Standing on the Shoulders of Giants: Artistry, Expertise and Professionalism in Mediation and the Role of Higher Education

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Dedication

This paper is dedicated to individual giants of the mediation field on whose shoulders we have the privilege to stand: O. J. Coogler, Meyer Elkin, Roger Fisher, Jay Folberg, Mary Parker Follett, John Haynes, Howard H. Irving, Robert McKersie, Jeffrey Z. Rubin, Alison Taylor, William Ury, Richard Walton, and many others.

Introduction

This article offers another view of what it takes to be a good mediator. It begins by reviewing the debates that have surrounded the question of mediator qualifications and suggests that the goal of qualifications should be to promote artistry in practice not merely technical competence in skills and techniques. Artistry is a defining feature of mediation because it describes creative responses to problems that are ill-formed, unique and complex such as those often encountered in conflicts and disputes.

The article then considers how artistry in practice is developed and adopts the approach of Donald Schön, who found it to be based on “reflection in action”. Reflection in action is an inquisitive, experimental approach to uncertain situations that draws on overarching theories and the frames, metaphors and themes they provide to help guide intervention.

What are the overarching theories mediators might drawn on to support reflection in action? Using a “reverse engineering” approach the article then surveys the theories and disciplines studied and used by some of the “giants” of the mediation field. It suggests that these are the foundations of knowledge that constitute the necessary expertise for artistry in mediation practice.

The article then takes a look at changing conceptions of professionalism today in the fields of law and medicine and their impact on our views of professionalism in mediation. It suggests that artistry in practice is becoming the new standard of professionalism and thus should be the aim of every mediator.

Based on the analysis of expertise in mediation the article then proposes that the foundational knowledge for artistry in practice should be academically taught in an undergraduate degree. The possible outlines of such a program, including clinical components, are described.

Finally, the article considers some of the pros and cons of an academic qualification for mediators and concludes that one of the important effects may be increased diversity amongst practitioners.

The qualifications debate

Several recent events will stimulate renewed interest in the issue of the appropriate qualifications for mediators. These are:

- Florida's state court has abolished the requirement of a law degree for some court sanctioned mediators[1]
- The International Finance Corporation, part of the World Bank, has received recommendations for the use of mediation in corporate governance disputes[2]
- Australian mediators have adopted a voluntary national accreditation scheme[3]
- The newly created International Mediation Institute (IMI) will offer competency certification for mediators[4]

As mediation permeates more sectors of business and society there is likely to be increased interest in and concern about the quality of service offered.[5] That in turn leads to questions about the proper education and training of mediators – the necessary qualifications for practice.

In North America mediation has been practiced from early in the twentieth century in the labor relations field. The issue of desirable qualifications for mediators was not debated much while mediation remained primarily identified with that field.

However, when the practice of mediation began to spread to other areas of society as part of the ADR movement of the 1960s and 70s the question of qualifications of mediators became more contentious. When disputes were connected with legal issues or lawsuits the question was raised whether legal education should be required. In the area of family matters, the question was rather whether training in behavioral sciences or counseling was necessary. As mediation became accepted in an ever wider variety of disputes the issue of proper qualifications of mediators became more acute. Here are some of the milestones in that ongoing debate.

- The Society of Professionals in Dispute Resolution Commission on Qualifications presented a report, Qualifying Neutrals: The Basic Principles, in 1989; it recommended, inter alia, that qualification criteria should not be based on formal educational credentials; the report was adopted by the Society's board of directors and was reconsidered in 1992 but was not otherwise acted on[6]

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[1] The decision is available online at: http://www.flcourts.org/gen_public/adr/bin/sc05-998.pdf .
[2] Available online at: http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Focus+Mediation/$FILE/Focus4_Mediation_12.pdf .
[3] See online at: http://www.wadra.law.ecu.edu.au/accreditation.html .
[4] See online at: http://www.imimediation.org/?cID=standards_main .
[5] See for instance the series of symposium papers on quality and certification of mediators published by the University of San Francisco Law Review in Vol. 30, Spring 1996, pp. 609-801.
[6] Qualifying Neutrals: The Basic Principles, Report of the SPIDR Commission on Qualifications, April 1989.

- In 1993 the Test Design Project presented its Interim Guidelines for Selecting Mediators; the competence testing procedure involved observed role plays[7]

- Beginning in 1998 the Academy of Family Mediators conducted a Voluntary Mediation Certification Project[8]

- In 2002 a Discussion Draft of a Report on Mediator Credentialing and Quality Assurance was produced for the ABA Section of Dispute Resolution; it recommended, inter alia, developing model standards for mediator preparation programs; the report was apparently not finalized nor acted upon[9]

- Family Mediation Canada adopted Practice, Certification and Training Standards in 2003; the standards require that mediators should be able to demonstrate knowledge, inter alia, of family dynamics, pertinent legal information, economics of separation and dynamics of abuse[10]

- In 2004 an Association for Conflict Resolution Task Force on Mediator Certification presented its report; among the recommendations were the requirement of a written test of knowledge; the report has not been acted on to date[11]

One approach to qualifications is accreditation – the formal declaration by a reputable organization or agency that a practitioner is competent. This idea and the related one of licensing as a means of quality control are not new in the mediation field. Jay Folberg, writing in 1981, foresaw the issue:

> Serious and perplexing issues are emerging about private mediation as an alternative to divorce litigation. These issues include:-the appropriateness of attorneys serving as mediators, alone or teamed with therapists.-the practice of law by non-lawyer mediators,-the licensing of mediators and arbitrators …[12]

In 1988 two studies concluded that training for family mediators was required in three basic areas: legal aspects, behavioral issues including emotions and communication, and mediator skills.[13] A 1993 study for United States courts concluded that the courts should take responsibility for the quality of court-connected mediators, and:

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[7] Available online at: http://www.colorado.edu/conflict/Theory_to_Practice/Method.pdf . See also, Christopher Honeyman, "A Consensus on Mediators' Qualifications, Negotiation Journal, Vol. 9, No. 4, Oct 1993, p. 295.

[8] See Margaret S. Herrman, Nancy Hollett, Jerry Gale, and Mark Foster, "Defining Mediator Knowledge and Skills", Negotiation Journal, Vol. 17, No. 2, Apr 2001, p. 139.

[9] Available online at: http://www.abanet.org/dispute/taksforce_report_2003.pdf .

[10] Available online at: http://www.fmc.ca/pdf/CertificationStandards.pdf . See also Linda C. Neilson and Peggy English, "The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience", Mediation Quarterly, Vol. 18, No. 3, Spring 2001, p. 221.

[11] Available online at: http://www.acrnet.org/pdfs/certificationreport2004.pdf .

[12] Jay Folberg, "The Changing Family—Implications for the Law", Family Court Review, Vol. 19, Iss. 2, Dec 1981, p.1.

[13] Amiram Elwork, Mervin R. Smucker, "Developing Training and Practice Standards for Custody Mediators" Family Court Review, Vol. 26, Iss. 2, Dec 1988, p.21., December 1988 and, Robert McWhinney, "Issues in the Provision and Practice of Family Mediation", Family Court Review, Vol. 26, Iss. 2, Dec 1988, p.33.

> Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.[14]

Deborah B. Gentry has provided a useful history of certification activities in the mediation field from 1982 to 1994.[15] She documents cooperation but also dissent over the issue. Accreditation as an approach to ensuring quality mediation practice is complicated by the diversity of interests and stakeholders involved. These include: labor mediators and conciliators; arbitrators; judges and court staff; family counselors; facilitators; volunteers; government administrators and staff; and last but definitely not least, lawyers. "Turf wars" between professionals acting as mediators have been present almost from the birth of modern mediation practice.[16]

In this paper I will not look for the "lowest common denominator" in terms of qualifications that mediators should have.[17] Instead I will start with our aspirations for the field – what we hold up as ideals of mediation practice and then ask, "How may we see them realized in future generations of mediators? What follows will therefore be a kind of "reverse engineering" of the process of formation of an exemplary mediator.

Artistry in practice

One way of describing the type of mediator we aspire to be is that they demonstrate "artistry" in their practice. Artistry in this context may have several meanings, two common ones being:

- Completing difficult tasks without apparent effort, mistake or hesitation
- Making new responses to old problems or adapting old responses to new problems

The first meaning above brings into question the sureness of a mediator's decisions in the course of the swift interaction that is a mediation session. The ideal mediator's interventions (and silences) seem to flow smoothly and suitably to the developing exchanges. How does this happen? Can it be taught?

The second connotation of artistry raises the question of creativity. Within a well defined process or structure of mediation, how does a model mediator bring about unexpected,

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[14] Margaret Shaw, Linda R. Singer, and Edna A. Povich, Project Directors, "National Standards for Court-Connected Mediation Programs ", Family Court Review, Vol. 31, Iss. 2, Apr 1993, p.156.
[15] Deborah A. Gentry, "The Certification Movement: Past, Present, and Future", Mediation Quarterly, Vol. 11, No. 3, Spring 1994, p. 285.
[16] See for instance, Meyer Elkin, "Defining the Interprofessional Boundaries Between the Law and the Behavioral Sciences in the Practice of Divorce Mediation", Family Court Review, Vol. 23, Iss. 2, Dec 1985, p. v.
[17] For a review of current approaches to setting minimum standards of competency for mediators through credentialing and other processes see Charles Pou Jr., "Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality", Journal of Dispute Resolution, 2005, p. 303.

unusual, but nevertheless productive interactions? Is everyone capable of such creativity?

Michael D. Lang and Alison Taylor studied the concept of artistry in the practice of mediation and offer some answers to these questions.[18] They agree with Donald A. Schön that it is not a mysterious gift given only to a select few, but is attainable by most dedicated professionals through a carefully constructed education and a reflective approach to practice. As Lang and Taylor put it:

> For every professional the manifestation of artistry will be unique, reflecting the individual's innate abilities and talents, which have been enhanced through the acquisition of specialized knowledge and skills. … Most people have some unique, inborn abilities that provide the basic foundation for achievement. With sufficient motivation and discipline they can experience artistry.[19]

Schön views professional artistry as the quality of practice that emerges from "reflection in action" in situations characterized by uncertainty, complexity, instability, uniqueness, surprise and conflict. Such situations are what most mediators face. Based on Schön's view, it seems that mediation must entail artistry rather than mere technical competence. It is also a defining characteristic of most mediation philosophies that clients will be treated as individuals rather than as routine cases. Thus, the ability of mediators to respond creatively to unique situations is an essential difference between mediation and legal processes which provide standard solutions to narrowly categorized problems. If artistry is the creative response to uniqueness then artistry in practice should be shown in all mediation.

The key to artistry seems to be an ability to move beyond the application of familiar techniques in order to achieve a more satisfying result in unique situations. According to Schön reflection in action allows the practitioner to move beyond routine problem solving to problem setting:

> When we set the problem, we select what we will treat as the "things" of the situation, we set the boundaries of our attention to it, and we impose upon it a coherence which allows us to say what is wrong and in what directions the situation needs to be changed. Problem setting is a process in which, interactively, we *name* the things to which we will attend and *frame* the context in which we will attend to them.[20]

The practice of reflection in action is one of experimental interactivity with the presenting situation guided by knowledge that is not merely applied, but rather adapted and tested to meet the demands of unique challenges.

Schön, Lang and Taylor identify reflective practice as the key to artistry in the professions. It is an approach to practice that manifests curiosity, flexibility and openness to new theories, altered procedures and revised expectations. It is in fact a

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[18] Michael D. Lang and Alison Taylor, The Making of a Mediator: Developing Artistry in Practice, San Francisco: Jossey-Bass, 2000.
[19] Ibid. p. 10.
[20] Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action, New York: Basic Books, 1983 p. 40.

commitment to lifelong learning as a professional which should begin early in a mediator's formation and be encouraged throughout all the stages of professional development.

Reflective practice as the prerequisite for artistry must be built on a structure of knowledge. The mediator must have a store of what Schön calls frames, images, categories, metaphors, precedents and exemplars[21] to draw upon while reflecting in action in order to make sense of unique problems and to come up with innovative responses to them. Lang and Taylor agree:

> Theory is the foundation of professional practice; it is the ground on which mediators stand, the basis for making choices about the timing and implementation of strategies and techniques. … Without a conceptual foundation, they lack the ability to duplicate an experience or to translate knowledge and skills from one area of practice to another.[22]

Schön pays particular attention to what he calls "overarching theories" which he describes as follows:

> An overarching theory does not give a rule that can be applied to predict or control a particular event, but it supplies language from which to construct particular descriptions and themes from which to develop particular interpretations.[23]

For Schön, psychoanalytic theory, for instance, can function in this way to guide artistry in practice. It is not a question of applying formulas to solve problems but more a way of preparing the mind to make sense of complexity in order to intervene effectively.

We have seen that mediation virtually demands artistry in practice and that artistry is based on a store of knowledge that can be flexibly adapted to the unique situation confronting the practitioner. This leads us to the question of expertise. What is the knowledge a mediator requires in order to practice at the level of artistry?

The expertise of mediators

From what sources do good mediators draw the metaphors, themes, strategies and frames they use to make sense of unique situations? What overarching theories are useful in dealing with uncertainty, instability and conflict in human relations?

My approach will be to look at the pioneers of the field – the "giants" on whose shoulders we now stand to discover the core of knowledge that is crucial to reflective practice as mediator. The focus of this investigation is somewhat different to Carrie Menkel-

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[21] Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action, New York: Basic Books, 1983 pp. 309 – 320.
[22] Michael D. Lang and Alison Taylor, The Making of a Mediator: Developing Artistry in Practice, San Francisco: Jossey-Bass, 2000, p. 21.
[23] Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action, New York: Basic Books, 1983 p. 273.

Meadow's review of the intellectual roots of the ADR movement.[24] Here I will look at those who are acknowledged to be model practitioners of mediation, those leaders of the field in whose work we are most likely to find professional artistry. What foundational knowledge did the "giants" of mediation build their practices on?

Labor Mediators

Mary Parker Follett was part of the "scientific management" movement of the early twentieth century which had as its aim applying the findings of the social and behavioral sciences to business problems including labor relations. In line with this approach she presented papers on topics such as "The Psychology of Conciliation and Arbitration"[25] and "The Psychiatrist in Industry"[26]. Accordingly, she remarked: "The reason we are here studying human relations in industry is that we believe there can be a science of co-operation."[27]

Although Mary Parker Follett was not a conciliator or mediator herself she was a close observer and researcher of practices in labor negotiations and dispute resolution and she contributed her own insights which mark her as one of the true pioneering giants of mediation.[28] Follett drew upon the concept of "integration" in psychology to formulate a problem solving attitude to resolving human differences that was perhaps the original "win-win" approach. Mary Parker Follett was expressing the values of respect, understanding and cooperation that underpin mediation when she wrote:

> I have to learn to recognize that the significance of my life is bound up with the significance of other lives, that however noble I may deem my purpose to be, however sure I may be that it springs from the deepest part of me, yet it is not to do with me alone. It gains its significance through its relation to the purposes which are being simultaneously expressed by many others.
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> And until we learn how to unify our purposes, we shall know neither industrial peace nor international peace, nor shall we have individual lives reaching their maximum effectiveness.[29]

In Follett's view scientifically gained insights into human nature would help those who sought to bring peace to industrial and international conflict.

Richard E. Walton and Robert B. McKersie put forward a comprehensive theory of "social negotiations" which drew from the insights and principles of psychology, social-psychology, communications theory and other disciplines.[30] They applied its elements, including integrative bargaining (viewed as cooperative problem solving) and attitudinal

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[24] Carrie Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR", Ohio State Journal on Dispute Resolution, Vol. 16, 2000, p. 1.
[25] Paper XI in Elliot M. Fox and L. Urwick (eds.), Dynamic Administration: The Collected Papers of Mary Parker Follett, 2nd Ed., New York: Hippocrene, 1973, p. 195.
[26] Ibid., Paper XVI, p. 294.
[27] Ibid., "How Must Business Management Develop in Order to Possess the Essentials of a Profession", Paper V, p. 88 at p. 94.
[28] See Albie M. Davis, "An Interview with Mary Parker Follett", Negotiation Journal, July 1989, p. 223.
[29] Ibid., Paper XVII, "The Teacher-Student Relation", p. 303 at p. 315.
[30] Richard E. Walton and Robert B. McKersie, A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System, New York: McGraw-Hill, 1965.

aspects of relationships not only to labor-management conflict, but also interracial and international contexts. These are some of the first steps towards today's theories of negotiation.

It also seems that labor mediators were leaders in applying the concepts of "integrative bargaining" and "win-win solutions". Walton and McKersie, in their seminal 1965 book[31] explored these ideas which have become common currency in mediation in the context of negotiations aimed at increasing worker productivity, the fruits of which would be shared equitably between labor and management. This was the original "expanding pie".

Labor mediators also developed strategies and techniques for dealing with conflicts between groups or organizations who dispute through spokespersons. In doing so they highlighted the necessity of understanding agency relations and organizational behavior and dynamics.[32]

Family mediators

Family counselors early on recognized the need for clarification and elaboration of the necessary qualifications to be a divorce mediator. Meyer Elkin posed a series of questions about mediation practice in 1982, asking "What are minimum standards (education and training) for a divorce mediator? For the counselor as a divorce mediator? For the attorney?"[33] Daniel G Brown noted differences of opinion on the proper background and training of divorce mediators in the same year.[34] Accreditation has therefore been a contentious issue in the family mediation field for over 25 years. As one early study noted:

> Although private and public mediation programs are interested in training their mediators, few require that their mediators be licensed. Licensing is a more important issue in the private sector although this is not a statistically significant pattern. Typically, those opposed to licensing feel that the mediation field is too new and eclectic and/or that certification in the more traditional fields of law or social work is sufficient protection for the consumer. In the words of one respondent: I think mediation is one of many skills which a counselor might have. To require special licensing for each skilled area would be ludicrous. However, anyone who does practice mediation should be required to state what his/her degrees or training consist of. I believe the clients will tend to seek out mediators who have appropriate degrees or who can claim special mediation training or who have earned reputations as skilled mediators. Licensing proponents believe it might foster uniformity of service and deter practitioners with "questionable training and' experience."[35]

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[31] Id..

[32] See, for instance, Deborah Kolb's description of labor mediators' strategies and tactics in dealing with spokespersons who the mediators considered negotiation "pros" and those they considered "amateurs": Deborah M. Kolb, The Mediators, Cambridge, Mass.: MIT Press, 1983, Chapter 5.

[33] Meyer Elkin, "Divorce Mediation: an Alternative Process for Helping Families to Close the Book Gently" Family Court Review, Vol. 20, No. 1, Jun 1982, p. iii.

[34] Daniel G. Brown, "Divorce and Family Mediation: History, Review, Future Directions", Family Court Review, Vol. 20, No. 2, p.1.

[35] Jessica Pearson, Maria Luchesi Ring and Ann Milne, "A Portrait of Divorce Mediation Services in the Public and Private Sector" Family Court Review, Vol. 21, No.1, Jun 1983, p.1.

Writing in 1983 Koopman and Hunt described divorce mediators as belonging to a "tack-on" profession and urged movement toward an independent profession. Fifteen years later it seems that counselor mediators still remained differentiated from lawyer mediators as reported in a 1998 study by Kruk:

> Lawyer mediators and mental health mediators have radically different views on a number of fundamental issues in the field, suggesting that their practice approaches are likely to be very different.[36]

In 2001 Standards of Practice for Family and Divorce Mediation were published that identified essential areas of knowledge and training for mediators:

> To perform the family mediator's role, a mediator should
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> 1 . have knowledge of family law;
> 2. have knowledge of and training in the impact of family conflict on parents, children, and other participants, including knowledge of child development, domestic abuse, and child abuse and neglect;
> 3. have education and training specific to the process of mediation; and
> 4**.** be able to recognize the impact of culture and diversity.[37]

These standards recognize the diverse knowledge and the disciplines that family mediators must draw on in their practice.

O. J. Coogler, a lawyer and pioneering mediator, is primarily known for bringing lawyers' strengths in organization, structure and procedure to disputes surrounding divorce.[38] But Coogler also had an undergraduate degree in psychology and was a family counselor who practiced the technique of transactional analysis. He recognized that emotional and interpersonal issues were intertwined with legal ones: "Legal divorce does not signify that emotional divorce has preceded it or that it will follow at any particular time".[39] Based on this understanding he concluded that in order to deal with the psychological structure of divorce and the needs of the parties a mediator should have "a solid background of training and experience in the behavioral sciences".[40]

John Haynes combined the practical problem solving skills of the labor mediator with the insight into emotion and family dynamics of the counselor to craft a family mediation process that was more responsive to all of the needs of the parties.[41] He identified the necessity of allowing divorcing spouses time to articulate and then let go of the conflicts they experienced while living together before negotiating their future separate lives. Haynes termed this step a "time out" from the main goal of planning for the future and it

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[36] Edward Kruk, "The Current State of the Art of Family Mediation" Family Court Review, Vol. 36, No. 2, Apr 1998, p. 195.
[37] *Model Standards of Practice for Family and Divorce Mediation*. The Symposium on Standards of Practice Family Court Review, Vol. 39, No.1, Jan 2001, p. 121. Available online at: http://www.abanet.org/family/reports/mediation.pdf .
[38] O. J. Coogler, Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators, Lexington, Mass.: D. C. Heath, 1978.
[39] Ibid, 12.
[40] Ibid, 3.
[41] John M. Haynes, Divorce Mediation: A Practical Guide for Therapists and Counselors, New York: Springer, 1981.

has become a common feature of family mediation practice.[42] Haynes thus combined knowledge of negotiation dynamics with insights into the structure of long term relationships to adapt mediation to the unique circumstances of family breakup.

Howard H. Irving, a noted Canadian practitioner, advocated that family dispute resolution should be informed by the social sciences. He viewed the family as an interpersonal system in which communications can become distorted thus hampering constructive engagement with conflicts. Accordingly Irving viewed the mediator as an agent of clarification: "The mediator is constantly helping family members clarify indirect and distorted messages. … He will try to reduce the destructive conflict and set a framework for non-accusatory blaming from one member to another."[43] Irving also recognized the relevance of sociological concepts such as roles and role conflict in the processes of family conflict.[44]

Family mediators from law and counseling backgrounds have continued to adapt their practices in the light of advancing knowledge in the field. Many lawyers have embraced collaborative law principles involving cooperative negotiation that have the potential to make formal mediation unnecessary. For their part, counselors have adopted forms of practice such as family group conferencing, divorce coaching and parenting coordination that may require specific behavioral science knowledge and training to implement safely and wisely.

Peace builders

Peace builders have also contributed to the development of mediation. As early as 1949 parallels were drawn between labor conflicts and those between states,[45] and mediation practice in the two spheres was compared in a systematic way by Elmore Jackson writing in 1952.[46] Jackson suggested that some procedures and techniques developed to settle labor-management disputes might be equally applicable in international relations. He recognized the limitations of generalized theories and didn't purport to "reduce mediation to a science nor to a set of procedures likely to prove effective in all circumstances".[47] Nevertheless Jackson acknowledged conflict resolution as part of the field of human relations in which study and research might be of value in uncovering "common denominators in human behavior" from which more tools could be fashioned for the mediator as artist.[48]

The labor field was familiar with processes called "interest arbitration" and "interest mediation" designed to create new collective agreements based on parties' needs and concerns. Lawyers were familiar with the concepts of the "public interest" and "conflict of interest" but it was not until the groundbreaking work of Roger Fisher and William Ury

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[42] Ibid, p. 137.
[43] Howard H. Irving, Divorce Mediation: A Rational Alternative to the Adversary System, New York: Universe, 1981, at p. 79.
[44] See Howard H. Irving and Peter E. Bohm, "An Interdisciplinary Approach to Family Dispute Resolution", in Howard H. Irving, ed., Family Law: An Interdisciplinary Perspective, Toronto: Carswell, 1981.
[45] See Philip C. Jessup, A Modern Law of Nations, New York: Macmillan, 1949, p. 7.
[46] Elmore Jackson, Meeting of Minds: A Way to Peace through Mediation, New York: McGraw-Hill, 1952.
[47] Ibid. p. xvii.
[48] Ibid. p. 192.

that the concept of “interests” became relevant to the whole of the conflict resolution field.

Roger Fisher drew on social science to aid international peacemaking.[49] He and William Ury both had backgrounds in international law and peace building which can be seen as contributing to the theory of “principled negotiation” made famous by their book Getting to Yes.[50] Their emphasis on “interests” rather than positions can be seen as a general extension of the concept of “national interest” so prominent in international relations.[51] “Separating the people from the problem” as advocated by Fisher and Ury likely stems back to Gandhian peace principles. Such an approach was also picked up by Walton and McKersie, who described the technique as “fighting the antagonism, not the antagonist”.[52] Relying on “objective criteria” for resolution of opposing interests also may have roots in international affairs where settlement of conflict by brute force is to be avoided. Such an approach also provides opportunities for “face saving”, so important to national (and personal) pride.[53]

Jeffrey Z. Rubin, whose background was in social psychology has contributed much to the understanding of conflict, beginning with his study (with Bert R. Brown) of bargaining.[54] This was a landmark achievement that attempted to integrate and organize experimental findings into a coherent theory of the negotiation process. In doing so he illuminated many of the processes and concepts now thought to be key to effective conflict resolution. These include the social role and status of an intervener, the impact of physical structure on negotiations and the importance of process features such as agenda control and issue framing. Rubin’s work illustrates the relevance and practical value of research in the behavioral sciences for the field of conflict work. As he wrote in a review of social psychological research into interventions in conflict:

> The three explanatory strands are hunches about the third-party intervention process, tentative laboratory-grown suggestions about how the process may work in the field. It is up to the great many practitioners of third-party intervention – the marriage counselors, group therapists, labor-management mediators and

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[49] See Roger Fisher, ed., International Conflict and Behavioral Science; The Craigville Papers, New York: Basic Books, 1964.

[50] Roger Fisher and William Ury, with Bruce Patton, ed., Getting to Yes: Negotiating Agreement Without Giving In, Boston: Houghton Mifflin: 1981.

[51] Fisher remarked in 1961 that governments “have a greater interest in the fair and wise settlement of disputes than in advancing their immediate financial or institutional position”. Roger Fisher, “Bringing Law to Bear on Governments”, Harvard Law Review, Vol. 74, (April 1961), 1130 at 1137.

[52] Walton and McKersie, 246-247. These authors quoted Johan Galtung, who noted that “The disagreement with the value is correspondingly transformed to a depreciation of the whole person.” Johan Galtung, “Pacifism from a Sociological Point of View”, Journal of Conflict Resolution, Vol. 3, (March, 1959), 67 at 78-79.

[53] Fisher has said that “The international interests of a government may be advanced more by having a matter decided fairly than by refusing to concede the point involved.” He also noted that “A judicial decision may provide the executive with a good excuse for doing what it would have to do anyway.” These remarks were made in the context of supporting arguments for following international law but are applicable wherever the “shadow of the law” is short or tenuous. Roger Fisher, note 51 above at 1138.

[54] Jeffrey Z. Rubin and Bert R. Brown, The Social Psychology of Bargaining and Negotiation, New York: Academic Press, 1975.

> arbitrators, diplomats, envoys and go-betweens – to determine whether these assertions have any general validity and applicability to real settings.[55]

The pioneers of modern mediation, the "giants" of the field mentioned above, allow us today to survey a field of practice that is diverse and sophisticated. Techniques have been refined and skills brought into better focus by successive generations of mediators trained by the giants or those who have been inspired by them. However, we run the risk, from our exalted viewpoint, of overlooking the foundations upon which the giants built their practice.

It has become common to view mediation as an artistic practice in which compassion, empathy and desire to help contribute to effective interventions. Such a view presents only a partial explanation of excellent mediation because it neglects the foundational knowledge of human behavior that the giants used to fashion their practice. In this sense the giants have done us a disservice in perfecting their craft because it appears as "artistry" in which theory and conceptual knowledge has become fused with practice. Knowledge has helped to fashion practice but it has not often been expressly referred to. It is to be expected that this should be so because the kind of artistry we seek is not found in the mechanical application of theories or formulas but the wisdom to draw on analogies and models to fit unique situations.

This survey of the background and education of the giants of mediation shows that they were far from being just "gifted amateurs". They were skilled and knowledgeable practitioners who brought the concepts, theories and schemas of a variety of scholarly disciplines to bear on their practice as mediators. We recognize them as true "professionals" in the field. If we are to stand on their shoulders we must be prepared to acquire similar stores of knowledge.

The recent institutionalization of mediation in many contexts has led to a questioning of the expertise appropriate to a mediator. Where courts are the host institution, legal knowledge is suggested to be required. In environmental matters, a scientific background is said to be desirable. Schön cautions against a view that limits the range of knowledge upon which professionals may draw. He suggests that a narrow specialization tends to limit the extent of reflection in action a professional engages in and thus impedes the display of artistry in practice. The danger for the practitioner is that:

> … if he learns, as often happens, to be selectively inattentive to phenomena that do not fit the categories of his knowing-in-action, then he may suffer from boredom or "burn-out" and afflict his clients with the consequences of his narrowness and rigidity. When this happens, the practitioner has "over-learned" what he knows."[56]

The same impediment to artistry can be a result of institutionalization itself, as Schön points out:

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[55] Jeffrey Z. Rubin, "Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations", Psychological Bulletin, Vol. 87, No. 2, 1980, p. 379.

[56] Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action, New York: Basic Books, 1983 p. 60.

> When he works in an institution whose knowledge structure reinforces his image of expertise, then he tends to see himself as accountable for nothing more than the delivery of his stock of techniques according to the measures of performance imposed on him. He does not see himself as free, or obliged, to participate in setting objectives and framing problems. The institutional system reinforces his image of expertise in inducing a pattern of unilateral control.[57]

The practitioner who is adequately prepared with a stock of concepts, themes, and metaphors drawn from "overarching theories" is more capable of bringing artistry to her practice than one whose knowledge is limited to a particular context or institution.

Some argue firstly that the field of dispute resolution has yet to identify its theoretical underpinnings and secondly that borrowing from diverse other disciplines prevents the emergence of a distinct profession.[58] The answer to the first point lies above in the work and thought of the "giants' described above who show us the key areas of knowledge required by a mediator. They have mapped the terrain of expertise required in the practice of mediation. The answer to the second point is that a profession may be built on the concepts and theories of other disciplines. Is the medical profession any less distinct although based on chemistry, biology and pathology? Architecture is indebted to engineering, yet we recognize both as distinct professions.

If artistry is the mark of a professional approach to helping people in unique situations of conflict, what does it mean to be a professional in the twenty first century? The concept of a profession has been contested almost from the time it was first studied. Let us now turn to examine concepts of professionalism today and what it would mean for mediators to act professionally in the twenty first century.

Professionalism in the 21st Century

First let us distinguish between the concepts of "professionalization" and "professionalism". "Professionalization" I will take to mean the transformation (some call it "uplift") of groups of people engaged in the same occupation into a self and socially identified role or status of a "profession". "Professionalism" I will use as a term describing the quality of work of an individual practitioner.

"Professionalization" has been a contested idea in the field of mediation for decades and is the subject of a large literature.[59] The monopoly power and control over entry usually associated with professions has been the subject of numerous critiques. These debates

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[57] Ibid. p. 345-346.

[58] See for instance, Nancy A. Welsh, "Institutionalization and Professionalization", Chapter 30 in Michael L. Moffitt and Robert C. Bordone, eds., The Handbook of Dispute Resolution" San Francisco: Jossey-Bass, 2005, p. 487 at p. 496.

[59] See, for instance, Jacqueline M. Nolan-Haley, "Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective", Harvard Negotiation Law Review, Vol. 7, (2002), p. 235; Bobby M. Harges, "Mediator Qualifications: The Trend Toward Professionalization", Brigham Young University Law Review, 1997, p. 687; Cheryl A. Picard, "The Emergence of Mediation as a Profession", in Catherine Morris and Andrew Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate, Victoria: University of Victoria, 1994 at p. 141 and Andrew Pirie, "Manufacturing Mediation: The Professionalization of Informalism", in the same volume at p. 165; Ronald M. Pipkin and Janet Rifkin, "The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation". Justice System Journal, Volume 9, No. 2 (1984), p. 204, at p. 207;

are connected with the related issues of certification, accreditation and licensing. On the other hand, "professionalism" has sometimes been used a term that inspires less adverse reaction.[60]

It is not my intention here to enter into the longstanding debate over licensing or certification of mediators. Rather, this article will focus on the quality of practice of the individual practitioner, based on the premise that artistry is a defining feature of professionalism. I take no position on how that professionalism might be socially recognized, legally or otherwise.

For centuries the idea of professionalism has included connotations of great skill in the practice of a "learned art". But it has also included conceptions of a unique relationship between practitioners, their clients and the public. The nature of this relationship has recently begun to change.

Globalization and the interconnectedness and interdependence of people have contributed to bringing professionalism into question. The free availability of vast stores of information used by professionals and challenges to traditional hierarchies have led to dissatisfaction with professional practices and relationships.

In the new millennium even the ancient professions of medicine and law have had to confront questions about the professionalism of their members. The same questioning has taken place among other professional groups including social workers, teachers, counselors and nurses.

Lawyers have identified a crisis of professionalism in the 21st century. In the United States the Conference of Chief Justices found it necessary to draw up a plan to answer concerns about a perceived decline in lawyer professionalism.[61] Similar concerns have been expressed in Canada.[62] Legal observers have noted a change in the relationship between lawyers and clients. Some have described this as a movement away from professional paternalism.[63] Other see it more as a shift of power towards the client based on the economics of practice.[64] In the result, lawyers have begun to adopt a more

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[60] See, for instance, Craig McEwen, "Giving Meaning to Mediator Professionalism", Dispute Resolution Magazine, Vol. 11, No. 3, p.3.

[61] Conference of Chief Justices, National Action Plan on Lawyer Conduct and Professionalism, 1999. Available online at: http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html .

[62] See Jordan Furlong, Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure, paper prepared for the Tenth Colloquium on the Legal Profession; Professionalism: Ideals, Challenges, Myths and Realities, Ottawa, Ontario, March 28, 2008 in which he notes "The proposition that professionalism in the law is in serious decline is generally met with widespread agreement among lawyers, judges and other stakeholders in the justice system." Available online at: http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf .

[63] "The traditional lawyer did not do what he was told by the client; he told the client what to do. Whereas some of today's lawyers see their obedience to client wishes as a mark of professionalism, the traditional lawyer saw his control of the relationship as a mark of professionalism". Robert F. Cochran, Jr., "Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue", Notre Dame Journal of Law, Ethics and Public Policy, Vol. 14, 2000, p. 305 at p. 313.

[64] "The lawyer, in many ways, has joined the ranks of merely mortal service provider…. Even senior partners are no longer placed on a pedestal by their increasingly demanding clients." Yves Faguy, "Reviving Professionalism", The National, Canadian Bar Association, June 2008, p. 21. Available online at: http://cbanational.rogers.dgtlpub.com/2008/2008-06-30/pdf/reviving_professionalism.pdf .

client-centered view of professionalism and to embrace the skills the changed relationship requires, such as developing "emotional intelligence" in order to empathize better with clients and others.[65] Client-centered lawyering has brought its own problems for the legal profession when those clients are predominantly large businesses. Lawyers have also been criticized for inattention to their professional obligations to the public at large which experiences economic barriers to access to justice when fees are set with corporate clients in mind.

Professionalism is also being debated by doctors.[66] As with lawyers, reconsideration of the relationship with patients has occurred. Today a patient-centered model of clinical practice is prominent.[67] This view of the relationship with a patient entails negotiation over health goals[68] and requires new skills such as narrative competence for collaborative practice.[69] Professionalism in medicine has been recently described to be intimately connected with patient autonomy and accountability to patients.[70] As with lawyers, doctors' professionalism nevertheless continues to be called into question over the accessibility of their services to the public.

Other professions (social work, teaching, nursing and counseling) are also reconsidering conceptions of professionalism in practice.[71] One can see in them a move away from

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[65] See John E. Montgomery, "Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students", University of Toledo Law Review, Vol. 39, Winter 2008, p. 323.

[66] "At present, the medical profession is confronted by an explosion of technology, changing market forces, problems in health care deliver, bioterrorism, and globalization. As a result, physicians find it increasingly difficult to meet their responsibilities to patients and society. In these circumstances, reaffirming the fundamental and universal principles and values of medical professionalism, which remain ideals to be pursued by all physicians, becomes all the more important." ABIM Foundation and others, "Medical Professionalism in the New Millennium: A Physician Charter", 2004. Available online at: http://www.abimfoundation.org/professionalism/pdf_charter/ABIM_Charter_Ins.pdf . See also, Edmund L. Erde, "Professionalism's Facets: Ambiguity, Ambivalence, and Nostalgia", Journal of Medicine and Philosophy, Vol. 33, 2008, p.6.

[67] "For the individual physician, professionalism is expressed primarily in the clinical transaction, a patient-centered interaction …" Jeremiah A. Barondess, "Medicine and Professionalism", Archives of Internal Medicine, Vol. 163, January 2003, p. 145.

[68] "The process of negotiation not only clarifies legitimate public and professional expectations but can also prevent counterproductive paternalistic behavior on the part of professionals. Individually, the process fosters patient-centered care by including each patient's health goals in decision making." Matthew K. Wynia, Stephen R. Latham, Audley C. Kao, Jessica W. Berg and Linda L. Emanuel, "Medical Professionalism in Society", New England Journal of Medicine, Vol. 341, Iss. 21, November 1999, p. 1612.

[69] "With narrative competence, multiple sources of local – and possibly contradicting – authority replace master authorities; instead of being monolithic and hierarchically given, meaning is apprehended collaboratively, by the reader and the writer, the observer and the observed, the physician and the patient." Rita Charon, "Narrative Medicine: A Model for Empathy, Reflection, Profession, and Trust", Journal of the American Medical Association, Vol. 286, Iss. 15, 2001, p. 1897 at p. 1898.

[70] Accreditation Council for Graduate Medical Education, "Common Program Requirements: General Competencies", 2007. Available online at: http://www.acgme.org/outcome/comp/GeneralCompetenciesStandards21307.pdf .

[71] See, for example, Del Loewenthal, "The Postmodern Counsellor: Some Implications for Practice, Theory, Research and Professionalism", Counselling Psychology Quarterly, Vol. 9, Iss. 4, December 1996, p. 373; Ian Stronach, Brian Corbin, Olwen McNamara, Sheila Stark and Tony Warne, "Towards an Uncertain Politics of Professionalism: Teacher and Nurse Identities in Flux", Journal of Education Policy, Vol. 17, No. 1, 2002, p. 109; and Nigel Parton, "Rethinking *Professional* Practice: The Contributions of

professionalism identified with detached, objective authority and towards a more relational view of the professional and those they serve. That relation is seen as constructed collaboratively between the service provider and service user with full recognition of and respect for the dignity and uniqueness of "the other".

Traditional concepts of professionalism are clearly under challenge in the 21st century. There appears to be a movement away from status based relationships between professionals and their clients and towards a more transactional approach in which the quality (and cost) of the service rendered is central. This movement may also be seen as decreasing the paternalistic provision of services judged appropriate by the professional and increasing the collaborative approach to solving the client's problems. We should bear these trends in mind when considering the question of professionalism amongst mediators.

The idea of professionalism in mediation is also a contested one. As long ago as 1982 Richard L. Abel decried what he saw as an inevitable movement towards professional status by mediators. The result he foresaw was "yet another layer of professionals … who increase the dependence of citizens on occupational specialists."[72] For those who view ADR as a reaction against the deficiencies of traditional legal institutions the professionalization of mediation is a regressive step – merely the substitution of a new profession for an older one: lawyers.

Distrust of the professions has its roots in the counter-culture movements of the 1960s and 1970s and is epitomized in the volume by Ivan Illich and others, Disabling Professions, published in 1977.[73] Rather than being the standard bearers of progress and enlightenment, the professions were criticized as manipulative, venal monopolies.

On the other hand, mediators have not shied away from some of the indicators of professional status, such as standards of conduct or practice and codes of ethics[74].

Social Constructionism and the Feminist 'Ethics of Care'", British Journal of Social Work, Vol. 33, 2003, p. 1.

[72] Richard L. Abel, "The Contradictions of Informal Justice", Chapter 10 in Richard L. Abel, ed. , The Politics of Informal Justice: Volume 1, The American Experience, New York: Academic Press, 1982, 267 at p. 304.

[73] Ivan Illich, Irving Zola, John McKnight, Jonathan Caplan and Harlan Shaiken, Disabling Professions, London: Marion Boyars, 1977.

[74]For a review of some of the major current standards see Paula M. Young, "Rejoice! Rejoice! Rejoice! Give Thanks and Sing: ABA, ACR and AAA Adopt Revised Model Standards of Conduct for Mediators", Appalachian Journal of Law, Vol. 5, Spring 2006, p. 195. And see, American Bar Association (ABA) and Society of Professionals in Dispute Resolution (SPIDR). *Model Standards of Conduct for Mediators*. Washington, D.C.: SPIDR, 1995. Revised, 2005 and available online at: http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf , ADR Institute of Canada, Model Code of Conduct for Mediators, available online at: http://www.adrcanada.ca/rules/national_code_of_conduct.pdf , Institute of Arbitrators and Mediators Australia, Principles of Conduct for Mediators, available on line at: http://www.iama.org.au/doc/medtrconduct.doc , and Family Mediation Canada, Members Code of Professional Conduct, available online at: http://www.fmc.ca/pdf/CodeProfessionalConduct.pdf . And see, Kimberlee K. Kovach, "The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way", South Texas Law Review, Vol. 49, (Summer 2008), 789.

However, when it comes to educational requirements for mediators there is much disagreement. One common position that is taken is that there is no specific degree that should be required to act as a mediator.[75] This begs the question because there are no generally recognized degrees intended to educate mediators. In practice what seems to be expected is postgraduate training and education, as shown by the number of graduate programs in conflict dispute resolution presently available.[76] I will return to the question of appropriate professional education in the next section. What must be considered first is the very notion of professionalism in mediation.

The pioneers of mediation mentioned above, and others like them, have laid the foundation for a profession that can help people to avoid destructive conflict and to repair the damage to relationships when it has occurred. These giants drew on the knowledge of a number of disciplines in order to fashion a helping practice that does not offer standard solutions to routine problems. Rather, they have contributed to a vision of mediation practice that is flexible, adaptable, and above all, reflective in approach. In some ways such a practice differs from the traditional model of applied expertise. This recognition has triggered a debate about whether mediation is more "art" than "science" which has significant implications for mediation training and education.[77] One way of reconciling these differing views of mediation practice is through considering what is meant by the reflective professional practitioner.

Donald A. Schön proposed a new way of looking at professions that tried to move beyond the traditional categories of theory and practice, pure and applied science, and rationality and artistry. In two seminal books[78] he suggested that professions in an increasingly complex, interdependent and globalizing world needed to rethink their approach to practice and the path to professional competence. Schön suggests that professions now must cope with a social environment that presents the following challenges:

- Problems are not well defined and problem setting is more crucial to practice than problem solving
- Professional goals are indeterminate and require choices to be made in the course of practice
- The definition of successful practice is shifting and contested
- Routine techniques are not sufficient; practice must be innovative and adaptive

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[75] This was the position of the 1989 Report by the SPIDR Commission on Qualifications which stated: "The Commission found no evidence that formal academic degrees, which obviously limit entry into the dispute resolution field, are necessary to competent performance as a neutral": Qualifying Neutrals: The Basic Principles, Report of the SPIDR Commission on Qualifications, April 1989, p. 3. The Florida Supreme Court however has recently adopted a decision that requires at least a bachelor's degree for family and circuit court mediators. Available online at: http://www.flcourts.org/gen_public/adr/bin/sc05-998.pdf .

[76] See Brian Polkinghorn, Haleigh LaChance and Robert LaChance, "A Panoramic View of Graduate ADR and CR Programs in the United States", ACResolution, Vol. 6, Iss. 4, Fall/Winter 2007 p. 32.

[77] Donald T. Saposnek, one of the "giants" of family mediation, was clear in his position: "Mediation is both a science and an art.": "The Art of Family Mediation", Mediation Quarterly, Vol. 11, No. 1, Fall 1993, p.5.

[78] Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action, New York: Basic, 1983, and Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions, San Francisco: Jossey-Bass, 1987.

These challenges almost always appear in the contexts of conflict where mediation is used.

In Schön's view, such demands on professionals today require more than technical competence and routine skills. In order to respond wisely to "messy" situations that cannot easily be reformulated into problems for which there are ready made solutions, the professional must "reflect-in-action" through which a type of artistry in practice may be seen. This mirrors the experience of the giants of mediation who brought the models, schema, metaphors and concepts of psychology, communication theory, organizational analysis and other fields to bear on the problems they encountered, but not in a routine or predetermined way. Rather they demonstrated the ability to reflect while fully engaged in practice so as to help their clients find new and innovative ways of dealing with conflicts.

The giants have shown that mediators are capable of reflective practice with professionalism that meets the current challenges described by Schön.[79] Those who aspire to practice like them will do so based on sound principles derived from rigorous research and theoretical insight but they will not prescribe easy "fixes" or standard solutions. Instead, mediators who seek to practice with professionalism will take a reflective approach and attempt to be engaged in a dynamic learning relationship with those they seek to help, contributing continuously to the improvement of principle, knowledge and skills.

There appears to be a trend for mediators in particular industries or sectors to be drawn from the ranks of those with backgrounds in those areas. This phenomenon is linked to debates about the necessity of mediators' knowledge of the "substance" or "content" of disputes as contrasted with the principles and practice of mediation itself. One possible reason for the trend is that "insider" experience provides insights into the context of disputes – the nature of the disputants and the dynamics of the conflict that make it easier to mediate. Perhaps the relevant contextual knowledge allows the mediator to make a quicker "diagnosis" of the situation.

The "insider" approach to the expertise required by a mediator can work against the goal of professional artistry. General contextual knowledge can lead to routine responses by a mediator that may not take account of unique elements in the particular conflict. Further, the development of mediation as a whole may be affected by a "silo" approach in which there is little cross-fertilization of knowledge and ideas across sectors. Finally, mediators who practice in narrow ranges give up the potential of becoming more flexible practitioners. A more coherent education for all mediators in relevant disciplines would help to provide the diagnostic skills needed to intervene in all manner of conflicts.

The volume, When Talk Works: Profiles of Mediators[80], is an interesting example of reflection on action (as Schön would describe it) in the practice of mediation. However it should be noted that the book was a collaborative effort between a group of "profilers" and was not primarily authored by the mediators whose work is portrayed, although

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[79] Robert D. Benjamin came to the same view of mediation practice in his article "The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice", Mediation Quarterly, Vol. 8, No. 2, Winter 1990, p. 91.

[80] Deborah Kolb and Associates, When Talk Works: Profiles of Mediators, San Francisco: Jossey-Bass, 1994.

there is some indication of mediator input. These reflections on practice thus appear to originate mostly from the "profilers" who bring to them scholarly backgrounds in diverse fields such as planning, law, politics, management, psychology, anthropology and sociology. We are left wondering whether the mediators featured would or could engage in such reflection on their own. The studies thus seem to point to the importance of coherent conceptual frameworks that can be provided by a number of disciplines to guide reflection and thus contribute to professional artistry.

Perhaps mediation is in the vanguard of a new approach to professionalism in the twenty first century. A profession that is client-centered, and, dare we say, humble in its offer of services. According to a transactional view of the client - professional relationship it is the quality of service that is the focus. Quality of service may be seen in the artistry of practice which is distinct from measureable variables such as cost and outcome.

One way of describing such a vision of professionalism would be to say that we are moving away from a status or class centered view of professionalism towards one which equates professionalism with artistry as I have used that term. In such a view the professional is one who through knowledge and skill is able to bring meaning and assistance to unique and complex problems. It is through artistry that the professional shows herself to be more than technically competent, more than routinely effective in offering standard solutions. The ability to practice at the level of artistry becomes the new hallmark of professionalism.

Mediators should aspire to artistry in the use of their expertise to assist their clients in discovering solutions to their problems. This would be professionalism that is not paternalist, elitist, condescending or patriarchal and therefore should not be considered as disempowering of clients.

How then, are we to produce the giants of tomorrow – those who will lead and build this field in the twenty first century? What should be the education and training of mediators for artistry in practice that demonstrates true professionalism? If "insider" knowledge gained through experience is not sufficient, from where does the necessary expertise come?

Educating the reflective mediator

What is the appropriate education for artistry in the practice of mediation? The answer to this question will involve discussion of appropriate instructional programs. When considering appropriate qualifications for mediation we should also keep in mind related issues including licensing, certification and voluntary accreditation.[81]

The question of what is the proper education for mediators is not a new one. Writing in the Conciliation Courts Review (now Family Court Review) of 1981, Alison Taylor called for tailored educational programs. After comparing and contrasting the processes of counseling and mediation she recommended that:[82]

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[81] See Forrest S. Mosten, "Institutionalization of Mediation" Family Court Review, Vol. 42, No. 2, Apr 2004, p. 292.

[82] See, for instance, M. Duryee, "A Mediation Intern Program in a Court Setting" Family Court Review, Vol. 27, No. 1, Jul 1989, p.19.

> Since many mediators are now coming from either legal, psychological, counseling, social work, or therapy backgrounds, a specialist's program could be developed to augment the area of expertise not formerly covered. Thus, law students could take specially designed counseling courses to prepare them for dealing effectively with feelings in mediation, and counselors would take courses relating to taxes, financial management, and the legal processes of divorce, separation, and other situations for which mediation would be offered. This would obviate the need for expensive and time-consuming dual degrees, and also protect the consumer of mediation services by assuring an adequate level of expertise.[83]

More recently, researchers concerned with mediator competencies have noted a gap in attention to the knowledge requirements of mediators:

> Common assumptions about mediation and mediators may have delayed attention to the knowledge areas relevant to the basic processes of problem solving. … It also appears that this is an auspicious time, a time when mediators are ready and willing to assimilate several decades of research and theory from the social sciences that relate directly to mediation. … Meeting these information needs, through basic and advanced training, through educational materials packaged for self-study, and through formal, academic course work would build a field characterized by mediators who use more sophisticated skills in flexible, responsive practices.[84]

The concern for appropriate knowledge on the part of mediators is highlighted by the omission of one prominent qualification project to include any basic behavioral or conflict knowledge in its list of “knowledges, skills, abilities and other factors” to be evaluated. The Test Design Project’s only reference to knowledge was to “Substantive knowledge: Competence in the issues and type of dispute.”[85] As noted above, perhaps contextual “insider” knowledge has been tacitly accepted by many as equivalent to a wider knowledge of conflict or human behavior. In connection with the “diagnostic” aspect of mediation this may be an acceptable approach but it may stifle development and creativity in the mediation process itself. Familiarity with a sector can breed, if not contempt, then at least inattention to unique aspects of disputes and parties that may frustrate the search for creative solutions to problems. Mediation can thus become a routinized practice with predictable outcomes. Mediators who become specialized in this way may also not be in a good position to benefit from advances in practice in other fields if they lack the knowledge base necessary to grasp and adapt concepts and theories to their own situation.

Taylor has also called for lengthier teaching of foundational knowledge for family law mediators. She recognizes the insufficiency of training programs in this area and

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[83] Alison Yarnold Taylor, “Toward a Comprehensive Theory of Mediation”, Family Court Review, Vol. 19, No. 1, Jun1981, p. 1.

[84] Margaret S. Herrman, Nancy Hollett, Jerry Gale, and Mark Foster, “Defining Mediator Knowledge and Skills”, Negotiation Journal, Vol. 17, No. 2, Apr 2001, p. 139 at p. 151.

[85] See Christopher Honeyman, “A Consensus on Mediators’ Qualifications, Negotiation Journal, Vol. 9, No. 4, Oct 1993, p. 295.

advocates working with universities to supply the needed courses.[86] One comparative study of four training programs found that "theoretical explanations did not play an important role in any of the actual training."[87] Another study of training programs in collaborative problem solving found that there were few references to theory and research in the written materials and that there appeared to be "a fairly significant disconnect between what interviewees describe as their theoretical influences and their training agendas."[88]

The time therefore seems ripe to reassess the way in which mediators acquire the appropriate knowledge required for artistry in practice.

We should also pay attention to the methods of instruction of mediators. Although knowledge may be gained through various traditional teaching methods, encouraging reflective professional practice may require new instructional techniques. Schön uses the word "design" to indicate the process by which reflective professionals fashion responses to the complex situations they encounter in practice. He notes that it is impossible to learn to design without practicing it, and that instruction in principles and rules is not enough. This is the paradox of learning something which cannot be completely described beforehand and is clearly applicable to the practice of mediation. Here is Schön's analysis of this problem in the education of a reflective practitioner:

- The gap between a description of designing [mediating] and the knowing-in-action that corresponds to it must be filled by reflection-in-action.
- Designing [mediating] must be grasped as whole, by experiencing it in action.
- Designing [mediating] depends on recognition of design [mediation] qualities, which must be learned by doing.
- Descriptions of designing [mediating] are likely to be perceived initially as confusing, vague, ambiguous, or incomplete; their clarification depends on a dialogue in which understandings and misunderstandings are revealed through action.
- Because designing [mediating] is a creative process in which a designer [mediator] comes to see and do things in new ways, no prior description of it can take the place of learning by doing.[89]

Because of this paradox Schön advocates that professional education should include a "reflective practicum" in which novices interact with seasoned coaches. This fits well with the experience of mediator training programs to date.

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[86] "Pretending that we can know, for example, child development, family law, communication techniques, and assessment of individuals in forty to sixty hours belies our development of disciplines that require years of study in order to meet their views of sufficiency of knowledge and skill." Alison Taylor, "The Four Foundations of Family Mediation: Implications for Training and Certification", Mediation Quarterly, Vol. 12, No. 1, Fall 1994, p. 77 at p. 82.

[87] Beatrice Schultz, "Conflict Resolution Training Programs: Implications for Theory and Research", Negotiation Journal, July, 1989, p. 301 at p. 308.

[88] Julie Macfarlane and Bernard Mayer, "What's the Use of Theory?", Dispute Resolution Magazine, Fall, 2005, p.5.

[89] Donald A. Schön, Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions, San Francisco: Jossey-Bass, 1987, p. 162.

Based on the considerations above I suggest that an appropriate qualifying path for mediators entails a four year undergraduate degree. Only such a program will be able to convey the range of disciplinary knowledge needed by a mediator to practice with artistry and professionalism.

By standing on the shoulders of the giants of mediation we gain a view of the possible curriculum of a well rounded educational program for mediators:

> **Year 1**: Introductory courses in psychology, sociology, behavioral science research and methods, political science, communication theory, legal system
>
> **Year 2**: Psychology of conflict, social-psychology of conflict, organizational behavior, international relations, litigation process, introduction to ADR processes and skills[90]; comparative conflict and dispute resolution amongst cultures and societies[91]
>
> **Year 3**: Principles of negotiation; principles of mediation; dispute resolution philosophy and ethics; law of ADR; reflective practicum[92] and supervised clinical experience[93]
>
> **Year 4**: ADR programs and systems design; specialized studies (eg. family conflict, workplace conflict, ethnic and racial conflict, international conflict); reflective practicum and supervised clinical experience

Following graduation, or perhaps as an additional internship year, the student mediator would be expected to work in supervised practice. Professional internship programs have a long history in mediation.[94]

Is the time now ripe for defining minimum educational qualifications for mediators? I think so. Today there are numerous programs at the tertiary level in the area of conflict and dispute resolution that could be adopted or adapted for this purpose.[95]

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[90] Many of the crucial issues in skills training for mediators are reviewed in a special issue of the Family Court Review. See Forrest S. Mosten, "Introduction. Mediation 2000: Training Mediators for the 21st Century" Family Court Review, Vol. 38, No. 1, Jan 2000, p. 17.

[91] Michelle LeBaron has drawn attention to the importance of this subject when considering mediator qualifications. See "The Quest for Qualifications: A Quick Trip Without a Good Map", in Catherine Morris and Andrew Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate, Victoria: University of Victoria, 1994 at p. 109.

[92] A "reflective practicum" was identified by Donald Schön as an important learning environment for reflective professional practitioners. He described it as challenging practice in a controlled environment guided by an experienced mentor. For students of mediation this might involve role playing in an interactive "fishbowl" arrangement guided by experienced mediators. As is well known, trainee mediators can gain much from participating in role plays both as mediators and disputing parties.

[93] This experience could be gained in a variety of settings from university mediation clinics, to court connected programs and community mediation services.

[94] M. Duryee, "A Mediation Intern Program in a Court Setting" Family Court Review, Vol. 27, No. 1, Jul 1989, p.19.

[95] For a recent review of graduate programs see Brian Polkinghorn, Haleigh LaChance and Robert LaChance, "A Panoramic View of Graduate ADR and CR Programs in the United States", ACResolution, Vol. 6, Iss. 4, Fall/Winter 2007 p. 32.

It would also be advisable, as in Australia, to provide for a national system of accreditation or approval of such degree programs. A peak body such as the Association for Conflict Resolution might be an appropriate organization to administer an approval or accreditation process. Models may be found in the approval systems of the American Bar Association[96] or the Liaison Committee on Medical Education.[97]

The SPIDR Commission on Qualifications disagreed with such a national approach. Catherine Morris makes the same argument in conjunction with her position that "there needs to be active resistance of efforts which suggest that 'one list' of mediator skills is an adequate template for all dispute resolution practitioners in sundry jurisdictions."[98] It should be noted that SPIDR's and Morris's views were expressed in the context of competency based qualifications that involve skills testing. An academic curriculum of the kind outlined here would allow greater diversity of mediation philosophies, models and techniques to be explored than current training programs which usually adopt only one model or approach.

Relationships between the proposed program of study and existing academic disciplines need not be contentious. Medical students study genetics, biochemistry, pharmacology, physiology and other disciplines, but don't profess to be geneticists, biochemists, pharmacists or physiologists. Similarly, students of conflict resolution should study psychology, sociology, law and other disciplines as part of a sound foundation for practice without concern that they are infringing on other professions.

Collaboration with colleges or universities may also help establish effective "collegial control" by mediators that leads to enhanced quality and service to the public. McEwen notes that the work of mediators involves many discretionary decisions (which may be expressions of artistry) that can best be assessed as effective or not by other practitioners.[99] He suggests that it is through the examples of respected peers, recognized best practices and informal consultations that mediators are guided in dealing with the ill-formed problems presented by disputes. Both the judgmental and supportive aspects of a community of fellow practitioners make up this collegial control. Universities, already part of large collegial academic networks, could help to form a stronger "community of practice" amongst mediators to provide collegial control and support for the benefit of users of their services.

Finally, the divide between practice and research may be bridged more easily in a well designed academic program. If we accept Schön's approach to reflection in action as the hallmark of artistry in practice we will encourage such reflection to be shared between practitioners and educators, for the benefit of both. Research into the dilemmas of practice, through the lenses of relevant "overarching theories" should become routine rather than exceptional.

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[96] See online at: http://www.abanet.org/legaled/accreditation/acinfo.html .
[97] See online at: http://www.lcme.org/ .
[98] Catherine Morris, "Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?", in Catherine Morris and Andrew Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate, Victoria: University of Victoria, 1994, p. 3 at p. 21.
[99] Craig McEwen, "Giving Meaning to Mediator Professionalism", Dispute Resolution Magazine, Vol. 11, No. 3, Spring 2005, p. 3.

Recently, Noah and Lawrence Susskind have explored the "theory-practice" gap and described one initiative in narrowing it in the environmental and public policy area. They note that "institutional distance" and "lack of opportunities for cross-pollination" are some of the factors in the way of dialogue between academics and practitioners.[100] Bringing theorists and practitioners together as partners in an academic program would be a good way of bridging that gap in the mediation community.

Susskind and Susskind found that a simple step such as dinner meetings between the two groups resulted in contributions by the academics that:

- challenged conventional wisdom
- alerted practitioners to trends
- addressed weaknesses in the field and possible remedies

and

- provided historical context[101]

All of these benefits and more could be realized on a continuous basis through the collaboration of practitioners, theorists and researchers in academic programs and departments.

Objections and opportunities

There are four frequent objections to a formal educational requirement for mediators:

1. Formal education is not required for quality practice as a mediator; rather, competency is acquired through training and experience[102]
2. Professionalization of mediators is a regressive step in the evolution of alternative dispute resolution because it disempowers parties to disputes and their communities[103]
3. Community based mediation may be deprived of its volunteer mediators[104]
4. Diversity amongst mediators may be lowered by requiring additional credentials[105]

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[100] Noah Susskind and Lawrence Susskind, "Connecting Theory and Practice", Negotiation Journal, April 2008, p. 201.
[101] Ibid. p. 202.
[102] This has been the position of qualifying schemes suggested by SPIDR and ACR.
[103] See Andrew Pirie, "Manufacturing Mediation: The Professionalization of Informalism", in Catherine Morris and Andrew Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate, Victoria: University of Victoria, 1994 p. 165.
[104] Writing for the National Association for Community Mediation, Melissa Brodrick, Ben Carroll and Barbara Hart state: "… we are beginning to see more restrictive legislation that mandates particular degrees or licenses as prerequisites for certain areas of practice. Community mediation, because it relies on trained volunteer community mediators, is concerned with this exclusionary trend." Quality Assurance and Qualifications", available online at: http://www.nafcm.org/pg9.cfm .
[105] See, for instance, Michelle LeBaron Duryea, "The Quest for Qualifications: A Quick Trip Without a Good Map", in Catherine Morris and Andrew Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate, Victoria: University of Victoria, 1994 at p. 109. ("Qualifications, including formal education or training requirements, will act as continuing bar to diversity among practitioners. This is true because formal educational requirements foreclose proportional minority participation" p. 120)

"Credentialism"

The first objection is based on a perception that mediation is more art than science and that training in process and technique is sufficient preparation for practice.[106] Those who advocate "competency based" standards for mediators adhere to this view. This perspective informed the work of the Test Design Project that attempted to generate a standardized test of competency as a mediator.

Training programs for mediators tend to focus on teaching the particular mediation process sanctioned by a service providing agency together with skills principally related to communication (listening and questioning).[107] In a program of even 50 hours training that includes practical exercises such as role playing there is little time for a consideration of theories of conflict, recognized patterns of human behavior or socioeconomic analysis that might allow linkages to be made between individual disputes and more widespread social problems. As Lederach and Kraybill put it:

> Training programs tend to present a basic model with adaptations according to different settings and specialties (divorce, environmental, neighborhood justice, etc.), while rarely raising to an explicit level these underlying values and assumptions on which the model is built.[108]

One danger of the current approach to educating mediators through training is that those who receive such training may be more inclined to provide routinized services and standardized responses to complex matters. Mediation practiced in this way would not demonstrate artistry as discussed above. Rather, such a type of practice would replicate criticized deficiencies in professional behavior instead of providing a more empowering alternative. Without a sound understanding of human behavior in conflict situations a mediator is unable to make those decisions about her intervention that demonstrate artistry in practice. Also, without knowledgeable reflection on the connections between individual conflicts and wider social forces it is hard to see how a community mediator, for instance, can contribute to social change in the community they serve.

Relying on training in process, skills and techniques alone for mediators is like training doctors how to operate without also instilling knowledge of anatomy and physiology, or training lawyers how to litigate without also teaching the laws of contract or property. Kathy Douglas has put it this way:

> Short course training arguably has some limitations if we wish to develop the highest levels of expertise in mediation practice. As the industry has evolved

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[106] "Mediation is an art. Just as in the art world there are different schools and genres and different outlets for expression. Appreciation of art is subjective. Mediators are faced with difficult choices during the course of a conflict and do not act in a mechanical manner. A mediator is not a monolith." Robert A. Creo, "Mediation 2004: The Art and the Artist", Pennsylvania State Law Review, Vol. 108, Spring 2004, p. 1017 at p. 1048.

[107] See for a review of some community training programs, Vicki Shook and Neal Milner, "What Mediation Training Says – or Doesn't Say – about the Ideology and Culture of North American Community – Justice Programs", in Sally Engle Merry and Neal Milner (eds.), The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993, at p. 239.

[108] John Paul Lederach and Ron Kraybill, "The Paradox of Popular Justice: A Practitioner's View", in Sally Engle Merry and Neal Milner (eds.), The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993, 357 at p. 373.

> many mediators have focussed upon the steps of the process, that is opening statements, private caucus and negotiation techniques, rather than investigating and reflecting upon theory.[109]

The theory of mediation as an intervention process has been developed and disseminated widely amongst mediators.[110] However there is a wide range of theory and associated techniques flowing from research that may be relevant and useful for mediators but not well known or understood because theory is typically not part of training programs.[111]

Reliance on process knowledge alone can lead mediators to adopt a variety of methods, often disguised from the parties, to lead disputants down a predestined path. Kolb describes the guiding techniques used by two types of mediators, based on their framing mediation as either a settlement or a communicative process.[112] Such approaches to mediation are not reflective in the sense of being flexible and adaptive to the needs of the participating parties. Instead, they are in the tradition of professional expertise being imposed on clients for their own good.

Most full time mediators practice in relatively narrow fields – for example child custody, labor-management and environmental disputes. In economic terms at least they are the most "professional" of mediators. Yet is has been noted that their practice runs the risk of becoming routine, with heavily constrained outcomes:

> … the professionals are more likely to work in settings that constrain – by the law, by contract, or by accepted practice – their range of options. Pros are unlikely to depart from the agenda given them by the parties. Because they do it regularly and because their practice is made up of similar cases, they are likely to develop a more consistent approach to mediation.[113]

Researchers have recently uncovered what may be another weakness in the current mediator training system. Honeyman, Goh and Kelly have documented preferences for mediators with "connectedness" and an aura of "authority" rather than specific expertise as a dispute resolver.[114] "Connectedness" is described as being a part of the community

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[109] Kathy Douglas, "Mediation and Improvisation: Teaching Mediators to Improvise the Storylines of Mediation", Murdoch University E Law Journal, Vol. 14, No. 2, 2007, p. 133, citing Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy,' Pepperdine Dispute Resolution Law Journal, Vol. 3, 2002, p. 39.
[110] Compare for instance, Cris M. Currie, "Wanted: A Theoretical Construct for Mediation Practice", Dispute Resolution Journal, Vol. 53, Iss. 3, August 1998, p. 70 with Douglas E. Noll, "A Theory of Mediation", Dispute Resolution Journal, Vol. 56, Iss. 2, May-July 2001, p. 78.
[111] See for instance, Jeffrey L. McClellan, "Marrying Positive Psychology to Mediation: Using Appreciative Inquiry and Solution-Focused Counseling to Improve the Process", Dispute Resolution Journal, Vol. 62, Iss. 4, Nov 2007-Jan 2008, p. 29.
[112] "The Realities of Making Talk Work" in Deborah Kolb and Associates, When Talk Works: Profiles of Mediators, San Francisco: Jossey-Bass, 1994, at p. 459.
[113] "The Professionals" in Deborah Kolb and Associates, When Talk Works: Profiles of Mediators, San Francisco: Jossey-Bass, 1994 at p. 15.
[114] Christopher Honeyman, Bee Chen Goh, and Loretta Kelly, "Skill Is Not Enough: Seeking Connectedness and Authority in Mediation", Negotiation Journal, Vol. 20, No.4, Oct 2004, p. 489 and Christopher Honeyman, "Something More than Skill: What Are Parties Really Seeking in a Mediator?", Alternatives to the High Cost of Litigation, Vol. 23, April 2005, p. 63.

from which the dispute arises, giving the mediator some credibility with the disputants, and "authority" is the power that comes from special qualities or capabilities. Honeyman makes the point that mediator training as it now stands fails to endow those who take it with the authority that comes from rigorous educational programs such as those found in medical schools. It should not be surprising that people with serious problems are not confident putting them in the hands of a mediator with just 40 hours training and with no special personal connection to them. A degree level education in dispute resolution might bestow on graduates the greater authority that at least some disputing parties seem to desire in mediators.

De-professionalization

The second objection to an academic education for mediators reflects the history of modern alternative dispute resolution which was in part based on rejection of control of disputes by professionals, principally lawyers.[115] As Pipkin and Rifkin put it as far back as 1984:

> With professionalization of mediation comes a challenge to the objective of community building through lay dispute resolution as the legitimacy of intervention is based upon individual expertise and professional "disinterest" rather than community engagement.[116]

The first thing to note about this objection is that it is based on a type of professionalism that is now on the wane, being replaced by a more collaborative, engaged and reflective approach to practice as discussed above. There is less to fear from professionals in the twenty first century in relation to imposing alien values and predetermined solutions.

Secondly, de-professionalization of dispute resolution is the avowed aim of community organizations, but observers have noted disconnections between community mediation services and the communities they seek to serve. Paul Wahrhaftig remarks that ties to the justice system for purposes of funding and referral tend to distance such programs from the neighborhoods in which they are located. He also observes that there are very few community mediation services that have "grass roots" origins – most are organized and supported by professional "outsiders".[117] On the other hand, problems have also been recognized in providing mediation by local peers. There is "contradiction and inherent tension" between a model of mediation premised on the neutrality and

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[115] Ray Shonholtz is one of the leading proponents of community based dispute resolution. He states: "Citizens in their civic capacity have a primary responsibility to manage conflicts at the family, school, and neighborhood levels. Failing to perform this civic justice function creates individual and community dependency on professional agencies and services. This form of dependency weakens the rights and responsibilities of citizens in a democratic society, thwarts the preventive capacity of residents to effectively de-escalate conflicts, and places an unreasonable and unmet burden on the formal justice system.": "Neighborhood Justice Systems: Work, Structure, and Guiding Principles", Mediation Quarterly, No. 5, September 1984, p. 3 at p. 4.

[116] Ronald M. Pipkin and Janet Rifkin, "The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation". Justice System Journal, Volume 9, No. 2 (1984), p. 204, at p. 207.

[117] See Paul Wahrhaftig, "An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States", Chapter 4 in Richard L. Abel, The Politics of Informal Justice: Volume 1, The American Experience, New York: Academic Press, 1982, at p. 75.

impartiality of the mediator and actual mediators involved with and connected to the parties they assist.[118]

Barbara Yngvesson has noted "social, geographical and power differentials" between volunteer mediators and parties even in the Community Boards Program of San Francisco. She suggests that this leading community based program has created a community of mediators rather than empowered neighborhoods. The mediators she studied identify themselves as part of a community with other mediators as fellow members instead of the clients who come to mediation.[119] One uncomfortable truth about the community mediation so far therefore may be that it is more transformative for the mediators it trains than for the geographical communities it serves. If that is so, volunteer mediators are not in fact de-professionalized community members.

Harrington and Merry note an inevitable conflict between prevailing conceptions of "neutrality" in the mediation process and mediators who, if they are members of the local community, bring community values with them into their work as mediators. They conclude that:

> Despite the efforts of local programs to have a variety of mediators from all ethnic, class, and educational backgrounds, the demand for neutral mediators and the detached stance tends to favor people with professional backgrounds. Ironically, it is the interest in providing neutral and detached mediators that facilitates the emergence of a core of mediators who are professionals.[120]

An answer, therefore, to the objections of the community mediation field is that the participation of "peers", envisioned as typical local community members, as mediators is an ideal which has not been realized in practice and thus does not require defending from increasing qualifications.[121]

Nevertheless, and perhaps ironically, community mediation has contributed an important element of a professional approach to mediation and that is a focus on the client and the public interest. In addition, community mediators have promoted awareness and understanding of the influence of cultural, racial, socioeconomic and other powerful contextual factors on the resolution of individual disputes.

Volunteerism

The third objection to more education for mediators is that it will prevent volunteers (ideally local peers) from participating in community based programs - it will set the bar too high.

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[118] John Paul Lederach and Ron Kraybill, "The Paradox of Popular Justice: A Practitioner's View", in Sally Engle Merry and Neal Milner (eds.), The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993, 357 at p. 375.

[119] Barbara Yngvesson, "Local People, Local Problems, and Neighborhood Justice: The Discourse of 'Community' in San Francisco Community Boards", in Sally Engle Merry and Neal Milner (eds.), The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993, 379.

[120] Christine B. Harrington and Sally Engle Merry, "Ideological Production: The Making of Community Mediation", Law and Society Review, Vol. 22, 1988, p. 709.

[121] However, note the findings of Honeyman, Goh, and Kelly, that some disputants look for "connectedness" rather than neutrality in their mediator. Supra, note 117.

Community groups and volunteers appeared in the early stages of the ADR "movement" which began in the United States in the 1960s. Over time the use of volunteers has increased in diverse fields such as family mediation, victim offender processes and some court connected programs.

There is some information available about the characteristics of these volunteer mediators. In 1984, one hundred sixty nine mediation agencies, including community based programs, were surveyed. Among the findings was the statistic that 87% of the mediators had a bachelor's degree or higher qualification.[122] Examination of one of the best known community services, the San Francisco Community Boards project showed that in the early 1980s ninety percent of the volunteers had some college education.[123] Another study of one pioneering community mediation service found that 80% of the 37 volunteer mediators had completed college, and a third of those also had graduate degrees.[124] A research study of an early volunteer-based mediation service for families reported that of the ten key mediators, nine had a college degree and eight some advanced education.[125] In 1991 a study of a neighborhood justice program found that almost all of the 34 volunteer mediators had advanced graduate degrees, and that two thirds were practicing attorneys.[126]

Based on the available data it appears that most volunteer mediators have college degrees, or at least some college level education, and many are lawyers, social workers, or members of other helping professions. In this respect most such volunteers probably differ from the norm of the communities they serve. Perhaps, therefore, volunteer community mediators are better described as highly educated, trained and motivated members of a translocal "mediation community" than as average residents of the neighborhoods where mediation services are provided, as Barbara Yngvesson suggests.[127]

The available evidence therefore suggests that most volunteer mediators already are highly educated, with many having professional degrees in other fields. Recognizing the value of an undergraduate degree as part of the essential formation of a mediator is not inconsistent with the current reality.

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[122] Ronald M. Pipkin and Janet Rifkin, "The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation". Justice System Journal, Volume 9, No. 2 (1984), 204.
[123] Frederic L. DuBow and Craig McEwen, "Community Boards: An Analytic Profile", in Sally Engle Merry and Neal Milner, eds., The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993, at 157.
[124] Jennifer E. Beer, Peacemaking in Your Neighborhood: Reflections on an Experiment in Community Mediation, Philadelphia: New Society, 1986, 59.
[125] Sally Engle Merry and Ann Marie Rocheleau, Mediation in Families: A Study of the Children's Hearings Project, Cambridge, MA : Children's Hearings Project of Cambridge Family and Children's Service, 1985.
[126] Peter J. Carnevale, Linda J. Putnam, Donald E. Conlon and Kathleen M. O'Connor, "Mediator Behavior and Effectiveness in Community Mediation", in Karen Grover Duffy, James W. Grosch and Paul V. Olczak, eds., Community Mediation: A Handbook for Practitioners and Researchers, New York: Guilford, 1991.
[127] Barbara Yngvesson, "Local People, Local Problems, and Neighborhood Justice: The Discourse of 'Community' in San Francisco Community Boards", in Sally Engle Merry and Neal Milner, eds., The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Ann Arbor: University of Michigan, 1993.

From a community mediation standpoint Albie Davis has expressed a number of concerns about formal education requirements for mediators.[128] First, she appears to endorse the view that mediation is more art than science and therefore does not require extensive educational preparation. This argument has been considered above where the knowledge required to demonstrate artistry in mediation was outlined.

Second, Davis is concerned that formal educational requirements will interfere with the ideal of community integration of services and diversity amongst mediators. In so far as most volunteer community mediators are already highly educated and do not identify with local communities the proposal made here will not adversely affect community mediation as it exists today. The concern for diversity is discussed below.

Finally, Davis is convinced that a properly structured training program coupled with monitoring and supervision of trainees is sufficient preparation for delivering quality mediation services. The inadequacy of the training model for preparation of mediators has been discussed above.

Another response to the concerns of the community mediation field is that recognizing distinct educational requirements for mediators does not prevent otherwise competent practitioners from volunteering their services. Here it is important to distinguish the issue of qualifications from that of certification or licensing. The proposal advanced here does not require any legislation or rule making and should not be seen as a bar to volunteer service by those recognized as competent by community programs.

Finally, there are potential benefits from placing students in the proposed degree program in community mediation services as part of their clinical training. The value of such an approach was recognized early on. In a 1977 report on six neighborhood justice centers, the authors noted that students are available at predictable times, may receive course credits instead of payment, and may have received some training before becoming involved.[129]

Diversity

One answer to the final criticism of the effect of additional education on diversity amongst mediators is that qualifying for practice through an undergraduate degree would be more accessible to minorities than the present regime in which graduate study is a de facto qualification.

Sarah Rudolph Cole makes a similar point about current certification schemes or proposals that require experience to be shown. She notes that members of disadvantaged groups may not be able to meet such requirements through lack of opportunities to network comparable to members of the majority.[130] A degree as the

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[128] See Albie M. Davis, "How to Ensure High-Quality Mediation Services: The Issue of Credentialing", in Karen Grover Duffy, James W. Grosch and Paul V. Olczak, (eds.) Community Mediation: A Handbook for Practitioners and Researchers, New York: Guilford, 1991, at p. 203.

[129] Daniel McGillis and Joan Mullen, Neighborhood Justice Centers: An Analysis of Potential Models, Washington, D.C.: Law Enforcement Assistance Administration, 1977, 73.

[130] Sarah Rudolph Cole, "Mediator Certification Has the Time Come?" Dispute Resolution Magazine, Vol. 11, No. 3, Spring 2005, p. 7.

primary qualification for recognition as a mediator would avoid the problem for minorities of having to gain entry to practice through “old boys” or “old girls” networks from which they are largely excluded.

A recent study investigated barriers to participation in the ADR field experienced by underrepresented racial and ethnic groups.[131] Amongst the barriers identified were the following which may be ameliorated by the educational proposal advanced here:

- *No clear entry point.*

  A degree level qualification obtained in an accredited or approved program might become the recognized entry point for entering the field.[132] At present the prospective mediator is faced with a plethora of training programs, advanced training, certificates, diplomas and graduate degrees, all at considerable cost.

- *No clear career path*.

  An academic program of study, with graduate work, teaching or training following would become a viable path to follow. The type of degree program envisioned here would be suitable for a number of careers including diplomacy, peace building, and community work as well as conflict and dispute resolution.

- *Raising the bar on credentials*.

  This barrier relates to the current need to pursue multiple, sometimes expensive training or graduate programs which may have limited recognition. The supports and assistance available to university students would make an undergraduate degree program more accessible.

- *Ambiguity about what constitutes acceptable credentials*.

  The wide variety of training and graduate programs currently available makes it difficult to know which “count”. A degree gained through nationally accredited or approved programs would become the benchmark and standard for practitioners.

Conclusion

We should promise and deliver artistry in our practices as mediators. The giants of mediation show us that professional artistry is grounded in a substantial body of formal knowledge that is being extended through research and testing. An appropriate preparation for practice as a mediator is therefore by a course of study at the degree

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[131] Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson Jr., Christopher M. Kwok, Janice Tudy-Jackson and Roberto Velez, “Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field”, Fordham Urban Law Journal, Vol. 35, Jan 2008, p. 119.

[132] For a discussion of the multiple and sometimes confusing entry points to mediation practice see David Matz and Roni Lipton, “Choosing Between a Training Program and a Graduate ADR Program”, Dispute Resolution Magazine, Vol. 12, No. 1, p. 17.

level which provides the required foundation of expertise in knowledge of human behavior.

Those who qualify as a mediator in this way will be prepared to practice with a professionalism well suited to society in the twenty first century without betraying the high ideals of mediation. They will become the giants upon whose shoulders future generations of mediators will stand.