an increased expectation that mediation will be used. Mediation 'may have been built in to the terms and conditions of sale.' Increasingly parties are aware that they are going to appear before a judge who will ask whether mediation has been considered. One respondent commented that this makes the mediation much more 'resolution-driven.' Another said that it could be a factor that 'gets in the way' of empowering people. One family mediator described how the requirement for financial disclosure meant that the process was much more rigid since disclosure needs to be completed before people can realistically consider options. Then, as she says here, there is a lot of formality and documentation:

"There is a much more formal sense in family mediation as opposed to community or workplace. In the way of involving solicitors; in the way of certain documents that are drafted, then those documents might go to court. In that sense it is more incorporated into the legal framework." (B14, family and workplace mediator.)

Another mediator, working across several contexts, gave a good illustration of the how the legal framework, or lack of it, can influence what mediation is trying to achieve in any given context. She said:

"Family mediation has a really nice balance of a legal framework and personal autonomy. So I love that you can be really creative within a fairly

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<sup>5</sup> For example, with publicly funded family mediation the Legal Aid Authority will fund 45 minutes for an initial meeting with each partner and eight hours of mediation including time spent in drawing up documentation.

open legal framework which has quite clear parameters. I would say those are the areas where it differs from other [contexts]. In neighbour mediation and inter-generational mediation, there is very little by way of legal framework, certainly on the issues that come to mediation. And people's motivation tends to be different – so one wants to get it sorted and the other says there isn't a problem. They can live at war for ages and they don't necessarily get to the same place at the same time, ever. At the other end of the spectrum you've got Special Educational Needs and people with disabilities, so, the Equalities stuff, where it is absolutely within a legal framework and it is much more specific. It is a much more clearly defined legal framework that the mediator has to work within and is expected to know about and is expected to make participants aware of and think about and consider. It puts the mediator in a different place. I would say there are two kinds of workplace mediation – there is the relational stuff and then there's the contractual stuff. I feel the relational stuff is kind of tough because actually you're often mediating in the context of a power imbalance and needing to recognise that actually whatever happens in the room the minute they step outside of it there is a power imbalance. That does limit mediation to some extent – or limits the honesty in mediation. And then the court room stuff is just a principled negotiation between someone who has money and someone who wants it! It feels like horse trading. All that is an interesting move up the spectrum from being purely about relationship to, as I say, horse trading. (B013, a mediator working in several contexts.)

These comments illustrate that the legal framework within which mediation is delivered can make a difference to how it is conducted and what it achieves. In other words, it can affect where the emphasis of mediation lies along the spectrum from empowerment to settlement.

### *Mediation as a Multi-functional Process*

As noted earlier, Hazel Genn has challenged the view that mediation can be understood as both an ideology and a practice, suggesting that it can lead to a 'divergence, if not polarisation of view' about what mediation is aiming to do.<sup>6</sup> This, she said, results in controversy about the form mediation should take and where its boundaries lie. In this chapter I have used the views collected from my sample to

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<sup>6</sup> Hazel Genn, *Judging Civil Justice: Hamlyn Lectures 2008* (Cambridge: Cambridge University Press 2010) 83.

examine to what extent this polarisation exists. The views expressed certainly demonstrate a variety of opinions as to what mediation can achieve, but these different aims and purposes overlap to a considerable degree. Rather than presenting a choice between relationship repair, at the ideological end of the spectrum, or settlement, at the practical end, mediation can achieve both at the same time – as well as several degrees in between. Respondents identified empowerment, bringing an end to conflict, improving communication and resolving issues, as other, equally viable outcomes for mediation. The conclusion I have drawn is that these themes do not represent choices but offer a starting point for the discussion in mediation. While there may be an expectation in some contexts that the conversation will lean towards settlement and in others towards relationship repair, it is by no means a straight dichotomy. It appears that either or both of these can be achieved in any context. The following mediator, for example, working with religious and political conflict as well as commercial disputes, is of the view that mediation can achieve different outcomes at different levels:

“I would distinguish between the ultimate outcome and things you have to achieve in order to get to that outcome. The outcome in the contexts I usually work in is some form of consensual way forward. But to get there you need to achieve things like: conversations where conversations couldn’t previously take place; or a greater level of trust; a greater degree of understanding; often a less binary way of looking at the problem (i.e. less right or wrong, black or white, 0 or 100 etc.) So there are lots of things to achieve along the way but I guess the outcome is for the parties to find themselves in a different place, in terms of what they were fighting about, than the position they were in before.” (C17, civil and commercial mediator.)

When he was asked specifically about whether he was aiming to achieve settlement or relationship repair, his response was this:

“That can be a very meaningless distinction. It doesn’t mean it always is but it can be. There are contexts where ‘settlement’ is dependent on certain things

happening first, one of which is to in some way enhance the capacity of those present to work together or talk together or communicate or whatever it is. I accept that there are plenty of cases where one or other of those is more overt but that may be too stark a division.” (C17, civil and commercial mediator.)

No respondent in my sample implied that there is a polarisation of view concerning the purpose of mediation. Instead, the consensus was that more than one purpose exists and that these are not contradictory. These findings have led me to question how far it is useful to describe the purpose of mediation in such linear terms, since this implies that a choice needs to be made: the question is more about where the emphasis lies, and I am of the view that it is more helpful to consider the question in cyclical terms. By viewing the themes that I have identified as points on a sphere (rather than along a continuum) it is possible to conceive of moving around the circle, from one element to another as need dictates in order, to make best use of mediation. For some parties, spending time ‘solving a problem’ in itself builds enough trust to be able to go on and consider their relationship. For others, expressing their emotion, telling their story and clearing the air will be necessary before anything else can be achieved in terms of determining a way forward. The question then becomes much more about how the starting point is determined. Considering the chart below, where should the entry point be? Respondents in my sample talked about two factors that influence the answer to that question: their own judgement and the position of the parties themselves.



**Figure 7: The interlinked purposes of mediation**



### *Mediation as a Party-led Process*

The considerable weight that respondents' attached to the expectations of the parties underlines a fundamental point about mediation: it is a party-led process. Many respondents considered a successful outcome to be one which was determined by the parties themselves. This was linked to what they wanted to achieve in the first place.

The following quotes illustrate that it is the parties' agenda that counts:

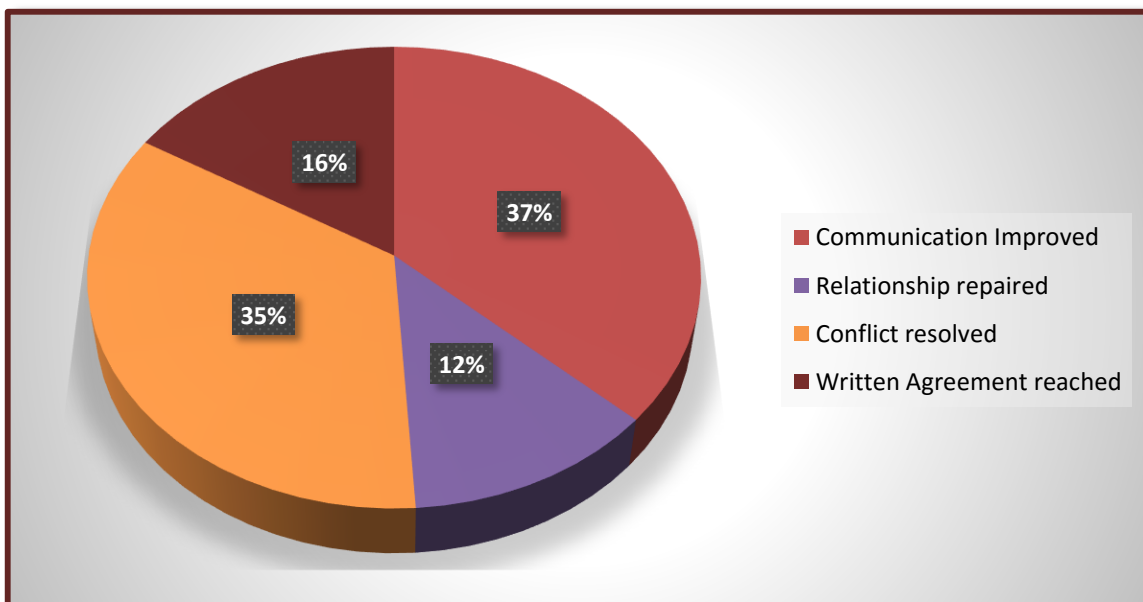
"I think it is successful if people feel they have got out of it what they want. That might be a settlement but it might not be the key thing they were looking for. It goes back to working with parties beforehand to understand what they are hoping to achieve. In the equalities work we always used to identify an agenda and if you do that generally in mediation, where you get position statements from each side and you get some understanding of what they hope to achieve, I suppose you judge success on the basis of what they had said they want to get out of it." (C01, Equalities mediator.)

“Where the people involved have reached an agreement that they feel is successful, that is the key for me, regardless of my perception, whether *they* feel that they have been successful and they’ve achieved what they wanted to achieve.” (B05, family mediator.)

“It is their lives and they will put into that what they want to achieve, not what I think they ought to achieve. I think that can even include someone giving away more than the other. Because if they have done that because they want to walk away from that situation and get on with their lives, maybe they thought that was a price worth paying. As long as they’ve made that decision realistically, knowing what they can and can’t do.” (B04, community and family mediator.)

When mediators talk about 'success' in mediation, it is important to identify the criteria they use. I asked respondents what they would consider to be a successful outcome. The following chart shows the responses I received to this question.

**Figure 8: Respondents' views on a successful outcome**



While 16 per cent of the sample indicated that a written outcome was an important measure of success, over a third referred to less tangible outcomes such as improved communication, or the nature and quality of interaction between parties. For example, “ ... when party A says something to party B which unlocks something and then the

two of them, well, you could at that point leave the room, because effectively, apart from drafting things, your job is done.” Respondents said that a change in communication style which incorporates “mutual respect and an ability to recognise each other’s position” was important. This change in the quality of interaction can have an impact on the future the future relationship. As one family mediator described it:

“So, the stereotypical separating parents who argue about everything and can’t agree anything to do with, let’s say the children. Or they feel that the other is using power over them and they are not going to have it. And you see them a few months down the road and there is something in the quality of their interaction where they have ‘got it’. And what I mean by ‘got it’ is that there is a level of communication and co-operation which gives me as a mediator some confidence that they are going to resolve issues as they inevitably will come up in future ... They have got to a ‘working environment’ as separated parents; they have got a way of discussing things; they have got a way of doing business which is now more manageable – it might not be perfect – but they have ‘got real’ really. They have understood that their role goes on, that in a sense you can never really divorce the other parent, that cooperation wins over competition every time and that the children require it of them.” (B08, family mediator.)

Respondents also recognised party decision-making as an important indicator of success. Mediation helps to bring clarity, as one practitioner put it, by “creating new rational and emotional information which allows parties to make clearer choices.” That new clarity may even result in an agreement to differ or bring an end to an intolerable situation by, for example, leaving a place of employment. The essential point is that the process of arriving at that informed decision is often no less important than the outcome itself. What mediation can achieve inevitably varies from case to case, and this is as important as from context to context.

### *Conclusion*

In this chapter, I set out to answer the question ‘what is the purpose of mediation?’ I have argued, based on the responses in my study, that mediation achieves a variety

of different purposes. Some of these correspond with the view that mediation represents an ideological approach to conflict, while in other respects, it is a much more practical, problem-solving tool. These purposes are not in opposition to one another, and the views of the respondents I interviewed indicate that mediation can achieve different outcomes at different levels. While some may focus on settlement and others on empowerment, there is a general recognition among practitioners that neither of these excludes the other. Instead, these themes can be complementary and it may even be necessary to address one aspect in order to be able to achieve the other. There is a strong view that improving communication and relationship repair are consistent themes that need to be addressed within any mediation. Again, these outcomes may be achieved to differing degrees, however, it is clear that variations occur just as much within different contexts of mediation practice, as across sectors. There is, then, a danger in making simplistic generalisations within a particular context about the purpose of mediation and what it might achieve.

These findings challenge a common perception among mediators that purpose is determined by sector. My conclusion is that there are marked similarities of practice and purpose across all fields of mediation delivery. I have argued that it is not useful to see the various outcomes that mediation might achieve in linear terms since this implies that a choice must be made between them. Instead I have proposed that it is more helpful to view these variations as linked. The question is, therefore, more about where the primary emphasis lies. Mediation is first and foremost a party led process and this is a key factor in defining its purpose in any context. The primary emphasis, or the starting point for mediation, is determined by the parties, with the support of a mediator, in the initial stages of the process. Talking to respondents about this has

served to reinforce my view that parties determine their own outcomes and that, for many respondents, their measure of the success of mediation is the satisfaction of the parties themselves.

## CHAPTER 8 - PRINCIPLES OF MEDIATION PRACTICE

In Chapter 3, I outlined the core principles of mediation as they are defined in the literature and discussed some of the problems in maintaining them. I suggested that these problems are particularly likely to arise where mediation is incorporated into other frameworks, such as the justice system or within the workplace. The principles of confidentiality, voluntariness, the impartiality of the mediator and party determination are generally central to any description of mediation. Yet the influence of the context in which mediation is delivered results in confusion as to how the mediation profession defines and applies these principles. Nevertheless, these core principles are the cement that holds ideology and practice together. They are considered to be critical components of basic mediation training in all contexts and they are stipulated by the regulating bodies that approve training providers as required curricula on training programmes.<sup>1</sup>

Yet little is known about how mediators, once trained, balance these principles when they are working or indeed how feasible they are to uphold. Nor do they directly address other values such as 'justice' and 'fairness', and how mediators ensure that these concepts inform the work they do. This exposes the profession to criticism from those who view mediation as undermining the justice system.<sup>2</sup> There is undoubtedly a lack of clarity concerning the values operating within the mediation profession<sup>3</sup> and no

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<sup>1</sup> For example, the College of Mediators, [www.collegeofmediators.co.uk](http://www.collegeofmediators.co.uk). The required curriculum for training programmes can be viewed at Mediation Training / Getting your training approved by the College Approval, Last accessed 29 May 2015.

<sup>2</sup> See Hazel Genn, *Judging Civil Justice: Hamlyn Law Lectures 2008* (Cambridge: Cambridge University Press 2010) 118. Genn argues that "Concern for 'justice' and 'fairness' is not relevant to the goals of mediation."

<sup>3</sup> See Charlie Irvine, 'Mediation's Values: An Examination of the Values Behind the Mediation Texts' (2007) unpublished Masters' Dissertation, Birkbeck College, University of London.

clear demarcation between the personal values of a mediator, the principles of practice articulated by the profession and the values of the justice system or even society at large. They may overlap, be in alignment or be contradictory to one another. Irvine suggests that “mediation rhetoric is often out of step with mediation practice” and calls for a closer definition of what mediators do and why they do it. Stevenson also describes the importance of mediation practice being steered by an ethical ‘compass’ operating at all times with client autonomy as its focus. She too identifies the need for greater clarity within the profession, commenting particularly on the difference between settlement and mediation:

“We need urgently to articulate the differences, to recognise and debate the appropriateness of different approaches for different situations and to involve clients in transparent conversations about choices of process and their implications.”<sup>4</sup>

My own experience as a practitioner has confirmed that the principles of mediation in practice are by no means clear. Take, for example, confidentiality. Certainly mediators discuss confidentiality with potential parties, but most often this is conveyed in conditional terms.<sup>5</sup> Even putting aside the possible causes of a breach of confidentiality, a common-sense approach in some situations will dictate that others outside the mediation process need to know at least something of what has gone on and what has been agreed.<sup>6</sup> In the civil and commercial arena, the whole question of

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<sup>4</sup> Marion Stevenson, ‘Mediation and Settlement-Broking’ (2015) 45 (5) Family Law Journal 575. See also ‘A Mediator’s Compass’ (2015) 45 (6) Family Law Journal 715.

<sup>5</sup> Mediators will breach confidentiality on discovery of a number of conditions depending on the context: risk of serious harm; illegal activity; money laundering; a major breach of company policy etc.

<sup>6</sup> For example, in the workplace a Human Resources Officer who has referred the case will, as a minimum, need to know that a successful outcome in mediation means that a formal process will be abandoned or, in family mediation, parties are very likely to instruct a solicitor on the basis of their written agreement.

mediator confidentiality was challenged in the case of *Farm Assist Ltd v DEFRA* (2008) where one of the parties attempted to call the practitioner as a witness.<sup>7</sup>

The principle of voluntariness has also been called into question, as was discussed in Chapter 4, with the introduction of a compulsory information meeting in several settings or the imposition of costs on parties in civil disputes who cannot reasonably defend a decision not to mediate.<sup>8</sup> As we saw in the previous chapter, respondents in my study placed great weight on the importance of party determination, some also recognised a responsibility, particularly where wider considerations such as a legal or policy framework cannot be ignored, to ensure that outcomes reached in mediation are 'appropriate'. This, in turn, potentially undermines mediator impartiality.

In the field work I conducted, I sought practitioners' views about the importance of these principles in practice and how they themselves would prioritise them. In this chapter, I examine their responses and argue that, while the demands of a particular context may be relevant to how far these principles can be upheld, mediators nevertheless rigorously defend the central pillars of the process. It cannot be denied that the demands of the justice system or the practical requirements of the workplace, to name just two scenarios, can compromise principles such as voluntariness, confidentiality and even mediator impartiality. However, the importance of parties

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<sup>7</sup> See *Farm Assist Ltd v DEFRA (No. 1)* [2008] EWCH 3079. While the mediator concerned never gave evidence, this was due to the collapse of the case. Mr Justice Ramsey had in fact determined that, while the principle of mediator confidentiality should be upheld, it was to be overruled in this case in the interests of justice and the public at large.

<sup>8</sup> See *Dunnett v Railtrack Ltd* [2002] EWCA Civ 3030 and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 for early examples of the refusal to mediate being questioned. More recent cases include *Rolf v De Guerin* [2011] EWCA Civ 78, *PGF II SA v OMFS Company & Anr* [2012] EWCH 83 and *Swain Mason & Ors v Mills & Reeve* [2012] EWCA Civ 498.



taking control of their own informed decision-making is a defining characteristic of mediation that distinguishes it from processes like arbitration or adjudication.

It may be accepted that mediators need, at times, to negotiate with parties about how these principles are employed in practice. They may even, at other times, have to make choices between them. However, that parties take responsibility for their own conflict and identify their own mutually acceptable solutions supported by, in Irvine's words, a 'self-limiting intervener'<sup>9</sup> who has no vested interest in the outcome, are all key elements of mediation that were strongly defended by the respondents in my sample.

I conclude that principled mediation practice must evolve from situation to situation. One commentator aptly describes mediation as an arena in which we "live daily in the minefields of moral ambiguity"<sup>10</sup>. Irvine himself comments that "[i]n a sense mediators are constantly working out their values, with fear and trembling, case by case."<sup>11</sup> While principles are not the same as personal values, there is considerable overlap.

### *The Research Findings*

The schedule that I used in my interviews included several questions which were designed to encourage respondents to talk about the principles by which they work as mediators.<sup>12</sup> In two multiple choice questions, respondents were asked to prioritise a) the factors contributing to a successful outcome and b) the principles of practice (from a list of eight). There were also more specific questions concerning mediators' views

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<sup>9</sup> Irvine (2007) 33.

<sup>10</sup> *ibid* 84.

<sup>11</sup> *ibid*.

<sup>12</sup> See Appendix A to view the interview schedule.

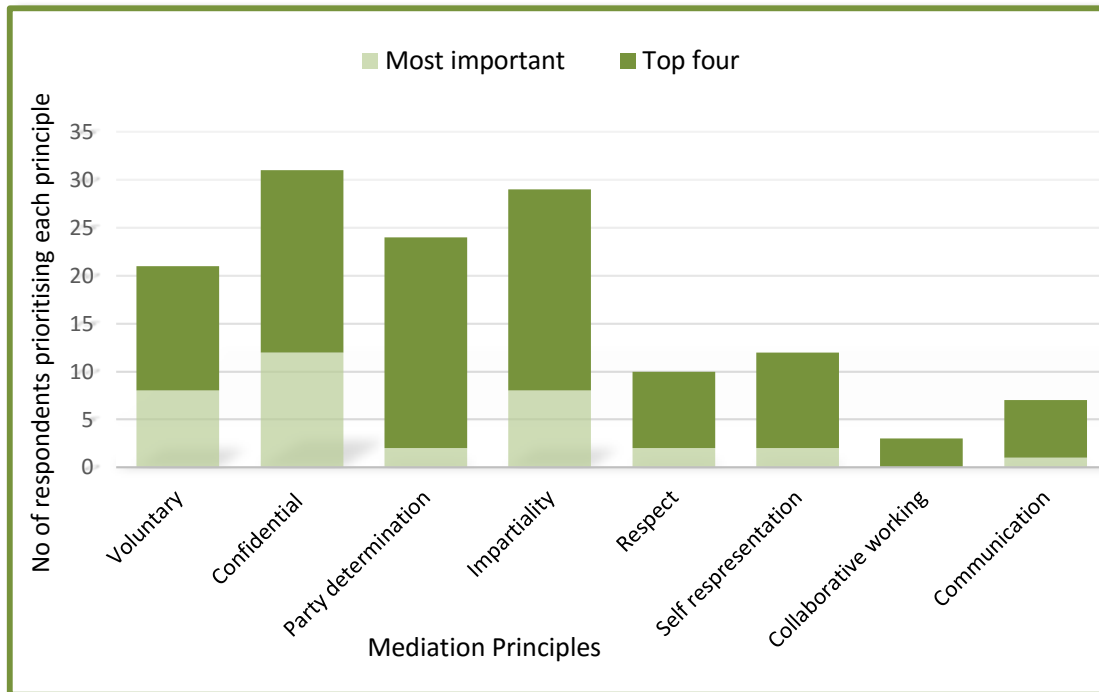
about the compulsory use of mediation and its effect on both the parties and the mediator.

The answers to these questions were immediately striking. Firstly, it was clear that respondents were overwhelmingly against parties being compelled to participate in mediation. It was clearly stated by 93.9 per cent of the sample that compulsion would not be helpful, or, worse, that it would be destructive. The concept of compulsory mediation is explored further below but it is important to note the resounding response to this question. The opinion expressed by the following mediator was typical:

“No! I’m very against the idea. I can see a certain value in a compulsory information meeting but I just feel it is against all the principles of empowerment and voluntariness which are so important to getting an outcome that will last. (E09, family and workplace mediator.)

Secondly, many respondents found it very difficult to pinpoint one principle that was most important in their practice. It was possible, however, to identify three or four that they considered to be most significant from a list of eight. The chart below shows the number of times that a specific principle was referred to as being among the four most important from that list.

**Figure 9: Respondents' views on the principles of mediation by importance**



The columns are divided into two sections. The bottom of each column (in light green) records the number of times each principle was specifically identified as most important. The top part (dark green) refers to the number of times it was referred to as being among the top four. As the chart clearly demonstrates, the four principles of voluntariness, confidentiality, party determination and mediator impartiality stand out as the four most significant as far as respondents were concerned. While the other principles listed were recognised as having relevance, they were seen as something to aim for as the process continued. The first four were considered to be essential elements in creating the environment in which mediation can take place.

In the rest of this chapter. I shall examine these four principles in detail, exploring why they come to be viewed as so important and how they are put into practice.

## 1. *Voluntariness and Compulsion*

The question whether disputants should be compelled to go to mediation, particularly in settings that operate within a legislative framework, is one of the most critical debates surrounding the future of mediation. In earlier chapters I have explored the impact of the Woolf Report, subsequent legislation and a number of decided cases that have all fuelled the debate on the merits or otherwise of compulsion within the civil justice system. As those debates have continued, it has become clearer that the principle of party determination allows parties to go to mediation without the presumption of reaching agreement and that a failed attempt does not rule out the possibility of the case continuing to court. Jackson clarified the circumstances in which mediation should be used and concluded that these will vary from case to case and should be considered a matter of judgement. He urged culture change through the provision of clear information about mediation, education for the public and training for the judiciary. He saw mediation as the default process and placed responsibility with disputants for providing a good reason for refusing it. More recent case law includes a number of applications being considered for penalties<sup>13</sup> and defines still further what constitutes 'refusal', extending the interpretation to include simply having ignored a request on two occasions (see in particular *PGF II SA v OMFS Company & Anr*).

This slow progression towards compulsion is paralleled in other settings including the family sphere, Special Educational Needs and the workplace. As already noted, the requirement for a pre-meeting with a mediator to test suitability is now accepted practice across these sectors. These measures provide information about the

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<sup>13</sup> For example, *Rolf v De Guerin* [2011] EWCA Civ 78, *PGF II SA v OMFS Company & Anr* [2012] EWCH 83 and *Swain Mason & Ors v Mills & Reeve* [2012] EWCA Civ 498.

availability of mediation as a way of resolving disputes, but as Ahmed<sup>14</sup> has argued, the power to impose sanctions where mediation has been refused begs the question whether it can be described as voluntary.

The movement towards compulsion undoubtedly conflicts with respondents' clearly stated view that mandatory mediation is unhelpful and self-defeating. Voluntary entry into the process was seen by 61 per cent of respondents in my study to be a significant factor influencing the success of mediation. The terms that respondents used to describe the importance of voluntariness were strong and unwavering: words like 'critical', 'essential', 'central' and 'absolutely vital' were used frequently. The following quotes give a flavour of the views expressed by several respondents:

"Voluntary choice is uttermost. If someone wants something to change for themselves it is likely to work. If they are feeling pressured and they feel they've got no choice, then they might just be going through the exercise to tick a box." (C04, community mediator.)

"Voluntary choice is *the* most critical by far and away. If people are forced into mediation, then the chances of success are minute. If you compare the London County Court to say the Edinburgh Sheriff Court where it is not compulsory, the success rate is a lot less in the south. That to me is the critical factor because the parties are part way there already. They've said 'Yes I am prepared to take the time, sit down with this person and sort something out.'" (C12, civil and commercial mediator.)

"This was a community mediation between two couples: we saw them both, everything was fine and then we got to the joint meeting and the elderly couple were so antagonistic. So we worked through things, until half way through the meeting she said 'Well, we are only here because we were threatened by the Housing Association.' That jeopardised the whole of the mediation because that was the elephant in the room. So we worked on it, but the feeling of being forced to do it and being threatened was so much inside them that they couldn't get over it and they left. I just know that forcing someone to do what they don't want to do will never work." (B14, community and family mediator.)

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<sup>14</sup> Masood Ahmed, "Implied Compulsory Mediation" (2012) *Conflict Resolution Quarterly* 151,152.

It is perhaps surprising, given the strength of opinion against compulsory mediation, that voluntariness does not feature more often in respondents' four most important principles. There are several possible explanations for this. The first is that practitioners recognise an ambiguity in the use of the term 'voluntary.' Parties' entry into the mediation process can seem less than voluntary. The examples used earlier in this chapter refer to the incorporation of mediation within the justice system. One respondent described it as 'a grey area' observing that "When the judge looks down the table and says at the case management review: 'Now, why am I dealing with this? Should it not go to mediation? – is it voluntary?'" That same question can be asked in the workplace where parties might well feel compelled to go to mediation rather than to be faced with a record on file indicating their refusal or to be labelled as being non-cooperative. Similarly, neighbours in a housing dispute may find themselves in a position where the alternative to a negotiated agreement could be a very serious outcome such as eviction. Though respondents recognised the value of voluntary choice by parties, for many it was a matter of having to learn to live with reality, as the following examples demonstrate:

"In an ideal world two sensible people will come together and will volunteer, without a shadow of a doubt. Brilliant! But in the real world there is a whole spectrum of what that means." (B12, family mediator.)

"Voluntary choice is fairly important but increasingly it is not as voluntary as all that. The commercial clients I am dealing with are assuming they probably have to mediate, certainly under English law. My original view was that any attempt at compulsion would be fatal to the process. That clearly isn't true and I have changed my view over the years. Certainly in the commercial field, whipping people into mediation probably doesn't do too much harm. In theory it is critical. In practice it is less so." (C13, commercial mediator.)

A second explanation given by respondents is that voluntariness is closely linked with parties' commitment to an outcome. A workplace mediator summed this up well:

“I would question sometimes how voluntary ‘voluntary’ is. It is always a choice but in some situations not going to mediation means another process kicks in. Sometimes people feel pushed into it by a manager and so it becomes more significant that they want something to change and are committed to an outcome. That might change as the process goes along. Expecting an outcome is more significant than going ‘voluntarily’ but not expecting a change.” (D01, workplace mediator.)

In other words, there is a difference between voluntary entry into the process as a whole (in particular, attending an initial individual meeting) and a subsequent choice to proceed to mediation. Many practitioners drew attention to the importance of individual pre-meetings where parties not only have the opportunity to talk about the situation from their perspective but also to hear about mediation and examine the risks and benefits of using it. Many mediators see themselves as skilled and confident at being able to use this first meeting to good effect. There, people are given a choice to proceed or not, irrespective of any compulsion to attend that initial meeting. A family mediator gives her views on these first meetings:

“One of the problems with ‘voluntary’ is that it means lots of different things to different people. Personally I have found no real difference between the clients who have been forced to come in for MIAMs and gone on to mediate and those people who have self-referred. I think, once they have made the commitment, by its very nature they become volunteers to the process. Making a commitment to the process just changes the mind-set. If they commit to going through and having an outcome that they are going to stick to, then they will make good use of the process.” (B09, family mediator.)

The fact that there is an initial information meeting, followed by a decision to go ahead with the process or not, means that the principle of voluntariness to participate in mediation remains protected. What is more, the decision to go ahead is based on an informed understanding of what mediation is and a willingness to make a personal investment in using the process. It is interesting to note that there was much less resistance amongst respondents to the idea of a compulsory information meeting. While some admitted to initial misgivings, almost 43 per cent of respondents said that

they could see benefits in it since it helps people understand the process of mediation and what it offers. These were often family mediators, as the following examples show, who have been working with this requirement for some time:

“There is no problem with compulsory attendance at a MIAM because what I would say is that you can’t refuse what you don’t know about. This is really about a meeting to help people understand what is on offer - people really don’t know what it’s about. The number of people who have said to me ‘I wished I had known about this before.’” (B06, family mediator.)

“I think that what some might call ‘a fudge’ is absolutely bang on - that individuals are required to meet with a mediator. I think MIAMs should be compulsory. In other words, I think they should have to meet with a mediator to consider mediation before making any court application. That should be for everyone regardless of wealth. I think it is the right balance. I wouldn’t want anything more mandatory than that, nor less.” (B08, family mediator.)

“I would have been one of the people that said MIAMs should not be compulsory, but they are. Having seen them, I think I am a convert for sending people for an information and assessment meeting. Against that, one of the first things I say to people in MIAMs is ‘Whatever else you have heard, the mediation process remains voluntary and it is entirely your choice. You can sit and listen to me and, at the end of this I’m not going to ask you for reasons that I think justify your excuse for not attending. It’s up to you.’ I think that giving back of control is vital – you can see them at that point, you can see their shoulders relax and you can see them thinking, ‘Oh well, I might as well listen then, because I am not going to be lured in.’ And I think you might end up throwing out the baby with the bath water by taking the next step and forcing people to engage in a process. I think probably we have gone as far as we can by ‘forcing’ people to hear about it.” (B09, family mediator)

The strength of feeling among respondents was, therefore, very much against the idea of mandatory mediation, though a significant proportion could see the benefits of a compulsory first meeting that offers an explanation of the process and enables participants to make an informed decision to participate or not. Some were quite clear that this should be conducted by a mediator rather than a gatekeeper to the process.<sup>15</sup>

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<sup>15</sup> For example, this could be a referring lawyer in a family mediation setting or a member of a Human Resources team within the workplace.



A meeting of this kind ensures that voluntary participation in mediation itself remains protected. Crucially the meeting also serves to support parties to 'buy into the whole thing', 'understand what it is about', 'prepare for it' and 'commit themselves to looking for a way forward'. One respondent observed:

"This takes some work pre-mediation because people are in the mind set of gladiators. They are 'anti' this person and whatever they say is wrong regardless. I have said to them sometimes, 'If we are going to do this, you have got to buy into the idea that all that stops and you are co-operating: you are going to turn around and stop looking backwards to whatever the problem was and as of today you are going to look forwards to a solution. That means you are going to listen to the other party and not to write off what they say. You are going to have a chance to say your thing and you are going to listen to what they say, because now suddenly you are not fighting them you are trying co-operatively to find a solution.' People literally have to turn round to look forward." (C08, Commercial mediator.)

A third reason that explains why voluntariness does not score more highly could be that, despite these strong views against compulsion, some respondents were able to identify 'exceptions to the rule', where the principle of voluntariness might be overruled by a higher concern, such as that of child welfare. As one family mediator put it, social norms and expectations about parenting and child safety might outweigh the principle of voluntary choice:

"I think I could be persuaded that there are circumstances where a court could order parties to attend a mediation but I think we would have to call it something else – because voluntariness is so critical. I do think that there are cases where you could say the benefits to third parties (probably children) of making it compulsory would be so great that a court might have to say to parents, 'We expect you to behave responsibly and behaving responsibly means looking at your parental relationship and we are going to insist that you do that.'" (B11, family mediator.)

Another mediator, again from the family sector, thought that long, drawn out cases might benefit from compulsory mediation in order to bring about some kind of change, almost as a last resort:

“But it is really tricky, isn’t it, because one of the things about it being made compulsory is that it can be ‘face saving’. And so I think there might be a place for it to be made compulsory right at the end of a really hostile court battle. At the absolute last ditch – you know, they’ve been in court for ten years; they’ve been backwards and forwards; the judge has got his hands up in despair and says, ‘This is what I am going to do unless you go and sort it out in mediation differently.’ And in the knowledge that neither of them are going to get what they want, could they at that stage come in and think ‘OK, I’m being told to do this’ so, regardless of the family that have been [in the background] for ten years saying ‘Go, go you can win this’, they agree to give it a try. It’s something about addressing all those other factors. I think that people, once they get into that court situation, have so much invested that to suddenly say ‘Oh, do you know what? I’m going to try sitting down and talking with him about this’, doesn’t feel grown up. It feels like backing down.” (B13, family mediator.)

Other respondents expressed the view that introducing an element of compulsion can contribute to a cultural change whereby using mediation to resolve disputes becomes more widespread, which in turn increases public awareness. Mediation is increasingly recognised as the first option to resolve disputes, with recourse to the law or other formal processes only necessary when this is not successful.<sup>16</sup> It could be argued that the strong encouragement to use, or at least find out, about mediation in the different sectors may play a significant role in achieving this.

Implicit in this shift is an underlying conviction that people have the capacity, even a responsibility, to resolve their own conflicts without having to call on an arbitrator or an adjudicator. Since the principle of party determination is so important in mediation, it is not surprising that this belief is endorsed by practitioners and in the literature.<sup>17</sup>

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<sup>16</sup> See Sue Prince, ‘Mandatory Mediation: The Ontario Experience’ (2007) 26(Jan) *Civil Justice Quarterly* 79-95. She examined the implementation of mandatory mediation in Ontario, Canada, and argued that, with safeguards such as opt out clauses, a culture change had been achieved whereby the use of alternative dispute resolution, and mediation in particular, is now an expectation within the civil justice system.

<sup>17</sup> See Joseph Stulberg ‘Core Values of Dispute Resolution: Is Neutrality Necessary?’ (2011-2012) 95 *Marquette Law Review* 810-11, where he argues that mediation is a “justice event” in which the parties take personal responsibility for determining the outcome. See also Carrie Menkel-Meadow, ‘Whose Dispute Is It Anyway?’ (1994-1995) 83 *The Georgetown Law Journal* 2692. She identifies the parties’ ownership of the dispute as crucial in reaching settlements through mediation that may offer more access to justice than an adjudicated decision.

However, others have argued that an over-dependency on the formal court system and similar frameworks has led to a general lack of personal responsibility within society when it comes to dealing with disputes.<sup>18</sup> Certainly respondents' experience of how people view conflict support this as the following practitioners observed:

"I think [people] are very averse to [conflict]. They avoid it, they suppress it, they shy away from it or they approach it in a formalised kind of way. Our whole society is focussed on solving problems through a third party arbiter and so when people are in conflict they are not inclined to say 'OK let me sit down with the person I'm in conflict with and be open about what's happening for me and encourage them to be open about what's happening for them.' People don't have any model for doing that because that's not the way conflict is dealt with. It's not dealt with like that in the family; it's not dealt with like in school; it's not dealt with like that in the workplace. So people continue the model of having a third party arbiter, which I think is one reason why there is a degree of acceptance for mediation because actually there is still a third party arbiter in mediation – it still fits that model. OK the mediator is hopefully going to play a different role than people expect and is not going to be a judge or make decisions - but the concept is still the same. People come into it thinking the third party is going to do it for them and one of the roles that we are performing as mediators is actually helping them to do it." (A05, workplace mediator.)

"[Being in conflict] is very much around either withdrawing from the other person or, if one has to engage, taking a 'rights' approach. People quickly fall into feeling undermined when conflict arises and there is a lack of capacity in dealing with it. I think this is why there is such a proclivity of workplace investigations and rights based processes because the default positions are either fight or flight." (E04, workplace mediator.)

"I think [people] see conflict as inevitable. I think they experience it as socially conditioned. I don't think we have yet moved, and it may be anthropologically impossible to move, to a situation where the natural reaction in relationship breakdown is to work co-operatively at those areas that need to continue, rather than run to separate corners." (B11, family mediator.)

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<sup>18</sup> This is seen as 'learned dependency' by Robert A. Bush and Joseph P. Folger in *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass 2005) 81, citing Robert A. Bush 'Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation' (1989-1990) 3 *Journal of Contemporary Legal Issues* 14-17. They argue that this dependency results in a mutual alienation and distrust and that mediation encourages 'civility' and recognises the human capacity for self-determination and mutual consideration.

Even if part of the role of a mediator is to endorse disputants' own capacity to resolve their conflict, the shift required to achieve a cultural change of this kind is an enormous, long term endeavour. Of the responses to my questions about conflict, 81 per cent of respondents said that people view conflict negatively, with over half of those indicating that fear and avoidance were common reactions. Moving from that position to one where society at large is confident to deal with conflict is difficult to achieve without education and awareness raising. There is therefore a delicate balance to be struck between encouraging people to take personal responsibility and not forcing them to do so. Perhaps mandatory attendance at an information meeting is one way of achieving that balance. One commercial mediator expressed it this way:

“What I do think though is that the balance here, of pressure to mediate rather than compulsion, is a good one. It is a much more nuanced, much more sophisticated approach to the problem. Because you are not saying ‘you have to’ but you are saying that ‘the State is paying out money to make available a court system that is phenomenally expensive.’ There is an important message about personal responsibility. I would want to be saying to people: ‘Yes, sure, listen: you have to take responsibility. The State is there to help you with things if you absolutely need it, but before you get there you need to show the State, if it is going to pay all this money for you, that are also taking responsibility. That, to me, is an appropriate balance of interests.” (C17, civil and commercial mediator.)

Finally, a fourth reason might be that, with the advent of compulsory information meetings in several settings, the concept of voluntariness has to some extent been taken out of the hands of mediators, at least until people reach that first meeting.

The debate about voluntariness versus compulsion rages. A general lack of uptake, together with resourcing implications for governments, courts, workplaces, housing associations and local authorities in addressing conflicts, fuel the arguments for mandatory mediation. Yet my research demonstrates the strength with which mediators themselves see the futility of compulsion. While compulsory information

meetings raise awareness and prepare people to make the best use of mediation, they still allow disputing parties to make their own decision about the best way to resolve their argument. Working within the constraints of the context in which they find themselves, mediators still, therefore, protect the principle of voluntariness. Nevertheless, some raised the question of the use of language and whether 'voluntary' is the right word. Others suggested that the process as it is conducted, in the shadow of the law, might better be described as a form of principled negotiation. The simple truth is that the word 'voluntary' is thoroughly ambiguous.

## *2. Confidentiality*

The issue of confidentiality within mediation is another area in which practice and theory are not necessarily aligned. Most mediators, probably without any pause for consideration, recognise the importance of a protected, legally privileged environment that allows participants to exchange their views freely and get to the root of their differences. Yet, in practice, the principle of confidentiality, just like that of voluntariness, is influenced by context. There are some circumstances, for example, in which the impact of a dispute goes beyond the individuals involved or where decision-making authority lies outside the mediation room. Confidentiality can also be overruled when safety of the public or of individuals comes into play. I will argue in this section that, despite these situational influences, mediators take great pains to protect this principle and to carefully negotiate around contextual factors in order to preserve the private nature of the conversations held in mediation.

Confidentiality raises problems in any context, but for the purposes of this discussion I will explore two areas of mediation delivery that I believe particularly highlight the

debate: those of the workplace and civil disputes. In his review of mediation in the workplace Latreille<sup>19</sup> discussed confidentiality and voluntariness: both principles identified by participants in his research as two 'canons of practice'. He acknowledged that it is of great importance to establish an environment in which parties to mediation can be "open and frank", but the study also showed that this was not necessarily straightforward for those in a gatekeeping role. These people, often staff working in Human Resources Departments, were responsible for introducing the idea of mediation which might include anything from 'encouraging' to 'persuading' people to use it. Workplaces, whether small or large, are effectively communities in their own right. They are not environments in which people can easily keep secrets and the challenges to offering a confidential mediation process are numerous. From my own experience of mediating in workplace disputes, I would observe that conflicts between colleagues or between a manager and a staff member do not go unnoticed by the rest of the work force. It is likely that over a period of time others are pulled into the dispute and allegiances are formed, either overtly or covertly. I have found too that, in some types of organisations, the community is prone to being very enclosed and inward facing. The result is that professional and personal relationships often overlap and become enmeshed. A small, locally based Care Home, for example, may employ several members of the same family from generation to generation; for members of the Armed Forces their work and their home are often based on the same site; in a prison environment, the parameters between those who are 'in' and those who are 'out' are forcefully drawn.

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<sup>19</sup> Paul Latreille, *Mediation: A Thematic Review of the ACAS/CIPD Evidence*, (ACAS Research Paper Ref 13/11, 2011).

Kenneth Cloke has written extensively about organisational conflict and describes the workplace as a system where “Conflict is the sound made by the cracks in a system, the manifestation of contradictory forces co-existing in a single space.”<sup>20</sup> In other words, individual disputes can be symptoms of larger, more complex issues facing the whole of the organisation. Conflict has a tendency to spread and anonymity is difficult to preserve. For these reasons people can be wary about entering into a mediation process to resolve a dispute which may have a very public feel to it. There are other considerations too: for a mediator who works internally within the organisation, the chances of knowing one or both of the parties in their other professional role can be high. Concerns are often raised by parties themselves about whether records of mediation will be kept on file.

It is not difficult to see, therefore, that there are various hurdles to be overcome if the principle of confidentiality in the workplace is to be preserved. Yet the responses from the mediators I interviewed in my study indicate that they go to great lengths to protect parties’ privacy and regard confidentiality as one of the most significant benefits of mediation for its users. The comments below from in-house workplace mediators show how crucial this principle is to them:

“Confidentiality allows people to enter the process in a more positive way. If they know what they say is not going to be used against them, it promotes honesty and this is needed to achieve resolution.” (D03, internal workplace mediator.)

“Often the people that we see in mediation, while we may not work closely with them, are people who we are likely to see in the workplace - and obviously between parties there has got to be an ongoing trust in order for them to be able to work in a particular way moving forward. So for me I think confidentiality and the assurance that everything talked about stays in the

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<sup>20</sup> Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass 2001) 8.

room, as it were, is critical to success. I think where people are not trusting of the confidentiality then it influences the success of the mediation.” (D04, internal workplace mediator.)

“Confidentiality means it’s a safe space so that people can tell you what’s really bothering them. It comes even before impartiality because if people can’t trust you to keep to yourself what they are saying, there is no room for them to feel comfortable. In the context of employment disputes, people can be very reticent until they are reassured that it’s absolutely OK to talk about stuff that may or may not be relevant to a tribunal. Once informed they will be more open and thoughtful about what is at the nub of the dispute.” (C02, civil and community mediator.)

The difficulties in maintaining confidentiality in the workplace are not just confined to the process of entering into mediation but also feature in what happens afterwards. Personnel working in a Human Resources Department who may have encouraged people to participate in the first place need to know whether a dispute has been dealt with or is likely to proceed further through a formal channel. Outcomes cannot be entirely confidential though conversations may be. The following workplace mediator illustrates the need to manage expectations with all concerned about what is and is not disclosed:

“Confidentiality is another [crucial factor], particularly in the workplace, where it is important to be clear with parties and HR that the conversation is confidential. It gives parties a lot of reassurance because their initial thoughts are ‘Here is someone who, no matter what I say, it’s going to be passed on.’ So I have to do whatever it is within me to persuade them that I am not going to pass it on. Feedback in the workplace is very general and that is made clear to parties. If someone needs to be informed it will be included in the written agreement.” (C12, commercial and workplace mediator.)

In this and other settings, the outcome of mediation may require the involvement of other people or become part of another decision-making process before a final conclusion can be reached. In the education arena, where a mediation is arranged between the parents, the school and the local authority to discuss provision for a child with special needs, it may actually prove impossible to involve those with final decision-



making authority. In some jurisdictions, decisions are made by panels whose role it is to consider one child's application alongside that of several others. In this situation the aim of the mediation may well be to arrive at a proposal which then has to progress through the appropriate channels. In a scenario such as this, the mediator will have to negotiate with all those involved to agree what information can be disclosed from their discussions, by whom and how.

The same question arises in the civil and commercial arena too. Generally, the principle of confidentiality is well respected in this context, not least because, as several respondents said, it "guarantees that people won't go to the press." One respondent observed that mediation offers privacy "whereas any formal process, no matter how confidential it is, generates paper, it generates reports, it generates legacy and if it is in court, it probably gets into newspapers." However, the issues surrounding confidentiality in this context are particularly complex and they are increasingly being challenged in the civil courts. The case of *Farm Assist Ltd v Defra* (2008) was a notable example. This case involved a company which had gone into liquidation and which had been in mediation with DEFRA five years previously. The liquidator sold on the right of action to another company that applied for an order to set aside the settlement agreement made at the time of the mediation on the grounds of economic duress. DEFRA wanted the mediator involved to be called as a witness to give evidence about the conduct of the mediation, including both private and joint meetings. The other party agreed in principle but did not see the necessity of calling the mediator.<sup>21</sup> This led to a

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<sup>21</sup> For a fuller outline of the case, see Michel Kallipetis and William Wood, 'Mediator Privilege' originally published for an online publication, The Mediator Magazine. The article is no longer obtainable through this source but can be found at [billwoodmediation.com](http://billwoodmediation.com) Accessed 10 August 2014.

complicated exploration of what was or was not considered to be legally privileged in the process. The parties had initially signed an agreement that explicitly stated that the mediator could not be called upon to give evidence and that the discussions were confidential to all those involved. In her appeal against being called as a witness, the mediator said that she could not remember the case (she had in the meantime undertaken some 250 mediations) and that her promise of confidentiality to her clients included an understanding that she did not take or keep notes. Manning Cox gives a useful analysis of the case in which he draws out the distinctions between confidentiality, 'without prejudice' discussions and 'privilege' that were highlighted in this situation:

“The without prejudice rule governs the admissibility of evidence. It applies to exclude all negotiations aimed at settlement, whether oral or in writing, from subsequently being referred to in evidence at trial should settlement not be achieved.”<sup>22</sup>

Confidentiality, on the other hand, applies not only to the discussions as a whole but to any exchanges between the mediator and the individual parties. The particular nature of civil and commercial disputes and the way they are conducted in mediation means that mediators hear information that may not be disclosed to the other party, at least in the first instance. It is to be hoped that, through their work to create a safe environment, the parties will eventually feel able to share information with each other. As the Guide to Confidentiality, published by The Centre for Effective Dispute Resolution (CEDR) points out:

“[T]he paramount purpose of introducing confidentiality into mediation practice is in its creating and preserving a sense of security for the parties

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<sup>22</sup> Andrew Manning Cox, 'Is it a bird? Is it a plane? Is it "mediation privilege"?' Lexology (05 Jan 2012). Lexology ([www.lexology.com](http://www.lexology.com)) is a web-based service that provides law firms with legal information, run by Globe Business Publishing Ltd, accessed 10 August 2014.

during settlement discussions, but in a way that eventually encourages mutual disclosure of private information and opinion in order to generate the possibility of settlement.”<sup>23</sup>

In the *Farm Assist* case, Mr. Justice Ramsey considered that the without prejudice privilege existed solely between the parties and that it was their right to waive it if they so wished. However, he held that all parties were bound by the confidentiality of the discussions so that, even if the parties agreed that matters could be referred to outside the mediation, the mediator could enforce the confidentiality provision. While the courts would generally respect this, he said that the interests of justice could override it. Mr Justice Ramsey found a precedent in case law, where a judge had overruled confidentiality in the interests of protecting a child and argued that this:

“... len[t] support for the existence of exceptions which permit use or disclosure of privileged communications or information outside the conciliation where, after balancing the various interests, it is in the interests of justice that the communications or information should be used or disclosed.”<sup>24</sup>

In the event the case collapsed and the mediator did not appear. However, a precedent has been established and it remains to be seen how far it is used. There is no doubt that it raised concerns within the mediation profession as a decision that might undermine both the protected nature of discussions in mediation and the impartial, non-judgemental role of the mediator. These have led to suggestions that protect mediation further by establishing a special ‘mediation privilege’.<sup>25</sup> Bartlet argues that it

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<sup>23</sup> Heather Allen, ‘Confidentiality: A Guide for Mediators’, (31 Oct 2014) ADR Times at [www.adrtimes.com/library/2012/10/31/confidentiality-a-guide-for-mediators.html](http://www.adrtimes.com/library/2012/10/31/confidentiality-a-guide-for-mediators.html) accessed 10 August 2014.

<sup>24</sup> *Farm Assist Ltd v DEFRA (No.1) [2008] EWCH 3079* at paragraph 27. This is endorsed by the EU Mediation Directive 2008 Article 7. Although aimed specifically at cross-border disputes in civil and commercial matters, the directive states that confidentiality is to be respected except “Where overriding public policy considerations make it necessary: in particular, when it is necessary to ensure the protection of children or to prevent physical or psychological harm.”

<sup>25</sup> See Manning Cox (2012), who suggests that:

“[T]o preserve and enhance the attractiveness of mediation (and in particular the special relationship between the parties and the mediator) it should be afforded protection by a special type of ‘mediation

is time for mediation to “come of age” and calls for “greater clarity both regarding the nature and scope of confidentiality at its heart ... [and] ... greater congruence between professional practice and the law.” He observes that:

“Mediation depends on the law but cannot be solely determined by strict legal entitlement. Many factors influence settlement including emotions, reputational risk, continuing business and other relationships, and non-dispute related interests. It is vital to this process that mediators should be able to explore all avenues with the parties without fear of disclosure.”<sup>26</sup>

Bartlet argues that a distinct form of mediation privilege would be a means by which to protect the integrity of the process and encourage settlement of legal disputes at the same time.

Cases like *Farm Assist* also raise difficult questions about the transparency of professional practice. Many mediators, particularly those operating within a legal framework, ask parties to sign an agreement to confidentiality, as in this case. While Mr Justice Ramsey agreed that the mediator was herself protected by such an agreement, criticism could be levelled at mediators that this is a convenient defence which prevents any scrutiny of their practice. Mediators most often work alone and it is sometimes argued that their deliberations are shrouded in secrecy. While it ensures the privacy that parties value, it is at the same time detrimental to the development of consistent mediation standards and does nothing to promote understanding generally about what mediation is about or what it seeks to achieve.

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privilege'. This would more strictly protect the confidentiality between the mediator and individual parties ... [T]he existence of such a privilege would encourage frank communications with the mediator, an integral part of the mediation process. Consequently, it could assist the mediator and parties in achieving a resolution of the dispute, safe in the knowledge that such communications could not be revealed at a later date.” Accessed on line 11 August 2014.

<sup>26</sup> Michael Bartlet, ‘Mediation Secrets “In the Shadow of the Law”’ (2015) 34 Civil Justice Quarterly 112 – 126, 125.

To conclude this examination of the principle of confidentiality, I would argue the responses in my study indicate that, like voluntariness, it is very much influenced by the context in which mediation takes place. I have pointed out that there are specific challenges depending on the legal or policy framework within which mediation is delivered. Nevertheless, practitioners place great weight on preserving the notion of privacy within the mediation process and this is likely to be important for disputants in deciding whether or not to proceed. Once engaged in the process, confidentiality significantly influences the level of openness and the quality of interaction between the parties. Respondents generally recognised that the guarantee of privacy not only increases parties' willingness to engage in mediation but also influences the chance of a successful outcome. As a result, mediators say that they take steps to ensure that both the content of the conversations that take place in mediation and the nature of the exchange between parties remain private even if the outcome cannot.

It is interesting to note that respondents in different contexts conveyed this in slightly different ways. As we have seen, in the civil and commercial arena and to some extent in family mediation, descriptors such as 'legal privilege' and 'without prejudice discussions' are often used. In the workplace setting, mediators are more likely to talk about 'protected' discussions that are 'off the record', together with the need to create a 'safe environment' in which people can get to the root of the problem. One family mediator highlighted the importance of this:

"You have to create an environment in which people actually feel that they are going to be listened to, going to be heard and that they are going to get their opportunity to say what they want to say. They are not going to be seen as stupid if they don't understand what the process is. The safe environment is about all of those things really. It is very much about feeling 'I can say what I want to say, fairly, openly and honestly, without any fear of repercussion or

without people thinking that I am being daft or stupid or conflictual or recriminating' or whatever it might be." (B07, family mediator.)

The implication is that feeling secure within the mediation process allows people to engage in a frank and honest exchange which caters for the more ideological aspirations discussed in Chapter 2: building understanding, repairing relationships, enhancing communication and bringing closure. I suggest that these aspirations seek to address the intensely personal, often debilitating, effects of being in conflict. It is these aspects of mediation that practitioners say that they take steps to protect, while the outcome of principled negotiations or settlements agreed in the process may well be shared in a court, with HR managers, housing associations, local authorities or other stakeholder.

### *3. Party determination*

This principle was identified as crucial by almost half of respondents in my study, many of whom spoke about it in strong terms. In this section, I use extracts from these interviews to illustrate the importance placed on party ownership, in terms of participation in the process, control of the content and the likely sustainability of any agreements made. These respondents stressed how vital it is that parties take responsibility for the disputes in which they find themselves. Some went as far as to express this as part of a movement towards achieving a cultural change in the way that people manage conflict. However, there is an important question to be asked as to why, if party determination is such a central feature, it did not score more highly among the remaining half of the sample. To answer this question I explore the original understanding of this concept as it emerged in the United States, and the subsequent debates concerning how far it is realistic or desirable. I consider how far the UK is at

risk of a similar erosion of this principle and whether parties are genuinely empowered to create their own solutions.

For many of the respondents I interviewed, party determination is a principle that applies not only to the joint agreement of an outcome but also to the decision to engage in the process itself, to agree what needs to be discussed and to participate freely in those discussions.<sup>27</sup> A similar view was expressed by Sir Alan Ward, current chair of the Civil Mediation Council in a presentation to The Academy of Experts (09 October 2013):

“Mediation has the great advantage that under the skilled guidance of the mediator the parties exercise control over the process allowing them to resolve their dispute in the way they want and so achieve an outcome which is satisfactory to their needs rather than an outcome which is imposed upon them. They are free to agree but they always remain free not to agree.”<sup>28</sup>

The concept of party determination is central to the whole purpose of mediation. In the civil justice arena, for example, the fact that those who take part in mediation are able to decide their own outcome is, in essence, the feature that distinguishes mediation from other dispute resolution processes. My interviews also illustrated the centrality of this principle as far as many practitioners are concerned. It was frequently described in terms such as ‘absolutely key’ or ‘fundamental’. As one community and workplace mediator said, “If that isn’t happening, it isn’t mediation.” The following quotes illustrate the strength of conviction that this is a core part of what mediation sets out to achieve:

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<sup>27</sup> See Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (London: Jessica Kingsley Publishers 2007) 104ff. She argues the centrality of “respect for the parties’ own decision-making authority” regarding not only the substance of their dispute but also the means by which to resolve it. She underlines how far the principles of mediation are linked, pointing out that to mandate the use of mediation would be “to den[y] parties the right to make their own informed decision whether or not they want to participate in the process” and is therefore incompatible with the concept of party determination.

<sup>28</sup> The full text is available at [www.civilmediation.org](http://www.civilmediation.org) under the Library of Documents. Accessed 29 May 2015.

“Mediation provides the opportunity for them to decide their own dispute. I think that is the whole power of mediation. Instead of any court or judge making a decision on their behalf, they are going to be able to take this decision into their own hands. Most people much prefer the results of mediation which they have decided themselves rather than going to a court where somebody probably isn’t going to give them much opportunity to speak, isn’t really going to listen to them either, frankly, and where it will be decided on a legal issue which may not, to them, be the most important matter in dispute.” (C08, civil and commercial mediator.)

“It allows people to be in the driving seat – and this is any mediation really, it doesn’t have to be education. Because if they go to tribunal, the panel will make the decision. If they go to mediation, the mediator doesn’t make the decision, the local authority doesn’t make the decision for anyone. People have to come together to make agreements that everyone round the table can live with. It is that sense of maintaining some control over what is going to happen.” (C15, SEN mediator.)

“I feel quite passionate that the purpose is to empower people to take control of their own lives and their own choices. So the purpose of mediation is to provide an environment and coach people to a place where they are able to handle things and then to dialogue themselves.” (B04, family and workplace mediator.)

“[The purpose of mediation is] to help people reach some sort of resolution of their own, to whatever it is that they want to get sorted out through mediation. It is very much about a solution that is theirs; that they can own; that they come to by themselves together with the help of a mediator. That’s the primary purpose.” (B07, family mediator.)

It is clear, then, from these responses that party determination was seen by many respondents as fundamental to an understanding of what mediation sets out to achieve. This helps to define the role of a mediator. In its most literal sense, party determination means that participants, not the mediator, retain control over the substantive elements of the dialogue. Most mediation training in the UK is based on a facilitative approach which encourages mediators to see themselves as responsible for the process, while parties are responsible for the content, both in terms of what they discuss and what they decide. This limits the role of mediator to encouraging healthy communication and supporting the building of understanding rather than prescribing



an outcome. It is perhaps the most difficult aspect of the role to learn and mediators remain very conscious of it in their practice, as the responses below demonstrate:

“Party determination is interesting because I entirely believe that I am not there to provide solutions. [Parties] make the choices, they make the decisions. My task is to stay impartial or multi-partial and support that. I don’t expect parties to respect each other but I think I have to offer respect to them and their stances. If they achieve collaborative working, that is great and my job is to support effective communication in order that they can get to party determination.” (A8, community and workplace mediator.)

“Parties determining the outcome is key. Sometimes parties want me to say what the outcome is but I always step back. I think for some people it is very important that they are the ones who work out what the solution is. For others they would rather it wasn’t that way but I think it is key.” (C12, commercial and workplace mediator.)

“It has to be about them expressing their ideas and deciding what they want to do. I practice facilitative mediation, so it’s not about any ideas or suggestions I might have – I deliberately don’t make any. I don’t lean on people to make agreements.” (C02, community mediator.)

“It has to be the parties’ solution at the end. If you get something that is suggested or hinted at that they then take on board, it is not as powerful as you creating the conditions for them to come up with their own ideas.” (B03, family and commercial mediator.)

“Parties determining the outcome is very important. This is what it is all about really. If we as mediators are leading people in a certain direction, they will reach an agreement that they are not going to uphold.” (B07, family mediator.)

“Party determination: that comes back to the thing about choice in that, if the parties themselves agree what they want and reach that as much as possible, then it is more likely to be a successful process, rather than a [process where people feel] ‘done to.’ If the outcome is pre-determined by the mediator or the manager, then the manager might as well have made the decision in the first place.” (D04, workplace mediator.)

Underlying this commitment to party determination, then, there was often a perception, whether explicit or implicit, that, when disputants have solutions imposed on them, they are less likely to be implemented. The statements above re-emphasise the importance of mediation as a process that clarifies communication, builds understanding, identifies

party interests and facilitates a mutually satisfactory outcome. The implication is that, if parties recognise the problem as a mutual one, they are more able to craft a mutual solution. Both parties then have a vested interest in implementing any agreement they have reached whether it is on a financial, emotional or psychological basis. An imposed solution is likely to be arrived at on a point of law (if it is within the civil justice system) or to take into account the interests of other stakeholders (such as employers, local authorities or housing associations). By contrast, mediation allows a tailored response that is specific to the needs of the individuals. As many respondents noted, the fact that parties are able to develop their own solutions is likely to increase the chances of outcomes being put into practice.

Some respondents went even further than this, describing the principle of party determination as a significant element in bringing about a culture change in terms of societal approaches to dealing with conflict. If people are to enter into mutual decision-making, it means taking personal responsibility for conflict and endeavouring to understand the fundamental differences that exist between themselves and the other party. By contrast, the growth in the use of formal processes to resolve disputes leads to a greater dependency on adjudication and an expectation that rights should be upheld. The respondents below expressed the view that formal procedures shield people from having to take ownership of their disputes. They felt that mediation can play an educative role in handling conflict more constructively:

“In terms of social change, what I have seen in the time that I have been doing community work is that the social systems that people use, like social services, the education system, the criminal justice system, housing, welfare, all of those things, have become much more like nannying. What I have seen is that people have developed, more and more, something that I call ‘learned helplessness.’ So we are now at a point where, if there is an interpersonal argument between two people, the parties involved imagine that phoning the

police or the housing officer or a social worker makes it somehow someone else's responsibility to deal with their interpersonal issues. And so for me the social change element is helping people to see, in a very, very compassionate way, that actually they need to take more responsibility and then giving them a vehicle by which they can take more responsibility." (A04, community and workplace mediator.)

"I spend a huge amount of time saying to people 'I really don't mind what you do. It's up to you what you do in this process. I am hoping you will make some good decisions and by all means let's have a conversation about what a good decision might look like. But I am not here to say you ought to do this or you ought to speak nicely to them.' It's not who I am as a mediator. I find it is really important in the mediation field, I think, for our credibility, that we are not thought to nanny people." (C17, civil and commercial mediator.)

"It's about promoting better ways to approach conflict. We help to resolve what is on the table in front of us. But I see it not just as that but more as giving people the tools to resolve things in other aspects of their lives and to prevent not just the main thing that we've been involved with, but perhaps to prevent other potential situations as well. I think there are a lot of people that see conflict as an entirely negative thing to be involved in and I think if we can get around to help people seeing that conflict is positive because it promotes change for the better in a lot of cases, it is a good thing. I think mediation is about empowering people to take responsibility and deal with their own situations as opposed to relying on someone else to do it for them." (C06, community mediator.)

As noted in Chapter 4, the Government consultation paper in 2011, *Solving Disputes in the County Courts*, specifically identified the same aspirations concerning personal responsibility and culture change. The final document does not state this so strongly but nevertheless says in the introduction that:

"... [t]he ultimate objective is a system that delivers justice more effectively, and for more people to be empowered with the knowledge and tools required to resolve their own disputes ... [the aim is that] ... citizens take responsibility for resolving their own disputes as much as possible, with the courts being focused on adjudicating particularly complex or legal issues."<sup>29</sup>

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<sup>29</sup> Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales: The Government Response* (London: The Stationary Office, 2012) 4ff.

The concepts of self-determination and individual responsibility were seen as the main drivers for the formation of the “contemporary mediation movement”<sup>30</sup> in the United States in the 1960s and 1970s. Nancy Welsh argues that the original vision of party determination came about as a response to criticism of the legal system in the USA which was perceived as depriving litigants of control over outcomes. This forced people to delegate their dispute to lawyers and judges to such an extent that they were virtually excluded from their own dispute.<sup>31</sup> Of central importance in those early days was the fact that mediation was recognised as a “disputant-centred, disputant-dominated process”<sup>32</sup> in which people fully participated, took back control and participated in a process which they “could and should define fairness for themselves.”<sup>33</sup> This meant being fully involved in deciding what was to be discussed in mediation, and how, as well as deciding any outcome. As Folger and Bush put it “ ... many mediation advocates envisioned party self-determination as involving more than just the disputants’ passive ability to respond to the particular settlement proposal put before them.”<sup>34</sup> Self-determination recognised participants’ ability to deal with their own problems and to define their own sense of fairness and justice. In other words, “self-determination in mediation was founded upon the principles of party empowerment.”<sup>35</sup>

Yet this defining purpose of the mediation movement has led to vigorous debate and questions are still raised about it today. The transformative mediation approach

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<sup>30</sup> Robert A. Bush and Joseph P. Folger, *The Promise of Mediation* (1<sup>st</sup> edn, Jossey-Bass 1994) 1.

<sup>31</sup> Nancy A Welsh, ‘The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (2001) 6 *Harvard Negotiation Law Review* 1, 15ff.

<sup>32</sup> Jay P. Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation* (San Francisco: Jossey-Bass 1984) 6.

<sup>33</sup> *ibid* 17.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid*.

developed by Folger and Bush<sup>36</sup> in the 1990s came about as a reaction against mediation being used routinely within the civil justice system in the United States making the principle of party determination increasingly difficult to maintain. Welsh uses the example of the legal systems in the states of Florida and Minnesota to illustrate a change in the meaning of self-determination. Gradually the holistic understanding outlined above was replaced with the more limited idea that parties approve the final outcome after an evaluation of the legal considerations from their mediator. Welsh identifies several factors that influence this shift, including the introduction of mandatory mediation when take up was low and there were high demands on the process to provide quick, cost-effective solutions. At the same time there were increasing expectations that mediators “have the knowledge and experience which would permit them to comment on the parties’ legal arguments ... and opine regarding the strengths and weaknesses of each party’s case and appropriate settlement ranges.”<sup>37</sup> As time has gone by, Welsh says, mediation has become more like a judicial case conference with the outcomes of mediation being judged by the same measures of the court. Recent research conducted informally by Adler<sup>38</sup> confirms the domination of the courts’ agenda over mediation principles, together with the increasing tendency of lawyers and judges to turn to mediating,

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<sup>36</sup> This approach describes the effects of conflict as a threat to both individual autonomy and interpersonal relationship, which creates a negative dynamic when people try to communicate with each other. Transformative mediation seeks to restore both of these through empowerment and recognition, and, by doing so, supports the creation of a positive dynamic. The emphasis is on improving the quality of the conversation rather than removing the conflict or settling the dispute. For a fuller explanation see Robert A. Bush and Joseph P. Folger, *The Promise of Mediation* (San Francisco: 2<sup>nd</sup> edn, Jossey-Bass 2005).

<sup>37</sup> Nancy Welsh (2001) 26.

<sup>38</sup> Peter Adler spoke at the 7th National Conference of the Civil Mediation Council in 2013, where he presented an unpublished paper entitled “Expectation and Regret: A look back at how mediation has fared in the U.S.” He had interviewed 24 practising mediators who discussed their perceptions of how mediation had changed over the last thirty years.

bringing with them a background of legal knowledge and expertise that has an inevitable impact on the way that mediation is practised.

While this had not occurred to the same extent in the UK, there are certain parallels that should not be ignored. Although many respondents expressed strong views about the importance of party determination, in practice it may not be so straightforward. Indeed, there are inherent dangers in working with this principle. What happens, for instance, where parties decide an outcome that breaks the law, places other people at risk or allows a more powerful party to impose its own desired solution? While mediators might not provide answers to these questions, they still have a responsibility to check the plausibility of a solution at the least and to point out where a proposed outcome breaks the law or contravenes a code of practice. The following quotations from mediators working in different sectors illustrate these dilemmas:

“It is their lives and they will put into that what they want to achieve, not what I think they ought to achieve. I think that can even include someone giving away more than the other. Because if they have done that because they want to walk away from that situation and get on with their lives, maybe they thought that was a price worth paying as long as they’ve made that decision realistically, knowing what they can and can’t do. The skill of the mediator is, if you are in a room and you think they are coming to an agreement that feels unfair, to have taken the time to say ‘Is this really what you want, because you know you don’t have to do this?’ Then at the end if they decide that is what they want to do, that is their choice.” (B04, workplace and family mediator.)

“There is an element of directiveness involved, particularly with the discrimination and SEN cases. I think of those as ‘rights-informed mediation’. They are done in the context of certain rights that complainants have, that are allegedly being breached. There may be times, for instance, when I might have to refer to the legislation. It is tricky, and particularly in the SEN context, because I am not there as the SEN expert. But if somebody is suggesting something that contravenes the code of practice, I’m expected to know about it. I do have a responsibility in those cases and with the discrimination cases, it is about holding the code of practice or the legislation or whatever so that it is present in the mediation and that any settlement takes account of what it says.” (C01, equalities mediator.)

Mediators are expected to have enough expertise to ensure that parties do not make decisions that go against the law or relevant codes of practice. In the UK and the United States, an increasing number of mediators in family, civil and commercial disputes have previously practised as lawyers or judges. Prior knowledge and experience inevitably influence mediators and this, in turn, must have an impact on party determination. As Roberts has insisted,<sup>39</sup> this moves the role of the mediator away from one which primarily supports communication to one in which the intervener is much more likely to have an impact on the outcome.<sup>40</sup>

What is more, the way in which the process is conducted in some settings increases the possibility that party determination is undermined. In the civil and commercial setting, for example, mediation is typically conducted through a process of 'caucusing' with each side of the dispute. As mediators meet with first one party and then the other, carrying information and messages backwards and forwards, they are placed in a position which clearly gives significant control over the content of discussions and how it is relayed to parties. While the process usually starts with the parties and their representatives gathered together to hear initial statements, most cases will then be conducted with the parties in separate rooms and with the mediator moving between them. How much the parties themselves or their representatives are actively participating depends to a large extent on the mediator. This method of working opens up the opportunity for 'off the record' discussions that may well tread a fine line between information sharing and advice giving. This kind of procedure, should mediators

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<sup>39</sup> See, for example, Simon Roberts, 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (1993) 56 *Modern Law Review* 456. Also Roberts (2002) 19 and Roberts and Palmer (2005) Chapter 4.

<sup>40</sup> Simon Roberts (1993) 456.

choose to employ it, could be more accurately described as 'assisted negotiation' than mediation. Over 60 per cent of the civil and commercial mediators who participated in my research described this pattern of operation.

The substance of these side meetings is likely to revolve around offers, information that is confidential to one side and an appraisal of the appropriate settlement range, on which the mediator may or may not express an opinion. For mediators to contribute their own view would be to take an evaluative approach, a practice which seems to be far more prevalent in the USA than in this country. However, the lack of research into the actual delivery of mediation in the UK makes it difficult to know how far mediators employ evaluative techniques or how much they exercise the 'self-limiting' approach that Irvine refers to.<sup>41</sup> I found that mediators themselves are vague about the influence they exert<sup>42</sup> though some respondents are conscious of working close to the boundary between facilitation and evaluation on occasion, as the following example shows:

“There are times where people are determined to prove their point. I might say: ‘Have you thought about *this* or *this*?’ which is not strictly part of the mediator role. Parties determine the outcome but mediators can be influential, or move the process along a bit through questioning, or doing

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<sup>41</sup> It is also striking that, though the term 'evaluative mediation' is frequently used, comparatively little has been written about it and there is a lack of clarity about what it means. Richbell describes it as “the mediator expressing an opinion ...on merits, possible settlement or some other area where he makes a conscious step from facilitation to evaluation.” For Richbell, it is a last resort, only to be used parties if agree to an evaluation and still retain final decision-making authority David Richbell, 'Evaluative Mediation', (2007) 73 Arbitration 1, 38-39.

<sup>42</sup> This is illustrated, for example, by the following quotation from a civil and commercial mediator:

“Actually it is a much more fudgy process. You get to a point where you say: ‘Yes, I think you are in a zone of potential agreement now. I think the numbers between you are such that I could say that you could achieve agreement. But you are both of you going to have to go further.’ And then you get to a point where you say: ‘I’d like you to let me tell each other what the figure difference is between you so that you can see how wide the gap is, because I need you to go a bit further if you are going to solve this.’ (C14, civil and commercial mediator.)

Here the mediator does not appear to give an opinion, but certainly has a degree of control over the procedural substance of the meeting and the way the negotiations are conducted.



some reality testing. They might be giving direction without taking sides.”  
(C10, civil mediator.)

In the interviews I conducted, I asked respondents how they would describe their own mediation approach. Their answers indicate that a degree of ambiguity surrounds the question of party determination. Over half of the respondents working in the civil and commercial sector described themselves as 'facilitative' mediators, while two thirds of the rest said that they adopted a more flexible approach to meet the needs of parties i.e. they were prepared to be more evaluative if the situation demanded it. Some said they found the principle of party determination difficult to protect at times, particularly because of the involvement of legal representatives, but they made conscious efforts to increase the participation of parties themselves. By contrast mediators operating in the family context put different protections in place. In this setting, mediation is far more likely to involve a series of joint meetings of separating partners without their lawyers present. Individual side meetings are used much more sparingly, mainly as a means of checking out proposed agreements or where parties cannot meet together. Agreements are drawn up in the form of non-legally binding memoranda in the expectation that parties will then consult with their legal representatives before a binding agreement is made. There is, therefore, more time for individual reflection and consideration of the options. Changes to the family law system in April 2013 whereby people can no longer claim public funding for legal representation may, however, prove to have a negative impact on this practice and, by implication, on the decision-making of separating couples. These changes have brought about a marked decrease in the number of people instructing lawyers and an increase in the number of litigants in

person.<sup>43</sup> Mediators might experience more pressure to advise about possible settlement options,<sup>44</sup> thereby undermining the principle of party determination.

In conclusion, the comments made by the sample of mediators in my study suggest that, although the principle of party determination is safeguarded in the UK, it is within certain limitations. These include the expectation that mediators support agreements within an acceptable settlement range (particularly in the civil and commercial sector), and uphold rights, policy and procedure where appropriate. Even so, the civil justice system within the UK is increasingly exposed to the same pressures as that in the USA to produce quick, cost-effective outcomes that are within legal parameters and guided by the knowledge and expertise of the mediator. As these influences are brought to bear, so party determination is undermined and the mediation itself comes to resemble a form of assisted negotiation. While this undoubtedly has value as a process in itself, party determination is weakened.

#### *4. Impartiality*

The final principle among the top four identified by respondents in my sample was impartiality. The concept is closely linked to the idea of party determination: if disputants are to arrive at their own sustainable agreements, the implication is that

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<sup>43</sup> See 'Judges warn of adverse impact of legal aid reforms', *New Law Journal* (23 May 2014) 5, in which it is stated that "Senior judges have described the increase in litigants in person (LiPs) as 'unprecedented'", with the result that "cases are taking longer and therefore eating up savings introduced by the reforms." Similarly, a later edition of the journal outlines the findings of the major Bar Council report into the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). In the article, Nicholas Lavender QC, chair of the Bar, is also reported as saying: "These changes pose a significant threat to effective access to justice for some of the most vulnerable members of society, as well as a threat to the viability of the publicly-funded Bar." *New Law Journal* (18 July 2014) 4.

<sup>44</sup> See Jon Robins, 'A Devastating Momentum', *New Law Journal* (25 July 2014) 7, where he notes the impact of legal aid cuts on access to appropriate advice: "Citizens Advice .... reported that nine out of 10 of its network of bureaux now struggled to refer people to specialist legal advice", and that even for litigants who were able to access public funding, the criteria are so stringent and it takes so much time that the "situation often becomes far worse."

they do so independently of the views of the mediator. Furthermore, if the process is to be regarded as a fair one in which both parties are able to participate equally, the mediator cannot take sides or make judgements between parties. Yet, as I have already argued, there are circumstances and contexts in which mediators will take steps to avoid reaching an outcome that they know to be unjust, unlawful or unsafe. There are also occasions when mediators take a more directional approach that leads people toward settlement. What meaning, then, does impartiality have in the delivery of mediation? And what is its significance for practitioners?

Though mediators are commonly described as third party neutrals who do not take sides or make judgements, the application of the principle of impartiality is in practice both complex and confusing. Within the literature, the meaning of the word 'impartiality' is often confused and used interchangeably with terms such as 'neutrality' or 'multi-partiality'. There have been vigorous debates since the early 1980s, particularly in the United States, in which protagonists have attempted to establish whether mediators can be neutral in their work and, if so, whether this can be applied to all aspects of the process. While it is doubtful that genuine neutrality can ever be achieved, an impartial approach continues to be regarded as of central importance in mediation practice and mediators work hard to maintain it.

In this section I examine the importance of this principle, give a brief summary of the key academic debates and analyse what respondents in my study had to say about it. The non-partisan stance of a mediator is seen as crucial in order to ensure that three important characteristics of the process are preserved. These are i) that it is equitable and encourages the full participation of all the parties ii) that the mediator has no vested interest in any particular outcome and iii) that the outcome is crafted by the parties

rather than imposed upon them. It is this combination of characteristics that distinguishes mediation from other forms of dispute resolution.

In the interviews I conducted, impartiality was seen by many respondents as critical, so much so that, as one put it to me, “if one party feels you are not impartial, you will lose them and you might as well give up and go home at that point.” The responses below illustrate how the impartiality of mediator is regarded as something that “goes without saying”:

“Parties determining the outcome and the impartiality of the mediator are absolutely fundamental. As soon as one party thinks you are on the other’s side, you have lost it. It sometimes takes a while for some people to fully understand that you are not going to make a judgement. It must be the parties’ decision.” (C11, Commercial mediator.)

“The impartiality is absolutely critical – the most important. You can say ‘We are never impartial’, but to provide a neutral environment, to the extent that any human being can for another, is vital. It is about stepping out of the way and supporting them.” (B10, family mediator.)

The words of this last quotation, “to the extent that any human being can”, underline a dilemma that has been hotly debated since the 1980s. The word ‘neutrality’ implies not only that mediators are non-responsive and indifferent to the parties, but that they have no influence in the process. Over time, several arguments have been developed, particularly among commentators in the United States, to demonstrate that this cannot be the case. Some scholars view conflict as a complex adaptive system which responds to change. By simply being involved with the system, the mediator “in a sense join[s] with it”<sup>45</sup> and brings about the opportunity for change. Mayer outlines the concept of ‘nucleation’ as “the idea that a small change can have large effects through how it

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<sup>45</sup> Bernard S. Mayer *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (San Francisco: Jossey-Bass, 2004) 200-202 and 492-3.

causes a system to reorganize.” Understanding conflict in this way means recognising it as a system of interactions which constantly evolves, develops and responds to input. The mediator is part of this system and so cannot achieve neutrality. Jones and Hughes note the “invalidity of the concepts of neutrality and impartiality” and suggest that instead mediators must be recognised as co-participants who bring their own unspoken and often unrecognised biases to the conflict.<sup>46</sup>

If, therefore, neutrality is to be understood in terms of a lack of influence, a mediator is far from being neutral. That a mediator exerts an active influence was accepted as being desirable by the following practitioner who worked in several different contexts:

“The mediator is a change agent. Whether you are in the room or out of the room you have an effect. That you are a mediator and there is a perception of you is going to have an impact and we have to acknowledge that. I do think that the effectiveness of the questions we ask, the reframing skills, all the strategies we use build in to the process of the change. The better the mediator is at enabling the parties to move and shift and change, the more likely it is that a positive change will happen.” (E09, family and workplace mediator.)

Bowling and Hoffman argue that “mediators are inextricably involved in the conflicts they mediate”<sup>47</sup> and this, according to Mayer, “makes true neutrality, objectivity, and objective standards of fairness impossible.”<sup>48</sup> Mayer makes the further point that there is always a power dynamic to address in mediation. If it is the role of the mediator to encourage the full participation of both parties in the process, she may well have to engage in strategies to ensure that they do so. As Mayer puts it:

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<sup>46</sup> Wendell Jones and Scott Hughes, ‘Complexity, Conflict Resolution, and How the Mind Works’ (2003) 20 *Conflict Resolution Quarterly* 4, 485.

<sup>47</sup> Daniel Bowling and David Hoffman (eds), *Bringing Peace into the Room* (San Francisco: Jossey-Bass 2003) 23. See also Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass, 2001), who also develops the idea of conflict as system that is calling for change.

<sup>48</sup> Mayer (2004) 201.

“[M]ediators often alter the power dynamics in negotiations. There is no such thing as a level playing field, and as a result, mediators always have an impact, which is not neutral, on the process and the outcome.”<sup>49</sup>

One respondent even saw it as her responsibility to use her influence actively, as the quote below demonstrates:

“I think there is considerable scope – and a requirement actually – for mediators to be saying ‘Well, I get what I think you want but let me give you the benefit of what I see when I look at this because it may or may not be the same as you.’ (C17, civil and commercial mediator.)

It is important to recognise that mediators, like others involved the process, are human beings who have their own values and biases, who make judgements, who warm to some people and not others and who bring their own experiences, both positive and negative, to the mediation table. This is something about which practitioners stated they needed to be constantly aware in their attempt to remain non-partisan. The following respondent saw it as vital to cultivate this awareness and to manage her responses so as not to affect parties unduly:

“We are all human, there are influences around us all the time. Having the self-awareness to be able to step back when you think you are being drawn into an issue or when you can identify with one particular person and their issues is crucial. For a mediator to have that depth of awareness so that, as much as they possibly can, it doesn’t impair their impartiality, is good practice for me.” (C03, community mediator.)

While it may be possible to keep a check on personal reactions, they are nevertheless inevitable. Furthermore some would argue that qualities such as a ‘warm curiosity’<sup>50</sup>

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<sup>49</sup> Bernard Mayer, ‘What we talk about when we talk about neutrality: A commentary on the Susskind- Stulberg Debate, 2011 edition’, (2011-2012) 95 Marquette Law Review 859, 860. See also Mayer (2004) 141-44.

<sup>50</sup> See the work of John Paul Lederach, in particular, *The Moral Imagination* (New York: Oxford University Press 2005) 35ff.

and a genuine interest in the parties and their conflict are motivational qualities which are essential for the engagement of disputants to the mediation process.

This seems to indicate that mediators can hardly be described as being unresponsive and uninvolved. Rather, the dilemma they face is how to be objective while at the same time supportive and empathic. This has led to attempts by scholars and practitioners to define terms more clearly. They have tried to draw a more nuanced distinction between 'neutrality' and 'impartiality'. Others have developed the theme further by introducing new terms such as 'multi-partiality' and 'omni-partiality', as descriptors of the mediator function. Questions have also been raised as to which aspects of the role and the process these terms apply. Are mediators, for example, impartial regarding the process, the issues, the outcome or all three?

The most useful distinction between neutrality and impartiality that I have come across originates in this country with Crawley and Graham, practitioners and authors in the workplace field. In their book 'Mediation for Managers', they write that "...we all have the capacity to pre-judge people and situations, to make assumptions and listen selectively, under the influence of our own experience and values."<sup>51</sup> They define neutrality as "the internal process of self-management" which keeps assumptions and pre-judgements in check and prevents the mediator from exercising undue influence on the dialogue between parties. Impartiality is described as "the visible sign of neutrality," demonstrated through strategies such as ensuring that each party has the interest and attention of the mediator, gaining an understanding on each issue from both perspectives, being balanced and fair in conducting proceedings and not getting

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<sup>51</sup> John Crawley and Katherine Graham, *Mediation for Managers: Resolving Conflict and Rebuilding Relationships at Work*, (London: Nicholas Brealey Publishing 2002) 79.

drawn into the argument itself with either or both parties. Implicit here is the idea that mediators must manage their own responses to ensure fairness. It requires the ability to be self-aware, to reflect on internal responses, and to retain that element of genuine curiosity to which Lederach refers. This definition of impartiality, then, relates largely to the fairness of the process and ensures that the mediator's own views and assumptions do not inhibit parties' participation.<sup>52</sup>

These considerations concern the mediators' impartiality in relation to their own self-management, their non-judgemental stance towards both parties and the fairness of the process. However, there are further tensions inherent in the idea of a neutral, impartial mediator and these are explored in the debate between two prominent practitioners in the dispute resolution field, Lawrence Susskind and Joseph Stulberg.<sup>53</sup> Their discussion focusses on the accountability of the mediator and the effect that this can have on impartiality, particularly regarding outcomes. Susskind argues forcefully that mediators should be concerned not only with ensuring that parties are fully engaged in an even-handed process but should also take responsibility for ensuring that any agreements reached are, as he describes it, "fair, efficient, stable and wise."<sup>54</sup> Of central importance to his argument is the fact that in some contexts private

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<sup>52</sup> The word 'multi-partiality' has subsequently been introduced or, to use Cloke's variation, 'omni-partiality.' (See Cloke 2001). Whereas impartiality indicates to the parties that a mediator is not on either side in the dispute, multipartiality and omnipartiality emphasise the proactive stance that she takes to demonstrate that she is working to promote the interests of *both* parties.

<sup>53</sup> See Lawrence Susskind, 'Environmental Mediation and the Accountability Problem' (1981) 6 Vermont Law Review 1 and Joseph B. Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind' (1981) 6 Vermont Law Review 85. The discussion has prompted much critical debate including Owen Fiss's famous paper 'Against Settlement' and others who challenge the alternative dispute resolution movement and question its ability to deliver social justice and equality. In particular it was revisited some 30 years later with a panel discussion at a conference at Marquette University Law School, when Susskind and Stulberg were joined by Mayer: see John Lande, Bernard Mayer, Joseph Stulberg and Lawrence Susskind 'Panel Discussion - Core Values of Dispute Resolution: Is Neutrality Necessary?' (2011-2012) 95 Marquette Law Review 805.

<sup>54</sup> Lande et al (2011 – 2012) 817.



negotiations can have a public impact.<sup>55</sup> There may be unseen stakeholders whose interests need to be protected. Cloke also argued that mediators must be alert to the multiple interests in the situation: that of the parties, seen and unseen stakeholders, as well as their own responses and concerns. Outcomes therefore need to be fully considered from all perspectives and should be robust. Since this might include judgement, challenge and influence, Susskind's conclusion was that mediators cannot be impartial as to the outcome.

Stulberg objected strongly to this, arguing that a neutral stance is necessary if parties are to feel secure enough to engage in genuine negotiation with each other in front of a third party. He states that there is no requirement or expectation that a mediator should perform the role of "social conscience, environmental policeman or social critic."<sup>56</sup> Stulberg describes mediation as a "justice event" in which parties not only determine their own outcome but take personal responsibility for arriving at their own, fair conclusions. While the concept of self-determination might appear to issue parties with a 'blank cheque', people are limited by social rules and the political community to which they belong.<sup>57</sup> In determining their own solutions, parties will be influenced by these pressures. If mediators were to be held accountable for outcomes, the effect would be to diminish party responsibility. As far as Stulberg is concerned, mediators must be neutral as to outcome though they should demonstrate an "unswerving

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<sup>55</sup> For example, environmental disputes, his own area of mediation practice, where decisions made about resources such as air, water or land, may affect stakeholders who are not present in mediation.

<sup>56</sup> Lande et al (2011 – 2012) 807.

<sup>57</sup> Stulberg states that:

"While I certainly want to support the central value of personal autonomy, that value cannot skew or escape the fundamental fact that we are all members, in an important sense, of a political community. How I want and choose to live my life is, to some extent, clearly and appropriately shaped and constrained by how others want to live their lives. It is simply not true that one's self determination licenses him or her to do whatever she wants." Lande et al (2011 -2012) 810.

commitment to structure” and to guiding a conversation that can embrace all these aspects.

Mayer agrees with neither, arguing that mediators do not have either the authority or the expertise to ensure a fair outcome; nor is it possible for them to be truly neutral. He attempts to define neutrality as it is applied to mediation practice and suggests that it is composed of different elements which include “structure, behaviour, emotion, perception and intention.”<sup>58</sup> I find these definitions helpful since they reflect many of the concepts that I have been exploring. Of more interest, however, as far as the information I collected from respondents is concerned, is Mayer’s statement at the beginning of his paper that:

“Mediators seem to be fairly clear about how to handle neutrality in practice, but confused in theory. That is, mediators are generally fairly clear about how to present their role, their commitment to impartiality, their structural independence, and the practical implications of how they define their role for how they approach their work. But when we discuss how to conceptualize neutrality, when we consider how thorough our commitment to neutrality can be, and when we debate whether such a commitment is even appropriate, we are often confused, inconsistent and divided.”<sup>59</sup>

I was surprised by the fact that, though respondents in my own study placed great weight on the principle of impartiality, they had relatively little to say about it. There were comments like “it goes without saying” or it’s “an absolute given”, but these were made almost dismissively without further elucidation. This seemed to me to bear out

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<sup>58</sup> See Mayer (2011 – 2012) 860ff. As Mayer defines these words, ‘structure’ is about connection and conflict of interest. Is there a connection through history, relationships, culture or any way? Will the mediator benefit from a particular outcome, for example, repeat work from an organisation if the mediation succeeds? ‘Behaviour’ concerns what mediators do or don’t do to convey their neutrality. ‘Emotion’ refers to the practitioners own feelings and responses to the parties in front of them. ‘Perception’ is how parties interpret the mediator’s attempts to be neutral. Finally, ‘intention’ is described by Mayer as the “clearest and most meaningful way to understand this concept.” He suggests that neutrality is an aspiration and points to the importance of both party and practitioner expectations that mediators set out to be fair and attentive to the interests of all concerned.

<sup>59</sup> See Bernard Mayer (2011 - 2012) 859.

the distinction that Mayer makes in terms of practice and theory, although there has been not been the same theoretical debate in this country. Nevertheless, by examining responses to other interview questions, I found material that reflects many of the dilemmas outlined above. Several strands emerged relating to impartial working and its challenges: not imposing views or decisions; being open-minded to parties; being non-judgemental; being self-aware and managing reactions; not getting drawn into the argument; ensuring equal participation and managing a fair process

On the basis of these responses, I distinguished three ways in which impartiality is applied to the mediation process: the management of the mediator's own internal responses; the management of the mediation environment and the management of the outcome.

*(i) The Self-Management of the Mediator*

The importance of self-awareness and monitoring personal reactions was recognised by several respondents in the interviews I conducted. Many acknowledged that such reactions exist and that the challenge for impartiality comes in maintaining a fair and inclusive approach despite them. How does a mediator behave, for example, when he becomes aware of a growing sense of irritation with a party whose attitudes become more and more entrenched? The challenge to the mediator is to maintain a genuine interest and, as one respondent put it, "... to manage yourself so that you can stay useful." Several others, working across a range of contexts, touched on the same issue, as can be seen in the following quotations:

"I need to have total positive regard, however obnoxious down in my core I might think one party is. As soon as you judge people, you are acting unprofessionally." (B09, family mediator.)

“Best practice is about managing own responses and judgements and not acting on them, recognising your triggers, managing your emotions and whether they are showing. It is about knowing how you judge things and what you do about that.” (E5, family mediator and restorative justice volunteer.)

“You need to be able to give people the opportunity to speak and not feel judged...Remaining impartial and not conveying a sense of judgement.” (C01, rights based mediator.)

“Being non-judgemental means providing a neutral set of ears. Two people listening properly to the issues and using their insight from that to help move things forward. Showing that you are listening, not jumping in with solutions and hearing the underlying message beneath the words.” (D1, workplace mediator.)<sup>60</sup>

I suggest that the need for self-management is not restricted to internal responses, to the parties or the issues they present; it extends to other interests that a mediator may have. An external workplace mediator might be very well aware, for example, that the outcome of a case could well influence further work that she might be offered by a company. For family mediation services contracted with the Legal Aid Agency, full agreements reached in mediation attract a different fee. When services are struggling financially, this puts pressure on mediators to bring cases to settlement. In the SEN context, mediators may find that they work with ‘repeat players’, as Nancy Welsh<sup>61</sup> has described it: one of the parties, often a local authority representative, may be involved in several cases so that a relationship is inevitably formed with the mediator which might influence the process. Self-management for the mediator, in my view, requires her to be aware of her own human responses and motivations and to adjust her

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<sup>60</sup> This respondent uses a co-working model in her mediation practice whereby a team of two mediators is used in each case.

<sup>61</sup> Nancy Welsh examines the risks to impartiality for dispute resolvers in general (i.e. judges, arbitrators and mediators) when they come across cases in which one party is a ‘repeat player.’ Apart from the risk of familiarity with one party, mediators may find that a repeat player has the power to re-appoint, or that there are reputational issues to consider. See Nancy Welsh, ‘What is (Im)partial enough in a world of embedded neutrals?’ (2010) 52 Arizona Law Review 395.

behaviour so that these do not adversely affect the parties and their experience of an open and fair process.

*(ii) Managing the Mediation Environment*

This begins before mediation takes place, very often in separate meetings with each party. The task of the mediator is to listen and understand as well as to give people full information about the process they are entering into and to gain their commitment to it. Engagement is a vital precursor to creating an effective environment in which parties have confidence in the mediator, a sense of their impartiality and an understanding of what is required of them as participants. Even at this early stage, mediators need to take great care with their use of language and their use of questioning in order to demonstrate that they are working equally for both parties. This continues into the mediation process itself. One mediator offered the following succinct summary:

“Being clear about what mediation is all about - gaining the confidence of the parties; using ‘authority’ appropriately i.e. to ensure people get their say; being reasonably assertive; demonstrating control of process; building trust in the mediator and the process; ensuring fairness with what goes on in mediation. It is about the whole demeanour of the mediator; it’s about being professional; it’s about being confident, respectful to the parties and modelling a whole lot of behaviours which they themselves can use in the mediation.” (B07, family mediator.)

Another important theme to emerge from the responses was ensuring the equal participation of all parties. This may not be straightforward, particularly when there is a significant power imbalance. The following two mediators described how they tackle this:

“It is about cutting through the hierarchy and ensuring we are all equal in this space: no one person is more important than another.” (C7, mediator in medical disputes.)

“For me it is about balance, so that everyone knows, if I do this for you, the other will have their turn as well. If I start asking questions of one then next time around, I will start asking questions of the other person. It is very much about fairness and neutrality. If people feel the mediator has been fair, has been impartial, has given them what they perceive to be equal air time, then that is good practice.” (C15, SEN mediator.)

Other respondents stressed the importance of not getting drawn into the dispute. While mediators may become part of the system that Mayer identifies, respondents in this study were nevertheless aware of the value to parties in maintaining emotional objectivity and distancing themselves from the issues under discussion. They saw this as contributing to impartial working, as the quotations below from two community mediators illustrate:

“[Impartiality means] being able to maintain a distance from the actual issues in order to help the parties find their own way forward.” (C6, community mediator.)

“You have to be totally unbiased and self-aware. It is very easy to get sucked in so you have to be able to check yourself and move back. You don’t get involved in the conflict – you are only there to provide the vehicle. There are some cases where you think, ‘You know what, if they could only see what I can see, this could all be over and done with’. But you can’t put yourself in their position and, if they can’t see it for themselves, then it hasn’t got much value anyway.” (C4, community mediator.)

Even so, respondents did not regard this as a passive role. Many recognised, for example, the need to make judgements about what constitutes a constructive conversation. The views I collected made it clear that, while managing their own biases, mediators still draw on their intuition to help facilitate the process. The following comment made by a civil and political mediator illustrates his view of the need to strike the right balance between taking account of parties’ concerns and interests and maintaining an impartial involvement in the dialogue:

“I did a couple of cases recently. In both of them the parties were extremely well prepared; they had very, very good lawyers with them; they had done all

the homework and everything else. And they arrived and said 'Look! No disrespect to the mediation process but we have been through all this stuff. We are adults. We understand what is at stake. Nobody is saying they are guaranteed to win this. We understand there is risk all round and so we would like to use this environment simply to put together a deal.' So that was their wish. I then had to make a judgement call for myself: 'Is it that they want that because that is genuinely a good analysis of what is going to work? Or are they just too terrified of any other kind of conversation? Or do they simply not understand enough about mediation involves?' and so on. And so I think part of it is one's own diagnosis about what is likely to take people forward." (C17, civil and political mediator.)

Respondents placed great emphasis on being clear with parties about what the process involves and their role in it. The comment below, from a family mediator, illustrates how she saw her own responsibility for ensuring that the conversation remained constructive:

"Transparency and clarity between mediator and clients are essential. Being really clear and saying 'This is the process; this is what you are engaging in; are you making an informed decision to do that? What is likely to get in the way and can we talk about that? And if I think we are not making progress we will need to talk about it.' And so my job isn't to push them into something or necessarily to slow them down but to make sure they do it completely, wherever that takes them." (B13, family mediator.)

In my view, these responses shed considerable light on the ways in which mediators strive to manage the mediation environment impartially. The conclusions to be drawn from these comments are that in the first instance, impartial working involves creating a safe and neutral space in which two parties can feel confident that they will have a fair chance to have their say. This requires a fine balance which begins at an early stage in the building of trust and rapport by the mediator. The views quoted above make it clear that the mediator role is limited to judgements about process, not content. They indicate that rather than getting drawn into a discussion of the issues, the role of a mediator is to create a vehicle for discussion, while drawing on their expertise as a conflict resolver to ensure that the dialogue between parties is as effective as possible.

### *(iii) The Role of Mediators in Managing Outcomes*

This is the most controversial aspect of mediator impartiality and goes to the heart of the Susskind-Stulberg debate. In my view it is also the area that is most influenced by context and in turn leads to the greatest variation in practice.

Though Mayer points out that mediators do not have the expertise to guarantee an outcome that is “fair, efficient, stable and wise”, there is no doubt that there are contexts where mediators do possess particular knowledge which can lead them to influence the outcome, thereby raising doubts about their impartiality. As one workplace mediator explained:

“It is based on my own personal experience of my desire, every now and then, not to be partial but to put my management stamp on it – you know, to suggest coaching or mentoring or something like that, outside of the mediation process. It’s very tempting to stray outside of the process to: ‘Moving forward one of the things you might find helpful is....’ and it’s very difficult to not do that. But that is why the impartiality is important. I think, even if you go in thinking that you know where the power base lies, often your views change through listening to the stories anyway. So I think you need to be impartial to be able to listen openly to both parties.” (D04, internal workplace mediator.)

Though providing solutions clearly undermines the principle of party determination and risks favouring one party over another, part of the role of the mediator is nonetheless to ensure that agreements reached are robust and can be put into practice. In my view there is a difference between directing outcomes (i.e. providing solutions and giving advice) and reality checking (testing out the feasibility of the proposals being made and encouraging parties to explore their implications). Considered in this way, the gap in the arguments between Susskind (who argues for ensuring a robust agreement) and Stulberg (who argues for commitment to the process) grows smaller. While strategies



such as ‘reality testing’<sup>62</sup> allow a mediator to explore proposed solutions from all perspectives (including, for example, that of stakeholders who may not be present or the specific requirements of a legal framework), it also leaves the final responsibility for decision-making with the parties. The following comments illustrate the balance that respondents try to achieve in making sure that parties reach decisions which are their own and are, at the same time, well informed and workable:

“It is important that people have actively engaged and participated rather than going straight at the problem-solving ‘deal’. You have to be aware of the other factors that are pulling, pushing and prodding the people around your table. Unless you can engage them in that wider way, I don’t think you do very effective work. People might feel cajoled into ‘doing a deal’ because that’s what they think they have to do, but it might then unwind or it never gets fully formalised or whatever because you haven’t really attended to other issues.” (B08, family mediator.)

“It is important not to make any assumptions about what the clients want to discuss and what the outcome might be. I think it is best practice to robustly reality check proposals. If you do not do so you are putting the settlement at risk and clients go through significant trauma if it is an unworkable settlement. I think best practice is people who really do know their onions in the area of practice that they are mediating in.” (B10, family mediator.)

Mayer argues that mediator influence over the outcome is also affected by whether the primary aim of the process is settlement<sup>63</sup> or creating the right environment for a constructive dialogue. It is noteworthy that many of the comments cited in this chapter are made by respondents working within the civil justice system where settlement is the factor that they must prioritise, even at the cost of relationship building.<sup>64</sup>

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<sup>62</sup> Reality testing is a strategy used by mediators to test out the feasibility of the options being put forward by parties. Typically, it involves questioning in order to ascertain how a particular idea would work in practice and to encourage parties to consider the fine detail of a proposal.

<sup>63</sup> See the debate outlined in Mayer (2011 – 2012) and Lande et al. (2011 – 2012) 812ff.

<sup>64</sup> See Roberts (2007) 106ff. In interviews with expert practitioners, she found that those within court settings required a pragmatic approach that was often more money driven and could result in a tension “between the mediator’s interest in achieving ‘success’ in terms of an agreement, an ‘outcome driven’ pressure ... and the principle of party determination.”

The interviews I conducted revealed another context in which the mediator is expected to influence outcomes, even at the cost of impartiality. This is in rights and conciliation work and wider issues to do with social justice. These issues are similar to those raised by Susskind, working in the environmental context, in his response to criticism from Owen Fiss that mediation privatises issues of public concern<sup>65</sup> and prevents change at a societal level. Where mediation is offered within the field of human rights (such as disability conciliation or special educational needs mediation), the implications can be wider than the individuals involved and fall within a legislative framework. In the context of disability, for example, providers and employers have legal responsibilities to “make reasonable adjustments” or to ensure that particular resources are available. Complaints that are referred to mediation are likely to have come about as a result of non-compliance, and it is expected that mediators have the relevant knowledge and will bring this to bear on the process. In the previous section I gave an example of a respondent working in equalities mediation who identified the need for a direct approach on occasions, particularly where complainants have specific legal rights and respondents have legal responsibilities. Such an approach might include an active challenge, as she describes here below:

“If somebody is suggesting something that contravenes the code of practice, I’m expected to know about it. I would meet with that person separately, for example the SEN officer from the local authority, and say ‘You know my understanding is such and such, how does your proposal fit with that?’ So I might find a way that feels facilitative but is actually pointing out the legislation because I do have a responsibility in those cases and the same with the discrimination cases. It is about holding up the code of practice or the legislation or whatever, so that it is present in the mediation and that any settlement takes account of what it says.” (C01, rights mediator.)

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<sup>65</sup> See Owen Fiss, ‘Against Settlement’ (1983-1984) 93 Yale Law Journal 1073 – 1090.

This is a good example of how a mediator might strive to maintain an impartial stance, by using facilitation and reality checking rather than confrontation to ensure that the legal framework is considered. While the mediator above was not imposing a preferred outcome, she was bringing influence to bear by encouraging the party to explore the situation from all angles. The implications are that in circumstances where challenge is necessary, practitioners are aware of the need to handle the issue sensitively, from a position of trust, so that one party does not feel a solution is being rejected or that the mediator is siding with the other.

To conclude this section on managing outcomes, it is clear from the interview responses that, remaining impartial with respect to the solutions which parties agree for themselves can be a difficult part of mediation practice. Questioning proposals that are put forward by one or both parties, whether because they contravene a code of practice, a legal precedent or else have serious implications for stakeholders not involved in the process, risks siding with one party over the other or imposing the mediator's own outcome. It takes away decision-making power from the parties thereby undermining the principle of self-determination. The mere perception of a partisan attitude can jeopardise parties' trust in the mediator and, consequently the whole process.<sup>66</sup> However, to knowingly conclude a mediation on the basis of an agreement that is not legal, is unworkable, or has wider social ramifications would not be considered responsible practice on the part of the mediator. We have seen from the responses above that mediators employ two strategies that go some way to addressing this tension. The first is to check both the feasibility and the implications of proposals

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<sup>66</sup> Roberts (2007) 98. She states that "[t]he credibility of the mediator depends not only upon being impartial, but on being perceived to be so."

through constructive questioning. The second is to ensure that parties are making decisions based on full and correct information. In some contexts, this means ensuring that a code of practice or the legal framework is available during the mediation. In other contexts, such as family mediation, it may involve sending parties to their legal representative or other advisor for the relevant information before a decision is made.

Having considered respondents' comments about impartiality in general, my conclusion is that this a principle that is difficult to live up to, largely because of the need to maintain a balance between the contradictory interests at work. To return to Crawley and Graham's definitions of 'neutrality' (an internal process of self-management) and 'impartiality' (the visible indications of that), it seems unlikely that anyone could ever fully achieve the first, and that the second is also questionable. This does not mean, however, that mediators do not make significant efforts to work in fair and even-handed ways to ensure parties have every opportunity to engage fully in the process. The examples given above illustrate some of the ways that respondents approach this difficult task. Mayer too, acknowledges the impossibility of pure neutrality but describes a neutral or impartial approach as a goal to which mediators can nevertheless aspire:

"We are saying that are intentions are to be fair, to be evenhanded, and to act in a neutral manner without bias – whatever specific meaning we give to those terms. We can control the most egregious or obvious expressions of bias or partiality, but we cannot offer complete neutrality both because the term itself is confusing and because it is impossible to adhere to a strict interpretation of neutrality, no matter which element we look at. Nonetheless, neutrality as an aspiration is not meaningless, at least not in practice."<sup>67</sup>

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<sup>67</sup> Mayer (2011 - 2012) 863-864.

My own view is that, given that neutrality cannot be achieved, impartiality is largely about two things: intention and perception. Mediators clearly seek to be non-partisan, to be aware of the hurdles that might prevent this and to take steps to adjust their behaviour accordingly. Equally important is parties' perception of whether they are treated with fairness, equality and respect. From both of these perspectives, factors such as mediators' use of language, their openness to both parties and their inclusiveness are crucial in adopting an impartial approach. In order to be genuine, I suggest that this aspiration must be applied to three core elements of the mediation process: the self-management of the mediator, the management of the environment and the management of the outcome.

#### *5. A Unified Code of Practice*

Finally, another question I put to practitioners, which has relevance for this discussion about mediation principles, was whether they considered it possible for all mediators to work to the same Code of Practice. The answer, from 86 per cent of respondents, was yes. There was a strong view that the core principles of mediation were transferable across different delivery areas and that an approach based on respect, improving communication and creating the right environment for discussion were inherent elements of a mediator role.

Many respondents recognised that context can influence purpose, which in turn affects process. However, most also expressed the view that it should be possible, having identified generic principles, to develop standards to take account of the specific knowledge, skills or process variations demanded by a particular context. The views expressed by these respondents were quite typical:

“Yes. In the sense that the generic stuff about trust, impartiality, confidentiality and so on, if I am working in a religious or political or a commercial or a community case, race relations, or whatever, I don’t detect that stuff being any different. But the bottom line is that people invest trust in mediators. And if they are going to invest trust in us then they need to know what sort of ethical framework we can be held to. I suppose it is possible that there may be differences, say in the family environment, where something like an imbalance of power is much more likely to be an issue than it is say in a business context. So you might say that there are some issues that may have to be taken into account more in a given context because they are more likely to occur. But my sense is that the ethics are about the setting up of the environment, making the process effective and having people trust us.” (C17, commercial and civil mediator.)

“I think we can probably all agree on some core ‘do’s and don’ts’ and some core requirements and principles. I guess what I would like to see is something where, underneath that, is a specific code or something that sets up the expectations of the role in the different contexts. Because I think, for example, rights informed work in some contexts is very different from small claims mediation. We can probably get an overall agreement on what mediation is and what are the core things mediators should and shouldn’t do, but then we need some recognition that there are differences in practice across different fields and there are different expectations about what it can achieve.” (C1, rights and equalities mediator.)

None of the remaining 14 per cent of the sample actually answered ‘No’ to my question. However, some foresaw that to achieve a unified code would be challenging. Even those in favour recognised there are complexities to overcome. One of the most common concerns expressed was that imposing a code of practice across all sectors could be restrictive and might limit creativity and flexibility. Respondents wanted to be able to remain responsive to the needs of the parties in front of them and adapt the process as necessary. At the other extreme, there was concern that a generic code of practice would have to be so general as to have no real meaning.

Others recognised that a collaborative approach would require energy and leadership and were sceptical as to whether this would emerge. The respondent below was bemused as to why there is no one professional body with a single code of practice:

“We don’t have anything like that at the moment and I don’t understand why. I have been involved in looking at quality issues for so many years and why are we no closer? I think it is partly because more people are coming into it as a profession but there is less work actually going around. There is a lot of territorial feeling. There are a lot of people chasing their tails and not a lot of collaboration. All the things we think are key to mediation don’t happen in terms of mediation regulation or as a profession. (C1, rights and equalities mediator.)

Almost a quarter expressed similar frustration at the ‘squabbling’ among mediation bodies that they had observed, the ‘hotch potch’ organisation of the profession as a whole, the ‘mess’ and the ‘lack of clarity’ that exists generally. Many put it down to competing interests of both mediation providers and regulators, and, unfortunately, an inability for mediators to apply their own principles of communication:

“I get fed up with the inability of organisations to get their heads up and work together on some of these things that you feel ought to have been sorted a long time ago - the framework has been there for so long. It really needs some leadership from the mediation world.” (B06, family mediator.)

“There are identities involved - which organisation you are a member of gives you a certain reputation or a certain standing - that gives you an identity. I do think that we should have a code of practice across the board. But what I see is people fighting with each other and not only within family mediation but also across the different mediation fields – people wanting to be more important, wanting it to be *their* organisation. I really think that if there was one mediation organisation and everyone worked together, actually mediation would be better known, there would be more clients and we would be role modelling what we are preaching.” (B14, family and community mediator.)

“I can’t wait for the day when we have a single unified professional body that we can be proud of. An awful lot of energy is being wasted on this and I feel professionally embarrassed by the state of organisations that we face.” (B10, family mediator.)

In Ireland matters have progressed further. The Mediators Institute of Ireland (MII) has nearly 800 members signed up to a detailed code of practice, which is, in the words of one respondent “fit for purpose”. He described a collaborative process that ensured

the MII “heard from all the different ‘churches’ of mediation” and arrived at a code that “fits everything without lowering the standards in any way.”

These insights have important implications for the central question to my research. The views of the respondents in my sample indicate that differences across sector are not so much to do with principles of practice as lack of cohesion and competing interests within the mediation community itself, as well as a fear of over regulation.

### *Conclusion*

I have three main conclusions to draw from this long chapter on the principles of mediation. Firstly, it is clear that the four main principles I have discussed were recognised by the respondents in my sample as fundamental tenets of mediation practice. This applied across all the fields of mediation delivery represented in my study. Nevertheless, taken individually, each principle is subject to risks associated with the pressures of a particular context. For example, within the family and the commercial sectors, the concept of voluntariness is gradually being weakened. In the workplace, confidentiality may be challenged when disputes between colleagues are highly visible and outcomes necessarily involve other people. Party determination may be threatened in the field of rights and equality where decisions must take account of the legislative framework. The mediators to whom I spoke readily acknowledged the risk of allowing their own personal values, interests or assumptions to affect their attitude to parties. A practitioner, armed with specialist knowledge (such as the law and legal precedent), can easily exert an overbearing influence on the outcome which jeopardises their impartiality. As Mayer suggests, working to these principles is an aspiration and therefore one which may not always be fulfilled. The respondents in my



research claimed that they went to great lengths to protect these principles, though critics might well ask whether these claims are justified if they are subject to compromise.

My second point is that, while scholars struggle to arrive at conclusive definitions of mediation theory and mediators find their practice influenced by context, a significant benefit lies in its procedural and structural flexibility. To be genuinely practising mediation means to be offering a process that is tailored and responsive to particular individuals in their specific situation. Many respondents in my study identified the importance of adapting their style and approach to meet the needs of parties. In practice this means that meetings may take place in a variety of ways: with individuals, with all parties, with their representatives, with subject experts, in conference, in caucus, in plenary, with one mediator or with co-mediators. And these are only some of the variations. In procedural terms, mediators might negotiate with parties about how far confidentiality extends, how far they are looking for direction or whether or not they want a written agreement. As far as outcomes are concerned, there is ample room for creativity. As one respondent put it, "You can actually get a resolution that is completely off the wall when you look at the law. It doesn't match the law at all, but it suits both parties." The adaptability of the mediation process and those who conduct it is, therefore, an integral part of what is being offered.

This same issue leads me to my final point. Despite the benefits of this kind of flexibility, the mediation profession must also be aware of its dangers. There is very little research into the actual practice of mediation and it may well be that such research would be resisted in order to safeguard the privacy of the proceedings. However, hiding behind principles such as confidentiality in order to avoid scrutiny risks leaving the profession

open to charges of inconsistency and a lack of clarity of purpose. While mediators may be clear in their own minds about what they mean when they talk about the principles of mediation, the message can easily be confused when those principles become compromised as a result of contextual pressures. At best, as Irvine has said,<sup>68</sup> mediation practice and mediation rhetoric are not in step with one another. At worst, mediators assume a license to practise outside the limitations of the role.

In my view the strength of mediation practice does not lie with any one of these principles but in the unique combination of them all. While other forms of dispute resolution uphold a number of the same principles,<sup>69</sup> mediation brings them all together. The focus is on the creation of an environment in which these are core ingredients, even if the quantities used may vary according to the context. This enables disputants to view their conflict from a different perspective and take steps to address it. While arbitration, litigation and principled negotiation all involve a third party neutral with no vested interest in the outcome, mediators are required to step back from the role of expert in the substantive issues at stake, or in the law, and to hand responsibility to the parties to be “the architects of their own agreement.”<sup>70</sup>

The principles and values of the mediation profession as a whole need to be more clearly articulated alongside the principles and values of the contexts in which mediation is delivered (i.e. the values of the workplace, the justice system or society at

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<sup>68</sup> See Irvine (2007).

<sup>69</sup> Arbitration, for example, is a private process, agreed to by both parties who have the opportunity to have their say. The solution, however, is not of the parties' making. Litigation places the dispute in the public arena where judgement is made over which the parties have no control.

<sup>70</sup> Roberts (2007) 104.

large). In this way, the vital balance between the flexibility of mediation and the unique combination of its fundamental principles can be struck effectively.

## **CHAPTER 9 - DELIVERING JUSTICE: DO MEDIATORS AND LAWYERS SPEAK THE SAME LANGUAGE? <sup>1</sup>**

In this chapter, I consider the growth in the use of mediation as a form of alternative dispute resolution (ADR) within civil justice and the impact that the coalition of two distinct disciplines, those of mediation and law, has had upon the other in terms of language and meaning. As the boundaries between legal practitioners and mediation professionals have become increasingly blurred in the effort to achieve a culture of settlement within the civil justice system, so their language has been borrowed, exchanged and evolved. However, I argue that the fundamental differences in outlook between the adversarial lawyer and the non-partisan mediator reveal significant variations in the use of the language which give meaning to these roles. While mediators and lawyers may share similar values about justice and fairness, they differ as to the means by which they might be achieved. The following analysis draws on my empirical study, which, with its broad range of respondents across a number of sectors, incorporates the views of mediators working both within the civil justice system and externally to it.

### *Blurring the Boundaries*

While mediation is used as an alternative means of resolving disputes within the court system, it is important to note that the practices of legal representation and mediation form two very distinct activities. As Derek Roebuck states plainly in his historical

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<sup>1</sup> This chapter is based on a paper delivered at "Language and Law in Social Practice" in May 2014, the 3<sup>rd</sup> International Conference organised by the Centre for Research in Language and Law, Naples University.

overview of the use of mediation since Anglo-Saxon times<sup>2</sup>, “ADR is not the alternative, litigation is.” He demonstrates that mediation is a practice which pre-dates the justice system and that, as early as second century BC in Rome, it was common practice to “look for a mutual friend and a kind of peacemaker”<sup>3</sup> to settle quarrels. His examples from various periods of history show frequent allusions to peaceful reconciliation with the support of a mediator.

Yet in the last thirty years, as the use of mediation has become more common, it has come to be viewed as a new and modern method of handling disagreements within the civil justice system. The consequence is that the two professions are becoming much more closely aligned. As I have already noted, Simon Roberts<sup>4</sup>, commenting regularly on the development of public dispute management over this period, observed that the nature of settlement has been influenced by a number of factors. In the first instance, mediation has developed as a profession in its own right externally to the court system. At the same time there has been a move within the English judiciary to engage actively in case management and early settlement as a result of the Woolf reports in the mid-1990s.<sup>5</sup> The response of legal professionals to this development has been to engage in dispute resolution themselves, including mediation, as a means by which to retain involvement in cases and outcomes. Roberts observes that providing mediation against a backdrop of legal training and expertise inevitably alters what is being

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<sup>2</sup> Derek Roebuck, *Disputes and Differences: Comparisons in Law, Language and History* (HOLLO Books: The Arbitration Press, 2010) 407.

<sup>3</sup> *ibid* 395, citing Favorinus, second century philosopher.

<sup>4</sup> See Simon Roberts, ‘Institutionalized Settlement in England: A Contemporary Panorama’ (2002) 10 *Willamette Journal of International Law and Dispute Resolution* 19’ and ‘Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship’ (1993) 56 *Modern Law Review* 456.

<sup>5</sup> Lord Woolf, *Access to Justice Interim Report* (London: Department for Constitutional Affairs, 1995) and *Access to Justice Final Report* (London: Department for Constitutional Affairs, 1996).

offered. Lawyers have an extensive knowledge of the law, the decisions that a court is likely to make and the parameters within which a reasonable settlement can be made. With this prior experience, a lawyer-mediator is much more likely to have a view as to what is an “appropriate” settlement, while his or her previous training will tend to steer towards advice giving and to influence outcomes accordingly. This may well be at the cost of some of the less tangible outcomes to mediation such as improvement in communication.<sup>6</sup> Bringing specialist legal knowledge to the mediation setting, together with a tradition of partisan advice giving, therefore threatens both the impartiality of the mediator and the defining characteristic of mediation as a process - that of the parties’ control of the outcome.

The tendency of lawyers to assimilate a different role within the civil justice arena and, by doing so, to influence the nature of the process itself, has also been noted by Bhatia and his associates. Their study of international commercial arbitration was undertaken by a group of specialists in discourse analysis with a view to assessing how far ADR was being progressively ‘colonised’ by litigative practices.<sup>7</sup> From the outset of the project, the researchers found that:

“... the legal community have found ADR a significant means of extending their professional calling and augmenting their business income ... [and that as a consequence ADR] as a non-legal practice is increasingly influenced by the practices and procedures of litigation, a development which seems to be contrary to the spirit of ADR, and of arbitration in particular, to resolve disputes outside of the courts.”<sup>8</sup>

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<sup>6</sup> See Roberts (1993) cited in Chapter 3.

<sup>7</sup> The project was led by Vijay K. Bhatia and entitled *International Arbitration Practice: A Discourse Analytical Study* (Project No. CityU105/06H). Further information can be found at [www.english.cityu.edu.hk/arbitration](http://www.english.cityu.edu.hk/arbitration) . Accessed 27 August 2014.

<sup>8</sup> Vijay K. Bhatia, Christopher N. Candlin and Maurizio Gotti, (Eds), *Discourses of Dispute Resolution* (Bern: Peter Lang, 2010) Volume 123 Linguistic Insights 10. See also *Worlds of Written Discourse* (London: Continuum 2004).

The concern expressed by the researchers that “lawyers rely on discourses and practices typical of their profession when acting as arbitrators”<sup>9</sup> applies just as much to mediation, as Roberts has also implied. The emphasis on settlement, for example, potentially undermines the wider aspiration of mediation to support relationship repair or to achieve a positive conflict interaction.<sup>10</sup> In her evaluation of the role of lawyers in medical negligence mediation, Linda Mulcahy (2001)<sup>11</sup> argues that it is difficult for legal representatives to move away from viewing “the main purpose of dispute settlement as the economically efficient disposal of cases” in their clients’ favour and of mediation as a process that helps to improve the working of the court system. Some respondents in her research did not recognise any cathartic value in the mediation process and were threatened by the lack of control that came about as a consequence of parties having an active involvement in the meeting. One described his view of mediation in this way:

“Mediation is simply an extension of the lawyers talking to each other and sorting it out. Off the record all they are doing in mediation is just passing those messages through someone else but it is still lawyers framing the dispute.”<sup>12</sup>

Moreover, Mulcahy’s findings reinforce the idea of ‘colonisation,’ the takeover of mediation practice by legally trained professionals. She not only points to the substantial increase in the number of lawyer-mediators but also the tendency on the part of many larger legal firms to rename their litigation departments in order to reflect

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<sup>9</sup> Paola Catenaccio, “Framing the Discourses of Arbitration and Mediation: A Comparative Analysis” pp 49 – 68, in Bhatia et al. (2010) 50.

<sup>10</sup> Robert A. Bush and Joseph P. Folger, *The Promise of Mediation* (San Francisco: 2<sup>nd</sup> edn, Jossey-Bass 2005).

<sup>11</sup> Linda Mulcahy, ‘Can Leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation’ (2001) 8 (3) *International Journal of the Legal Profession* 218.

<sup>12</sup> *ibid* 219.

a broader approach to dispute settlement. Key players such as the Ministry of Justice, the Law Society, the Bar Council and the Lord Chancellor have publicly supported the use of mediation. While this can be interpreted as a recognition of the failings in the civil justice system identified in the Woolf Report (1996), another view is that it reflects “a proprietorial interest in mediation as a way of maintaining the professional status and dominance of lawyers,”<sup>13</sup> and staking a claim as “legitimate occupants” of the practice.<sup>14</sup>

Some might question the significance of this apparent take-over. Others would argue that, as the principal architects of settlement agreements within the civil justice system, lawyers are well placed to use mediation as an additional tool, alongside their legal expertise, to achieve that end. However, to take this view significantly limits the scope of mediation to an “adjunct or offshoot”<sup>15</sup> of litigation rather than a process in its own right. It also ignores fundamental differences between lawyers and mediators, their respective roles in the delivery of justice and the language they use in the execution of these roles.

### *Perceptions of Justice*

It is not difficult to point to differences in how lawyers and mediators define 'justice' for their clients. Within the court system, justice is based on the law and legal precedent. There the language of the law (e.g. that of 'statutes', 'ordinances' and 'due process') dominates. Tiersma outlines the gradual movement of legal language from an oral

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<sup>13</sup> *ibid* 204

<sup>14</sup> See also Simon Roberts, 'Mediation in the Lawyers Embrace' (1992) 55(2) *Modern Law Review* 258.

<sup>15</sup> Mulcahy (2001) 218.



tradition in Anglo-Saxon times to one which is now entirely written. While early court reports were merely a recording of an oral event, they later came to be regarded as more important than the event itself, leading to “an ever increasing fixation on the exact words of legislation [which] has permitted the development of the doctrine of precedent.”<sup>16</sup> Legal language is therefore used to define law and social order, based on the experience of the past. Justice is about the implementation of that social order. As Roebuck says, “The law is not primarily concerned with whether it does justice to the individual. The law’s primary concern is not justice but order.”<sup>17</sup> As such it is conducted publicly. Moreover, as courts are overloaded, the concept of order is increasingly compromised by considerations of proportionality, expediency and cost saving.

By contrast, a defining principle of mediation is its commitment to party determination. Parties, not mediators, decide the outcome. Implicit in this is the belief that people have the ability, even a *responsibility*, to make their own justice and to decide what is fair for themselves and each other. The process is conducted privately and outcomes are specific to the particular situation. The protections of confidentiality and legal privilege mean that mediation is, for the most part, an oral process rather than a written one. There is no formal record of the event of mediation. Future actions and points of agreement may be written down but the dialogue between parties, the substance of the mediation itself, remains protected. What is more, outcomes are not limited to legal

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<sup>16</sup> Peter M. Tiersma, *Legal Language* (Chicago: The University of Chicago Press 1999) 36ff.

<sup>17</sup> Roebuck (2010) 184.

remedies which cannot cater for every eventuality. One civil and commercial mediator in my study commented:

“Mediation is trying to resolve a difference between the parties in a manner that is acceptable to both of them, *not necessarily* in achieving their strict legal rights, and without recourse to third party decision-making.” (C13, civil and commercial mediator).

To take another example from my research,<sup>18</sup> a respondent described the details of a case in which a concrete supplier and a builder who had worked together for years found, when a job went wrong, that they were forced into dispute by their insurance companies. Through mediation they arrived at a solution whereby they shared responsibility for costs over a period of time but, more importantly, were able to preserve their friendship and their future business relationship without having to go to court. The mediator in this case commented:

“That is the beauty of mediation in my view: that you can actually get a resolution that is completely off the wall when you look at the law. It doesn’t match the law at all, but it suits both parties. What lawyers can’t do is try to find that type of solution - because they are not allowed to and neither is the judge. A mediation is the only method of ADR that can actually deliver something like that. An adjudicator can’t do it – he’s got to come up with a decision as well.” (C11, civil and commercial mediator).

While lawyers and mediators would no doubt agree on the importance of fairness and justice, the legal system may not always be the best way to achieve these goals. Aristotle raised the question “How does equity relate to justice, and the equitable to the just?”<sup>19</sup> The principle of equity is “that which is fair and yields to reasonableness”. He

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<sup>18</sup> This is discussed at greater length in Chapter 7.

<sup>19</sup> Aristotle, *Nicomachean Ethics* (350 BC.) 5.10.

argues that equity is not always just according to the law, but sometimes a “correction of legal justice.”<sup>20</sup> The equitable man therefore, is one who:

“... does not insist on his strict legal rights but is prepared to settle for less though he has the law on his side. Such is the equitable man and that is the character of equity: a kind of justice.”<sup>21</sup>

Mediation supports a conversation that builds understanding and creates the opportunity for an equitable outcome in a way that the prescribed law cannot. Another respondent in my study gave the example of a dispute between a builder and his customer who was unable to pay her bill because her husband had died part way through the job. The builder had done nothing wrong but was made a low offer which his representative advised him to reject. The builder’s response was to say: ‘Look, she’s lost her husband. If I lose thirty grand I’m still better off than her, aren’t I?’”

This is not to say that there are not circumstances in which legal determination plays a crucial role, or where mediation, with its emphasis on mutual responsibility and collaboration, is not the right process. At times individuals who are vulnerable or at risk need protection and for their legal rights to be enforced. It is not appropriate, for example, for a separating parent who is afraid of the other and who has been the subject of illegal, abusive behaviour, to be asked to enter a consensual process in which they may not be able to fully participate for fear of the consequences. In this eventuality, recourse to the law offers protection and it is right that it should do so. It is important to recognise too that at other times the courts have a vital role to play in the testing or the application of legal norms. As the arguments outlined in Chapter 2

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<sup>20</sup> Aristotle, *“The Art of Rhetoric”* (330 BC.).

<sup>21</sup> *ibid.*

indicate,<sup>22</sup> the law exists for the good of society as a whole. There are situations in which it is crucial that contentious issues of law are clarified and legal precedent is set or where legal rights re-emphasised. This points to another crucial difference between mediation and law: whereas the latter serves the interests of society as a whole, mediation addresses the private interests of the parties concerned.

These, then, are important considerations in deciding which process is most appropriate to the situation. Often they are factors that need to be balanced: the right to protection as against individual autonomy; societal values versus individual interests. As I observed in chapter 2, the idea that law is not the only code by which fair outcomes are determined, is a concept that is evident throughout history. Keith Wrightson, for example, comments on the notion of "good neighbourliness" which was prevalent in the seventeenth century and directly links it to mediation:

"The positive dimension of neighbourliness involved recognition of the obligation to render aid and support [...] and a willingness to accept the neighbours as a reference group in matters of behaviour and to promote harmonious relations among them. Conformity to these standards made a 'good neighbour'. Adam Eyre was one such. He [...] mediated quarrels and accepted mediation in a quarrel of his own."<sup>23</sup>

Wrightson makes the point extensively that the principle of good neighbourliness was one which structured local morality and functioned as more of an organising principle than litigation in that period.

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<sup>22</sup> See *The ADR Debates*

<sup>23</sup> Keith Wrightson, *English Society 1580-1680* (New Brunswick, New Jersey: Rutgers University Press 1982) 38. Wrightson draws on material from H J Morehouse (ed.), 'The Diurnall of Adam Eyre' in *Yorkshire Diaries*, Surtees Society vol 65 (1875).

### *The Purpose of Dispute Resolution*

Roebuck argues that, within the court system, “law is about establishing facts, applying a special kind of language, and exercising discretions or judgement.”<sup>24</sup> Since the publication of the Woolf Report in 1996, the English civil justice system has steadily adopted case management and early case settlement in order to reduce the need for formal court adjudication wherever possible. The use of alternative dispute resolution within this system has the primary purpose of bringing the dispute to an end through negotiation. Nevertheless, disputants still expect to be legally represented and, in civil and commercial cases, lawyers generally take part in mediation. The role of the lawyer has traditionally been to act as an advocate for one side and to argue the case in order to improve the client’s chance of success.

There is, therefore, an inevitable adversarialism attached to the law and formal court adjudication. Lawyers are trained in a tradition in which two parties with conflicting interests are represented in order to establish fault or blame and they are part of an adversarial culture. This is what Lord Woolf set out to change through his recommendations for reform. While lawyers only exceptionally take cases to court, they actively utilise the arena of litigation and bargain in the shadow of the law. Mulcahy suggests that “this imposes a distinctive flavour on the negotiations with emphasis being placed on evidence, proof and a binary win-lose resolution of a financial nature.”<sup>25</sup> This was recognised by many of the respondents in my study. One said, for example:

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<sup>24</sup> Roebuck (2010) 179.

<sup>25</sup> Mulcahy (2001) 215.

“There is so much resting in this country on our existing legal system: the idea that you win by debate; you win by argument; you win by beating the other. Too many people are invested in that so that the idea of actually: ‘Let’s just sit down and try and be sensible about this’, simply isn’t culturally acceptable to an awful lot of people.” (B12, family mediator).

Mediation, on the other hand, in its broadest sense, is a consensual and co-operative process in which parties are encouraged to speak for themselves. The roots of mediation lie in its aim to repair relationships. History shows that a primary purpose of seeking out a mediator was to restore peace rather than “the discovery and application of an objectively just solution.”<sup>26</sup> Communities tried to avoid outcomes that awarded everything to one side. Roebuck describes how even where the strength of the case was clearly in favour of one party, the successful candidate would be required to make allowance or contribute a gift to the other side who could then return to the community with no loss of face. A relationship would be maintained and the disputants, together with their families and friends, would hope to resume their lives without further problem.

Mediators still see their role as supporting good communication so that parties can reach agreement based on increased understanding. Elizabeth Stokoe, a conversation analyst, has studied the nature of dialogue between mediators and people in conflict.<sup>27</sup> Before mediation, parties identify what she describes as a “one-sided problem”. Typically people in conflict demonise the other party while absolving themselves (“*I would be prepared to come and talk but it’s her – she will never listen to anyone.*”) This is a stance that is carried into the court setting and reinforced by it. By contrast, she argues that mediation offers a “two-sided solution” which is “talk based.” The following

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<sup>26</sup> Roebuck (2010) 303.

<sup>27</sup> Elizabeth Stokoe, ‘Overcoming Barriers to Mediation in Intake Calls to Services: Research-Based Strategies for Mediators’ (2013) 29 *Negotiation Journal* (3) 289-314.

quotations from my own interviews illustrate the importance that mediators place on communication and mutual language. One mediator described how she consciously listens for a change in language from parties, from focussing on what 'I' regard as important to considering what 'we' can do together. The opportunity to frame the problem as two-sided was recognised by practitioners both as a benefit of mediation and as a measure of its success.

"I am listening out for much more relational language and possibly, when people are starting to think of moving towards actions that they are reflecting more on the impact of them on others and vice versa, rather than being firmly entrenched in their position. The focus is on relationships and communication." (D02, workplace mediator.)

"Effective communication is very important. People do use the wrong words. They use the wrong language. And they can say things in a certain way, by putting emphasis on things, which upsets the other party straight away." (C10, workplace and community mediator).

The interviews I conducted were of course not restricted to practitioners operating within the civil justice system and included mediators who were working in the community, education, health and workplace sectors. It was very clear that those working in commercial and family mediation were influenced by a perceived pressure to settle and that many had absorbed the language of settlement into their practice. Some, indeed, viewed it as a crucial part of their contractual obligation to parties. However, looking at the sample as a whole, the responses indicated a much broader - and less tangible - spectrum of outcomes that included bringing an end to conflict, improved communication and relationship repair. Relationship improvement was identified by respondents in my study as achievable across all areas of delivery.

The findings indicate that mediation fulfils different purposes at different levels, but with a strong emphasis on improved communication and the amicable resolution of issues

arrived at through a process of co-operation. Practitioners are very conscious that people come to mediation with “a whole range of ambivalence and contradictory motives” of which savings in time and cost are a small part, while providing “a peaceful, neutral space to people in transition [...] to help them try and make some decisions and become clearer about their trajectory” can be much more significant. For mediators, the mix “between a healing process and a problem-solving process” is a vital one. It results in a “dance” requiring a continuous appraisal as to where to direct the energy in the room most effectively: into problem-solving or relationship building.<sup>28</sup>

Despite the apparently converging paths of the two professions, my argument is that mediators and lawyers have a fundamentally different outlook in terms of how they understand the purpose of dispute resolution and the delivery of justice. This is reflected in the language that they employ which, for both of these professional disciplines, is instrumental. However, as I shall argue later, it is a tool that is used in very different ways.

### *The Language of Disputes*

The use of language among lawyers and mediators is markedly different. While the law defines the behaviour of those who approach it for a resolution in terms of ‘rights’ and ‘wrongs’, mediation seeks to help its users to understand each other’s position in terms of ‘interests’ and ‘needs’. The legal process is investigatory in character while mediation is an exploratory process which seeks a solution that is unique to the particular situation. Even the labels attached to those involved in the argument vary

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<sup>28</sup> Fuller quotations are given in Chapter 7.



and reflect an expectation of certain behaviours: The civil justice system identifies 'disputants', one of whom is a petitioner and the other a respondent. The principle is that a case will be brought before the court, with arguments put forward on both sides so that a decision can be made. Mediation, on the other hand, involves parties who, in an effort to move on from the debilitating effects of conflict, voluntarily agree to find their own mutually acceptable solution, with the support of a neutral third party. The first inevitably apportions guilt or blame and results in a winner and a loser while the second encourages mutual responsibility and collaboration in the expectation that both sides will benefit from the outcome. <sup>29</sup>

It is interesting to note how the use of metaphorical language reflects the differences inherent in the two professions. John Haynes, a leading US mediator in the 1990s, commented on the metaphorical language associated with representation, pointing out that it reinforces the adversarial nature of the process: lawyers come to the table 'armed with the facts' and 'ready to shoot down their opponent'. Mediators on the other hand are equipped with a 'toolkit' <sup>30</sup>. The use of metaphor within the process itself could be described as one of these tools where, for example, the process is described in terms of a 'journey' which can help people to consider how they can 'move forward together', 'build bridges', 'take the next step' or to see the 'light at the end of the tunnel.' Mediators consciously use language to encourage parties to view their conflict

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<sup>29</sup> See Lisa Webley, 'Gate-keeper, supervisor or mentor? The role of professional bodies in the regulation and professional development of solicitors and family mediators undertaking divorce matters in England and Wales.' (2010) 32 (2) *Journal of Social Welfare and Family Law*, 119, 128. Webley discusses the different 'messages' that these two professions send out regarding their role in order to extol their own benefits. On the basis of her study she observes that the "rhetoric focused on consensual decision-making in place of adversarial partisanship ... and expert legal help and protection of legal and financial interests over non-expert decision-making."

<sup>30</sup> See John Haynes, 'Metaphors and Mediation', Parts 1, 2 and 3. (1998) [www.mediate.com](http://www.mediate.com) and Suzette Haden Elgin, 'Metaphor in Mediation: Mediation is a \_What\_?' (2001) [www.adr.com](http://www.adr.com).

differently. Strategies such as ‘positive reframing’<sup>31</sup> are employed to help people understand one another beyond the initial attitudes of anger or criticism. Through careful listening and reflection, mediators support parties to articulate their real concerns, while techniques such as ‘mutualising’ and ‘normalising’<sup>32</sup> are intended to reinforce joint responsibility and collaborative problem-solving. Neil Robinson writes about the change that can occur in mediation. The language that he uses to do so is in itself an illustration. He says:

“The transformation we seek for our clients is from entrenched, adversarial, self-interested, focussed on fighting the battle, to co-operative, collaborative, engaged in effective communication and dialogue, focussed on working towards a common solution and [...] working in partnership.”<sup>33</sup>

Often the effect of the interventions described above is to simplify the exchange between parties and to break dialogue down into manageable chunks. The purpose of the mediator’s use of all these language strategies is to get to the real meaning behind the quarrel and to build understanding.

By contrast legal rhetoric can be both complex and confusing. Rather than breaking down arguments, Mulcahy notes the tendency for lawyers to develop an argument from the information presented to them by their clients:

“Lawyers do much more than reproduce the arguments made by their clients. They play a pivotal role in the evolution of the grievances their clients represent to them. They mould them and reinvent them as formal claims which are recognised by the legal system. The rhetorical accounts of

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<sup>31</sup> ‘Positive reframing’ involves taking a non-constructive or negative statement and reflecting back the meaning without the negativity. For example: “He’s an absentee manager – never here when you need him - absolutely useless.” Reframe: “So you would like to see more of your manager.”

<sup>32</sup> ‘Mutualising’ is used to identify common ground between parties or to reinforce collaboration. ‘Normalising’ is used to combat the sense of isolation that people often experience in conflict.

<sup>33</sup> Neil Robinson, ‘The Spirit of Family Mediation: Future, Immediate Past and Present - Part 2: Great Expectations’, (2012) Family Law 340.

common sense morality offered by disputants become generalised accounts of harm which fit into categories recognised by statute and case law.”<sup>34</sup>

In his book ‘Legal Language’, Tiersma describes a range of strategies such as the use of lengthy and complex sentences, conjoined phrases, unusual sentence structure and multiple negation<sup>35</sup> that make legal language dense and difficult to comprehend. He goes on to examine what he describes as a “sub-language” with limited subject matter and containing “lexical, syntactic and semantic restrictions” which altogether form “a complex collection of linguistic habits that have developed over many centuries and that lawyers have learned to use quite strategically.”<sup>36</sup> While the language of mediation is not so well established, it is nevertheless possible to identify devices in use that are similar to those outlined by Tiersma. The use of different types of questioning is one example. Both mediators and lawyers use questioning strategically to invite a broad account from the speaker, to probe more deeply for meaning or to pinpoint it quite concisely. Another is the use of jargon, which he defines as “the vocabulary of a trade, occupation or profession.”<sup>37</sup> He argues that, within the lawyers’ vocabulary, phrases such as ‘conclusory’, ‘hypothetical’, ‘predecease’ and ‘judge-shopping’ fit into the category of jargon. Similarly, mediators in conversation with each other commonly use terms such as ‘process’, ‘dialogue’, ‘journey’, ‘informed decision-making’, ‘sense’ (used to suggest meaning rather than attribute it) and ‘common ground.’

The level of formality presents another crucial difference between mediation and litigation. While civil and commercial mediation takes a more business-like approach

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<sup>34</sup> Mulcahy (2001) 207.

<sup>35</sup> Tiersma (1999) 51ff.

<sup>36</sup> *ibid* 173.

<sup>37</sup> *ibid* 107.

not found in other mediation contexts,<sup>38</sup> the process is generally intended to present an opportunity for informal resolution, reinforced by its voluntary, private and non-binding nature. Even family mediation, which comes within the civil justice arena, adopts a more relaxed approach, taking place largely away from the courts.

The divide between formality and informality is reinforced through language. Legal language is characterised by impersonal constructions that are intended to create an impression of objectivity and authority. The use of the first and second person (*I* and *You*) are generally avoided, not only by lawyers but by judges who tend, for example, to refer to themselves as *the court*, rather than *I*. Mediators are much more likely to encourage parties to talk in personal terms and to see the other person as a human being in the interests of restoring a relationship which may be of importance in the future. Furthermore, a characteristic of parties in conflict will be to expand their argument, with the intention of strengthening it and to speak for others in the situation too. For example: "*It is not only me that thinks you are an absentee manager – you should hear what the rest of the team say about you behind your back!*" A typical response might be to remind the employee that the mediation involves just the two of them and invite them to comment more on the particular effect that their manager's absence has on them.

Formality is emphasised through the use of 'nominalisations' such as 'settlement' or 'resolution'. Outside the justice system, mediators may do the same but the language is likely to be softer and less prescriptive. Outcomes are framed less legalistically as

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<sup>38</sup> For example, there is a more formal structure to the process which is seen in the use of 'opening statements' from legal representatives, the presence of experts of various kinds who will provide reports, side meetings and a more business-like 'feel' to proceedings.

'agreements' or 'solutions.' Tiersma discusses the use of the word 'shall' which, in legal terms, functions as a promise or an obligation. By contrast, a typical outcome reached in family mediation will phrase agreements as 'intentions' or 'proposals'. This is an area in which the mediation context undoubtedly has an influence. As I have mentioned above, respondents in my study working in the justice system were much more likely to talk in terms of settlement and resolution, something that is reinforced by the movement of legally trained professionals into the mediation sphere. However, respondents working in this sector also saw the dangers of using the language of the court. The following mediator commented on the use of the phrase 'party determination':

"Parties *evolve* the outcome. 'Determine' is too strong. Mediators broaden the options and parties participate in that. It is about language: The reason I worry about determination is because evaluative mediation starts talking about determinations and judges and law – people come to 'determinations' and so when you are dealing in the arena that you are in, which is close to law and you start 'determining' something, you are sort of saying that they sit like judges and decide between them. Actually it is a much more fudgy process." (C14, civil and commercial mediator.)

This quote provides an apt illustration of the tendency of legalese to use homonyms, words that have a different legal meaning from that of ordinary usage, another feature of legal language referred to by Tiersma.<sup>39</sup>

The growth in the number of litigators and arbitrators who have expanded their practice to incorporate mediation results in increasingly formal associations including promotion. Garzone examined the websites of various arbitration providers in order to compare the language used to describe alternative dispute resolution processes.<sup>40</sup>

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<sup>39</sup> Tiersma (1999) 111. Other examples include words like 'action'; 'motion'; 'plead'; 'prayer'; 'appearance'.

<sup>40</sup> Giuliana Garzone, 'Promoting Arbitration and Mediation on the Web', in Bhatia et al (2010)23ff.

Looking at one of the providers in the study (the London Court of International Arbitration), she observes the formality conveyed through the use of impersonal, non-interactive language. The site outlines extensive rules for mediation and suggests mediation clauses such as the one below which is for use in a contract. It provides an example of a lengthy and complex sentence construction which is expanded to cover a number of eventualities. It conveys a sense of formality that is at odds with the process itself:

"In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Rules, which Rules are deemed to be incorporated by reference into this clause."<sup>41</sup>

Another principal characteristic of mediation, relevant to this examination of language, is the importance of parties being able to speak for themselves: what mediators refer to as 'party voice.' Many respondents in my study saw this as an essential part of the mediation process. Perhaps because of the reasons outlined above, those practitioners working within the civil justice system said that they go to great lengths to ensure that parties get the opportunity to speak, though this is often against the expectation of their representatives. In some cases respondents take active steps either to manage the lawyer's contribution or to eliminate it altogether, as the following quotations illustrate:

"The self-representation of the parties is vital. Where people are represented you nearly always find the solicitors will give the opening statement and include their spurious legal arguments. I will always say to the individuals 'What would *you* like to say?' And quite often they then look puzzled, but then they start and what they want to say is quite different to what the legal people have said and all sorts of things come out in that moment. As an

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<sup>41</sup> See the LCIA website: <http://www.lcia.org> Accessed 22 September 2014.

example, in this one case the lady started talking and said to the builder ‘Well the problem was that my mum was dying, I didn’t know you were coming and it made a mess ...’ and so on. The builder just said ‘Well, you never told me. I didn’t know. I would never have done it.’ All of a sudden there was a completely different atmosphere – and that was in the first twenty minutes. So I think it is great when the two parties do talk because they will put the emotions in as well, you see, which is sometimes good. It is amazing how often something comes out in a situation like that, which the other side had no idea about, that then affects their whole view of the situation. (C11, civil and commercial mediator.)

“It is about ensuring that [the parties’] point of view is put across. The mediator is pulling out all of the stuff that a lawyer actually closes off. [She] is trying to widen the scope of the problem to find that common ground and something on which you can build a solution. A lawyer is trying to narrow it to points of law on which a determination can be made. What the mediator is doing is trying to find the widest possible ground for *self – determination* so that people can say ‘Yes, I can concede on that if I can have this.’” (C14, civil and commercial mediator.)

“Sometimes lawyers will try and interfere and say ‘Oh, you shouldn’t answer that.’ I will just say ‘Well, I’m sorry this is Mrs X that we are dealing with here. I cannot deal with you. It is for her to answer and, if she is not prepared to answer those sorts of questions, I’m afraid it can’t continue. And if you want to go and sit outside because you can’t keep quiet on this, then please do that.’ There is no point in getting a lawyer’s version of what his client would want to say. It just doesn’t work like that.” (C10, commercial, community, and workplace mediator.)

“Parties speaking for themselves is a big issue. In commercial mediation people often speak through their lawyers. If I had my way, I would ban legal representatives. I actively discourage it. I say: ‘Try it’. They can be in the next room. They can come along and sit in the next room. Because what happens is the parties never speak for themselves. You never get to hear what they feel. They are paying for solicitors or barristers to be there so they want them to say their piece. They never engage and the lawyers take over and it’s not mediation is it? In no sense is it mediation. It becomes a negotiation. The lawyer or the solicitor or barrister will always reframe the debate in terms of the law and you never get to hear what the parties think or feel. I feel really strongly about this. Whatever it is, it isn’t mediation. It is only mediation when the parties are talking to each other.” (B03, family and commercial mediator.)

With the changes to civil justice in the last thirty years, mediation and law have inevitably influenced one another. As mediation has become an expected part of civil justice, particularly in family and civil commercial disputes, it tends to be judged by what the court system recognises as a ‘good’ outcome. Mediators working within these

settings increasingly talk about 'settlement' as their main priority. Meanwhile, the adoption by legal representatives of practices like Collaborative Law<sup>42</sup> influences the nature and purpose of the legal representative. The language of the courts themselves has changed too. Take, for example, family law, where the 1989 Children Act altered the previous orders relating to children of divorcing parents from 'custody' and 'access' to the less punitive sounding terms of 'residence' and 'contact'. The Children and Families Act 2014 introduces Child Arrangement Orders which soften the terminology still further to purely descriptive terms such as who a child will 'live with' and 'spend time with.'

### *Conclusion*

I have argued that increasing use of mediation as a form of dispute resolution within the civil justice system has blurred the boundaries between the roles of mediator and lawyer. While mediation is often offered within the civil justice domain by practitioners whose first profession is the law, there is the possibility that its success will be measured by the criteria applied by the courts and its scope limited to that of principled negotiation. Commentators have highlighted the danger of 'colonisation' of both mediation and arbitration by lawyers working within this setting so that the original purpose is altered.

Development and progression need not be negative, however. Indeed, mediators describe the flexibility of the process as one its main benefits. There is nevertheless a

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<sup>42</sup> Collaborative Law is a process by which two lawyers agree to work together in a joint meeting, comprising of themselves and the parties, in order to agree a mutually acceptable settlement. It is characterised by the fact that, if these attempts fail, the lawyers cannot then act as legal representatives in court and must pass the case on. This acts as a powerful incentive to resolve the matter.



risk that mediation will change beyond recognition, simply becoming an adjunct of litigation. I have attempted to demonstrate throughout this thesis that mediation presents a real alternative to formal court adjudication and a fundamentally different approach not just to the management of disputes but to the perception of justice too. It sets out to create an environment in which parties can view their conflict differently, build mutual understanding and take responsibility for the crafting of a solution which is uniquely theirs. Mediation has the potential to address not just the dispute in question but the future relationship of those concerned. These differences in outlook are clearly illustrated in numerous examples of the way that language is used by lawyers and mediators to achieve varying purposes.

Bhatia and his collaborators have explored the significance of '*inter-discursivity*' in this context, pointing out that "the discourses of dispute resolution now constitute an intimate and reflexive network of discourses within, and among which there is considerable contestation and professional struggle."<sup>43</sup> They call for further exploration of these discourses from a co-operative, multi-disciplinary perspective. In my view this is essential and urgent. The current blurring of boundaries is unhelpful and results in a lack clarity and respect for the real alternatives that these two professions present. Language helps us to define difference and in doing so paves the way for interdiscursive debate and the evolution of new discursive practice.

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<sup>43</sup> Bhatia et al (2010) 18.

## CHAPTER 10 – CONCLUSION

In this final chapter I will draw a number of conclusions from the research I have conducted over the last four years. My starting point in undertaking this study was to examine different fields of mediation delivery in order to explore the similarities and differences across sectors. I wanted to establish whether there are consistent elements that are recognisable in all areas or whether the variations across fields are so wide and so fundamental that they cannot be considered to be the same process. My conclusions are based on interviews with a sample of experienced mediators working in different fields. In my view, these interviews have important implications for the mediation profession as a whole at a time when serious questions need to be asked about its future direction.

I drew four main conclusions from my research:

- There is far more commonality across sectors than is currently acknowledged among mediators. While there are undoubtedly variations in practice, these differences are to be found as much within fields of delivery as between them.
- Despite the fact that mediation was originally a process that operated within communities and provided a way to maintain social cohesion in the face of conflict and disharmony, it has, as a result of the ADR movement, become much more closely associated with the civil justice system and in some arenas it has become almost synonymous with settlement. Restricting mediation to settlement limits its potential for addressing the more ideological aspects of conflict resolution, in particular enhancing communication and repairing relationships.

- There is an uneasy, unresolved tension between mediation and the law and between lawyers and mediators, and this is seen in particularly sharp focus with the evolution of hybrid roles such as that of the lawyer-mediator.
- The mediation profession remains disjointed and makes little attempt to engage in dialogue across different sectors. There is no single voice representing mediation and a resistance even to 'light touch' regulation in most sectors. Without this and without a clearer definition of what mediation can offer, the profession will remain fragmented and open to the criticism that its objectives are controversial and confusing.

### *1. Common Ground in Mediation Practice*

For some years there has been a perception among mediators that process and practice vary greatly across fields. Family mediators and commercial mediators, for example, see themselves as dealing with very different issues, different relationships and, typically, as adopting very different styles of working. Community mediators, concerned with relationships and communication breakdown have greater affinity with the family sector, but see themselves as separate from the civil justice system. In the workplace setting, mediation has largely been established independently of any of these other contexts, as has dispute resolution in the fields of SEN, human rights and health.

These perceptions are reinforced through a lack of interdisciplinary dialogue and exchange, particularly in England and Wales. There are few forums in which mediators from different sectors come together and exchange information about their practice and ideology. Those regulatory bodies that now encourage membership across

delivery areas, such as the College of Mediators and the Civil Mediation Council, are largely dominated by their field of origin. Yet the experience of the Scottish Mediation Network (SMN) and the Mediators Institute of Ireland (MII) demonstrates that a level of coherence and shared recognition is both achievable and beneficial.

The perception of difference is reflected in approaches to training. Family, community, workplace and civil / commercial mediators all undertake different training programmes delivered by a range of different suppliers. It is rare in the UK for a provider to offer a training course that teaches delegates first and foremost to work generically as mediators, before following up with additional elements which address the requirements of a particular context or the comparatively minor process variations that may occur in some settings.<sup>1</sup> This is despite the fact that any cursory examination of the courses on offer shows a marked similarity in content. Over recent years there has been some development of conversion programmes that recognise prior mediation training and experience. They are shorter in length and provide the necessary contextual elements that enable a practised mediator to move into a new field.

However, leading bodies such as the Centre for Effective Dispute Resolution and the Family Mediation Council refuse to accept these courses as valid and insist that trained, experienced mediators attend the same programmes as those who are new to mediating. If the sample of mediators that I contacted in my research is at all typical, this failure to acknowledge the transferability of core mediation skills from one area to another is at odds with the reality of actual practice. While 41 per cent of respondents

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<sup>1</sup> Again, this has been achieved by the MII.

said that they mediated in one field only, 28 per cent said they worked in two different contexts and 31 per cent in three or more. The implication is that, despite popular perceptions, there are a growing number of people who are spending a significant amount of their working life mediating, whether or not it is their primary occupation. 71 per cent of respondents in my sample were indeed working as mediators and/or mediation trainers and supervisors as their main occupation.

The research findings have indicated that there is greater similarity than difference across these areas. In particular, the core principles of voluntariness, confidentiality, impartiality and party determination are acknowledged by mediators across the board as key elements of the process. Although maintaining these principles in practice can be challenging, mediators say that they seek to protect them rigorously wherever possible. These principles may be more accurately described as aspirations but, according to the respondents in my sample, mediators do strive to ensure that parties make informed decisions about whether to use the process, to resolve conflict constructively and to do so on their own terms.

Variations do of course occur and it has been observed that context does influence purpose. An analysis of the responses in my study showed that a settlement-led approach can incorporate relationship repair; an improvement in communication and understanding can lead to a concrete agreement. I concluded that the question is more about finding the right starting place for discussion in mediation and that outcomes can be achieved at multiple levels. For the majority of the respondents I interviewed, that starting place is heavily influenced by the parties themselves and what they are looking for. Mediators report that they adapt their style and approach to meet the needs of their clients and this reflects the current enthusiasm in academic thinking for the notion of

'process pluralism', in which the importance of party choice is respected not only in relation to outcomes but also to the process that is used.

In my opinion, perceptions of differences in mediation practice are actually much more to do with variations in personal style, self-confidence, individual preference and contextual knowledge. For example, a commercial mediator told me in one interview that he viewed negotiating over huge sums of money objectively, as a business transaction, whereas he would find dealing with the future of children whose parents are divorcing far too emotive an issue. Another commented on the importance of knowing "where your subjective boundaries and biases are." A third expressed his personal interest in focussing on interaction and communication rather than the "salami slicing" exercise that is sometimes characterised as typical of commercial mediation.

A central question in determining how far the role of a mediator can be regarded as a generic one, transferable across fields of practice, is whether all mediators can work to the same code of practice. With only one or two exceptions, respondents in my sample said they could. Some qualified their response by suggesting that the lowest common denominator would have to be fairly broad and that there would need to be recognition of the demands of different contexts (for example, the need for specific knowledge or an appreciation of how steps of the process might vary). However, the significant point is that the great majority of respondents said that they could relatively easily work within a shared ethical framework. This suggests again that there is a common identity among mediators in terms of how they see their function and the values that inform the role. It is a commonality that should be more widely recognised.

## *2. Defining Mediation*

Mediation is a process that is flexible and adaptable. Many practitioners said they viewed this as a strength and one that is crucial to the responsive approach that is required in mediation. This flexibility is apparent in the origins of mediation where it was used as a tool to promote community cohesion and to encourage members to address conflict constructively at an early stage. It is still the case today as mediation continues to expand into new areas. I largely restricted my research to the contexts of family, workplace, community, civil and commercial disputes but mediation is used to address an increasingly wide range of issues, such as the environment, homelessness, health, education, disability and human rights. As we have seen repeatedly, the ADR movement has had a considerable impact on the popular understanding of mediation, linking it more and more closely with settlement. Even respondents who saw settlement as their priority still expressed the opinion that outcomes such as improved communication and relationship repair were both possible and desirable.

In my view, this close association with settlement limits the purpose and function of mediation and reduces its potential to enhance communication, repair relationships, resolve conflict and equip people with the tools to address disagreement for themselves in the future. I have argued in this thesis that the risk is that the success of mediation is evaluated using criteria determined by the courts, tribunals or other formal bodies with an adjudicative function. These criteria are usually associated with cost savings, speed and efficiency. While such outcomes are without doubt valuable in themselves, they are not the defining factors of mediation practice.

By contrast, I see mediation as an opportunity for individual responsibility in addressing conflict, allowing participants to articulate their own interests, respect each other's viewpoint and arrive at their own solution. I would argue that these are benefits that enhance satisfaction and security at an individual level, and cohesion at a community level. Mediation could be redefined in much broader terms within the context of initiatives such as the Wellbeing Agenda or as part of an educative process that draws on individual and societal norms and reinforces a sense of community cohesion. The practice of mediation in the fullest sense is not simply a problem solving tool but a means of supporting disputants to understand and address their own conflict.

A closer dialogue between mediation practitioners across disciplines would facilitate a shared understanding of what mediation can offer, strengthen professional identity and reiterate its core values. From the research I conducted it would seem that the strength of mediation practice lies in the unique combination of the principles of confidentiality, voluntariness, self-determination and impartiality. While other forms of dispute resolution uphold a number of the same principles, it is mediation that brings them all together. The focus is on the creation of an environment in which these are core ingredients, even if the quantities used may vary according to the context. This enables disputants to view their conflict from a different perspective and take steps to address it. While arbitration, litigation and principled negotiation all involve a third party neutral with no vested interest in the outcome, mediators are required to step back from the role of expert in the substantive issues at stake, or in the law, and to hand responsibility to the parties to be "the architects of their own agreement."<sup>2</sup>

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<sup>2</sup> Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (London: Jessica Kingsley Publishers, 2007) 104.



### *3. The Unresolved Relationship between Mediation and Law*

As has been noted in the earlier chapters of this thesis, it is argued that mediation undermines the role of the courts and inhibits access to formal justice administered through the law. There are several implications to this which I believe could usefully be clarified. It seems clear that the continuing decline in the use of court adjudication has a direct impact on the application of the law. As Genn herself points out, mediation is just one means by which cases are resolved before trial among a number of other processes and in a setting that is now incontrovertibly geared towards settlement.<sup>3</sup> Most often, mediation provides an alternative to lawyer-assisted negotiation, rather than to adjudication. While one might argue that the ADR movement as a whole is responsible for the decline in the use of trials, mediation alone is not.

If justice were to be equated with law, there would indeed be conflicting interests in terms of outcomes between mediation and the legal framework. My study has shown that mediators see one of the strengths of the process as offering the opportunity to find solutions that would not be possible in law but which are nevertheless considered by the parties to be appropriate to the situation. I have argued that, while there are circumstances in which legal rights need to be protected and where, in the public interest, contentious issues of law need to be clarified by the courts, there are many other situations in which fair outcomes can be achieved through mediation independently of the law. These are arrived at on the basis of mutual understanding and a willingness to look for a solution that meets the interests of each party. Mediators indicate that they make considerable efforts to create an environment in which parties

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<sup>3</sup> Hazel Genn, 'Civil Mediation: A Measured Approach?' (2010) 32 (2) *Journal of Social Welfare and Family* 195, 199.

have an equal voice. They say that seek to do this by giving people ample opportunity to speak and to listen to one another; by setting up an environment that is based on reciprocal respect; by being impartial and even-handed and by empowering participants to mutually influence their own outcome. The mediators I interviewed spoke clearly about their interest in justice and fairness, in terms of both process and outcome, even if the outcome does not necessarily equate with a legal remedy. I would argue that it is reasonable to conclude from my research that the ambition to achieve a 'just' outcome within mediation is based on the assumption that parties have entered the process in good faith and with a willingness to reach an accommodation that takes into account the other party's interests as well as their own.

It must be acknowledged, however, that, though mediators have an interest in justice in the sense in which it is described above, the relationship between mediation and law is more complex. The two processes sometimes appear to be contradictory, despite sharing a common purpose in the resolution of disputes. While the law seeks to establish right and wrong in order to bring the dispute to an end, mediation avoids the allocation of blame, placing the emphasis instead on achieving resolution by addressing the conflict. The first seeks to end disputes by independent, legal judgement, the second to resolve conflict through consensus. The law protects individual rights and acts in the public interest, whereas the emphasis in mediation is on mutual interests and the attainment of a private remedy.

The contradiction is played out in the relationship between lawyers and mediators where, as I have described in Chapter 9, the two professions often adopt conflicting approaches reflected in both language and behaviour. The absorption of mediation within ADR has resulted in the blurring of these roles as lawyers have increasingly

adopted mediation as a tool by which to achieve settlement or, perhaps more cynically, as a means by which to retain control of the civil justice arena. At the same time, mediators with a background in counselling, therapy or social work, influenced by the drive of the court setting and by the civil justice policies of successive governments in this field, are at risk of prioritising the securing of a legally acceptable settlement over the broader, ideological purposes of mediation to resolve conflict, improve communication, and repair relationships.

The conflict of interest inherent in these two roles is consistently ignored. Indeed, I would argue that it has been exacerbated by the recent cuts to legal aid which have resulted in increased competition between these professional services. Low income families who fall outside the qualifying criteria for legally aided mediation are now faced with the choice of paying for mediation or for legal representation if, indeed, they can afford to pay for either.

Genn's argument is that undue emphasis has been placed on mediation as *the* means of closing disputes, when in fact it is one process among many in an arena that promotes settlement.<sup>4</sup> In my opinion this is a valid point and results in a situation that is favourable to neither mediation nor the justice system, nor, for that matter, the professionals involved in the delivery of those services. To represent a genuine alternative, mediation would need to be located outside that system. More precise definition of roles and processes, within and outside the justice system, would bring clarity and encourage the appropriate use of the various options. In the field of judicial review, for example, this has to some extent been achieved since the differences

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<sup>4</sup> *ibid* 195ff.

between discussion and negotiation, the use of the ombudsman, early neutral evaluation and mediation, are all understood as separate options that are available before any application is made. The specific functions served by mediation are to allow parties to be heard, to support the recognition of each of their needs and interests, to encourage collaboration and to give back control over the outcome. In other words, I see mediators as conflict resolvers rather than problem solvers. I suggest that establishing more distance between mediation and the civil justice system would afford greater clarity in the differences between conflict resolution and problem solving, and that this would be of benefit for practitioners, for users and for other third party actors.

#### *4. Implications for the Mediation Profession*

The fact that there is no united voice to speak for the mediation profession in the UK emerged as perhaps the most pressing issue in my research. Despite the compatibility between sectors regarding principles and purpose that my study has revealed, the profession as a whole is disjointed.

There is a resistance to scrutiny, shielded by the principle of confidentiality, which makes it difficult to examine actual practice or to explore the common ground in mediation. This in turn makes it more difficult to define what mediation is - and what it is not. Although the benefits of 'process pluralism' have been widely documented, there are risks in giving practitioners license to adopt any approach they favour without being answerable for what they do. I have argued that mediation offers participants support in resolving current and future conflict. Mediators facilitate an exchange of information in order that parties might alter their understanding and reach a mutual decision. If that information is used for other purposes, for example advice giving, it

raises doubts as to whether the procedure can be called mediation. This is not a question that should continue to be avoided. Currently there is no way of establishing for sure how far, and with what frequency, mediators advise, offer solutions, direct outcomes or advocate for weaker parties. Supervision is established in the family sphere and to a lesser extent within the community field, but other sectors have been slow to acknowledge a need for this or to develop higher standards such as post-training qualifications. Without mechanisms like supervision or peer review in place, there is a danger that practice becomes inconsistent from mediator to mediator. While my study points to common core values and similarity in approach, there is a remarkable lack of empirical information to show what mediators actually do, as opposed to what they say they do. In my opinion, this lays the profession open to charges of a lack of clarity of purpose and leads, potentially, to divergent practice.

My strong view is that the mediation profession needs to become much more coherent and consistent, both internally and in terms of the messages it gives out. The growth of mediation as a profession in its own right has progressed so far: the three hallmarks of professional status, outlined by Marian Roberts as “a recognized and distinct body of knowledge; mechanisms for transmitting that body of knowledge; and means for self-regulation and evaluation”<sup>5</sup> are evident, to some degree, in all of the settings I have discussed in this thesis. However, the variation from sector to sector demonstrates that the profession as a whole is fragmented. Separate strands have evolved independently of one another at different rates and with varying degrees of regulation with the result that progress has been halted through perceptions of

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<sup>5</sup> Marian Roberts, ‘Family Mediation: The Development of the Regulatory Framework in the United Kingdom’ (2005) 22 Conflict Resolution Quarterly 509, 516.

difference across areas of delivery and a reluctance to share experience. Something of a silo mentality has grown up and, as a result, artificial divides have grown up in areas where there is much greater similarity than difference. In my view, the profession has enough in common across disciplinary boundaries to suggest there is a shared identity that marks out mediators as part of a common profession rather than as a collection of professionals from different backgrounds. The formation of a single regulatory body operating over all areas of delivery would constitute the next step towards the creation of mediation as a profession in its own right.

There are several ways in which such a development could be supported. In the first instance representatives from the regulatory bodies and membership organisations in various sectors need to engage in dialogue to explore their similarities and differences in order to arrive at a shared understanding of mediation practice: the profession needs to define itself more clearly and to openly recognise the commonalities to be found in all fields of delivery, many of which have been noted in this study.

Undoubtedly variations exist and, if mediation is to be relevant and useful, it needs to retain enough flexibility to be applicable in a variety of situations. However, as conflict resolvers, mediators should not be frightened of difference. Instead, they need to discuss together when these contextual variations are likely to occur, what their impact on practice is likely to be and how they should be addressed within an ethical framework. The creation of a shared code of practice which articulates the core principles of mediation practice, while acknowledging the flexibility that contextual demands necessitate, would provide clarity to those within and outside the profession.

There is also, in my view, a reluctance to scrutinise existing practice based on the assumption that this will bring regulation and limit flexibility. However, this strengthens the argument that an exercise in defining mediation more clearly should be practitioner-led. The experience in the family sector was that unless greater regulation, albeit taking a 'light touch' approach, was agreed among practitioners in the field, it would be imposed from outside. Without strong leadership from within, the mediation profession risks a lack of unity and identity. Without its own identity, mediation becomes shaped more by the context in which it is delivered than by its own definitions of purpose and practice.

A second step in the development of a single professional identity would be to address the matter of training. For those already working as mediators, the existing membership bodies could recognise and accredit prior learning and experience in another mediation discipline. This would represent an endorsement of the current situation whereby increasing numbers of mediators work across several fields of delivery. These bodies, working under the same professional banner, could encourage the establishment of generic mediation training as the first stage of a career in mediation, to be followed by specialist training in chosen areas. This additional training would address the knowledge requirements of a particular field and any process variations that individual settings employ. Finally, a single professional body could consider the introduction of vocational training which includes a more substantial theoretical underpinning and an academic element, rather than the current approach which is almost entirely based on skills development. Mediation training would take longer, be more rounded, and aspire to an educational standard that would more closely resemble training for other professions such as counselling, therapy and law. A natural progression from this

would be to put in place accreditation processes, again with context specific specialisms, which would result in an easily recognisable, standardised mediation qualification.

I accept that these steps would present huge challenges to the mediation profession, disparate as it is. The most significant advance would be an initial agreement to begin such a dialogue. This would require a corporate recognition of the current counter-productive, at times competitive, situation.

In my view, a consolidation of practice and experience across sectors would bring about considerable benefits. It would, for instance, enable mediators to explain their role more effectively to clients and referrers. It would also put them in a better position to resist some of the pressures resulting from civil justice policy and government-led initiatives which, while encouraging mediation, place an undue emphasis on cost saving, speed and efficiency. These are often promoted to the detriment of the ideological aspirations embodied in mediation's traditional roots: those of conflict transformation, improved communication and relationship repair. It would protect the practice of mediation itself, defining it more clearly as a vocational career in the resolution of conflict rather than as a problem-solving tool that is used as an adjunct to another professional role or as an affordable option to legal representation.

I have, then, concluded that, with a stronger internal identity and under the leadership of a single professional body, it would be feasible to define more clearly what mediators do and what mediation offers individuals, communities and society. I think it is possible to formulate a common framework that describes, first and foremost, the key role of a mediator as an expert in conflict dynamics, who is skilled in facilitating negotiation,



supporting communication, managing power relations and providing an environment in which conflict can be addressed. I believe that all these functions should be based upon an ethical system which draws on the key principles of party determination and impartiality. From this starting point, the profession would need to understand and accept the variations that occur across and within sectors for a number of reasons: the desirability of managing a party-led process and offering choice; the requirement for contextual knowledge; the different emphasis on purpose which may lead to an adaptation of the process; the personal preferences of mediators and their inclination to work with some kinds of dispute but not others. A consolidated approach could be reflected in the introduction of vocational training for mediators that is generic in the first instance and which still allows individuals to specialise in their area of choice. Qualification and accreditation could follow a similar route and would bring further clarification to the role of mediator and its diverse application.

In my view, the mediation profession must embrace the challenge and look for coherent ways to articulate the similarities, as well as the differences, in purpose and role that occur across fields of practice. It must define these far more clearly for other professionals and for the public at large if the common ground in all mediation practice is to be properly understood and valued.

## **APPENDIX A: INTERVIEW SCHEDULE**

### **Section 1: Biographical Information**

What initial mediation training did you receive? (from which training provider)

What field(s) of mediation do you currently work in?

Is the role of mediator your main occupation?

How would you describe your professional background?

In your cases, is a mediated outcome a direct alternative to a formal judgement?

How is the mediation you undertake funded?

### **Section 2: Practice Questions**

1. What is the main purpose of mediation?
2. How far do you think the purpose of mediation is the same in any context?
3. How do people view conflict?
4. What do you consider to be a successful outcome?
5. Which factors are influential in achieving that?
  - i. a voluntary choice by the parties to mediate
  - ii. customers are privately paying
  - iii. the mediator has created a safe environment
  - iv. the parties are committed to an outcome
  - v. mediation is a recognised stage in dispute resolution which parties are expected to attempt
  - vi. others
6. Do you think mediation should be made compulsory? Yes / No

7. If it was made compulsory how would it affect i) the parties ii) you as a mediator?

8. Please place the following list of mediation principles in order of importance:

- i. voluntariness
- ii. confidentiality
- iii. parties determine the outcome
- iv. impartiality of the mediator
- v. respect
- vi. self-representation of parties (i.e. speaking for themselves rather than a representative)
- vii. collaborative working (between those directly involved in the mediation)
- viii. effective communication

9. What do you regard as good practice on the part of a mediator?

10. In what circumstances would you not go ahead with a mediation?

11. How would you describe your mediation style?

12. Do you use strategies such as caucusing and shuttling in your practice?

13. Why and when would you use these strategies?

14. Do you think it is possible for all mediators to work to the same code of practice?

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