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Is mediation now a profession?

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Reflections on mediation practice

Is mediation now a profession?

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Introduction

In seeking to explore the question whether mediation is a profession, a dozen criteria of the words 'profession' and 'professional' will be canvassed from contemporary sources: see Table 1. The criteria will be listed, divided into 'general' and 'special', and three clusters identified. Then those for the special sense will be applied to mediation as a practice.

There are general and special senses of 'professional' and 'profession'.

I suggest at the start, without extensive argument, that criteria 1–4 are part of the more general, non-normative, commonly cited notion: *A professional job is one done for a living, or for money, expertly, and often as a career*.[1]

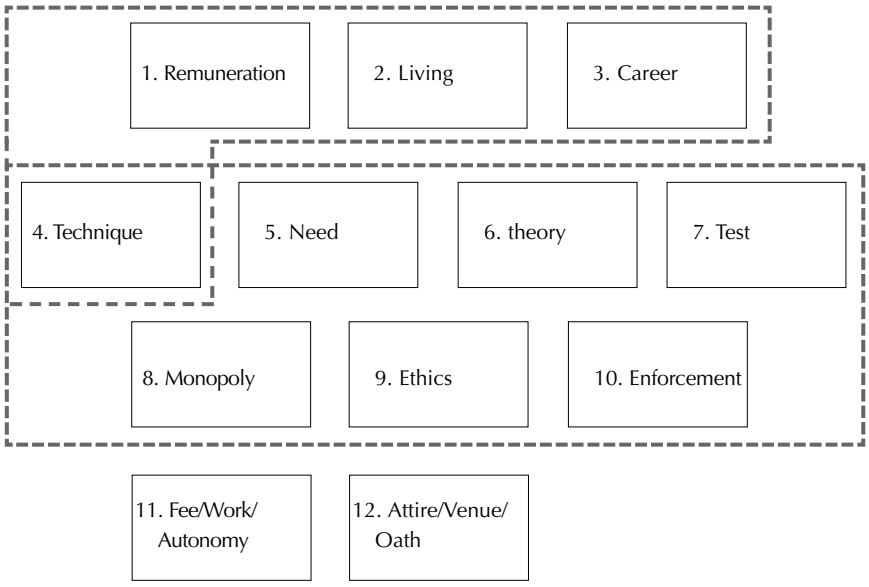
A sub-set of the criteria, senses 4–10 (in which *technique* again appears) are connoted in a more specialised usage and they capture the main normative marks of a profession in this narrower sense.

The whole set 1–12 divides roughly into three clusters: theoretical, ethical and political; see Figure 2. My intuition is that because established professions in the special sense hold the theoretical and practical group expertise and pass it on to the next generation, they can meet important normatively and ethically warranted needs through self-governance. They can then argue for protection and preservation by society through monopoly concessions and other political benefits. This gives criteria 4–10 their prominence. But the intuition and the correlative suggestion is argued elsewhere.[2]

Table 1: The criteria of professional activity to be discussed

CRITERION NUMBER	DESCRIPTION	SHORTHAND REFERENCE TERM
1	Activity being done for money	Remuneration
2	Activity done for a living	Living
3	Activity engaged in as a career	Career
4	An activity done well technically	Technique
5	Worthwhile activity satisfying a human need	Need
6	Based on complex theoretical foundations	Theory
7	Competence tested at admission and in continuing education	Test
8	Enjoying a socially conferred monopoly	Monopoly
9	Following a code of ethics and conduct	Ethics
10	With code of conduct enforcement	Enforcement
11	Autonomous fee-setting and pro bono work	Fee/Work Autonomy
12	Special attire and/or venue or oath of office	Attire/Venue/Oath

Figure 1: Criteria for general and special sense of 'profession'



Specialised sense of 'profession'

When the word 'profession' is used in the narrower, normatively positive sense, it captures only some of these criteria. It is closer to 'vocation' as will be explained below. If an activity's focus is a normatively conceived *need*, it begins to meet the more specific, normatively positive, sense of profession/ professional outlined further below.

Besides criterion 4 already mentioned, the normative sense of profession connotes at least criteria 5–10 of the following set:

Criterion 5 — Need

Professional activity is a **worthwhile activity**, with a worthwhile determinate goal, performed with expertise as alluded to in criterion 4 above, and often meeting 1–3 above. The practice is worthwhile in part because it **meets a particular ethically warranted human need** like health, justice or security.[3]

Criterion 6 — Theory

The practice has some **complex established theoretical or scientific foundations**[4] to be passed down from previous practice.

Criterion 7 — Test

Apprentice practitioners are to be **tested for admission** to the professional group in the application of standardised areas of the theory, on agreed answers generated in accord with it, and in observed performances measured by expert practitioners of theory, as a condition of admission to the group practice. Mandatory **continuing education** is required to assure standards are met.

Criterion 8 — Monopoly

The practice is controlled by certified self-governing peers in a peak body or an institution with a **socially conferred monopoly** and control with respect to theoretic content, admission, discipline and expulsion, and perhaps remuneration.

Criterion 9 — Ethics

To further this remit of authority there will be:

(a) a **code of professional ethics** which sets out the ends of the practice, and

(b) a **code of conduct** which sets out specific prerogatives and duties, like fiduciary duties of representation, confidentiality, disclosure and informed consent and impartial/disinterested arms-length relation to clients.

Criterion 10 — Enforcement

There is **enforcement** of the code of conduct with sanctions, including fines and gazetted expulsion, and the code can form the basis of liabilities for suing professionals for malpractice.

Although I think that they are more peripheral, there are some further criteria sometimes mentioned.

Criterion 11 — Fee/Work Autonomy

There is **self-setting of fees** and **working conditions** and often some expectation of institutionalised **pro bono service** to those unable to afford minimal or threshold level need satisfaction as specified by criteria 5, 8, and 9.

Criterion 12 — Attire/venue/oath of office

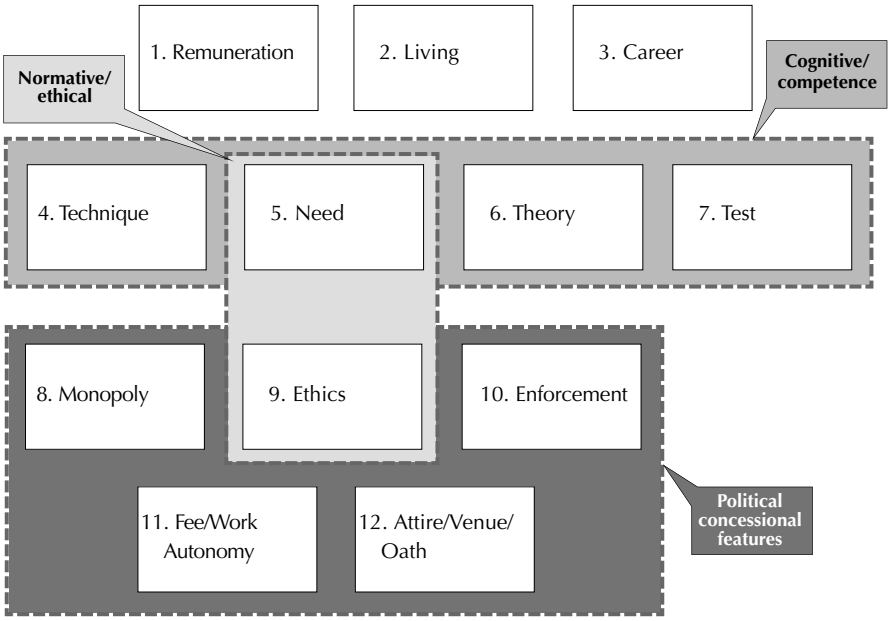
There may be a uniform or designated **attire and venue** to signify one's status and rank, and a kind of official place of operation like a surgery, court, laboratory, or church.[5] There may be an **oath of office,** loosely modelled on the Hippocratic oath, or a swearing in ceremony.

Clusters within specialised criteria for 'profession'

As mentioned above, the criteria for professions fall roughly into clusters:

- **cognitive/competence** — criteria 4, 6 and 6;

Figure 2: Clusters within criteria for special sense of 'profession'



- positive **ethical/normative/social or moral desirability** — criteria 5 and 9; and
- possessing a **political concession, recognition, and duties** — criteria 8, 10, 11 and 12.

Some criteria, for example, 1 and 2 (remuneration and degree of occupational involvement), do not fall under any one cluster, and these connote the broader notion of 'profession'. They may indeed be now disconnected remnants of an older more specific notion. They are insufficient to capture the special notion of profession and are not crucial to an activity being professional in the more specific sense. I now review the clusters.

Cognitive/competence — Technique, Theory, Test

Professional activity is action done well technically (criterion 4), with theory determining technique. The practice has some complex, established theoretical foundations (criterion 6), expressed in an educational curriculum, to be passed down. Apprentice practitioners are tested in the practical application of standardised parts of the theory before admission to the professional group, attaining success in giving agreed answers in accord with theory, and in observed performances mimicking and measuring up to standards generated by the expert practitioners of theory. This is a condition of admission to the group practice (criterion 7). There is mandatory continuing education (criterion 7).

Normative/ethical and social desirability — Need, Ethics

Professional activity is worthwhile activity (criterion 5), with a worthwhile determinate public goal, performed with expertise, as alluded to above; and usually meeting the other criteria above. The practice meets a particular ethically-warranted human need like health, justice or security, in a complex, not easily duplicable way. Professions offer specific, competitively testable, diagnosis of and therapy for problems of normatively-warranted need satisfaction.

A code of professional ethics (criterion 9(a)) sets out the ends of the practice and a code of conduct sets out specific prerogatives and duties (criterion 9(b)). Professionals must fulfil some fiduciary duties as noted above, care of client interests, neutrality or other duties assigned by the profession and recognised by society through the state. They are conferred on the condition that the need-satisfaction specified is achieved.

Political concessional features — Monopoly, Enforcement, Autonomy, Attire/Venue/Oath

The practice, through its representative institution or peak professional body, enjoys some institutionalised monopoly, politically conferred (criterion 8). It is controlled by certified self-governing peers in an institution, with a monopoly control with respect to theoretic content, admission, discipline and expulsion and often remuneration. Mandatory continuing education is provided to assure standards are met, and competitive therapies are excluded. There is state-backed enforcement of the code of conduct (discussed 9(b) above), with sanctions, including fines and gazetted expulsion (criterion 10) and the code can form the basis of liabilities for suing professionals for malpractice.

Professionals set their own fees, and there is some expectation of institutionalised pro bono service to those unable to afford minimal or threshold level need-satisfaction (criterion 11) as specified by criteria 5 and 10: for example, government-funded Legal Aid or Medicare.

There may be an attire and designated place of operation (criteria 12): for example wig, uniform, insignia, dog collar, court, church, chambers, consulting rooms.

Application of analysis to 'mediation'

The word 'mediation', like 'profession', has broad and narrow, descriptive and normative senses, and cognitive, moral and political criteria.

The broad notion of mediation connotes: *any conflict resolution process aimed at discussing differences or some outcome of conflict reduction, assisted by a third party.* This says a little about ends and processes as means, but not much. There is so far no specific intended or actual normatively positive outcome assigned in this definition, even agreement, and mediation can include voluntary or coercive court-directed processes. Mediation could take place between mafia or criminal groups over territory for exploitation.

Applying the criteria 1–4 above, if pursued competently, regularly and well, for remuneration, mediation is clearly a profession in the broad sense. The broader term 'alternative dispute resolution' partly overlaps with mediation in this sense.[6]

For professionalisation in the special sense captured in criteria 4–10 to apply to mediation, further conditions should be understood to be necessary, underpinned by theory, morality and politics. This will narrow the concept's meaning and may exclude some worthwhile practices which meet the broad definition. But can criteria 5–12 be met? Should they? Given the above, is mediation a profession in the special sense and is it 'professionalisable'? Would it be desirable?

These are big questions that will not be resolved here. In the rest of this article, however I want to briefly consider the application of criteria 5–12 above to mediation, beginning with the first: the cognitive/competence cluster and the matter of a stipulated theoretical and practical curriculum.

Cognitive/competence — Technique, Theory, Test

According to criterion 4, for professions there must be technical expertise and criteria 6–7 imply that technique is suspended from theory.

Theory and *test* are usually to be met via a range of accredited tertiary qualifications being deemed acceptable as admission to practice. Mediators can clearly meet technical expertise if its processes are counted as 'applied technique', but by reference to which *theory*, and in what way? It depends on how mediation is more closely defined, and on what special *theory* or theories if any it draws. Theory ties in with purpose: as *bodily health* is the broad inclusive goal of *medicine* (setting the theoretical agenda of medicine), so arguably *interpersonal peace* or *peace between persons* is the broad need-satisfying goal of *mediation*.

Here 'peace' would be defined positively and negatively, as inner and outer. 'Peace-making' could include as a branch mediation — the 'management, settlement, resolution of conflict',[7] not necessarily full agreement. But mediation shares the goal of 'peace with justice' with other professional practices like law, policing, corrections. Tom Fisher suggests 'restoring a constructive atmosphere in the room' as a definition. Sir Laurence Street stresses the 'meeting of minds' and suggests the mediator guides the negotiation between the parties in detached and impartial appraisal. Susan Douglas and others stress protecting the self-determination of the parties, and others dwell on neutrality. Perhaps Bush and Folger's emphasis on facilitation of mutual respect and empowerment is the core goal.[8]

Taken broadly, mediation seeks an ethical or just interpersonal peace, including intra- and inter-organisational peace, by distinctive methods of some sort to be determined. The distinctive peace-making techniques which would figure in any claim to professional status would presumably have to be of the kind outlined in standard manuals of facilitative and settlement mediation. But that distinction might be crucial, with facilitative seen as the core. To distinguish itself from other peace-seeking practices as a separate profession, from law and negotiation and even collaborative law, it would need some clearer differentia.

Could mediation approach this kind of professional status based on meeting the established theory/ technique/test?

If it wanted to go this way, what core topics, and at what level of technical difficulty, would nominated subjects in 'Mediation Studies' under *technique/ theory/test* be appropriately constructed?

This would concern the relation of some extant body of theory or theories to stipulated curriculum content. Corresponding to anatomy, physiology and bio-chemistry in medicine; to torts, contracts or property in law, what would mediation require? Which Faculty would house it?

Its near neighbours and models would be the emergent degrees in social work and counselling. Some sub-branches of the social science subjects, like anthropology, including primatology, as Mary Clark and Lawrence Boulle suggest; sociology, moral philosophy, psychology, politics, economics and history seem obvious as initial subjects.

ADR DEVELOPMENTS

Fair Work Bill 2008

As part of the second phase of the Labor Government's workplace reforms, the Fair Work Bill 2008 was introduced to Parliament on 25 November. As part of the Bill, Labor has re-introduced the requirement for parties to bargain in good faith when negotiating enterprise agreements. The Bill proposes that bargaining representatives must:

- attend and participate in meetings at reasonable times;
- disclose relevant information (other than confidential or commercial sensitive information) in a timely manner;
- respond to proposals made by other bargaining representatives in a timely manner;
- give genuine consideration to the proposals of other bargaining representatives and give reasons for the bargaining representative's response to the proposals;
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Under the good faith bargaining requirements, bargaining representatives are not required to make concessions during bargaining or reach agreement on the terms that are to be included in the agreement.

If one of the parties does not comply with the good faith bargaining requirements, then the other party may apply to Fair Work Australia to make a workplace determination.

Peace Studies depends partly upon Buddha, Socrates, Jesus, Tolstoi and Gandhi, M L King and Philosophy of Non-violence, so religious studies/philosophy are in the mix. Game theory issues around the prisoners' dilemma and other paradoxes would need to be included through study of the main figures in that field, and Primatology. More specific applied subjects on conflict resolution skills formation and areas of application like commerce, criminal and family law and political domains, with electives to suit the student's interests, would follow.

It is not impossible to sketch this curriculum and many tertiary institutions already offer credentials which could be recognised, provided that a rough consensus was achieved by practitioners through peak bodies on the purposes and scope of the practice. This would also require explicit recognition that implementing values in its practices is relative to domains (like family, commerce, and legal) and to the stages of conflict development.

As with medicine, within mediation in the general sense, there are different professional practices which meet the broader definition. To be special and professionally distinctive, however, mediation would have to be recognised as 'special', something like western medicine.

I share with many others[9] the belief that in the special sense needed for professionalisation, the mediator's special normative and constitutive role is to facilitate: to help the parties to relate to one another respectfully, recognise each other, talk to each other about the problem, and assist them to seek mutual empowerment, not necessarily to attempt to fashion a remedy. Settlement and negotiation and other ADR methods would be contingent means to this unwavering goal. If settlement is taken to be mediation's constitutive goal, as it often is, mediation would simply be a sub-species of negotiation, and as Peter Adler has argued, negotiation is not a profession, but a craft driven by a set of indeterminate universal values.

It may be a mistake to define a mediator as the National Standards do as one who attempts to 'manage', 'settle' or 'resolve' ('fix') the conflict between parties, with a definite, issue-specific, agreed outcome on that issue, which is superior to the pre-existing state of affairs. That need not be taken to be the defining goal.

The focus perhaps should be upon the on-going relationship between the parties, for example, parents re children's welfare matters. It seems to maintain the special differential goal of mediation we must build the facilitative model into the theory requirement in criterion 6 and treat the settlement phase as part of the tool-kit, not the essence of mediation. The other social ethical and political criteria would flow from the facilitative core.

We could try to supply from theory some specific characterisations of the domains and stages at which facilitative mediation as core practice can bring in mediation methods of other specific types as appropriate. We need not rule the 'settlement' emphasis out.

Alternatively, and I think less plausibly, we might treat facilitation and settlement as complementary alternatives which can be conjoined as species in a loosely defined generic definition and applied at different stages, and in different domains as suggested.[10]

According to *test*, apprentice practitioners are tested before admission to the professional group in the application of standardised areas of the theory. They will be admitted to the group practice on success in giving agreed answers in accord with theory and observed performances measuring up to standards generated by the expert practitioners.

Mediators could bind themselves to a required professional test, like a bar exam, but with a practical component. Many bodies already provide mediation training of this at different levels. The Australian practice is moving under the pressure of Federal and State statutes (like the family law provisions for pre-court mediation) toward certification and accreditation.

As is the case for US State bar exams (though not in US mediation practice) there could in principle be some equivalent standard test for mediator competence. The professional bodies like IAMA and LEADR, or a national peak body, could adopt a role parallel to those of accounting's peak bodies like the Institute of Chartered Accountants and CPA.

Normative/Ethical and social desirability — Need, Ethics

If as noted above, mediation is focused on the need for ethical peace-making in various domains using the facilitative model as basic and as its constitutive targeted need-satisfier, and other different methods as contingent tools at different stages, then mediation will meet this 'need satisfaction' criterion (criterion 5). A moral philosophy is presupposed of the sort I have described elsewhere.[11]

There are codes of conduct and national standards of practice (criterion 9). National accreditation standards exist and special ones for special practitioners like Family Dispute Resolution Practitioners (FDRP). Mediation must fulfil a code of conduct covering confidentiality, information and consent, neutrality/impartiality and arms length requirements of a fiduciary nature. Duties would be specified by society, through the state.

At present due to the matters canvassed below in the discussion of criterion 8 (monopoly), enforcement of some of these features is at least formally and explicitly absent, but there are in practice many of the features of a code of professional ethics or conduct setting out prerogatives and duties. A detailed enforced code could be constructed on the lines of those for other professions. It is close to a definitional matter, for example, that the mediating third party is impartial on the issues, with no conflicting interest arising from the substance of the issue; and the third party is impartial and at arms length regarding (extra-issue) relations to the parties, or their interests.

Political concessional features — Monopoly, Enforcement, Autonomy, Attire/Venue/Oath

Monopoly (criterion 8), an enforceable code (criterion 10), and sanctions are absent at present.

I noted above that *theory, technique and test* are capable of being met with a range of accredited tertiary qualifications being deemed acceptable as admission. Perhaps a State or federally agreed way of assessing

practical ability, that would enable a case for monopoly to be made on the grounds of quality control, protection of the public and self-governance, parallel to that which is made for other professions, could be devised.

As noted, there are now national accreditation standards, but these are not a requirement. Individual organisations accredit their mediator panels, and set some conditions like insurance, complaint handling and continuing education.

A nationally recognised code of ethics, or of conduct for mediators exists, but there is no detailed enforceable code of conduct with sanctions, including fines and gazetted expulsion and specifying liabilities for malpractice. (There are league tables of surgical performance in some nations already, but could a mediator do such a bad job that they were liable to be sued? They could if they were giving advice.)

There are codes of conduct and national standards of practice, but it is for the individual accrediting body to apply them. There are special ones for special practitioners like FDRPs. Mediators must fulfil a code of conduct covering confidentiality, consent and arms length requirements of a fiduciary nature.

Due to absence of monopoly, enforcement of some of these features is at least formally and explicitly absent, but many of the features of a code of professional ethics or conduct, setting out prerogatives and duties, do exist. An enforced code could be constructed.

Fee-setting and work autonomy (criterion 11) and attire/venue/oath (criterion 12) are the least central features.

Fee setting by mediators themselves is common, but not universal. Some expectation of institutionalised pro bono service to those unable to afford minimal or threshold level need satisfaction is evident in Legal Aid practices. At present in NSW and ACT Community Justice Centres (CJCs) and other mediators already do work which is modestly paid, and some is done unpaid.

There is no attire or special place of work for mediators, but that is also true of accountants and architects.

Conclusions

Mediation is a profession in the broad or general sense, and close to meeting the three criteria clusters of the special sense. It meets theoretic and moral criteria, but not the political criteria, such as monopoly status, licensing and admission control through competence testing; mandatory continuing education, and gazetted discipline and expulsion for malpractice. However, it is within range of qualifying in this third area.

If society considered 'quality control' important here, mediation could qualify as a 'profession' within the special sense. Quality assurance brings ethical and social status. Mediators meet a particular ethically-warranted human need for facilitating peace in a distinct way, relative to domains and stages in disputes. If focused on peace with justice and a paradigmatically facilitative peace-making process as its constitutive aim; and other forms of ADR as contingent tools of the practice, to be used in different domains, mediation can meet the 'need satisfaction' criterion.

There are theoretical foundations, as required by the *theory* and *test* criteria, in philosophy, religious studies, game theory and the relevant social sciences. The theoretical foundations are not yet fully determinate and not all are standards are securely in place.

There are not yet institutionally agreed curricula and practice entrants need not be tested for mediation practice to occur. There is no peak body with authority to control the theoretic content, test for competence prior to admission, punish malpractice, or expel; and no monopoly institution monitoring agreed standards/codes of ethics and conduct or volunteering to provide service to indigents. Continuing education is not mandatory across the profession.

For the more complex prestige-conferring special notion to apply clearly to real practice, some definitional work and theory specification may also be needed. Though the gaps noted can be filled, some problems of definition and self presentation remain and these need solution if the step of professionalisation is seen as desirable and is to be successfully taken.

The possible downside of professionalising is that expert unlicensed practitioners could find themselves out of work. But as folk

medicine, alternative medicine, indigenous law and custom flourish alongside standard western practice, so perhaps could informal mediation and indigenous and other alternative unregistered forms of mediation, formal and informal, continue.

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Endnotes

1. Criteria 1 and 2 and criteria 2 and 3 are only slightly different, but perhaps worth distinguishing. What ministers, priests and nuns do is professional, 'done for a living' but not for the money; entering golf tournaments with money prizes can be done by an expert amateur in an ad hoc manner, without being done for a living, so 1 and 2 are not the same. Doing a job professionally sometimes means 'as a career', or in a committed, regular, or frequent manner. But if a 'career' can include continuous/frequent/ regular committed activity without being publicly avowed *as* a career, then a professional safe cracker, burglar and hit man are professionals in all these senses. Even if they have no career, they are professional in criteria 1, 2 and 4. A professional job is one done for a living, for money, and done expertly, and often as a career. In this broad, non-normative sense of 'professional', the end-goal of the activity itself need not be assumed to be worthwhile.

2. D Ardagh, 'Global professional service providers: Some ongoing tensions' (2005) 6 *Australian Journal of Professional and Applied Ethics* 2, 56–74; D Ardagh, 'The professional-isation of HRM and Codes of Ethics', Chapter 9 in A Pinnington, T Campbell, R Macklin (eds) *Human Resources: Ethics and Employment* (2008) Oxford University Press.

3. J Oakley and D Cocking, *Virtue Ethics and Professional Roles* (2001); also D Koehu, The Ground of Professional Ethics (1994) Routledge.

4. J Callahan, *Ethical Issues in Professional Life* (1988); M Bayles, *Professional Ethics* (1989).

5. See for further discussion and elaboration of these and more criteria see Ardagh above note 2.

6. The fact that there were books in the 1970s call *The Magic of Mediation* and many mediators are presently unpaid volunteers shows that remuneration can be absent. It suggest the possible pressure of other and more specific narrative and theoretical conditions.

7. National Standards 2007.

8. In Medicine, one thinks first of Western medicine, but there are also Alternative medicine, Chinese medicine, Chiropractors, and Osteopaths; and resultant controversies and schools which lead to contending peak bodies claiming professional status. Still, Western medicine, based on physical science, has prime position and enjoys professional status, and correlative social and political preference. Anglo-American Adversarial law is also dominant.

9. Bush and Folger, *The Promise of Mediation* (1996).

10. On this see Anne Ardagh, 'Repositioning the profession in ADR services: The place of collaborative law in the new family law system in Australia,' *Queensland University of Technology Law and Justice Journal*, forthcoming.

11. See Ardagh above note 2.

Book Announcement

Mediating with Families

Linda Fisher • Mieke Brandon
Mediating with Families
(2nd Ed, Lawbook Co. 2009)
ISBN 9780455225524

Mediating with Families (2nd edition) offers unique insights into the theory and practice of family mediation in Australia. The text reflects on the many different relationships in families, such as between same sex,de facto and married couples, parents and adolescents, siblings and their elderly parents.

Providing expanded commentary on pre-mediation and mediation processes, this second edition extends the discussion on child-inclusive practice, mediation of financial and property matters, and family violence.

This new edition also includes information on conciliation, collaborative practice, family law conferences, the role of lawyers in dispute resolution, and mediation by telephone. The authors closely examine amendments to the *Family Law Act 1975*, which require parties wanting to make a parenting application to attend family dispute resolution.

A practical tool for both beginners and seasoned practitioners, *Mediating with Families* (2nd edition) provides readers with an understanding of the important role played by language and culture in successful dispute resolution. Discussion on indigenous mediation, and on the differences that may arise when dealing with other cultural backgrounds, demonstrate the need for linking philosophy to practice.

Additional case studies, reflective exercises, and examples of mediator interventions expand and supplement those of the previous edition, and provide a valuable teaching aid.

These invaluable resources draw upon the authors' many years of experience as practitioners, trainers, supervisors and academics. They will enable readers to enhance their understanding of the mediation process and to transfer their reading directly into their own areas of work in dispute resolution. ●

A review of this book will be published in a forthcoming issue of the ADR Bulletin.