Mediation as Part of Legal Education: the Need for Diverse Models

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Introduction

Mediation is a growing area of practice for a large range of professionals and is one of a number of alternative dispute resolution (ADR) options. Mediation is practiced in a variety of contexts including community, workplace, family, parent/adolescent, criminal justice, environmental, Native Title, commercial and construction.[2] The backgrounds of those who work in mediation range from social work and psychology to the legal profession.[3] There are large numbers of short courses available to train mediators and there are academic subjects/programs in which the area of mediation is studied.[4]

The resurgence of interest in this dispute resolution option and the need to decrease costs and waiting times for courts has led to widespread use of mediation in court-connected disputes.[5] In the literature, mediation is generally described as an alternative to litigation. Nevertheless, the practice of mediation is said to occur in the shadow of the law as the negotiation phase of the mediation process does not occur in a vacuum. Rather, each participant is aware of the option of litigating the matter and may be aware of the range of outcomes available if the matter is taken to court. Mediation is, therefore, not divorced from the court process.[6]

Additionally, lawyers have an impact upon the practice of mediation through themselves taking the role of mediator, particularly in court-connected mediation, and through their participation as adviser to a client in some mediations. Other professions also have an impact upon the practice of mediation. For example, many social workers conduct mediations, particularly in the family law area.[7] Psychologists work as mediators in a variety of areas and tend to be well represented in workplace mediation.[8]

However, although mediation can be categorised as a multi-discipline profession, the legal fraternity arguably exert a powerful influence upon some areas of mediation practice, particularly court-connected mediation. Lawyers involved in mediation can negatively impact upon the opportunity that mediation presents. Some lawyers utilise mediation as an adversarial process. If this approach is adopted, the culture of the courtroom is transferred to the setting of the mediation. The issue of rights

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2. National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Report*, (2001) [2.4].
3. The recent history of dispute resolution is discussed in Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, Sydney:Butterworths, 2002) ch 1.
4. Ibid. 206.
5. Kathy Mack, *Court Referral to ADR: Criteria and Research* (2003).
6. Robert H Mnookin, and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.
7. Astor and Chinkin, above n 3, ch 10.
8. Bernadine Van Gramberg, 'The Emergence of Private ADR in Australian Workplaces' (2003) 22 *The Arbitrator and Mediator* 53.

is the main concern, and lawyers representing clients tend to advocate for their client's position. There is a focus upon the way a court would be likely to decide and a lawyer-mediator may contribute to an evaluation of the relative merits of each party's case.[9] This approach is often described as an evaluative model of mediation. A similar, commonly utilised model is the facilitative model, which incorporates interest based negotiation theory, but does not evaluate the dispute.[10]

Recent mediation literature critiques models of mediation which are focused upon solutions to problems rather than relationships between parties. Theorists refer to solution-focused models as problem-solving models of mediation. Arguably, evaluative and facilitative mediation models could be described as problem-solving models:

> *The problem-solving framework is based on and reflects an individualist ideology, in which human beings are assumed to be autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self interests. The problem-solving model, while seldom going by that precise name, and seldom acknowledging or exposing its ideological roots, is the dominant model in the mediation field.*[11]

A survey by the National Alternative Dispute Resolution Advisory Council (NADRAC), found that law schools in Australia provided the greatest number of postgraduate qualifications in mediation and ADR. Eight institutions out of the thirteen listed placed their various qualifications in ADR in their law schools.[12] Clearly, the law schools have significant influence in the postgraduate area of education in mediation. In addition, many law schools include subjects in mediation or alternative dispute resolution in their undergraduate studies.[13]

There is a danger that the kinds of matters being taught in law schools regarding mediation and ADR more generally, will replicate the present adversarial culture that many lawyers exhibit. The strong culture of the law, with its emphasis upon litigation, may restrict the curriculum of dispute resolution courses. The adherence to problem-solving models may lead law students to only marginally modify their orientation to rights based solution focused outcome to conflict. Ultimately, law students become practitioners[14] and bring their views of mediation, shaped in law schools, to the mediation table. The potential of mediation to provide more than just a solution to a problem will be diminished if lawyers are not also educated to address relationship issues in the process.[15]

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9. Greg Rooney, 'Mediation and the Rise of Relationship Contracting: A Decade of Change for Lawyers' (2002) 76 *Law Institute Journal* 40.
10. Laurence Boulle, *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996) 29-30.
11. Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) *Pepperdine Dispute Resolution Law Journal* 39, 49.
12. National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Discussion Paper* (2000) 125.
13. Hilary Astor, 'The Place of Dispute Resolution in Legal Education' Conference Proceedings, *Beyond the Adversarial System: Changing Roles and Skills for Courts, Tribunals and Practitioners* (1997).
14. This paper focuses upon the education of law students at universities. The education of practitioners in mediation through continuing legal education, short courses and studies by law students at Practical Training Courses are not addressed in this discussion.
15. Lela P Love, 'Twenty-five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators' (2002) *Ohio State Journal on Dispute Resolution* 597, 603.

I would argue that in order to fully explore the potential of mediation, Australian law schools need to ensure that students are exposed to a variety of different models of mediation, not merely problem-solving models.[16] Newer models of mediation, such as the transformative[17] and narrative[18] models pursue outcomes other than settlement, critique the concept of neutrality and provide a theoretical framework for mediation practice that includes a focus upon relationships.

In this paper, I will discuss aspects of legal culture and mediation. I will then consider diversity in mediation, including two models, transformative and narrative mediation. As an example of the benefit of understanding diverse models of mediation I will explore emotion in mediation and point to the ways that newer models more effectively deal with emotion and relationships. Finally, I will discuss the law school curriculum and diverse models.

Legal Culture and Mediation

Traditionally, lawyers will embrace a litigious orientation. When analysing how lawyers approach disputes, Riskin has devised a 'Lawyer's Standard Philosophical Map'. This map suggests that lawyers approach disputes as adversaries and that disputes, generally in their view, are to be decided by a third party through the operation of legal principles.[19]

There are skills and knowledge that a lawyer can valuably contribute to mediation. Clearly, the ability to narrow the issues in terms of legal concerns may be an asset in a mediation, particularly in a court-connected mediation. Arguably, there is no part of the mediation process to which the lawyer could not conceivably contribute, but does the adversarial mindset of some lawyers lead to a narrowing of the way the mediation unfolds so that relationship issues are not addressed?

Zariski contends that from his own and overseas studies that there has been a change in legal culture in relation to ADR. Lawyers more readily utilise ADR, including mediation, than previously.[20] Similarly, Boulle, when considering the Queensland jurisdiction, notes a possible change in the legal culture. He attributes this change in part to case management of litigation and possibly the appreciation of the legal profession of the advantages of ADR. In Queensland, lawyers are seemingly increasingly referring to mediation and other processes without the direction of courts. Boulle remarks:

16. Some law schools may be including various models in their teaching. Research needs to be conducted to establish what models are taught. Recent research into the curriculum of law schools does not provide sufficient detail regarding the teaching of the subject alternative dispute resolution or mediation to identify models, see Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by Australian Universities Teaching Committee (AUTC)* (2003).
17. Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (revised ed, San Francisco: Jossey-Bass, 2005).
18. John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution*, (San Francisco: Jossey-Bass, 2001).
19. See Leonard Riskin and John Westbrook, 'Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan' (1989) 39 *Journal of Legal Education* 509.
20. Archie Zariski, 'Disputing Culture: Lawyers and ADR' (2000) 7(2) *E Law- Murdoch University Electronic Journal of Law*, <http//www.murdoch.edu.au/elaw/issues/v7n2/zariski72_text.htmil> at 4 May 2004.

> *Where structures change so do cultures, and it is to the credit of the legal profession that most lawyers are now conscious of the advantages of ADR in the appropriate circumstances. Where the legal culture is using and promoting ADR to clients of its own accord there is less need for the involvement of the courts in referring matters to ADR. There is also a less positive version of this explanation. It is that even without any change in attitude and disposition, lawyers advise their clients to attend ADR because of the likelihood of a court referral if they do not. Here the motivation is not cultural but economic.*[21]

There would appear to have been some modification to the 'Lawyers Standard Philosophical Map'. However, it is the degree to which lawyers have changed their approach to mediation that is of concern in this discussion. It may be that lawyers are adopting mediation only on a surface level. Boulle also noted, when speaking of the definitions of mediation provided in relevant Queensland legislation:

> *… but it would be true to say that both the definition and description leave open many key issues relating to the boundaries of mediation and the appropriate limits of the mediator's authority. This imprecision allows for a wide range of mediation practices, including that of evaluative mediation which has a strong foothold in the legal culture.*[22]

Clearly, in Australia there is a recognition that the evaluative model of mediation, with its mirroring of the court process, is the model of choice of many lawyers.

This recognition of the dominance of the legal culture is not limited to Australia. Recently, some American writers have raised the issue that lawyers are exerting a disproportionate influence in the mediation industry. Mayer, in a comprehensive critique of conflict resolution, identifies, amongst other issues, the danger of the field being subsumed into established professional disciplines, in particular law.[23] Although acknowledging that many lawyers have embraced the field,[24] he warns that the discipline may be swamped by existing professions and the theory and practice of conflict resolution diluted. Within his general discussion of the dilemmas of conflict resolution he points to the area of family mediation. He notes that family mediation began as a genuinely multidisciplinary field of practice. However, in more recent times there has been an increasing dominance in the USA of lawyers as private family mediators: 'This may be due in part to the fact that lawyers are the major referral source for private mediators, and in some circumstances judges have been willing to refer cases only to lawyers.'[25]

Research in the USA also notes a trend for lawyers to prefer an evaluative process in the mediation setting. Welsh has recently argued:

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21. Laurence Boulle, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation' (2004) *22 Law in Context* 93, 103.
22. Ibid. 94.
23. Bernard S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (San Francisco: Jossey-Bass, 2004) 7.
24. Ibid. 22.
25. Ibid. 69 and note that Mayer goes on to argue that clients may also feel the need to consult a professional with legal training.

> *As attorneys have become more frequent participants in mediation sessions and have assumed responsibility for selecting mediators, the process has become less focused on empowering citizens and more focused on forcing these citizens to confront and become reconciled to the legal, bargaining and transactional norms of the courthouse. Attorneys select fellow attorneys as mediators and especially value those who possess substantive expertise and the ability to value cases and conduct "reality testing" with the parties.*[26]

A focus upon problem-solving and evaluation of the merits of a case can curtail the potential of the mediation process to achieve more than settlement. It is understandable that the courts and lawyers wish to promote efficiency in dealing with conflict, however, such an approach limits the opportunity to also deal with relationship issues. Too often mediators rush parties towards settlement and fail to address all the issues that have brought parties to the mediation.[27] We are losing some of the potential benefits of mediation by allowing lawyers, in court-connected contexts, to focus simply upon settlement. Alexander points out that courts appear to give secondary attention to relationship dimensions of disputes:

> *In court-related mediation schemes quantitative data related to service-delivery objectives, such as reducing court backlog and reducing overall disputing costs for litigants, appear to have greater impact on decision-makers than qualitative objectives. Qualitative objectives, such as transformation of the relationship between the parties and delegalisation of the dispute, frequently take a back seat.*[28]

If mediation is to be a true alternative to litigation, we need to focus upon relationships rather than settlement. My view is that lawyers need to be aware of diverse models of mediation so that there is a *fundamental change* to the legal culture.[29] Law students exposed to diverse models are arguably more likely to move away from evaluative models of mediation.[30]

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26. Nancy Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System' (2004) 5 *Cardozo Journal of Conflict Resolution* 117, 137.
27. Bush and Folger, above n 17, 239-247.
28. Nadja Alexander, 'Mediation on Trial: Ten Verdicts On Court-Related ADR' (2004) 22 *Law in Context* 8, 17.
29. In conjunction with changes in legal culture there would need to be changes to the culture of court administrators.
30. I acknowledge that the teaching of diverse models may not necessarily translate to law students changing their culture, but it is one strategy. See Zariski, above n 20, where he points out that research shows that the teaching of ADR subjects does not necessarily encourage students to use ADR processes when they become lawyers.

Diversity in Mediation

As the field of mediation has matured there has been a number of innovations in mediation theory and practice. The literature relating to different models of mediation has grown, particularly in the last decade.[31] Different models of mediation have been articulated so that practitioners and consumers now have more choice regarding the philosophy and process of mediation. Some of these innovations in theory and practice come to us from the USA[32] and some are more local.[33] These models represent the opportunity for practitioners to critically reflect upon their practice and to consider the best way to meet the needs of those who wish to utilise conflict engagement services.

The theory and practice of mediation has been informed by many disciplines including sociology, psychology, counselling, communications, political science and organisational behaviour.[34] The most influential contribution has come from negotiation theory as many models of mediation rely upon the Fisher and Ury model of principled negotiation.[35] As indicated, earlier these approaches can be categorised as problem-solving models of mediation. The newer models of mediation critique these ideas and offer alternative ways of conceptualising mediation theory and practice. This focus on theory is at odds with the common practice of mediation training and education which focuses more upon skills based, 'how to' approaches.[36]

Transformative Mediation

Transformative mediation rejects the problem solving approach and replaces it with the aim of participants achieving moral growth. Growth occurs through mediator interventions designed to increase both empowerment and recognition amongst the participants. Empowerment refers to the fact that in each mediation participants have the potential to increase their own feelings of self worth and their capabilities in relation to the difficulties they face. Recognition deals with the opportunity to experience a greater empathy with other parties in the dispute, to acknowledge and respond to the concerns and difficulties that other parties face, and to feel a common bond of humanity.[37] Bush and Folger argue that without a focus upon solutions to a problem the potential of mediation to bring about a change in the participants is powerful. Solutions can be found to the problems that participants bring to the process, but this is not the dominant focus of the mediation:

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31. For instance, the first edition from Bush and Folger, dealing with transformative mediation, appeared in 1994 see Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994).
32. See Bush and Folger, above n 17.
33. Originating in New Zealand, the model of narrative mediation has generated interest, see Winslade and Monk, above n 18.
34. New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators, Report* (1991).
35. Roger Fisher, and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981).
36. Della Noce, Bush and Folger, above n 11, 45-46.
37. Bush and Folger, above n 17, ch 2.

> *Their strongest reason for believing that the Transformation Story should guide mediation practice is the story's underlying premise: that the benefit of conflict transformation—that is, changing the quality of conflict interaction—is more valuable than the other benefits that mediation can be used to produce, even though those other benefits are themselves important.*[38]

Bush and Folger provide a number of different stories to help us understand competing approaches to mediation. They argue that problem-solving models present the mediation industry, and courts, with the 'Satisfaction Story'. This story tells us that mediation can provide a low cost alternative to litigation that engenders creative win-win solutions for parties. It is empowering and can deal with power imbalances and allows participants to vent emotion.[39] However, the opportunity to provide participants with a unique alternative to litigation is lost if we adopt the 'Satisfaction Story'. Bush and Folger argue that there is a 'Transformative Story' to tell. If this model is followed there is the potential to transform the quality of conflict interaction. Both the parties and society more generally can benefit from this transformation. Too often the problem-solving approach suppresses conflict and focuses on solutions in the context of legal rights. If we adopt the Transformative Story of mediation we forgo a focus on settlement in exchange for the chance for participants to achieve moral growth.[40] There is a relational philosophy informing this story rather than an individualistic approach.

Transformative mediators understand that mediators cannot be neutral and that they impact upon the mediation as it unfolds. Specific mediator interventions are advocated as a method of achieving empowerment and recognition for disputants. Briefly, these include using the opening conversation of the mediation not as a statement to the parties, but as an opportunity to begin a dialogue identifying goals and guidelines. Parties contribute to the design of the process as they proceed. Stages of the process emerge rather than adhere to a set linear structure, but generally include creating the context, exploration of the issue at hand and a decision making element. The mediator will be actively looking for opportunities to support empowerment or recognition shifts. Communication skills are used to support these shifts.[41]

Narrative Mediation

Narrative mediation constructs mediation as a storytelling experience. Narrative mediation practitioners do not make a distinction between the process of the mediation and the content of the mediation. The mediator is an active participant and he/she makes the party aware of their role. The conflict stories that many parties bring to mediation often consist of scenarios of mutual blame. The mediator does not seek to establish the facts of the dispute believing there is no independent truth to be found, but instead validates each parties' perspective. Mediators seek to separate the conflict from

38. Ibid, 35.
39. Ibid. 9-11.
40. Ibid. 22-26.
41. Ibid. 108-112.

the parties through a method of externalising the problem: 'As mediators externalize a problem, they speak about it as if it were an external object or person exerting an influence on the parties but they do not identify it closely with one party or the other'.[42]

The mediator then seeks to destabilise the stories of blame, using questioning and private meetings to open up the story that the participant brings to the mediation. The mediator attempts to deconstruct the dominant story[43] lines that have emerged in the mediation. Through the technique of curious questioning the mediator asks a series of questions aimed at helping the participants tease out the assumptions that underline the expectations that they bring to the mediation.[44] The technique of curious questioning asks the mediator to adopt a naive stance that questions the meaning of terms used in the mediation.[45]

Curious questioning is but one of the techniques the mediator utilises in an attempt to loosen the convictions that parties have and assists them to map the history and effect of the conflict. The mediator can then actively work to find a solution to the dispute and will often use the written word as part of the process.[46] There is no pretence of neutrality and the mediator is explicit in his/her co-authoring role in finding a new more cooperative story for the parties.

The Example of Emotion

Lawyers in a mediation are often slow to pick up the emotional dimensions of the dispute. Mediation is commonly touted as a dispute resolution option that can deal with emotion, but this kind of attribute of the process is possible only if the mediator, and the lawyers involved in the mediation, are attuned to those issues. At some level emotion is present in all mediations.[47] Although many commercial disputes are seen as devoid of emotion, these kinds of disputes arguably involve emotion as each participant is likely to have an emotional reaction to the dispute. The head of a large corporation involved in a dispute with a consumer lobby group over an allegedly defective product may feel his status is threatened by the smear on the good reputation of his company. The basis of conflict is emotion. Some areas of mediation, such as family mediation, may be more influenced by emotion than other areas. However, all mediations do deal with emotion in some form. Most training courses or academic study do not adequately deal with issues of emotion. There is a focus upon a simplistic venting of emotion without more analysis.[48] Lawyers, because of their legal culture and their approach to mediation, may not acknowledge the place of emotion in mediation and may ignore this aspect of the process.

42. Winslade and Monk, above n 18, 6.
43. There is an explicit use of social constructionism and postmodernist theory, ibid, ch 2.
44. Ibid. 123.
45. Ibid. 80.
46. Ibid. ch 10.
47. Suzanne Retzinger and Thomas Scheff, 'Emotion, Alienation, and Narratives: Resolving Intractable Conflict' (2000) 18 *Mediation Quarterly* 71.
48. Ibid. However, note the authors acknowledge some disputes are less dominated by emotion than others.

A judgment that emotion is not appropriate to the dispute being mediated can affect the mediation in that it suppresses the voices of the participants, fails to deal with this aspect of the dispute and may, for the mediator, lead to a biased view of a party or parties. If the mediator is legally trained and takes the view that emotion has little place in the mediation they may become biased against a party who exhibits emotion. This may be particularly the case if preconceptions of the way parties should behave in a mediation are based upon a particular cultural and gender status quo.[49] There may also be a variety of issues that lawyer-mediators or lawyers participating in the mediation should be aware of regarding particular attributes of the parties mediating.[50] Similar to emotion, issues relating to gender, culture and sexual preference may be concerns that the traditional culture of lawyers would regard as irrelevant to the dispute.

The thorny issue of neutrality, and the acknowledgment that mediators bring their own perceptions and value systems to the mediation process when they mediate,[51] may also be a difficult concept for some lawyers to accept. The culture of lawyers values court hierarchies and a belief in the ability of judges to deliver unbiased judgments based upon legal reasoning.[52] Acceptance of another view of neutrality may be difficult.

However, by teaching diverse models of mediation we may better equip law students to deal with emotion and be reflective of the perceptions that they bring to the mediation table. Both the transformative and narrative models of mediation articulate approaches to emotion based upon their respective theories.

For example, Bush and Folger articulate a theory of conflict informed by the fields of communication, cognitive psychology and social psychology. Their view is that an individual's reaction to conflict is a kind of crisis. There is a sense of disempowerment and displacement so that an individual's sense of self and relationships with others is affected. Parties become self-absorbed and self-centred because of their sense of weakness and then become angry, suspicious and hostile. A mediator who utilises the transformative approach would recognise the negative spiral of conflict affecting the parties and would intervene in the interaction so that the spiral is reversed.[53] The mediator would assume parties wish to change their conflict interaction, that they value this change more highly than settlement:

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49. For instance, strongly expressed emotion can trigger this kind of bias in the mediator, see Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545, where the author notes that mediators may view women who express strong emotions, in family mediations, as strident and inappropriate. Culture can affect outcomes in relation to mediation, see Gary La Free and Christine Rack, 'The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases' (1996) 30 *Law and Society Review* 767. Differing cultures may have different views of the appropriateness of expressing emotion.
50. See National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper (1997), where they discuss a variety of issues that may affect mediations and other ADR processes i.e. gender, minority cultural groups in Australian Society, age, disabilities, minority sexual preference, geographic location and socioeconomic power differences.
51. See for a discussion of neutrality in mediation, Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice- Part I' (2000) 10 *Australasian Dispute Resolution Journal* 73 and Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practise- Part II' (2000) 10 *Australasian Dispute Resolution Journal* 145.
52. Margaret Davies, *Asking the Law Question* (2nd ed, Sydney:Thomson, 2002) ch 2.
53. Bush and Folger, above n 17, 45-53.

> *The transformative framework is based on and reflects relational ideology, in which human beings are assumed to be fundamentally social – formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction.*[54]

In a similar way, narrative mediators do not necessarily accept the individualistic needs based approach of problem-solving mediators. This philosophy is one possible way of viewing conflict, but narrative mediators prefer a social constructionist perspective. From this perspective needs are constructed in the social discourse and the mediator's task is to deconstruct the stories that participants bring to the mediation table. The mediation process itself is a site for the construction of a participant's world: 'When they talk, people are not only expressing what lies within but they are also producing their world.'[55]

Stories of conflict that are brought to a mediation are a matter of perspective. When perspectives differ it is due to the diverse understanding of meanings. When mediators deal with emotion in mediation, often of blame and anger, they attempt to deconstruct the stories of the participants, dealing with issues of power and privilege that inform conflict. By asking questions the mediator peels back assumptions that participants make about conflict: 'The powerful potential of thinking in terms of discourse is displayed when apparently intractable patterns of interaction are deconstructed and other possibilities for discursive location are opened up.'[56]

The mediator in the process of the mediation acknowledges that self is not stable and that individuals can construct themselves anew. There is the potential for change. New stories can be created between participants that alter the angry recriminations that may have begun the mediation.[57]

Law students need to engage with different models of mediation to think through the implications of diverse practice. Reflective students who have considered theoretical issues will be less likely to accept the dominant norm of problem-solving once they become practitioners.[58]

54. Della Noce, Bush and Folger, above n 11, 51.
55. Winslade and Monk, above n 18, 40.
56. Ibid. 44.
57. Ibid. 37-47.
58. The culture of the firms that students join will also be a significant factor in the approach they adopt.

Law School Curriculum

There is an ongoing debate about the types of skills and the kinds of knowledge lawyers need to exhibit and utilise for their client's benefit and for the benefit of society generally.[59] There is a tension between the need to master critical areas of substantive law and the need to develop professional skills. Part of the professional skills that lawyers arguably need to master is an understanding of alternative dispute resolution skills, including mediation.[60] But it is the kinds of understandings of dispute resolution and in particular mediation that law students gain that is important. Without a diversity of models being taught there is no guarantee that issues such as emotion and relationships will be addressed. The teaching of diverse models is one way to introduce perspectives from other disciplines such as social science and communication.[61] Both transformative and narrative mediation incorporate theory from the social sciences. Thus inclusion of these models gives a more multidisciplinary focus for law students.[62]

There is already a tension in law schools about the content of curriculum. There are calls for the inclusion of more legal theory and less of the approach of black letter law.[63] Teaching of diverse models of mediation, with their articulation of theory, would meet this need to include more theoretical material in legal education. Time may be an issue when considering what material to include in a subject dealing with mediation, but I would argue that these diverse models should take priority over other material.

The teaching of these approaches, by their very nature, would help law students to deconstruct the dominant discourses in the mediation industry. There would be a greater likelihood that problem-solving models would not be uncritically accepted.

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59. Of interest is the US contribution to the debate which identifies understanding litigation and alternative dispute resolution processes and consequences as part of the 10 fundamental lawyering skills, see American Bar Association, *Legal Education and Professional Development: An Educational Continuum, Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap* (the McCrate Report) (1992).
60. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) ch 2. The Commission explicitly called for opportunities for legal practitioners to undertake instruction in conflict and dispute resolution techniques as part of continuing legal education, see Recommendation 7. At an undergraduate level there is concern to include more mandated professional skills such as in conflict resolution.
61. See Andrew Stewart 'Educating Australian Lawyers' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999).
62. See for the comment that ADR needs to be informed from a multidiscipline perspective, including social science, Charles Brabazon and Susan Frisby, 'Teaching Alternative Dispute Resolution Skills,' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (Sydney: Federation Press, 1999).
63. Paul O'Shea, 'The Complete Law School: Avoiding the Production of "Half-Lawyers"' (2005) 29 *Alternative Law Journal* 272.

Conclusion

Without a change to lawyers approach to mediation there is a danger that lawyers will colonise a section of the industry, mirroring the evaluative, litigious culture of the law. If this were to happen we would lose the potential of mediation to make a significant difference to relationships in our society. I would argue that new models of mediation are the key to allowing law students the opportunity to engage with alternative discourses to the problem-solving approaches that dominate mediation practice. The reliance on theory, the focus upon relationships and the rejection of neutrality that these new models espouse combine to make a powerful story for students to reflect upon. Some law teachers may be including these models in their curriculum. Once a substantial proportion of mediation and ADR subjects include this material the legal culture's response to mediation may change.

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