RE-IMAGINING LEGAL EDUCATION: MEDIATION AND THE CONCEPT OF NEUTRALITY

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Abstract

Mediation is a standard part of present-day legal practice as it is the most popular of alternative dispute resolution (ADR) options used in courts. Mediation has a pivotal role to play in re-imagining legal practice away from dependence on an adversarial frame of reference to a range of collaborative problem-solving options. Neutrality is a contested core concept for the theory and practice of mediation. Engaging with contested constructs of the meaning of neutrality is a useful vehicle for law students to think critically about legal practice and their role within it. It is a concept that introduces students to socio-legal theory and broadens their thinking beyond a traditional legal methodology to a more self-reflective and critical standpoint. This paper explores the work of Paul Ramsden, his theories of teaching and his concept of a 'deep approach to learning', as a framework for teaching students about neutrality in mediation.

I Introduction

Alternative Dispute Resolution (ADR)[1] is a growing area of professional practice for lawyers in Australia. The opportunity to refer clients to ADR options and for lawyers to practice in ADR has grown significantly in the last 25 years.[2] This changing landscape in dispute resolution has prompted a number of law schools to incorporate a study of ADR as a component of existing substantive courses, or to offer ADR as a stand-alone course of study.[3] More recently academics have recognised not only that new lawyers need to be cognisant of, understand, and incorporate ADR in their practice, but also that aspects of ADR practice are shaping the professional identity of the new generation of lawyers.[4]

The most well recognised and commonly used form of ADR is mediation. In this paper we examine one standard for the practice of mediation, an understanding of neutrality,[5] as a vehicle for exploring deep approaches to learning, and the teaching of a re-imagined professional identity for lawyers — one that incorporates an understanding of, and practice in, ADR options,

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1 Often now referred to as 'Appropriate Dispute Resolution' in recognition of the broad range of alternatives to litigation now available and increasing attempts within various systems to match the nature of a dispute with the most appropriate dispute resolution option: Michael King et al, *Non-adversarial Justice* (2nd ed, Federation Press, 2014) Ch 7. Many subjects taught in this area are called *Dispute Resolution*: Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16 *Legal Education Review* 125.

2 Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148.

3 For an argument advocating the inclusion of ADR in law programs see: James Duffy and Rachael Field 'Why ADR Must be a Mandatory Subject in a Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 25 *Australasian Dispute Resolution Journal* 9.

4 Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315.

5 National Mediation Accreditation System (NMAS), Practice Standards, cl 7(3)(c)(iv) requires mediators to demonstrate ethical understanding of neutrality and impartiality. Possible interpretations of these concepts and their interrelationship are explored in later discussion. <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

particularly mediation. We have confined our discussion to neutrality in mediation in order to give close attention to the learning and teaching of this one standard for practice. In reality its examination would sit within a course of ADR study that would challenge and reframe the traditional adversarial and rational–analytical paradigm of legal professional practice.

The following discussion begins by introducing the role of ADR and mediation in re-imagining legal education and considering the education and training options currently available for mediation practice. We argue that there is a well-developed knowledge base for mediation practice, and we advocate for a greater acknowledgement and emphasis on theoretical foundations and issues in the teaching of mediation. To that end we explore the approach to teaching and learning advanced by Paul Ramsden, which sees good teaching as that which encourages a deep approach to learning. Finally we bring together Ramsden's views as to the interrelationship of learning and teaching with our interest in the concept neutrality in mediation through a discussion of learning objectives and teaching strategies for a study of neutrality.

II Mediation And Re-imagining Legal Practice

The teaching of ADR, and in particular mediation, in the legal curriculum can have a part to play helping law students to understand a range of dispute resolution options in legal practice, readying them to play a non-adversarial role in mediation.[6] Julie Macfarlane argues that legal education is pivotal for re-imagining conflict resolution and improving legal practice.[7] A study by Tom Fisher, Judy Gutman and Erika Martens in Victoria points to the benefits of studying ADR, including mediation, in legal education.[8] This research evidenced a shift in law students' attitudes to legal practice through the experience of undertaking a first-year compulsory course in ADR. The majority of students in the study demonstrated a change from a largely adversarial approach to litigation to an approach that privileged collaborative problem solving.

Carrie Menkel-Meadow points to the importance of the inclusion of ADR in the legal curriculum not merely as an 'add on' but as an integration of a range of dispute resolution theory and skills in order to combat the adversarial culture of much of law teaching.[9] Leonard Riskin and James Westbrook argue for integration in the first year of the law curriculum,[10] and specifically suggest that ADR options be taught as part of substantive law subjects. In the United States, six universities were funded to trial the integration of ADR in various law courses by the incorporation of ADR into substantive law courses or the teaching of ADR as a stand-alone course. Subsequent evaluation of these initiatives found improved understanding of ADR in law students.[11] More recently, writers in the area of ADR and legal education continue to advocate for an integrated approach to ADR as a first-year course in law programs.[12] If an integrated approach is not taken, writers argue, law teachers risk marginalizing ADR and mediation and privileging litigation, because traditional legal education values the litigation frame when teaching law.[13]

6 Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-adversarial Practice in Law' (2011) 22 *Australasian Dispute Resolution Journal* 49.

7 Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008) 223−4.

8 Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students Part 2: An Empirical Survey' (2007) 17 *Legal Education Review* 67.

9 Carrie Menkel-Meadow, 'To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum' (1993) 46 *Southern Methodist University Law Review* 801.

10 Leonard Riskin and James Westbrook, 'Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan' (1989) 39 *Journal of Legal Education* 509.

11 For detail of United States efforts to integrate ADR in substantive law courses: Leonard Riskin, 'Disseminating the Missouri Plan to Integrate Dispute Resolution Into Standard Law School Courses: A Report on a Collaboration with Six Law Schools' (1998) 50 *Florida Law Review* 589.

12 John Lande and Jean Sternlight, 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' (2010) 25 *Ohio St Journal on Dispute Resolution* 247.

13 Jeff Giddings argues for a systematic approach to integrating legal skills, amongst other graduate attributes, into the law curriculum: Jeff Giddings, 'Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum' (2010) 34 *Washington University Journal of Law and Policy* 261.

In Australia the 2012 the National Alternative Dispute Resolution Council (NADRAC) published a study into the teaching of ADR in law schools.[14] This research indicated that ADR is taught in many law schools in Australia, although in some law schools it remains an elective.[15] NADRAC argues that legal education is an important part of changing the culture of the legal profession. If law students understand the theory and practice of ADR they will be better prepared to advise their clients about the benefits of pursuing alternative options such as mediation. Mediation provides the opportunity for informal, flexible and speedy dispute resolution with the possibility of maintaining an ongoing relationship with the other party to a dispute.[16] The council advocated for ADR to be more widely included in legal education.[17] Learning about ADR is said to improve law students' practice, and it may also positively affect their mental well-being.[18] Jill Howieson's research at the University of Western Australia showed that the interactive pedagogy of an ADR course contributed to student engagement with their studies and had a positive impact on their mental health.[19] The teaching of ADR — the most popular option being mediation — is therefore growing in importance in the legal curriculum.

Mediation practitioners, whether lawyers or not, are required to meet a set of competencies articulated according to the National Mediator Accreditation System (NMAS), a system of voluntary accreditation of mediators introduced in 2008.[20] The NMAS provides standards in relation to the education and training of mediators (Approval Standards) and ongoing practice standards for mediators (Practice Standards). In order to register as an accredited mediator, practitioners are required, inter alia, to undertake a course of training with a recognised mediator accreditation body (RMAB) of a minimum of 38 hours. Such training must include the participant in at least nine mediation simulations, and in three of these the participant must act as a mediator.[21] The core competencies needed for accreditation are gained through this training and reflect the NMAS Practice Standards.[22] These competencies are assessed in a 'final skills assessment mediation simulation' of at least 1.5 hours duration.[23]

Understanding of the concept of neutrality in mediation is a core competency according to the NMAS Practice Standards.[24] However, in the context of a course of 38 hours which must give each participant the opportunity for involvement in nine mediation role-plays, scope for consideration of the theoretical underpinnings of mediation is limited. Greater scope is possible in semester-long ADR courses offered within law programs. However, such courses may not satisfy the requirement of providing opportunities to participate in simulations needed to achieve accredited practitioner status. There are instances where a semester-long tertiary course in ADR is offered in conjunction with training from a RMAB.[25] This combination is arguably ideal in offering an opportunity to engage with the ADR literature, and hence with issues of theory, as well as providing the experiential learning necessary for practice.

14 National Alternative Dispute Resolution Advisory Council (NADRAC), *Teaching Alternative Dispute Resolution in Australian Law Schools* (November 2012).

15 Ibid 6−7.

16 Ibid 4.

17 Ibid 8.

18 Rachael Field and James Duffy, 'Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well Being through a First Year Law Subject' (2012) 12 *Queensland University of Technology Law and Justice Journal* 133.

19 Jill Howieson, 'ADR Education: Creating Engagement and Increasing Mental Well-Being Through an Interactive and Constructive Approach' (2011) 22 *Australasian Dispute Resolution Journal* 58.

20 For an explanation and history of the NMAS see <http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>.

21 NMAS,ApprovalStandards,cl5(1).<http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf>.

22 NMAS, Practice Standards <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

23 NMAS, Approval Standards, cl 5(2).

24 NMAS, Practice Standards, cl 7(3)(c)(iv).

25 One example is the partnership between Griffith Law School and the Dispute Resolution Centre of the Department of Justice, Brisbane.

The practice of mediation, like the practice of law, combines requisite knowledge, skills and ethics to demonstrate required competencies.[26] The emphasis, in short courses in mediation, has been on acquiring the requisite skills and understanding the necessary ethical issues for practice. Hence neutrality appears in the NMAS Practice standards as an ethical competency.[27] This emphasis on skills and ethics has developed historically from a commitment to understanding and practising mediation as a process of dispute resolution largely independent of the content of the dispute. However, while expertise in the content of disputes remains outside officially recognised requirements for practice, there is a well-developed and growing theoretical knowledge base for mediation. Some of that theory concerns theory about the skills needed to mediate and ethical principles for practice. In addition there is a body of explanation and critique about pivotal concepts in mediation such as power and self-determination. These include the concept of neutrality.

We argue here that the existing knowledge base of mediation practice justifies a clear acknowledgement and a stronger emphasis on a substantive component, on theory, both in short courses and in semester-long offerings. In relation to the concept of neutrality, we argue that neutrality is one of a number of key theoretical concepts (despite being, and even due to being, contested), which requires investigation and understanding by any student of mediation, and increasingly by any aspiring legal practitioner. Neutrality is a complex notion that has application (even if contested) beyond mediation, and it has relevance to issues of legal interpretation and application. It offers a useful vehicle for engagement in learning, critical thinking and contextualising the shifting landscape of legal practice. Issues for educators include: what we want students know about neutrality, how we teach about neutrality, and how we know that students have understood it and gained something from the experience of investigating it. To begin to address these issues we explore the work of Paul Ramsden, a scholar of the theory of learning and teaching, below.

III A DEEP APPROACH TO LEARNING AND GOOD TEACHING

If lawyers as mediators, whether university educated or short-course trained, are to understand and respond to issues in mediation, they must fully appreciate theoretical issues underpinning practice including those relating to neutrality. It is our responsibility as educators to teach in such a way that effective learning — that is, learning that demonstrates an understanding of the relationship between theory and practice — is achieved. When considering the best way to teach we can consider what is already known in educational literature relating to teaching and learning. The work of Paul Ramsden[28] and his approach to teaching and learning in higher education can assist in the design of strategies for teaching theoretical constructs and their translation into practice. This is true of theoretical issues generally and of neutrality in mediation in particular. Many of Ramsden's insights are relevant to devising teaching and learning strategies not only in university courses in mediation but also in short-course training.

According to Ramsden, what we hope students will learn through tertiary education is the ability to think critically.[29] In order to achieve this aim it becomes necessary to consider how students learn and to apply that knowledge to the design of teaching and learning strategies. One of the notable conceptual distinctions that Ramsden introduces in his work is the distinction between deep and surface approaches to learning.[30]

26 The traditional trilogy of knowledge, skills and ethics have been translated into the six threshold learning outcomes for undergraduate study in law; see <http://www.utas.edu.au/__data/assets/pdf_file/0007/456829/altc_standards_LAW.pdf>.

27 NMAS, Practice Standards, cl 7(3)(c)(iv).

28 Paul Ramsden, *Learning To Teach in Higher Education*, (2nd ed, Routledge, London, 2003). A discussion of the various schools of thought dealing with the ways students learn is beyond the scope of this paper. For an overview of educational literature in the context of learning in law schools, see Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Company 1994), Ch 2.

29 Ibid.

30 Another approach that has been identified is an 'achieving' approach. Students assess what time and effort is required to achieve in a task and whether understanding or merely rote learning is required, see John Biggs, 'Approaches to the Enhancement of Tertiary Teaching,' (1989) 8 *Higher Education Research and Development*, 7.

A student who employs a deep approach to a learning task approaches that task in a manner that promotes learning; he or she approaches the task (for instance the reading of an article) in such a way that understanding is promoted (ie the author's intention in writing the article is ascertained). In contrast, a student who employs a surface approach to the same learning task will read the article in a manner that does not promote learning or understanding (ie concentrating on parts rather than meaning). A deep approach, as the name suggests, gives students the ability to better reflect on meaning and a surface approach means that the student merely skates along the surface of a learning task.

Each approach reflects the way students approach tasks they are set. A student who is utilising a deep approach is attempting to understand by focusing upon arguments and concepts, searching for meaning by making connections, identifying structure, and relating the concepts to the real world or to previous reading. They are actively approaching the task in such a way that learning, and hence understanding, is promoted. Those using a surface approach to learning see the learning task as an outside imposition, something they must complete. Though they may anxiously try to perform, they will find it difficult to extrapolate principles, be confused by examples, and confuse evidence with conclusions, and thus fail to draw out the overall meaning of a learning task.[31] According to Ramsden:

> Deep approaches generate high-quality, well structured, complex outcomes; they produce a sense of enjoyment in learning and commitment to the subject. Surface approaches lead at best to the ability to retain unrelated details, often for a short period. They are artificial, so are they ephemeral.[32]

Associated with the ideas of deep and surface learning are two other concepts, holistic and atomistic approaches, as advanced by Ramsden.[33] Deep and surface approaches refer to whether a student is searching for meaning while holistic and atomistic refer to the way a student approaches organising the learning task. A student who focuses on the parts of the task is described as approaching it in an atomistic fashion; where a student approaches the task as a whole, integrating the parts, the approach is described as holistic. These two distinctions in approach tend to occur together. A student will approach a task in a deep/holistic fashion or a surface/atomistic fashion.

Importantly, a student is not a deep or surface learner *per se*. Rather they approach a learning task with a deep or surface approach. The same student may in the same day, in the same subject, approach some tasks in a deep manner and some tasks in a surface manner. The exact descriptions of a deep as opposed to surface approach will also differ according to the task and the subject matter under study.[34] Significantly, Ramsden acknowledges that as teachers, we cannot instruct students to adopt a deep approach to learning.[35] Instead we can only encourage deep approaches by influencing the students' experience of their educational environment.

According to Ramsden, whether students adopt surface or deep approaches to learning is a response to the educational environment in which they find themselves. Significantly, the approach chosen is a response to a student's perceptions of that environment rather than a response to the environment itself. Therefore, while there are teaching contexts that will tend to encourage a deep approach to learning, there is no necessary correlation between a given strategy and intended outcome. Educators must contend with 'the routine divergence between intention and actuality in university teaching'.[36] Ramsden identifies a number of factors that he suggests will impact upon a student's approach to learning; namely, a student's interest, knowledge base and previous experience; assessment methods; students' experience of teaching and teachers; and the effects of courses, departments and institutions.[37]

31 Ramsden, above n 28, Ch 4. See also Le Brun and Johnstone, above n 28, 56–63.
32 Ibid 80.
33 Ibid Ch 4.
34 Ibid 80.
35 Ibid.
36 Ibid 63.
37 Ibid Ch 5.

Of particular interest for the teaching and learning of ADR, is the previous educational experience of a student. That previous educational experience will encompass the diversity and complexity of a student's past exposure to learning. Furthermore, a student who has in the past practised mainly a surface approach to learning is likely to continue with this approach.[38] For law students, or lawyers in undertaking short-course training in mediation, the tendency may have been to adopt surface and atomistic approaches to memorising legal principles and cases for examination purposes.[39] Lawyers and law students may be particularly challenged to think critically about issues in mediation, such as neutrality. The legal methodology[40] designed for solving legal problems is not easily translated to a consideration of broader theoretical issues, which are perhaps akin to the more marginal questions of policy in a legal curriculum. By contrast, other participants in mediation short-course or postgraduate training (and some combined undergraduate programs) may have been exposed to learning about social theory (as, for example, psychologists or social workers) and may have developed a deep approach to comprehending and critically analysing theoretical issues such as neutrality. Teaching law students and lawyers about neutrality in mediation will necessarily require the teacher to take account of the emphasis on legal methodology in legal education and the need to introduce and foster other ways of thinking about theoretical issues.

The other factors Ramsden identifies as having an impact upon learning include various aspects of teaching. Importantly, the central thrust of Ramsden's thesis is that learning and teaching in higher education are interrelated; are two sides of the one coin.[41] According to Ramsden, good teaching will discourage superficial approaches, and will encourage a high quality of engagement with the subject matter taught.[42] Ramsden advances three theories of teaching: teaching as the transmission of knowledge or information; teaching as the management of student activity; and teaching as making learning possible.[43] Good teaching is achieved principally by the third approach, in which students are helped 'respectfully towards seeing the world in a different way'.[44] According to the first theory, the focus is upon the teacher as the expert who imparts his/her knowledge of content and procedure to a passive recipient, the student. This theory places responsibility for learning solely upon the student; his/her capacity and willingness to learn and application to the task. According to the second theory, the focus is on the student as learner and the task of the teacher is to encourage and facilitate student activity as a vehicle for learning. Responsibility shifts to the teacher to develop and apply techniques to manage student learning. According to the third theory, teaching 'is comprehended as a process of working cooperatively with learners to help them change their understanding. It is making student learning possible.'[45] Content and teaching technique remain important, according to this theory, but are framed by the understanding that knowledge is constituted by the student and that teaching technique aims to encourage learning by addressing students' problems in understanding. Responsibility, according to this last theory, is jointly held. Yet at the same time it is acknowledged that learning occurs for the student, and that teaching encourages but does not directly *cause* that learning. Learning, according to Ramsden 'is applying and modifying one's own ideas; it is something that the student does, rather than something that is done to the student.'[46]

38 Ibid 64−67.
39 Le Brun and Johnstone above n 28, Ch 1.
40 A legal methodology is signalled by the (C)IRAC method of analysis: (Conclusion), Issue, Rule, Application, Conclusion.
41 Ramsden, above n 28, 110.
42 Ibid 84.
43 Ibid Ch 7.
44 Ibid 84.
45 Ibid 110.
46 Ibid 80.

Ramsden makes the point that students will rise to the expectations of their teachers. He argues that:

> The most important thing to keep in mind is that students adapt to the requirements they perceive teachers to make of them. They usually try to please their lecturers. They do what they think will bring rewards in the systems they work in. All learners, all educational systems and at all levels, tend to act in the same way.[47]

Importantly, then, the interaction between student and teacher has a particular character. It is the student who learns, and learning occurs according to the meaning constructed by the student from a variety of influences. The teacher cannot accurately predict whether a student will learn or what he/she will learn. But the teacher has an important role in creating an expectation of learning, and of learning of a particular quality — that of critical thinking.

Having articulated his theory of teaching as making learning possible, Ramsden applies that theory to questions of formulating and communicating learning goals; devising appropriate teaching strategies; designing assessment strategies; evaluating teaching; and the broader issue of accountability and development in higher education.[48] For present purposes, we are interested in exploring learning goals and teaching strategies that facilitate a deep and critical understanding of neutrality in mediation — the project to which we now turn. As an extension of Ramsden's thinking about teachers' expectations of students' learning, we argue in what follows that modelling deep approaches to learning is important in communicating those expectations.

IV Understanding Neutrality in Mediation

As we have noted above, neutrality in mediation is one of a number of key concepts that we have argued are important in law student and mediation education and training. Here we advance one learning objective as pointing to what we want students to know about neutrality. That objective is: understanding neutrality in mediation as a contested concept.

This objective places neutrality within a broader context of socio-legal perspectives and within that, critical perspectives. As our examination of Ramsden's thesis acknowledges, a deep approach to learning and good teaching is not independent of the content of what is taught. Therefore in what follows we flesh out the content of our objective by indicating what a deep and critical understanding would look like, and suggest approaches to encouraging that understanding that we might adopt as teaching strategies.

V Learning Objective: Understanding Neutrality in Mediation as a Contested Concept

The neutrality of the mediator has been a foundational concept for mediation practice. Neutrality has functioned as a legitimising feature of mediation. It establishes mediation as a recognised and accepted form of dispute resolution within Western democratic processes.[49] Boulle notes that mediator neutrality mirrors the ideology of judicial neutrality,[50] while Astor describes neutrality as the theoretical cornerstone for the legitimacy of mediation.[51]

47 Ibid 62.

48 Ibid, Part 2 Design for learning.

49 Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Parts 1 and 2' (2000) 11 *Australasian Dispute Resolution Journal* 1, 73; Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social and Legal Studies* 221, 221-2; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (2nd ed, Butterworths, 2002) 146; Laurence, *Mediation: Principles*, *Process*, *Practice* (3rd ed, Butterworths, 2011) 31; Rachael Field, 'Neutrality and Power: Myths and Reality'(2000) 3(1) *The ADR Bulletin*, 16,16; Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality − Towards an Ethic of Partiality?'(2001) 10(4) *Social and Legal Studies* 505, 508.

50 Boulle above n 49, 72.

51 Astor above n 49, 74.

Early definitions of mediation referred to the intervention of a neutral third party.[52] Mediators were therefore defined as third-party neutrals. Newer definitions have replaced a reference to mediators as neutrals with a description of their role as 'acceptable third parties'[53] or merely third parties, as in the NMAS definition.[54] This change reflects a measure of uncertainty as to the meaning and application of the concept of neutrality in mediation, and differing views as to its continued relevance for mediation practice.

Scholars have drawn attention to the variety of meanings attributed to neutrality.[55] Boulle proposes three distinctions useful in understanding neutrality's complexity.[56] He identifies neutrality as disinterestedness, independence and impartiality. Disinterestedness means that a mediator will be neutral in the sense of having no interest in the outcome of the mediation. Independence means that he or she will be neutral in the sense of having no prior relationship with the parties. Impartiality means that a mediator will conduct the process fairly, even-handedly and without bias towards either party.[57] Boulle argues that neutrality as disinterestedness and independence are not absolute requirements, and that their existence depends upon context and circumstances. He argues that only neutrality as impartiality would normally be considered a defining feature of mediation.[58]

Scholars have advanced different views as to the meanings of neutrality and impartiality and as to the relationship between these concepts. Astor treats these concepts as synonymous,[59] while Moore distinguishes them.[60] Moore defines impartiality as the attitude of the mediator as unbiased and lacking preference, and neutrality as the mediator's behaviour towards, or relationship with, the parties.[61] Douglas constructs impartiality and even-handedness as aspects of an overarching concept of neutrality, itself constructed as the limitation (rather than elimination) of mediator bias.[62]

In Australia and since the year 2000 with the seminal work of Hilary Astor,[63] neutrality has been widely critiqued in mediation theory. Critique has drawn upon earlier empirical research[64] and experience of practice[65] and questioned whether mediators could truly be neutral

52 See for example, Christopher Moore, *The Mediation Process* (Jossey Bass, 1986) 6; Jay Folberg and Alison Taylor, 1984, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Jossey Bass, 1984) 7.

53 Ibid 15.

54 According to these NMAS standards, mediation is described as 'a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.' NMAS, Approval Standards, above n 21, 4; NMAS, Practice Standards, above n 22, 5; see also Kathy Douglas, 'National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation' (2006) 25(1) *The Arbitrator & Mediator* 1.

55 Susan Douglas, 'Constructions of Neutrality in Mediation' (2012) 23 *Australasian Dispute Resolution Journal* 80.

56 Boulle, above n 49, 73-4..

57 Ibid.

58 Ibid 73-77..

59 Astor, above n 49, 'Mediator Neutrality: Making Sense of Theory and Practice', 222−3; see also Leda Cooks and Claudia Hale, 'The Construction of Ethics in Mediation' (1994) 12(1) *Mediation Quarterly* 55.

60 Moore, above n 52 53.

61 Ibid

62 Douglas, above n 55.

63 Astor, above n 49, 'Rethinking Neutrality' 145.

64 See, eg, Mulcahy, above n 49; Gwynn Davis, *Partisans and Mediators*, (Clarendon Press,1988); Martha Fineman, 'Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking'(1988) 10(4)*Harvard Law Review* 727; David Greatbatch and Robert Dingwell, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators'(1989) 23(4) *Law and Society Review* 613; Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf, 1993).

65 See, eg, Kevin Gibson, Leigh Thompson and Max Bazerman, 'Shortcomings of Neutrality in Mediation: Solutions Based on Rationality' (1996) 12(1) *Negotiation Journal* 69; David Gorrie, 'Mediator Neutrality: High Ideal or Sacred Cow?' in Linda Fisher (ed.) (1995) *Conference Proceedings*, *Famcon '95*, Third National Mediation Conference, Sydney, 30; George Kurien, 'Critique of Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43; Alison Taylor, 'Concepts of Neutrality in Family Mediation: Context, Ethics, Influence, and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215.

and whether, as a result, the process was being misrepresented to parties.[66] Scholars have also employed social theory to locate their critique within critical theory and feminist standpoints,[67] and from postmodern and post-structural perspectives.[68]

Some scholars have taken the view that neutrality is at best a mere aspiration incapable of actuality, and ought to be abandoned.[69] Alternative foundational principles have been argued to replace neutrality, including maximising party control,[70] an ethic of partiality,[71] reflexive practice[72] and a framework for ethical decision making.[73] Scholars have also argued for the application of principles of social justice, fairness and ethics to replace the requirement of neutrality.[74]

There is now acknowledgement that mediators cannot be purely or absolutely neutral.[75] At the same time, it is acknowledged that mediators continue to attribute meaning to the concept and employ it in practice.[76] Furthermore, the NMAS Practice Standards require an understanding of neutrality and impartiality as competencies.[77] As a result there have been attempts to make sense of neutrality by reconstructing it — creating theories about how it might be understood and applied in practice despite, and in the context of, ongoing critique. Bogdanoski advances a situated and contextualised understanding of neutrality,[78] while Douglas reconstructs neutrality as a relational concept having meaning in relation to party self-determination mediated by a postmodern construction of power.[79]

Neutrality is not only a central concept for mediation, it is considered more fundamentally central to the Western concept of law.[80] Yet, the neutral application of law claimed by judges within our common law systems has been repeatedly challenged.[81] Critical jurisprudence pointedly calls attention to the non-neutral, political processes inherent in the making of law, its interpretation and its implementation.[82] Feminist methodology seeks to unearth the gender implications of superficially neutral legal standards.[83] Hence, critique of neutrality as a dominant, accepted theme in liberal legal theory is mirrored by critique of neutrality in mediation.

66 Rachael Field, 'The Theory and Practice of Neutrality in Mediation', (2003) 22(1) *The Arbitrator & Mediator* 79, 79.

67 Dale Bagshaw, 'Self-reflexivity and the Reflective Question: Broadening Perspectives in Mediation' (2005) *The Arbitrator and Mediator* 1;

68 Tony Bogdanoski , 'Beyond the Paradox of Neutral Intervention: Towards a Situated Theory of Mediator Neutrality' (2010) 21 *Australasian Dispute Resolution Journal* 146; Susan Douglas, 'Mediator Neutrality: A Study of Mediator Perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139.

69 Astor above n 49 'Rethinking Neutrality'; Bagshaw above n 67; Mulcahy, above n 49.

70 Ibid.

71 Mulcahy, above n 49.

72 Astor, above n 49, 'Mediator Neutrality: Making Sense of Theory and Practice'; Bagshaw, above n 67; Mulcahy, above n 49.

73 Rachael Field, 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination' (2011) 22 *Australasian Dispute Resolution Journal* 8.

74 See for example Isabelle Gunning, 'Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations' (2004) 5(2) *Cardozo Journal of Conflict Resolution* 87;. Bernard Mayer, *Beyond Neutrality* (Jossey-Bass 2004); Michael McCormick,'Confronting Social Injustice as a Mediator' (1997) 15 *Mediation Quarterly* 293.

75 Douglas, above n 55.

76 Astor, above n 49, 'Mediator Neutrality: Making Sense of Theory and Practice'; Douglas, above n 55.

77 NMAS Practice Standards, above n 4.

78 Bogdanoski, above n 68.

79 Douglas, above n 55.

80 Trina Grillo, 1991, 'The Mediation Alternative: Process Dangers for Women', (1991) 100 *Yale Law Journal*, 1545, 1547.

81 Mulcahy, above n 49, 506−7.

82 Stephen Bottomley and Simon Bronitt, *Law in Context* (3rd ed., Federation Press, 2006) 186-275; Marett Leiboff and Mark Thomas, *Legal Theories: In Principle*, (Lawbook Co, 2004) 251-91.

83 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002) 56-84; Nancy Levit and Robert Verchick, *Feminist Legal Theory: A Primer*, (New York University Press, 2006) 45-56.

VI LEARNING AND TEACHING STRATEGIES: A DEEP APPROACH

A superficial approach to teaching and understanding neutrality in mediation might refer to the requirements in the NMAS and describe neutrality according to one or two definitions, such as the need to avoid conflicts of interest and the need for mediators to avoid giving advice. A more comprehensive and thoughtful consideration would point the fact that neutrality is contested in mediation, examine the various ways in which the concept has been constructed, and introduce students to the ways in which scholars have attempted to make sense of neutrality — the theories about neutrality. An even more robust examination could consider neutrality in its relationship to other core concepts, such as power in mediation and self-determination of the parties, plus issues of cultural situatedness, and the development of other theoretical concepts aimed to deal with the limitations of neutrality, such as reflective and reflexive practice. Still more in-depth analysis would introduce students to parallel critiques of neutrality in both social and legal theory, and thereby introduce students to a broader critique of the neutrality and objectivity of the law, lawyers and judges.

How might teachers encourage a deep approach to this consideration of neutrality? We have argued for an emphasis on expectations and modelling for students. We would bring to the teaching task our own engagement with and critical approaches to the material. Importantly, we would present ourselves as learners employing a deep approach to learning. We would thereby model a deep approach to learning for students. We would communicate this expectation of a deep approach through our design of learning objectives, teaching strategies and assessment, therein communicating our expectation that students develop a critical standpoint and demonstrate critical thinking.

Assessment is a complex topic beyond the scope of this article.[84] There are several options for teaching strategies. The traditional lecture format lends itself to an experience of teaching as the transmission of knowledge, but is not necessarily limited to that experience. Assigning journal articles for students to read, as well as making reference to cases and legislation, represents a necessary provision of resources. Yet too often students feel overwhelmed, undirected and even isolated by the amount of reading and comprehension of written material required.[85]

The use of active learning strategies, such as a fishbowl teaching strategy, can be an effective tool in ensuring deep learning. This approach can bring students together to critically discuss the content of written resources on neutrality.[86] According to this technique, students can be asked to read material on neutrality set before class and then engage in a structured discussion about the relevant issues in class. In one approach to the use of a fishbowl technique, two circles of participants are created, an inner circle and an outer circle. Those in the inner circle are given the task of answering questions aimed to excite discussion about a chosen topic. Those on the outside are tasked with observing the dynamics of the discussion, both its content and the interactions of students involved. Students can be asked to switch roles either individually or collectively from one circle to the other. Participants are asked to keep a record of their discussion and observations, making them accountable and encouraging their investment in the process. This technique has an added advantage for canvassing issues of neutrality in mediation because it allows students to reflect upon their own and others apparent biases as revealed in the discussions.

The use of case studies that invite discussion and critical appraisal are also useful for large and small numbers of students studying neutrality in mediation.[87] Case studies dealing with neutrality dilemmas in mediation can be introduced to students in lectures or tutorials and are often used in short courses where numbers are limited. Combining case studies with the fishbowl technique is an effective way to encourage students to apply theory to practice. The use of current issues in the media is another effective tool for contextualising material in such

84 For a discussion of assessment see: John Biggs and Catherine Tang, Teaching for Quality Learning at University (3rd ed, Open University Press, 2007) 151.

85 Le Brun and Johnstone, above n 28, Ch 1.

86 Ibid 306.

87 Mieke Brandon and Tom Stodulka, 'Effective Conflict Resolution Training through Case Studies' (2007) 18 *Australasian Dispute Resolution Journal* 245.

a way as to demonstrate its relevance and broader application.[88] Internet technologies make accessing media reports relatively simple in lectures and smaller classes and provide a more dynamic interaction than mere reliance on lecturing.

Simulations or role-plays are an integral feature of mediation education and training. Noam Ebner and Kimberlee Kovach note that role-plays are widely used in teaching ADR and are part of orthodox teaching practice.[89] As referenced above, participation in simulations are required for accredited mediation training and central to assessment of the competencies needed for practice. Role-plays provide extremely fertile ground, not only for experiential learning as such, but also for the opportunity to reflect, during and after participating, on how to put theory into practice. Role-plays provide an effective opportunity for students to develop a critical standpoint by offering an experience of what works and what does not work, what makes sense and what simply does not. At the same time, taking on the role of another's identity may be disrespectful in some cultures, and thus the audience of the role-play must be carefully considered.[90]

VII Conclusion

In this paper we have pointed to the growing recognition of mediation as part of legal practice, necessitating progress toward the inclusion of ADR courses, including mediation, in legal education. We have considered the views of scholars who advocate for the inclusion of ADR education and practice in re-imagining the role of lawyers towards collaborative problem solving and away from an exclusive focus on litigation. We have pointed to the reality of ADR options in the changing legal landscape and to calls for this change to be reflected in legal education. We have pointed to evidence that such a change could contribute to the well-being of new lawyers.

Having acknowledged the place of mediation in a re-imagined legal practice, we examined the existing options for mediation education and training and their relationship to voluntary accreditation through the NMAS. We argued for a greater emphasis on the teaching and learning of theories and theoretical issues relevant to the practice of mediation, including that of neutrality. As a prerequisite to effectively incorporating more theory into mediation education, we explored the approach of Ramsden to learning and teaching in higher education.

We examined Ramsden's distinction between deep and surface approaches and holistic and atomistic approaches to learning. We noted that the aim of higher education is essentially to provide opportunities for students to develop critical thinking. We explored Ramsden's association between deep approaches to learning and the exercise of critical thinking. We outlined Ramsden's theories of teaching and his thesis that learning and teaching are two sides of the one coin. We noted Ramsden's argument that good teaching encourages deep approaches to learning and hence critical thinking, and his contention that there was no easy relationship between teaching intent and strategies and how students approach learning, or what they learn. We emphasised Ramsden's assertion that students are guided by the expectations of their teachers and will endeavour to rise to those expectations.

We applied Ramsden's thinking to the learning and teaching of neutrality in mediation. We articulated one learning objective for our project and considered a number of teaching strategies to achieve that objective. We examined what a deep approach to learning and good teaching would look like in our attempts to bring together our learning objective and selected teaching approaches. Central to our project is our argument that mediation education and training should include a consideration of theories advanced in the literature as part of its knowledge base. Also

88 Noam Ebner and Yael Efron, 'Using Tomorrow's Headlines for Today's Training' (2005) 21 *Negotiation Journal* 377.

89 Noam Ebner and Kimberlee Kovach, 'Simulation 2.0: The Resurrection' in Christopher Honeyman and James Coben (eds), *Venturing Beyond the Classroom* (DRI Press, 2010) 245−246.

90 Nadja Alexander and Michelle LeBaron, 'Death of the Role-play' in Christopher Honeyman, James Coben and Giuseppe De Palo (eds), *Rethinking Negotiation Teaching: Innovations for Context and Culture* (DRI Press, 2009) 179, 182.

pivotal to our project is an extension of Ramsden's view as to the role of teachers' expectations of students. We have argued that expectations can be communicated by modelling ourselves as learners who employ a deep approach to our own lifelong learning.