'Leave no footprints': on the role of influence in mediation

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Of the best rulers the people (only) know that they exist:

The next best they love and praise:

The next they fear:

and the next they revile.

When they do not command the people's faith,

Some will lose faith in them,

And then they resort to oaths!

But (of the best) when their task

is accomplished, their work done,

The people all remark "We have

done it ourselves".

Chapter 17, Tao Te Ching (commonly attributed to Lao Tzu, 6th Century)

Introduction:

Is it possible, or even desirable, for practising mediators to aim to 'leave no footprints'? The phrase itself is enigmatic. Superficially, it aligns with mediators' typical rhetoric of impartiality and neutrality: but it also implies that a practitioner's input can be so minimal as to be barely discernable, thus exerting little, or no, influence over the process or parties.

In this short paper I discuss the role of influence in mediation, and some of the disagreements in the literature about whether this should be considered benign or reprehensible. I argue that mediators are unable to step more lightly in terms of practice without first becoming more aware of their existing impact on the parties and process, and the reciprocal influence of the parties on the mediator and each other (Bodtker & Jameson, 1997).

Lastly, if the goal of leaving no footprints were adopted in principle, how would this be applied in practice? As Rajkowski (2014) asks rhetorically, 'what would a mediator have to know so that their performance might be considered "invisible," whereby the parties, having come to a solution, are saying, "we did it ourselves?"' In response to Rajkowski's question, a groupwork model is suggested as a conceptual framework for explaining and addressing the inevitability of influence in mediation practice.

Origins:

The phrase 'leave no footprints' is borrowed from Shennan & Iveson's (2012, p.290) chapter *'From Solution to Description Practice and Research in Tandem'*. Here the authors discuss their work within a solution focused brief therapy (SFBT) context, and explain that one concept informing SFBT is known as *Ockham's razor* (Domingos, 1999, p.409; Braithwaite,

2007), or the *law of parsimony* (Stanford Encyclopedia of Philosophy, 2010). Parsimony posits 'simpler things are better'.

William of Ockam was a 14th Century English logician and Franciscan friar, whose name is now usually misspelled Occam. According to Braithwaite (2007, p.1), Occam did not invent the law of parsimony, although he utilised the idea extensively. Domingos (1999, p. 409) suggests that parsimony was particularly relevant for Occam, and adopted by him to critique the scholastic philosophy of his time. This is described as laden with ever more elaborate theories, which nevertheless failed to offer any corresponding improvement in predictive power.

But parsimony can seem counter-intuitive when applied to the complex field of contemporary mediation, a genre of Alternative Dispute Resolution (ADR). Some of the issues facing mediators are comparable with the evolutionary struggles marking the historical development of psychotherapy – its relatively recent arrival compared with the traditional professions, the proliferation of models and theoretical positions (some incompatible, or even contradictory), and partisan disagreements about qualifications. Psychotherapy and mediation both have extensive canons, numerous pundits and critics, and protagonists who may come to be regarded as leaders, or even gurus.

Mediation is inherently pluralist (Hansen, 2008, p.411), multi-disciplinary in both origin and application, rife with theories, counter-theories, opinions and – somewhat ironically for dispute resolution professionals – fierce arguments. The plethora of ADR literature makes understanding and codifying the canon a significant challenge. Perhaps this is one of the reasons why mediation training events typically focus on skills teaching and the development of tools for the mediator's ubiquitous toolbox, rather than input based on empirical research. The focus on skills and strategies, with little (if any) exposition of their underlying theoretical constructs means that mediation is still often construed as an adjunct to other disciplines, notably law. Despite ongoing attempts to professionalise the field, there is as yet no universal recognition that practitioners need to be familiar with the substantial ADR literature now available.

Factions and therapy:

One thread within the ADR literature concerns the relationship of mediation to therapy, and debates concerning whether mediation should be considered therapeutic (Benjamin & Irving, 2005), cathartic (Kochan & Jick, 1978 p.207) or a relatively straightforward way for parties to deal with their disputes through facilitated bargaining (de Roo & Jagtenberg, 2002). From Stein (1974) and Bowen (1978) onwards, family systems theory has provided a framework for those working with individuals and families across a number of settings. Some mediators formally adopt mediation models acknowledged as therapeutic, and deliberately enlist theories and techniques from therapeutic practice. According to Favaloro (1998, p. 12), although conflict resolution and therapy have theoretically and practically discrete goals, they share many skills and conceptual frameworks, even if these are implicit rather than explicit. Favoloro argues that therapeutic techniques are not only helpful, but justified, especially in high conflict cases, provided the mediator's intentions are made clear

to the parties. This inevitably raises questions about the depth of the mediator's self–awareness, the extent to which the parties are cognisant of what mediation involves, and how practitioners might better enable disputants to give informed consent before engaging in mediation.

Notwithstanding Favaloro's recommendations, the importation of family systems theory into mediation has not been universally welcomed. Kelly (1983) draws careful distinctions between therapy and mediation, while Roberts (1992, p.16) contends that a firm line must be drawn between the two because the boundaries could otherwise become dangerously blurred, tainting mediation with the stigma of family dysfunction and treatments which potentially pathologise the disputants (for a contrasting view see Haynes, 1992). Nevertheless, Kandel (1998) argues that the lines between mediation and psychology are inevitably blurred, and codes of conduct should express this. Theoretical distinctions – for example, distinguishing process from content, and option–development from suggestions, are untenable in practice, and inadvisable as the sole basis for developing good practice criteria (p.303). Kandel also contends that mediation guidelines should recognize the inevitability of substantive interventions, and encourage mediators to 'make such interventions better' (p.312). His proposed remedy is that practitioners should have an affirmative obligation to operate a model of situated substantive expertise, which he describes as the grounded understanding of the people participating, the particular problems they face, and the range of workable solutions (p.303), although Kandel does not elaborate on how this model might be developed, or taught.

Arguably, family mediation has discrete challenges, such as the requirement that mediators should remain neutral and impartial while simultaneously upholding welfare principles in relation to minor or dependent children. In some settings, mediators are also expected to power–balance in favour of weaker parties. It is unclear whether this requirement should be based on the mediator's perception of the disputants' relative vulnerability, or function as a protective response to one party's claim of disadvantage, even where this might not be apparent. For someone to claim that they are less powerful presumably means that this is how they feel, a factor which could hamper their negotiating strength accordingly and must be taken into account. However, power is not a static phenomenon; power shifts back and forth during the process, sometimes making it difficult to gauge if a party is less advantaged overall, or is attempting to exert greater influence over how the conflict is framed (Bodtker & Jameson (1997, p.247).   This is not to deny the reality of power issues in mediation, nor the potential for abuse of the process or parties. Mediation is not appropriate in all cases. However, well–intentioned injunctions regarding mediator neutrality, impartiality and power balancing can result in conflicting imperatives, especially where these appear adjacent to each other in professional codes of practice (*Code of Practice for Family Mediators,* Family Mediation Council, 2016, p.5).

Influence, mutuality, and motives:

According to Bodtker & Jameson (1997, p.237), influence in mediation is mutual, at play between the parties as well as featuring in their respective relationships with the mediator, and how the conflict should be framed. Even if the parties do not actually meet because

their negotiations are conducted in shuttle format, they will nevertheless influence both each other and the mediator. The inevitaly of influence has implications for mediation's rhetoric of practitioner distance from the parties, whether the distance claimed is remote (the mediator's assertion that they are neutral and impartial), or positional (the mediator's claim of equidistance through equal engagement).

Pfetsch's (2011) analysis of influence implicitly conceptualises mediation as a systemic process (see also Laszlo & Krippner, 1998), while Mayer (2004, p.245) suggests that the mediator's role is to promote a culture of constructive conflict through a focus on the functioning of the system, rather than the resolution of any particular conflict. Coleman (2006, p. 546) observes that a systems approach encourages the practitioner to 'see the whole', although he also points out that, ironically, a systemic understanding is one of the most common yet least well–developed of the conflict paradigms. Ruhl (1997, p.781, citing Holland, 1995) contends that mediation may best be understood as a complex adaptive system, combining qualities of coherent stability and disordered change to produce sustaining, adaptive performance in the long run. Complex adaptive systems allow for fluidity and solidity within a single process, being structured and unstructured at the same time. The functional qualities of complex adaptive systems are potentially valuable for mediators and other dispute managers involved in fast-moving, often chaotic, dispute management processes.

Bowling & Hoffman's (2000) '*Bringing Peace into the Room'* makes thirty-eight references to the role of influence in mediation which, according to the authors, begins with the mediator's growing awareness of how his or her personal qualities influence the mediation process – for better or worse (p.16). The authors appear to link constructive influence with personal evolution, 'undertaken in cooperation with those around us' (p.32). Social scientist Cialdini (2001, p.x) is far more pragmatic, and names six principles of influence in his seminal text, identified as *reciprocation, consistency, social proof, liking, authority and scarcity.* Coggiola (2008), recognising these principles from her previous career in sales, observes that they have proved transferrable to her current work in court–ordered family mediation. Honeyman (1988, p.154) remarks that, regardless of style, there are similarities between the persuasiveness of mediators and that of salespeople. Nevertheless, although not referring specifically to ADR, Cialdini himself repeatedly cautions against the unethical use of influence, and draws attention to the risks of manipulation or other potentially abusive behaviours.

Numerous references or allusions to influence appear elsewhere in the canon. For example, an evaluative research study of family mediators at a social bureau in Sweden (Lindstein & Meteyard, 1996, p. 182) concludes that some of the mediators' most fruitful contributions were to guarantee a safe environment, inspire confidence, and motivate the participating couples to resolve their differences. Johnson, Levine & Richard (2003, p.162) advocate the development of 'the social skill of influence' in furtherance of mediator competency, while Mayer (2004, p. 135) contends that mediators have an impact on the outcome of mediation by virtue of their substantive influence.

As already noted above, Bodtker and Jameson (1997, p.238, citing Burrell, Donohue & Allen, 1990) argue that mediators both influence – and are influenced by – the parties. The authors further propose that mediation should be understood as communicative, and emphasise joint influence and the co–construction of frames. Similar examples of mutual influence can be found in the medical literature in the context of shared decision making between patients and physicians (Lown, Hanson and Clark (2009). Such influence is engendered by, and impacts, all those involved, including the practitioner (p.241) (see also Hollander and Gordon, 2006; Hunter and Ritchie, 2007). From a theoretical perspective, conceptualising mediation as a sphere of influence aligns with Pearce's (2004) theory of the coordinated management of meaning.

Pfetsch (2011, n.p.), citing Bercovitch (1984), goes further. Writing about the mediator's personal stake in the conflict, Pfetsch contends that participant relationships are trilateral, rather than dyadic:

> "The concept of the equidistance of a third party constitutes the fourth form of symmetry/asymmetry in negotiations. It means that the mediator possesses positive and equal relations with the main negotiators, which is not the same as taking a neutral stance. Neutrality indicates too much distance and does not take into account the fact that the third party is itself an interested party in the whole process of negotiation. As Bercovitch (1984) claims, with the intervention of a third party the dual relationship becomes trilateral; the original dyad is turned into a triadic interaction. The mediator is not a disinterested party but pursues its own interests. He expects some reward for its services and good office. Equidistance by a third party consists of equal engagement with each of the other parties, otherwise it will not be accepted. If the third party were too close to one of the parties, it would not be accepted as a fair third partner."

Pfetsch here identifies the mediator's motivation as fundamental to their role as a participant in the conflict, rather than that of a disinterested party. Even if acting without payment, there are other potential rewards for mediators, such as the satisfaction of functioning for the public good, or the esteem potentially afforded them as third party 'neutrals', whether this demonstrated by the parties, the courts, or other interested stakeholders and observers. Pfetsch's contention also reflects some the rhetoric underpinning most private dispute resolution processes in the developed world. This is founded on culturally liberal norms which are commonly embedded in professional codes of practice, and typically prohibit prior connection between the parties and the mediator in order to ensure the practitioner's claimed neutrality and impartiality.

Post–mediation dealings between the practitioner and parties are often disallowed as well, although this is a more contentious area, especially if the parties agree otherwise after reaching a settlement. Pfetsch is correct in his assertion that mediation is not an aseptic process, even where attempts are made to establish firm boundaries between the parties and the practitioner. Such 'distance norms' are not necessarily universal; they vary globally,

especially within cultures which function according to communitarian, rather than individualistic, principles (Lederach 1991, pp 165–186; Barnes, 2007).

Benjamin (2003) argues that mediators may not have such noble motives as those often attributed to them, and are certainly not above the fray. Somewhat provocatively, he opines that they may instead best be served by personality traits such as being confused, voyeuristic, compulsive and marginal (pp. 84–88). The voyeurism of which Chouliaraki (2006) accuses the global media may indeed be paralleled to some degree in private dispute resolution. In truth, practitioners have similar qualities and failings to everyone else, including the parties. Unconscious bias may be a universal human foible. Awareness and acceptance of one's shortcomings and strengths can help begin the process of lightening one's footsteps as a practitioner. As Vindeløv (2011, p.152) writes concerning the impossibility of impartiality, 'the negative effects of this can be countered most effectively when mediators are aware of it in their own hearts and minds, and are therefore able to control it' (or, as perhaps this should rephrased here, *more effectively attempt to control their influence*).

Muscular mediation – overt and covert:

Party self-determination is generally considered a primary principle of mediation, and is enshrined in most codes of practice. However, some forms of ADR are considered 'muscle mediation', owing to the tactics employed by those who deliberatively practise this model. For example, Brunet (2002, p.234) describes how:

> "… the judge, as mediator, appraises the relative strengths and weaknesses of the parties' cases, presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge's analytical perception of the dispute".

Within *realpolitik* arenas such as international conflicts, mediation with muscle is considered a legitimate and effective way to get the parties to the table in order to make them talk (Mirimanova, 2009, p.14). A notable politician said to have used this model was Henry Kissinger (Pruitt, 1981). At the other end of the spectrum, many practitioners feel that 'muscle' and 'mediation' are antithetical concepts, regardless of context, and are very uncomfortable with the idea that they may be exerting any form of influence, let alone coercion. Even so, practitioners who reject highly directive tactics often significantly under–estimate, or even deny, the extent to which they themselves exercise power and influence, and contribute towards the shaping of disputants' seemingly freely–chosen outcomes (Irvine, 2017).

At face value, Bush & Folger's (1994) transformative mediation model appears to address this problem, demanding a micro–focus on the parties' contributions, avoidance of any global assessment (p.192) and aversion to any suggestion of practitioner influence (pp.65–66). Despite the authors' opprobrium of models other than their own, Kandel (1998, note 19, p.316) points out that Bush & Folger appear not to regard the mediator's suggestion as a

substantive proposal in a case described approvingly by them (1994, p. 167). Nor do they openly recognise that their model's goal of transformation constitutes a moral project in its own right, with its objective that this should take precedence over the other possible outcomes mediation might achieve (1994, p.4). Even if nobly intended, mediation aimed at disputants' moral growth is value–laden, and a potentially highly influential enterprise.

Simplistic assertions that mediators are above the fray may reflect practitioners' and theorists' reluctance to engage with some of the dilemmas inevitably raised by debates about influence. Rooney (2016, p.8) contends that reliance on neutrality to define mediator behaviour effectively eliminates the mediator from the mediation relationship equation, resulting in an unbalanced focus on the parties. Ignoring or dismissing this element is disingenuous, and potentially dangerous. The practitioner and parties are interdependent throughout the mediation, making mediation a site of leverage as well as negotiation, regardless of whether such leverage is conscious or unconscious. The fact that mediators may sincerely intend not to influence (or be influenced by) the parties does not mean that this does not occur (Astor, 2007, p.225). Wishing does not make it so. Influence cannot be totally eliminated, but raised self–awareness, and a greater degree of self–management on the part of practitioners, is far preferable to denial.

Leaving no footprints – theory and practice:

Influence is an inevitable factor in the mediation process, and demands an informed approach. It raises ethical, theoretical and practical concerns which need to be addressed, especially in the interests of obtaining informed consent from the parties (Imperati, 2015). From a transparency perspective, one might suggest that disputants should be made aware, in advance, that at least some mediation strategies and techniques were originally developed for therapeutic, rather than dispute resolution, purposes. It follows that clients have the right to be informed of the mediator's position on these matters, and for the strategies and techniques to be explained to them before they begin the process. For a mediator aiming to 'leave no footprints', the challenges are both conceptual and practical, raising questions such as:

- The nature and reach of influence in mediation.
- Its impact on the participants' autonomy and decision-making.
- The extent to which the parties influence the mediator's own decision–making processes, as she navigates the process on a minute-by-minute basis, choosing between potentially numerous interventions.
- The theoretical constructs informing the mediator's practice.
- The ethical validity of proceeding if the mediator doubts the parties' understanding of how certain therapeutic techniques, theories and values inform even the most apparently neutral or impartial interventions.
- Whether disputants, especially if deeply embroiled in conflict, are ready to discuss (or, indeed, interested in) such matters.

If mediation is not a form of therapy, and does not constitute a legal process (although, arguably, may be a paralegal forum in some contexts), an alternative understanding of practice is needed. Theoretically, the goal of leaving not footprints involves a conceptual shift of role by the mediator, from the remote stance implied by neutrality and impartiality to one of full integration within the mediation dynamics. This shift reconceptualises mediation as a group process in its own right, regardless of the number of participants, or issues. While not fundamentally changing the mediator's conventional duties and responsibilities, it redefines her as someone also fully within the fray, described by Astor (2007, p.229) as *mediator situatedness*.

A theoretical understanding of mediators as group members means reexamining their function. It involves drawing from an extensive literature not generally cited in the mainstream ADR canon, namely the study of leadership in group contexts. Perceiving mediation as a group process aligns with a number of compatible theoretical constructs, such as the democratic notion of "power–with" proposed almost a century ago by Mary Parker Follett (1924, p.187). A more recent but similar concept is formalised *participatory influence*, argued by the proponents as compatible with the democratic process (Saltmann, R.B. & von Otter, C., 1991, p.206).

Group leaders can be highly influential, and greatly affect those they engage with, whether beneficially or otherwise. Most leaders have at least some degree of awareness regarding how they impact others, whether their leadership style is transformational, heroic, charismatic or transactional (Odumeru & Ogbanna, 2013, pp. 355–361). According to Yukl (1999, p. 287, citing Kelman, 1958, 1974), leadership influence involves a series of dyadic interactions over time, as well as instrumental compliance, personal identification, and internalization (although in mediation such interactions will be multi–lateral, rather than dyadic). Pheng (1995 p.296, citing Davis, 1972) identifies intelligence, social maturity and breadth, inner motivation, and achievement drives as four characteristics generally prevalent among leaders. However, Pheng also observes that many effective leaders do not have one or more of these personal characteristics. He suggests instead that leadership must be examined in terms of activities and behaviours – for example, democratic leaders will canvass group opinions and suggestions, conduct not dissimilar to that exhibited by mediators.

Enlisting leadership models might appear to directly contradict the idea of leaving no footprints. Yet the mediator is nevertheless a de facto leader within a structured negotiation process that relies on her active participation. Without her involvement, there is no mediation. Framing mediation as a form of group process opens the way for alternative discourses about the mediator's role, and encourages greater awareness of how unwittingly influential she might be. It is also offers a more realistic explanatory framework for conceptualising mediation, rather than simplistic adherence to tenets of supposed neutrality, impartiality and similar professional orthodoxies and doctrines, however well meant.

Conclusion:

Ockam's razor does not equate to naïvity or simplistic reductionism. Greater honesty about the mediator's situatedness (Astor, 2007, p. 229) should be a key element when gaining the parties' consent. Paradoxically, greater awareness of the weight of her role, and the inevitability of trilateral influence, could lead the mediator to step more lightly in practice. Party self-determination should not be illusory, or taken for granted, but as informed and demonstrable as possible. This a far more justifiable position for mediators to take than that promulgated by insupportable codes of conduct which obscure – or even attempt to deny – the complex and paradoxical space that mediators occupy.

In practice, the mediator could frankly share a description of her position, together with the expressed intention that she will be as non-interventionist as possible, while attempting to achieve a fair and balanced process. For family mediators in some jurisdictions at least, this would also entail her explaining that, *because she cannot be entirely neutral or impartial,* there are certain circumstances in which she might possibly need to take an openly and actively partisan approach. This would alert the parties to the fact that the mediator is already aware that she is integral to the process, and therefore cannot function outside of it: despite this, she will do her utmost to be transparent, and visibly even–handed in her interventions. Such discussions provide opportunities for party concerns or questions about the process to be aired and addressed, although clearly also constitute an obverse rhetoric from the usual claims of practitioner neutrality and impartiality. This explanation would, however, provide a more frank and accurate account of mediation than adherence to a dubious polemic which claims distance from the parties and disinterest in the outcome, yet simultaneously demands that mediators privilege the rights of those perceived as being at a disadvantage by means of unacknowledged (or even covert) power–balancing.

It is operationally impossible for the mediator to leave no trace of her role nor, indeed, her unique personality. Nevertheless, practitioners can still attempt to practice with as light a step as possible. Skilfully done, this would result in disputants making choices over which they have much greater informed choice and control. First, they would be offered a far more realistic understanding of the mediator's function, and thus be better placed to decide whether mediation is appropriate for them in the first place. Secondly, the mediator's motives and moves within the process would be made more transparent. More importantly, parties should be able to take informed account of the mediator's influence, yet still be able to claim 'we did this ourselves'.

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