

2017

Mediation Ethics and the Challenge of Professionalisation

Jonathan Crowe

Bond University, jonathan_crowe@bond.edu.au

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Mediation Ethics and the Challenge of Professionalisation

Abstract

It is becoming more common to speak about mediation as a profession. This raises the question of what form mediation ethics should take in the professional era. This article outlines two ways of thinking about mediation ethics — the regulatory model and the practice model — and considers their suitability to address the challenge of professionalisation. I examine the main features of the two models, then compare them with some core characteristics of mediation as a dispute resolution process. I argue that while it is tempting to associate professionalisation with the regulatory model, the practice model offers some important advantages in the mediation context. I conclude that the mediation profession should aim to strike a balance between the two models, while generally emphasising practice over regulation.

Keywords

Regulation, Practice, Profession

Mediation Ethics and the Challenge of Professionalisation

JONATHAN CROWE*

Abstract

It is becoming more common to speak about mediation as a profession. This raises the question of what form mediation ethics should take in the professional era. This article outlines two ways of thinking about mediation ethics — the regulatory model and the practice model — and considers their suitability to address the challenge of professionalisation. I examine the main features of the two models, then compare them with some core characteristics of mediation as a dispute resolution process. I argue that while it is tempting to associate professionalisation with the regulatory model, the practice model offers some important advantages in the mediation context. I conclude that the mediation profession should aim to strike a balance between the two models, while generally emphasising practice over regulation.

I Introduction

Mediation is increasingly regarded as an emerging profession.¹ The defining characteristics of a profession have been widely discussed by sociologists and there is general agreement on some key yardsticks. These include institutionalised education and training; a body of specialised knowledge and expertise; professional licensing; workplace autonomy; a communal code of ethics; and peer-to-peer accountability.² Mediation in Australia now exhibits many of these features. Universities and other institutions offer specialised mediation training courses, many of which are designed in accordance with the National Mediator Accreditation System

* Professor of Law, Bond University. This article summarises arguments developed in greater detail in Jonathan Crowe, 'Two Models of Mediation Ethics' (2017) 39 *Sydney Law Review* 147. Parts of that article are reproduced here with the kind permission of the *Sydney Law Review*. Thanks to Francesca Bartlett, Mieke Brandon, Kate Curnow, Rachael Field, Diana Knight, Lola Akin Ojelabi, Olivia Rundle, Bobette Wolski, John Woodward, and the anonymous referees for helpful comments and suggestions.

¹ See, eg, Omer Shapira, *A Theory of Mediator's Ethics: Foundations, Rationale, and Application* (Cambridge University Press, 2016) 6–7; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 9 [1.7]; Conrad Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 *American Journal of Mediation* 39; Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 *Australasian Dispute Resolution Journal* 178; Rachael Field, 'Ethics for a Mediation "Profession": An Answer to the Neutrality Dilemma?' (2007) 10 *ADR Bulletin* 23; Forrest S Mosten, 'Institutionalization of Mediation' (2004) 42 *Family Court Review* 292.

² Cf Randy Hodson and Teresa A Sullivan, *The Social Organization of Work* (Wadsworth, 5th ed, 2012) ch 11; Shapira, above n 1, 5–6.

(‘NMAAS’).³ Ethical codes exist in the form of the Practice Standards associated with the NMAAS,⁴ as well as standards issued by state law societies and other bodies.⁵

There is, nonetheless, still some doubt as to whether mediation in Australia should be regarded as a profession in its own right. One apparent reason for this uncertainty concerns the lack of a formal and unified process for professional discipline. The national Mediator Standards Board (‘MSB’) is responsible for maintaining the Mediator Standards associated with the NMAAS, but it lacks the power to hear complaints or impose sanctions.⁶ Disciplinary matters are the responsibility of the Recognised Mediator Accreditation Body (‘RMAB’) to which the mediator belongs. However, the resulting framework is somewhat inconsistent. There are more than 35 RMABs and their complaints processes vary widely.⁷

It is tempting to think that a fully-fledged profession must have a single unified process for dealing with disciplinary breaches. However, I want to argue against placing too much weight on this assumption. My suggestion is that mediators need to distinguish two different models for thinking about professional ethics — the *regulatory model* and the *practice model* — and decide which path they wish to follow. This article examines the central features of these two models, before comparing them with some features of mediation as a dispute resolution process. I argue that the practice model offers some important advantages in the mediation context. I conclude that the mediation profession should aim to strike a balance between the two models, while generally emphasising practice over regulation.

II Ethics as Regulation

I will begin with the more familiar way of thinking about professional ethics, which I call the *regulatory model*. The regulatory model assumes

³ Mediator Standards Board, *National Mediator Accreditation System (NMAAS)* <<https://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>.

⁴ Mediator Standards Board, *NMAAS Practice Standards* (1 July 2015) <<http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>>.

⁵ See, eg, Law Council of Australia, *Ethical Guidelines for Mediators* (August 2011) <http://learnedfriends.com.au/getmedia/b72ee6c5-cbf4-4c8f-b170-cd7bc66fd5cf/Walker_Ethical-Guidelines.aspx>; Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators* (6 February 2003) <<https://www.resolution.institute/documents/item/2266>>; Law Society of New South Wales, *Revised Guidelines for Solicitors Who Act as Mediators* (1 January 2008) <<https://www.lawsociety.com.au/es/groups/public/documents/internetcontent/026438.pdf>>; Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (23 September 1998) <http://www.qls.com.au/files/3bb45e65-d423-4693-93cb-a7af00aeb539/standards_of_conduct_for_solicitor_mediators_280708doc.pdf>.

⁶ Mediator Standards Board, *How Do I Make a Complaint Against a Mediator?* <<https://www.msb.org.au/faqs/how-do-i-make-complaint-against-mediator>>.

⁷ Mediator Standards Board, *RMAB Contact List* <<http://www.msb.org.au/accreditation-bodies/rmab-contact-list>>.

that a professional community at a particular stage in its development will identify the need for shared standards of conduct. It will therefore draw on the wisdom of experienced members of the community to identify appropriate rules. These rules will be drafted by influential members of the profession and promulgated as a binding code. The standards contained in the code will be taught as part of a standardised accreditation process, often linked to licensing and enforced by legal regulations. Formal complaints about breaches will be adjudicated by a body of practitioners with the power to impose professional sanctions, such as suspension or withdrawal of accreditation.

This model is familiar from its adoption by the legal profession.⁸ The regulatory model can be seen in sociological terms as a natural outgrowth of the social influence of professions and, in particular, their more established members. Professions have historically asserted a monopoly over certain kinds of specialised knowledge and expertise.⁹ This tends to give rise to institutions that serve as gatekeepers of this knowledge and, by extension, admission to the profession itself. It therefore makes sense that professions tend to give rise to recognised bodies with the role of formulating and enforcing ethical standards. These bodies then also play a gatekeeping role in their ability to suspend or exclude people from the professional community.

The regulatory nature of professional legal ethics has been recognised and critiqued (using different terminology) by authors such as David Luban, William Simon and Christine Parker for the emphasis it places on professional autonomy over relational ethics and duties of care.¹⁰ A hierarchical model of self-regulation risks emphasising rigid rules of conduct, rather than recognising the ethical complexities of legal practice. It also risks privileging the perspective of the legal profession — or, more precisely, its most established and privileged members — over the needs of clients and other affected parties. The dangers of self-regulation for vulnerable stakeholders are increasingly well recognised by both scholars and policy-makers. Indeed, criticisms of the effectiveness of the state Law Societies in addressing ethical problems in the profession have resulted in recent years in significant regulatory powers being transferred to independent Legal Services Commissioners.

I want to suggest that the regulatory model tends to constrain the scope of ethical discourse within a profession in at least three important ways. First, it tends to yield a focus on *hierarchical* relationships between members of the professional community, rather than their duties of care to outsiders or each other. The regulatory model emphasises ethical codes of

⁸ See generally Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) ch 3.

⁹ Cf Hodson and Sullivan, above n 2, 266–8.

¹⁰ See David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988); William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998); Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

conduct that are formulated by expert bodies and enforced by professional organisations or regulators. This approach inevitably gives the sense that the ethical responsibility of practitioners consists in being accountable to these bodies. Ethical duties, although owed in theory to clients and other professionals, are more responsive in practice to the priorities and interpretations of the professional organisations that maintain them, and the disciplinary bodies who interpret and impose them.

A second feature of the regulatory model is that it tends to emphasise compliance with the specific rules and guidelines expressed in codes of conduct, rather than the broader principles or virtues of ethical practice. This yields what might be called a *formalistic* way of thinking about professional conduct, whereby the formal rules are seen as defining or exhausting the ethical domain. Professional ethics, on the regulatory model, tends to become juridified: the focus falls on determinate rules that can be applied and enforced by regulatory bodies. Ethical codes of conduct give rise to their own specialised fields of jurisprudence, attracting specialised advisors, advocates and scholarly authorities. The resulting ethical discourse tends to focus on what is necessary to comply with the rules and escape sanction.

Finally, the emphasis that the regulatory model places on centralised enforcement and sanctions gives the sense that ethics is primarily the responsibility of regulators, rather than the professional community as a whole. This suggests a *coercive* conception of professional accountability where practitioners obey ethical rules mainly due to the threat of sanctions, rather than seeing ethics as a shared and ongoing responsibility for which each practitioner is accountable to the other members of the profession. This feature of regulatory ethics risks giving rise to a kind of tragedy of the commons, where areas of ethical life not subject to centralised enforcement are viewed as nobody's specific responsibility and become neglected or ignored. The coercive dimension of regulatory ethics therefore risks undermining the voluntary dimension of ethical compliance.

III Ethics as Practice

I now want to introduce an alternative way of thinking about professional ethics, which I call the *practice model*. The practice model begins with the insight that snap judgments in response to concrete scenarios lie at the heart of ethical discourse.¹¹ Ethical standards, on this view, do not arise when they are formulated and announced by a body of experts. Rather, they emerge and evolve over time as members of a professional community respond to ethical scenarios. The decisions made in particular

¹¹ Cf Jonathan Crowe, 'Ethics and the Mediation Community' (2015) 26 *Australasian Dispute Resolution Journal* 20. See generally Jonathan Crowe, 'Natural Law and Normative Inclinations' (2015) 28 *Ratio Juris* 52; Jonathan Crowe, 'Levinas on Shared Ethical Judgments' (2011) 42(3) *Journal of the British Society for Phenomenology* 233; Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 103.

circumstances by members of the community are repeated and internalised when the same situations recur over time. These judgments are then shared and reinforced through communication with other members who may have had similar experiences. As a result, certain kinds of responses come to be widely shared within the group. The members of the group may then reflect upon these responses, expressing them as principles that are adopted as guides for future conduct.

We can add further depth to our understanding of the practice model by drawing on the work of the moral and political philosopher, Alasdair MacIntyre. Two of the central concepts in MacIntyre's moral and political theory are those of a *practice* and a *tradition*. He uses these two ideas to explain the purposive character of human action. All human action is directed towards certain goals and objectives deemed to be worth pursuing, but where do these goals and objectives come from? MacIntyre argues that this question cannot be adequately answered without paying attention to what it means to be part of a moral community. The goals and objectives we use to orient our conduct gain meaning from their role in wider social practices and traditions. MacIntyre explains his concept of a practice as follows:

By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.¹²

Practices, then, are social institutions that contain their own internal standards of excellence. These standards of excellence give rise to goods or values that members of the community aim to achieve when participating in the practice. Practices and goods, in turn, arise in the context of what MacIntyre calls a 'living tradition', which represents 'an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition'.¹³ Traditions, then, are always in a state of movement; it follows that practices and goods will evolve over time in response to changes in the wider tradition of which they form part. Conversely, traditions and practices may wither and die over time if the relevant forms of good cease to be recognised and pursued by the community.¹⁴

There is value in thinking about professional ethics in general — and mediation ethics, in particular — as a MacIntyrean practice. A professional community is engaged in an ongoing discussion about the goods that members of the community are seeking to pursue in their work. This

¹² Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 3rd ed, 2007) 187.

¹³ Ibid 222.

¹⁴ Ibid 222–3.

conversation is, as MacIntyre puts it, ‘historically extended [and] socially embodied’.¹⁵ It is historically extended in the sense that the terms of the discussion change over time as the social role of the profession changes. It is socially embodied in the sense that the discussion is not merely an abstract conversation, but is embedded in and responsive to the active pursuit or neglect of the goods that constitute the tradition. Professionals respond to ethical situations intuitively, then reflect on their responses and discuss them with colleagues. This process shapes professional discourse about ethical norms, which in turn helps shape the judgments made in future cases.

What makes the practice model a useful way of thinking about professional ethics? It is useful to return here to the ways in which the regulatory model influences the shape of ethical discourse. I suggested before that a regulatory approach tends to make ethical discussions hierarchical, formalistic and coercive. The practice model, by contrast, places much less emphasis on the role of centralised professional and regulatory bodies. Instead, it emphasises the decisions professionals make in response to practical scenarios. The majority of these scenarios are likely to involve interactions with clients and other stakeholders from outside the professional community. The practice model tends to yield a conception of ethical discourse as inherently *relational*, rather than overtly hierarchical.

The practice model, unlike the regulatory model, does not give formal codes of conduct a privileged role. Rather, as we have seen, the practice model regards ethical discourse as shaped by the snap judgments of practitioners, along with the reflection and discussion that follows those judgments. The values that practitioners identify in their practice through these discussions may well come over time to be expressed in codes and guidelines. However, the content of those codes and guidelines always remains subsidiary to the underlying discourse. The discourse, as we have seen, is historically extended and changes over time. The resulting picture of ethics is therefore not formalistic, but *dynamic*. This feature has the advantage of rendering the practice responsive to professional challenges and wider social developments.

The centralised nature of the regulatory model yields a focus on coercive mechanisms of enforcing the associated ethical standards. The practice model, by contrast, disperses both power and responsibility among members of the professional community. It does not view regulatory bodies as having the primary responsibility for ensuring the health of the ethical rules. Rather, the ongoing health of the practices that make up professional ethics depends upon the attitudes of practitioners and, in particular, their willingness to participate in discourse with other community members. The regulatory model yields a picture of enforcement focusing on professional sanctions, such as suspension or revocation of licenses. The practice model, by contrast, views enforcement in terms of the pressure exerted among members of the community by their mutual participation in a shared moral

¹⁵ Ibid 222.

tradition. The model is therefore not coercive, but *normative* in its understanding of compliance.

IV Mediation as a Profession

The practice model of professional ethics is relational, dynamic and normative, by contrast with the hierarchical, formalistic and coercive focus of the regulatory model. These features make the practice model an appealing conception of professional ethics — and, indeed, ethics more generally.¹⁶ However, it seems to me that the practice model is particularly well suited to mediation ethics due to the nature of mediation and its relationship to other forms of dispute resolution. I therefore want to conclude by elaborating on the merits of the practice model in the mediation context and drawing some lessons for how we view the mediation community.

There are three key features of mediation that make it particularly hospitable to the practice model. First, mediation is an *inherently relational* process. The regulatory model of legal ethics mirrors, to some extent, the traditional focus of legal practice on litigation — a hierarchical, formalistic and coercive form of dispute resolution. Mediation, by contrast, has often been presented as offering a more relational alternative to the adversarial norms of the courtroom process.¹⁷ Mediation takes many diverse forms, but at its core lies the simple idea of parties sitting down together and discussing their interests in a structured format. Shuttle mediation and private conferences may depart from this model to some extent, but they still involve structured communication between the parties and the mediator.

Second, mediation has long been regarded as a *relatively unstructured* form of dispute resolution — certainly by contrast to litigation and the courtroom environment. It is unstructured both in the sense of being relatively informal in its procedures and in the sense of not being governed by substantive rules for resolving the dispute. Mediation, of course, is not entirely unstructured: mediators will often set out ground rules that constrain the process and disputes may implicitly take place in the shadow of the law.¹⁸ Nonetheless, this feature of mediation makes it a far more dynamic environment than many other forms of dispute resolution. Mediators are innovators: the nature of the process enables them to try new

¹⁶ Cf Crowe, 'Natural Law and Normative Inclinations', above n 11; Crowe, 'Levinas on Shared Ethical Judgments', above n 11.

¹⁷ See, eg, Robert Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005).

¹⁸ See generally Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. Cf Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Federation Press, 2011); Rachael Field and Jonathan Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27 *Australian Feminist Law Journal* 97.

things and evolve their practices over time. This flexibility extends to ethics as well as other aspects of the process.

A third feature of mediation that lends itself to the practice model is its *interest-based* focus. It is commonly accepted that, whereas litigation focuses on legal rights and duties, mediation focuses on the interests of the parties.¹⁹ This enables mediation to retain its flexibility and forge a workable outcome in each individual dispute. The interests-based focus of mediation also makes it hospitable to a model of professional ethics that views ethics as a set of shared responsibilities, rather than a set of formal rules imposed from above. Ethics, understood in this way, can be responsive to the needs and interests of all those affected by mediation. Mediators are well used to responding to the parties and their disputes without relying on formal rules to balance competing interests. This makes the mediation community well suited in principle to take shared responsibility for ethical norms.

Mediation, as we have seen, is increasingly viewed as a distinctive profession. This brings certain expectations by the community at large. The impact of these changing expectations can be seen in recent discussions among mediation practitioners and scholars in Australia. Mediation scholars, for example, have been prompted to scrutinise and evaluate the traditional view of neutrality as central to mediation ethics.²⁰ They have reflected on the evolving ethical standards of the mediation community and the appropriateness of lawyers' ethical codes for mediation contexts.²¹ The Mediator Standards Board and other peak bodies have led efforts by Australian mediators to reflect on their ethical responsibilities.²² Indeed, it could be said that the NMAS, which was adopted after several years of consultation with mediators and has recently been revised in response to further consultation and feedback, more closely mirrors a practice than a regulatory model.²³

There is no inconsistency between the practice model and communal efforts to formulate ethical standards as an aid to debate and reflection. A

¹⁹ See, eg, Boulle, above n 1, 28–9 [2.21]; Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1, 3–4.

²⁰ See, eg, Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studies* 221; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part I' (2000) 11 *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part II' (2000) 11 *Australasian Dispute Resolution Journal* 145; Field and Crowe, 'The Construction of Rationality', above n 18.

²¹ See, eg, Bobette Wolski, 'Mediator Standards of Conduct: A Commentary to the Revised National Mediator Accreditation System Practice Standards' (2016) 5 *Journal of Civil Litigation and Practice* 109; Bobette Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (2013) 16 *Legal Ethics* 182.

²² This discussion resulted in a revised set of *National Mediator Accreditation Standards* being released in 2015, replacing the original version from 2008. For an overview and critical discussion, see Wolski, 'Mediator Standards of Conduct', above n 21.

²³ Mediator Standards Board, *National Mediator Accreditation System (NMAS) — A History of the Development of the Standards* <<http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>>.

regulatory model of professional ethics must be grounded in some form of practice if there is to be any connection between the formal regulations and actual norms of conduct. Similarly, most (if not all) manifestations of the practice model will involve at least some regulatory aspects, since shared ethical standards will tend to be codified at some stage in their evolution. The two models of professional ethics presented in this article are, in this sense, best understood in terms of a continuum, rather than a rigid dichotomy. The danger for mediation, then, is not that codes of conduct might be employed to bring clarity and focus to discussions of professional standards, but that these codes may supplant communal discourse and move the profession too far towards the regulatory end of the spectrum.

The model of mediation presented in this Part might strike some readers as somewhat idealised. The relational, unstructured and interests-based features of mediation have all been widely discussed by scholars, but it is questionable whether these attributes are always found in mediation practice, which is often more normative than a pure facilitative model might suggest. This issue raises a deeper question about whether professional ethics should be understood primarily in pragmatic or aspirational terms. Ethics, after all, is a normative discipline: it concerns how we ought to behave. Professional ethics must remain sufficiently pragmatic to have actual purchase on practitioners as a practical guide to conduct. At the same time, however, it must be sufficiently aspirational to inspire respect as a normative standard. Furthermore, at least on the practice model, professional ethics has an important forward-looking role: it is how a profession projects its vision of itself as a normative community with its own values and standards of excellence.

It is important for the mediation community — and I include here both practitioners and scholars — to reflect upon its distinctive attributes and avoid complacency about its shared values. If members of the mediation community value their profession's relational, dynamic and interests-based focus (whether this is understood on a descriptive or an aspirational level), they need to be prepared to articulate this vision and avoid undermining it through heavy-handed regulation. The ongoing discussion about the professionalisation of mediation in Australia and elsewhere means that issues such as accreditation, licensing and professional discipline are on the agenda. No doubt centralised professional governance, perhaps along with legal regulation, will be among the options discussed. Centralised governance has potential merits in assisting the formulation of shared standards and facilitating a sense of professional belonging. However, it also has a tendency to produce hierarchies, along with a focus on formal rules of conduct and the imposition of sanctions. It tends to lead, in other words, to a regulatory view of ethics. I have argued that mediators have reason to be troubled by this prospect.

The mediation community is well placed to determine the form of its ethical life. My claim in this article is that mediation practitioners and scholars should recognise the merits of the practice model and resist the pressures that may come to weaken or abandon it. They should not simply

accede to the widespread assumption that a mature professional ethics equates to a regulatory model. The mediation profession needs to have an ongoing dialogue about the prospects of centralised licensing and regulation and ask whether that is really what its members want. My point, then, is not so much to suggest a single model of professionalisation as to open up a dialogue about the different forms it may take. It is up to the mediation community to determine its shared goals and values — and whether these are best realised through a regulatory or practice-based approach to ethical life.