In search of family mediation virtue ethics: picking through the undergrowth

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Introduction

This discussion paper looks at some of the ethical challenges of mediation from the perspective of a family mediator practising in this jurisdiction (England and Wales). It argues that, although mediator ethics as set out in codes of conduct can seem relatively straightforward, pathways through disputes can be convoluted or vague, with different values vying for light.

Family mediation is a type of Alternative Dispute Resolution (ADR), addressing the care of dependent children, apportioning of assets, distribution of other financial matters, or all three. Mainstream family mediation does not attempt the therapeutic restoration of original relationships; it tries instead to create an informal, confidential forum for managing disputes, where at least some issues might otherwise have ended up in litigation. Yet, this simple assertion as to mediation's basic premises and purposes immediately raises questions about the mediator's own intentions and values. These are not uniformly addressed or agreed, even locally – certainly not globally; there is no universal consensus as to what constitutes good mediation practice (Midgley and Pinzón, 2013, p.608; Kovach, 2005, p.309).

Training courses typically emphasise the mediator's facilitative role in assisting the parties to reach a negotiated settlement. However, mediation models are represented by a continuum, with considerable overlap in actual practice and notwithstanding certain claims of distinctive formats. Models range from highly directive, settlement-driven processes to therapeutic interventions aimed at achieving moral change or growth. Despite competing claims, Stoica (2011, p.1986) contends '…each of these models is valuable and has a potential utility. The most important thing is to solve the conflicts…'. Theoretical and ideological arguments aside, some of this disparity reflects the highly commercialised nature of the family mediation training market, in which numerous instructors claim the superiority of their own teaching and materials when competing for a share of a limited pool of potential trainees. Any training may be only tenuously linked to subsequent practice opportunities, with no guarantees of a paid, or even voluntary, role afterwards. Opportunities vary according to jurisdiction and fora, and many trainees do not go on to have thriving mediation practices. Some may never practise at all, although the skills they acquire in training are often useful in other contexts.

The quality of practice also differs, as mediators self–regulate, with no unifying, cross-national certification. The accepted accreditation standard here for family mediators – administered under the umbrella of the Family Mediation Council (FMC) – is recognised by

the Ministry of Justice as a prerequisite for mediators who wish to provide legally-aided family mediation. Accreditation involves trainees attending an FMC-approved foundation course, followed by supervised case experience, regular consultancy, developmental training, and submission of a case-based portfolio for assessment purposes. Ongoing casework, professional development activities, regular practice consultancy and eventual re-accreditation are required thereafter.

Some of the critical literature, including contributions from both academics and practitioners, accuses mediation of being a practice in search of a theory (Marlow, 1997; Richards, 1997; Boulle, 1999). There is certainly some merit in such criticism. Mediation's professionalistion project remains a work in progress, marked by struggles to establish a discrete identity distinguishable from ADR's many sources – disciplines as diverse as anthropology, psychology, law, linguistics, sociology, economics, the neurosciences and others. Even though family mediation generally draws from traditional and current societal practices, its relatively recent endorsement in this jurisdiction via legislation is not uncontroversial. It has detractors, proponents, and an extensive canon too lengthy to fully cite or reference here. The literature includes debates about mediation's ethical basis and the mediator's role and values as a moral actor. These contentious areas are the main topics of this paper, with a particular emphasis on the argument that virtue ethics should have a place in mediation discourses, while Ricœur's (1992) 'caring conversation' provides a useful construct for their outworking. The next section discusses some of the issues and complexities underlying practice.

A complex process:

Family mediation does not always involve high conflict. Indeed, a proportion of clients come to mediation specifically because they want to remain in control of their own affairs and avoid what they see as the alternative, namely the uncertainties, costs and potential hostilities of litigation. But it would be naïve to assume that an apparently easy, low-conflict case means it will be easy to mediate. Instead, initial amicability between the parties may indicate the existence of a polite standoff, devised to keep a temporary peace. Civility should not be taken as evidence that the parties are getting on well, despite their differences, nor that they have already reached a mutual understanding that simply needs ratifying. The disputants' underlying dynamics and degree of conflict can appear deceptively straightforward. Nor is it necessarily obvious whose interests may best be served at any moment in a mediation session, or even which issues or options are at stake.

Kandel (1998, p.303) observes that it is common wisdom that practitioners manage the process while relinquishing authority to decide outcomes, which the parties must determine for themselves. Kandel rightly challenges the supposed difference between process and outcome, since it provides an account of practice that cannot withstand scrutiny , either

theoretically or when it comes down to what actually happens in the mediation room. Mediators are inextricably involved with shaping the content and – therefore – outcomes of the process; otherwise there would be no need for their involvement in the first place. For example, mediators use questions and answers to structure and progress the parties' negotiations. However 'neutrally' these interventions are framed, they are instrumental in constructing and eliciting meaning from the process. Mediators must also keep under consideration which matters are mediatable within the time immediately available – decisions which are not necessarily obvious, or simple.

Another example of the mediator's structuring role is the requirement that they should give the parties information but not advice (FMC *Code of Practice,* 2016; 5.3). But how are clients to know the difference between 'information giving", "guiding"' and 'legal advice', as proposed by Shapira (2016, p.176)? However carefully delineated by the mediator, these differences are not automatically recognisable by the parties, especially those new to mediation. This difficulty of distinction may result in making mediators highly influential – however unwillingly or unwittingly so – and despite their best efforts to uphold party self-determination. Shapira's suggested solution is that disputants can rely on the degree of the mediator's substantive knowledge when giving guidance, an assumption that seems to sail perilously close to the giving and receiving of professional advice, albeit not named as such and in a different guise.

Mediation is complex. Practitioners are tasked with adhering to a relevant code of conduct in circumstances which are often replete with complexity, tactical strategies, and multiple issues. Negotiations can be fast-moving, sometimes chaotic. Under these conditions, concepts as seemingly prosaic as common sense can be problematic when it comes to finding solutions – whose view of common sense should prevail when 'sense' isn't shared in common? Further, formal justice is legislated according to jurisdiction, so varies significantly by location. As to fairness, what I consider 'fair' may be the exact opposite of how you see things.

Cobb (2006, p.186) notes that collaboration and the disciplinary power of language itself can mask a host of problems related to asymmetries between the parties. For example, asymmetry may stem from a lack of access to independent legal advice. Far fewer people here now qualify for legally–aided mediation, following changes to the eligibility and scope rules enacted under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Not only are they unrepresented, they may not be aware of the basic norms and principles applicable in family law, whether they are taking part in mediation or choosing to act in person at court (Grimwood, 2016, p.10). There is also some anecdotal suggestion of wider public resistance to experts generally, including reluctance to pay for legal advice – even when affordable and desirable on a best interests basis.

Certain feminist critics warn against women taking part in mediation in the first place, on the grounds of claimed innate gender power imbalances between heterosexual couples. However, there is considerable evidence that women, too, are significant perpetrators of abusive behaviours. Hamel et al's (2012) meta-analysis found that intimate partner abuse (IPA) is endemic, and not confined to male assailants. This study's data mostly originate in north America, but the position in our own society may not be that dissimilar. Further, Neumann (1992) and Gewurtz (2001) argue that power issues are not static. As Cobb and Rifkin (1991, p.62) contend, adopting a poststructuralist perspective of conflict means that power is no longer seen as a commodity to be possessed by an individual. Power is also an attribute of discourse, manifest in the production and contestation of consensus. The less powerful participant – should there be one – may not be the party presenting as such. Further, power fluctuates as a consequence of the parties' changing circumstances, and shifts dynamically during negotiations.

Abusive or violent behaviours are matters of concern for all practitioners, whether such allegations are current or historic. Mediation may well not be appropriate in these circumstances, although not necessarily ruled out under conditions of informed consent and a process agreed as safe with and by those involved. Those alleging abuse can claim automatic exemption from the mediation process on certain defined grounds, or are screened out routinely during their initial intake meeting with the mediator. This is known as a Mediation Information and Assessment Meeting, or MIAM (Family Mediation Council, no date). Elimination is not gender-specific, nor are same-sex couples immune from such concerns. Screening at MIAMs must therefore take account of the many dynamics that may be encountered in any intimate relationship.

While family mediation is typically organised to deal with all the substantive issues to be negotiated, the parties may be concerned about less tangible matters as well, such as alleged psychological or emotional trauma, especially where a divorce petition alleges behaviour such that it would be unreasonable for the initiator to continue in that marriage. The most difficult issues for family mediators may be the very ones that are seldom justiciable at law, such as hurt and blame. Other people can function as external influencers, keen to take sides and have a metaphorical 'dog in the fight', even if vicariously. As Wade (2003) points out, friends, relatives and co-workers may act as tribal influences, impacting the process, creating barriers, and affecting the participants' perceptions of their own authority to settle – yet without ever taking part in the mediation themselves.

Compounding these factors is Mnookin and Kornhauser's (1979) much–cited 'shadow of the law', a term coined to represent the overarching reach of the legal judgments, remedies or sanctions potentially available to the parties and – thus – the role of law in the delivery of ADR. Family law always overshadows mediation, especially if the parties intend to seek a financial or other order, or make decisions about the care of minor or dependent children.

Finally, mediated proposals for settlement are not binding unless eventually submitted to the court via an application by consent, which then requires scrutiny and approval before an order may be granted. Similar considerations usually apply to proposals reached through solicitor negotiation, or other means.

Throughout their work mediators are thus dealing with more than the superficial aspects of conflict. In order to steer a path through the numerous issues that can arise, most family mediators in the developed world have established professional bodies which have some degree of regulatory function, including standard-setting and ethical conduct codes, to which this paper now turns.

Codes of practice

Mediators are tasked with being on both sides of the fence at the same time. They form a working alliance with each of the parties and owe them equal treatment (FMCCoP, 2016; 5.4.1). However, in this code at least, the equality principle is immediately countermanded by an injunction that practitioners must also power-balance as between the participants (FMCCoP, 2016; 5.4.2). A loyalty dichotomy therefore lies at the heart of mediation, confounding notions of straightforward facilitation based on a one-size-fits-all moral code. Power-balancing assumes that the mediator will deal appropriately with a party's claimed disadvantage, as well as spotting and responding to subtle dynamics that are not necessarily articulated. This requires the ability to manage discussions with finesse and good judgment, often when under considerable pressure.

Family mediation anticipates the parties' commitment to joint decision-making within the framework of the law, coupled with an overriding focus on the needs of any minor or dependent children. Mediation is therefore a communitarian project, fostering information sharing and discourse aimed at reaching consensus (although communitarianism as used here does not automatically mean community of property in financial disputes). The FMCCoP (2016; 5.8.3) enjoins mediators to uphold the principles of voluntary participation, fairness and safety. Mediators must also adhere to a number of other principles when a marriage or relationship ends: minimum distress to the participants and any children, promotion of as good a relationship as possible between them, and the avoidance of any unnecessary cost or delay. A separate code, also operative in this jurisdiction (National Family Mediation, no date) extends this focus on minors to include consideration of the children's *views as well as needs* (emphasis added), anticipating child-inclusive mediation as the default practice norm and raising another contentious topic (Roberts, 2015).

Codes of practice may include – but are not restricted to – assurances of mediator impartiality (treating the parties equally), neutrality (the mediator not having a preferred outcome), practitioner competence and the absence of professional conflicts of interest, along with guarantees of confidentiality, party voluntariness, and self-determination.

Powerful moral and welfare injunctions are thus enshrined within at least two local codes of practice. Yet none of these 'norms' is absolute. For example, mediators may need to depart from impartiality in order to intervene if discussions become over–heated, or clients decline to fully disclose their financial circumstances for negotiation purposes. Practitioners are inextricably involved in the negotiations, and therefore cannot be wholly neutral, regardless of their intentions. Every mediator should not necessarily accept every case referred to them, even where they are not otherwise prohibited from doing so (anonymous commercial mediator, cited Grossman, 2002, p.86). A disclosed conflict of interest does not necessarily rule out the appointment of a specific mediator in certain circumstances (FMCCoP, 2016; 5.1.4.). Mediators may be obliged to break confidentiality if there are over–riding safety or, even, money–laundering, concerns (FMCCoP, 2016; 5.5.). True voluntariness and self–determination can be somewhat illusory.

The interactive nature of mediation ethics

What of the parties' own norms and values? Much of the literature tends to reflect a belief that disputants seek to realise individual interests and goals, whether expressed or underlying. Broadly speaking, dispute resolution is often described as the culmination of initial positional bargaining, transmuting to the search for common ground, trade–offs – perhaps concessions – and eventual acceptance of the best outcome available to both parties in their circumstances (or, perhaps, damage limitation and the least worst result possible). Accommodating each other's needs within the constraints of the total resources and options available means both parties abandoning a 'winner takes all' position. Litigation commonly involves similar adjustments, since around the majority of contested family law cases settle before full trial (85% according to Hitchings, Miles and Woodward's study, 2013).

However, for Midgley and Pinzón (2013, p. 607), identification of interests alone is insufficient: their Columbian study found that the most important thing for many mediation participants was to have their moral reasoning understood and appreciated. This concurs with Hoffman and Wolman's (2013, p. 766) endorsement of psychotherapist Elkin's (2011) assertion – 'what is our deepest need?…"innocence"', interpreted by the authors as the desire to feel 'we are right, we are blameless, we are good'.

Reprising the theme of mediation ethics, Midgley and Pinzón (2013, p. 607) continue:

> '…the morality of the mediator unavoidably influences his or her facilitative interventions. Therefore, personal reflection by the mediator on his or her own moral framework is essential, so that its influences can be made visible and the facilitator can thereby be held accountable for them in dialogue with his or her peers.'

A need for peer approval is articulated elsewhere in the canon, often in conjunction with

protecting mediation's public image. This is another issue not unanimously endorsed by the mediation community: for instance, Macfarlane (2002, p.86) offsets the risk to her own reputation against the need to be frank about the realities of practice. It is hard to escape the conclusion that mediation is a moral as well as practical project, encompassing deeply–held personal and professional values and beliefs, as well as the substantive matters to be resolved.

Sources of ethical norms

Where do mediation's norms come from? Indeed, as Irvine (2010, p.81) asks rhetorically, 'is mediation American?'. Irvine answers largely in the affirmative – although with certain caveats, particularly with regard to Scotland's own legal system. Irvine's study of five prominent ADR texts uncovers values largely attributable to the legal and political culture of the United States, where the authors of four of the books originated. Drawing on a number of sources, Cobb (2006, p.186) summarises her understanding of these values, perhaps expressed somewhat aspirationally:

> 'Ethical perspectives on negotiation and conflict resolution arise from normative assumptions about the merit of participatory processes, the management of marginality, the reduction of violence, the need for coexistence, the importance of positive approaches and the need for self-reflection. The values espoused across these frameworks are often implicitly or explicitly tied to pragmatics on the assumption that self-reflection, the reduction of marginality and violence, the promotion of coexistence, etc., are often both the goals of negotiation and the means for producing effective outcomes. "Participation" becomes both the ethical end as well as the pragmatic goal.'

Nevertheless, as Irvine demonstrates, there are differing views about whether such assumptions are indeed considered normative, either within or across different jurisdictions (see also McCorkle, 2005). Other perspectives can be equally valid, even if marginalised by dominant discourses, and only identifiable through critical interrogation and analysis based on familiarity with the wider literature. For example, even a cursory review of the North American ADR canon shows that relatively few authors cite any of the extensive scholarship emanating from other parts of the globe, even that confined to the Anglophone literature.

Mediation's ethical norms, as described in societies considered 'developed', appear to be typically neo-liberal. They are usually expressed in deontological, act-consequentialist, or teleological terms, formulated in codes of conduct under local professional governance. Although there are allusions to the mediator's personal qualities in the literature (Wilson & Irvine, 2014), codes of practice are generally role-specific, rather than reflecting the personal nature of Aristotelian virtue ethics. This has led to heated debates about which disciplines of origin are acceptable prerequisites for mediators with – sometimes – unfavourable contrasts

drawn between those with legal backgrounds and those originating in the social sciences or other fields. As 'alternative' (sometimes rephrased 'appropriate') dispute resolution practitioners – there is little difference for the purposes of this discussion – mediators need ethical constructs reflecting the unique features of their discipline. These do not align neatly with those found in any other role, although there may be overlaps with some.

Mediators and virtue ethics: role or attributes?

According to Coulter and Wiens (2002, p.16), *phronesis* is not simply a form of knowledge, but an amalgam of knowledge, virtue and reason, enabling people to decide what they should do. If mediation is a beneficial process for at least settling some disputes, do mediators need to be good (or at least aspire to be good) in order to do good?

There is little specific reference to virtue ethics in the ADR literature, although descriptions of, or allusions to, mediators' personal skills, characteristics, attributes and values are scattered across the canon (Wilson & Irvine, 2014). These may be conflated, propositional or speculative, aspirational rather than actually descriptive. Examples are the need for a sense of humour, the wisdom of Solomon, the patience of Job.... One commentator, knowingly provocative, frames mediators as subversive and inherently at odds with the very same established order by which they are legitimised, namely the legislature (Benjamin, 1998). Yet regulated activities in any sphere have to be worked out when it comes to how people think and act – usually in circumstances where there is no opportunity to down tools and phone a friend. Does virtue ethics have a place in mediation?

Certain leading mediation ethicists are not at all keen on virtue ethics, or fail to mention them at all. Waldman (2011, p.9) pays relatively scant attention to mediators' personal characteristics or values, favouring ethical intuitionism instead and the weighing and balancing of the competing values at stake in the totality of the circumstances. She writes: 'the need for a context-driven balancing approach becomes even clearer when one looks at the regulatory landscape. In some professions, existing ethical guidelines are unified and consistent. This is not the situation in our field'.

Gibson (1989, p.45) observes that mediation occurs between people, and thus varies with the dispositions and traits of the parties involved: in his view, virtue ethics concerns what sort of dispositions and habits we should inculcate in order to benefit mankind, rather than suggesting what ought to be done on any particular occasion. Gibson thus rejects virtue ethics as providing little guidance in new and different moral dilemmas, or where values conflict over individual cases.

Shapira (2016, p.15) is similarly sceptical, relying on Gert's (2004) treatment of moral values as moral virtues, and the need to establish whether the speaker or writer intends an assertion of duty or aspiration. His proposed model of mediator ethics references

'*fundamental social values* that are in consensus in Western developed societies and among theoreticians' (emphasis original, p.11). Shapira enlists both public expectations and those of the mediation field at large as providing tests as to right professional conduct. While offering a useful means of informing practitioners' decision-making and behaviours, his claimed consensus is problematic. It appears to assume the existence of a Kantian-type model of agreed norms that almost certainly does not actually exist, regardless of jurisdiction, and is unlikely to do so in the foreseeable future.

Shapira (2016, 11–12) also criticises moral relativism as descriptive of the social conventions of societies, and as a variety of conceptions of the good that cannot be morally criticised. Yet in Roberts' (1979, p.167) ethnographic account of dispute management in stateless and other less complex societies, the author warns that we have to be particularly careful not to let arguments about how 'trouble may be handled' be coloured by our own values and preconceptions. It would be easy to interpret Roberts' remarks merely as a commentary on the developmental state of certain emergent societies as observed several decades ago. It is less easy to stand back from the hegemonic influence of much of the contemporary ADR canon, with its neo-liberal assumptions that are seldom articulated. Further debate about relativism in mediation is beyond the scope of this paper, except to observe that cultural norms – in the widest sense of that phrase – inevitably influence what takes place in mediation, wherever and however it is practised.

Grossman (2002, p.45) also speculates that there may be a distinction between the virtuous professional and the virtuous layperson, a proposal similar to that made by Swanton (2007, p.208). Writing of virtue ethics in business contexts, Swanton argues for a non-Aristotelian pluralist position. This allows for two broad views, namely the possible conflict between being good in a role and being a good human being. She proposes that role virtues 'make one good qua role occupier in roles that are worthwhile or valuable'. However, there is no agreement about which such virtues accurately reflect the mediator's role: neither is there universal enthusiasm for ADR generally (for example, Fiss, 1984 and other commentators since). Mediation's perceived value therefore remains debatable.

In his critique of Swanton, Carr (2007) expresses some sympathy with her wish to bring business or other professional practice more in line with 'regular' *(sic)* virtue. However, he observes that it might be a better move simply to deny that role virtues are virtues in anything other than some secondary or derivative sense. Carr contends:

> 'In the context of education and teaching, it is professionally desirable that teachers should behave honestly, fairly and with self-control; but the best sort of teacher is arguably not the one who feigns honesty, fairness and self-control but the one who actually is honest, fair and self-controlled. From the virtue ethical

> viewpoint, the aim of professional ethics should be to produce virtuous teachers, rather than practitioners of 'role virtues'.

The same argument might well be made about mediators. Simple role adoption is not how some of the leading ADR authorities see their work. For example, Roberts's (2007, p.50) study of experienced mediators found that many of her informants identified their own patience as an important personal attribute that enabled them to mediate. Lindstein & Meteyard (1996, p.9) identify courage and directness as requisite mediator qualities. Bowling & Hoffman (2003, p.14) describe being better able to 'bring peace into the room' when they are feeling at peace with themselves and the world around them. Vindeløv (1996, p.224) goes even further:

> "Whether we like it or not, behind our work as mediators lie assumptions about what we mean by a 'good life', understood as a *meaningful* life, not necessarily an easy, successful and rich life, but a life which is based on an *interested and responsible relationship* with its context." (emphases original).

The above accounts do not suggest that the mediators concerned have adopted certain desirable traits in order to function in their role – although it is of course likely that they do this at least some of the time in practice. Reflecting on these authors' comments, it appears instead that at least some have sought to undertake work as mediators in order to give primacy to the expression and cultivation of their dispositional (aretaic) qualities, rather than to serve deontic role principles – important though these are. Similar factors may of course be true of those practising in any other field or profession.

Does this leave open the possibility that some mediators might claim moral superiority? As with all endeavours, and given the ubiquitous nature of human foibles, the answer is probably 'yes' – some people, sometimes, may. But it is also important to insert a caveat here: Benjamin (2004) points out that mediation is, at heart, deal making, and many past dealmakers were historically considered outright swindlers and pragmatic opportunists, lacking scruples. He observes that there remains a strong cultural antipathy and resistance to negotiation and mediation. Although writing in the context of the United States, Benjamin's comments resonate in this jurisdiction, given the evidence of considerable public resistance to settling matters through private dispute resolution processes, especially mediation (Moore & Brookes, 2017; Ministry of Justice, 2018). Further, Honeyman (1988, p.150) writes of the mediator's need to be adept at discerning complex game-playing behaviour, which suggests a certain lack of innocence so far as the mediator's own character is concerned. Nevertheless, I suggest that this should not invalidate mediators' pursuit of Aristotle's *eudaimonia* (human flourishing) any more than that of anyone else who enters public service.

Which virtues?

Virtue ethics in the so–called helping professions may be conceptualised by a complicated, fuzzy, Venn–type diagram. Establishing a taxonomy of mediation virtue ethics warrants empirical investigation, but this does not yet appear to have been undertaken and is unlikely to be straightforward if it were empirically investigated. For example, impartiality may signify the mediator's virtuous commitment to scrupulous fairness, demonstrated by their ability to treat both parties equally. Yet those who seek entry to mediation practice, which typically positions practitioners as being above the fray, can have their own unresolved conflict–avoidant tendencies, which may potentially impact their work (Benjamin, 2001). A virtuous concern for justice may be expressed by promoting respectful discussion of opposing views, but is theoretically deficient unless also accommodating a systemic understanding of how disputants interact and negotiate. At best, advancing the need for virtue ethics commits mediators to delivering the best practice they can, for the best reasons possible. At worst, there is always the danger of unexamined motives and values.

So, where should mediators look for professional guidance? In 2014 the Jubilee Centre published a Research Report (JCRR, 2014) setting out empirical support for virtue ethics as a promising contributor to character-driven legal education and morally–strengthened lawyers' conduct (p.4). This study of lawyers' self–reported virtue ethics is a promising starting point for mediators, although the report does not mention ADR. The findings show considerable agreement between experienced solicitors and barristers when identifying lawyers' top six personal values – fairness, honesty, humour, judgement and perseverance are listed in roughly the same order, with kindness and a love of learning in sixth place, depending on discipline. Aspirational virtues attributed to 'ideal' lawyers (p.15) are broadly the same. One notable exception is counsels' mention of idealised bravery, arguably also essential for those venturing into mediation practice. It is unclear whether the JCRR's informants' responses illustrate Swanton's (2007) 'role' argument, or meet Carr's (2007) more exacting criteria in terms of determining character virtue ethics in professional activities.

It is challenging to untangle the strands of mediation virtue ethics. Mediation is not the practice of law. While lawyers' virtue ethics may offer some useful markers, they represent qualities essentially attuned to a lawyer's primary duties – namely to the court, and the zealous pursuit of their own client's interests. Certain authorities (Honoroff and Opotow, 2007, p.168), believe that medicine's moral thinking is more apposite to mediation, although they do not mention virtue ethics as such either. Legal virtue ethics are certainly not unproblematic in their own right; neither can they easily address mediation's fundamental loyalty dichotomy and the many other discrete issues faced by ADR practitioners. Given the apparent paucity of research concerning mediations' virtue ethics, the virtue ethics suggested below are therefore offered unranked, and very tentatively.

Beneficence, non-malfeasance, autonomy, justice and fairness

ADR has won government endorsement in many jurisdictions. Judicial encouragement promotes mediation as beneficial to the parties, helpful for the disposal of cases in the public interest of avoiding cost and delay, and is therefore deemed 'good' in many circumstances. The global mediation community generally appears to endorse non-malfeasance ('do no harm'), despite interpretive problems when it comes to what might considered damaging (Macfarlane, 2002, p.83). Mediators' virtue ethics are likely to promote clients' autonomy and self-determination, expressed in the mediator's endorsement of the parties' right to author their own outcomes.

But there are cogent arguments against private ordering and informal justice, with some critics viewing ADR as inherently harmful to justice concerns and the rule of law. Settlement for the sake of peace may not be a beneficial outcome, which raises the question of whose good is promoted in conflicts? Much has been written about preserving the democratic right to a fair trial, and the necessity of evolutionary precedents in common law jurisdictions. Yet it is questionable whether either party 'wins' when litigation results in the tragedy of the commons, especially where families and children are concerned. Further, judicial processes and precedents might not meet the parties' expectations of fairness in mediation: feminists such as Nussbaum (2001) question Rawls' (1971, restated 2001) 'justice as fairness' when applied to the family. Men and women alike complain about certain legal rulings, such as departures from equality or other determinations they deem unfair, even if for different reasons.

Trust

People in conflict can be rightly suspicious of facilitators they do not already know and trust. The notion that impartiality and neutrality encourage participants' trust is not totally supported by communitarian–oriented contributions to the ADR literature [Wehr & Lederach, 1991). Trustworthiness has to be experienced and built, not merely assumed as a given. Trust takes time to establish, is easily breached, and may need to be earned by the mediator through painstakingly overt demonstrations of fealty to *both* parties, and parity of respect for each (for example, through managed turn-taking and the monitoring of equal 'air time').

Perseverance, fortitude and generosity

Perseverance and fortitude are probably needed by mediators and parties alike. Negotiations can be exhausting, even when going well; generosity can be sorely stretched in pursuit of settlement. The performance demands of equitable conflict management make considerable demands on both mediators' and parties' self-control. Baumeister et al's (1998) strength model predicts that self-control is a finite resource, the exercise of which results in ego–depletion and weariness, which then require counteraction through rest or relaxation.

There is a delicate pivot between giving up the search for a solution too quickly and going on too long. Put colloquially, it's usually best to quit while you're ahead.

Compassion

Compassion is perhaps one of the most basic virtues that might be expected of mediators. Etymologically, compassion is a noun of action, derived from the Latin meaning 'with-suffering'. According to the Oxford English Dictionary, 'compassion' sometimes appeared historically as a transitive verb – someone *compassions* someone else, or their plight – although this usage is now considered archaic.

People who take up mediatory roles inevitably bring with them their own experiences of conflict, both positive and negative. As noted above, aspirant mediators may enlist for training notwithstanding unresolved difficulties in distinguishing their own needs from their motivation to engage in other people's conflicts. No one is entirely free from mixed motives, but unacknowledged psychological and emotional drivers can be dangerous, risking the possibility of their projection onto other people or situations as suggested by certain psychoanalytic theories.

References to psychoanalysis are contentious in ADR circle; there is a longstanding debate as to whether or not mediation is indeed a therapeutic process (for example, Amundson & Fong, 1993). Even when adopting a model where a therapist is engaged to work separately with the parties alongside the family mediation process, mediators are not free from boundary concerns. As Haynes (1982, p. 11) notes:

> "… the mediator alternates between mediation and therapy and, therefore, needs to know the perimeters – where mediation ends and therapy begins. At what point does the therapeutic activity take over and replace mediation rather than enhance it?"

Concerns about projection cannot necessarily be eliminated, even where mediators adopt what they see as purely facilitative roles. It is unrealistic to expect any adult to fully separate their personal history from the demands of their work, whatever that might be. However, acknowledged and understood – insofar as anyone is ever able to do this about their own lives - someone's background can be their greatest strength, and personal suffering may be the very thing that best equips them for the tasks ahead. This concept has its roots in the story of Chiron in Greek mythology, later conceptualised as the 'wounded healer' as found in the work of Jung (1951: 116), Adler (1956: 18-19) and Frankl (2004: 116-119).

Reviving the use of compassion as a transitive verb repositions the mediator as a 'with-sufferer', rather than a distant intervenor who is remote, untouched, and untouchable. 'Compassioning' also differs from empathising: it involves joining with the parties in their distress, rather than demonstrating the less intense sense of understanding and appreciation

conveyed by the word 'empathy'. To compassion the parties is to allow oneself to impart to them something of one's own 'with-suffering' in managing their dispute, while holding in check any need to inappropriately self-disclose or cross over alignment boundaries.

Virtuous curiosity, the pursuit of excellence, and the humility of 'not knowing'

Curiosity does not mean prurient nosiness; rather, virtuous curiosity manifests as respectful enquiry, as wilfully free of as many assumptions and stereotypical value judgements as possible. A virtuous commitment to excellence means valuing professional development for its own sake and the desire to acquire knowledge and skills for oneself and others at the highest level possible. Yet there may be another, less tangible ADR virtue, arguably not coterminal with patience, party autonomy, or self-management. It is virtuous humility in the form of *not knowing*, the tolerance of uncertainty and the possible personal discomfort of sitting alongside the parties while they reach their own conclusions, in their own way, at their own pace, without one's own obvious assistance. This does not mean abandoning participants to their fate or overseeing unconscionable outcomes. Rather, it reflects the mediator's calibrated resistance to taking over, to seizing control through unwarranted interventions, to yielding to seemingly benign professional desires to be reputed a successful dispute resolver – even to eschewing the very human need to be needed.

What philosophical construct might inform the practice of ADR virtue ethics?

Mediation ethics will remain impoverished unless ADR advances beyond the inadequate architecture of conduct codes. Every dispute has unique features which will exercise the mediator's personal discretion and values. Standards devised to regulate practitioners' conduct cannot provide specific answers to every issue that might arise: at best, standards offer the clearest guidance when determining what mediators should <u>not</u> do. Even then, standards may have to be honoured in the breach, as Macfarlane (2002, p.65) argues so persuasively. Ultimately mediation involves the building of multilateral relationships between the parties and the mediator, in which process and content eventually become virtually indistinguishable.

Discussion of the vast panoply of philosophical constructs available is not possible here, except to think in terms of which might best accommodate mediation's dichotomy dilemma and the virtue ethics which might be expected of ADR practitioners. Ricœur's (1992) philosophical thought includes the concept of the caring conversation, 'practical wisdom inventing conduct that will best satisfy the exception required by solicitude…that is, the exception on behalf of others'. The caring conversation, hallmarked by solicitude, provides a framework for the outworking of mediation virtue ethics. Writing as an environmental philosopher, a discipline similarly co`ncerned with competing needs, rights and obligations, Utsler (2009, p.174) here endorses Ricœur's philosophical intention in *Oneself as Another,* which Utsler construes as:

> 'a most profound way of considering…the dialectic of the self and the other–than–

> self constitutive of personal identity that is not merely in comparison with the other. This dialectic is such that "the selfhood of oneself implies otherness to such an intimate degree that one cannot be thought of without the other, that instead one passes into the other"'.

Conclusion

Rather than rejecting virtue ethics, ADR ethicists might consider the conclusion reached by Grossman (2002, p.98):

> 'Particularly in a global market, a profession's ethics have to function at a broad societal level which seems, on the face of it, to be difficult to reconcile with an ethical approach whose primary focus is the life and character of individual agents. However, virtue ethics leaves open the door to the idea of professionalism which is not independent of an idea of why professions emerge and what they are for'.

Pathways meander in mediation ethics, with the tangle of virtues and issues never more than a footstep away. Even the mediator's own values may not look static: the blessedness of the aspiring peacemaker; the pragmatics of the deal broker. In more explosive disputes, sometimes this is as good as it gets. In the absence of a more useful thesis, Ricœur's (1992) caring conversation and ethical intention — 'aiming at the "good life", with and for others, in just institutions' — might offer the best philosophical framework within which mediation's virtue ethics can be developed and enacted.

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