

RESEARCH ARTICLE

‘Mediators mediating themselves’: tensions within the family mediator profession

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Abstract

The demand for family mediation to adapt and change has risen sharply in the contemporary English and Welsh family justice system. This paper focuses on a crucial, yet overlooked, barrier to reform: the tensions felt within the family mediator profession. It first provides an important overview of the introduction of family mediation in the late twentieth century, highlighting the distinction between the traditional therapeutic mediator and the subsequent lawyer mediator. Recent anecdotal evidence suggests that friction exists amongst the two mediator sub-groups, similar to earlier tensions felt between lawyers and mediators. The remainder of this paper is based on an empirical study, comprising 17 interviews with family mediators, which confirms these tensions, as well as a lack of national identity across the profession. However, the data also reveal mediators’ desire for collaboration and community within the profession. The paper is hopeful that regulatory reform can help mediators to ‘mediate themselves’ going forward, and questions whether this transition is supported by a new hybrid mediator.

Keywords: family law; dispute resolution; mediation; professionalism

Family mediation was introduced in England and Wales as an alternative to court, but has since moved to the centre of modern family justice. Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which reduced legal aid in a number of areas including advice and representation for private family matters in court, family mediation is now presented as the primary and preferred option for disputants. To quote the Family Justice Review, published the same year as the LASPO proposals: ‘It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service’.¹ Nevertheless, take-up of family mediation is slow after LASPO, and concerns around the suitability of the process for complex family matters are widespread.² As summarised by Anne Barlow et al, ‘there is an urgent need to consider how mediation can be re-designed to operate more effectively... to provide a better service in these neoliberal times’.³

A significant part of mediation reform is the professionalism and conduct of mediators. In late 2007, the Family Mediation Council (FMC) was established as the main regulatory body for family mediators. Three decades after the family mediation was first piloted in England and Wales, the

¹Family Justice Review *Family Justice Review: Final Report* (Ministry of Justice, 2011) para 115.

²A Barlow ‘Rising to the post-LASPO challenge: how should mediation respond?’ (2017) 39(2) *Journal of Social Welfare and Family Law* 203; R Hunter ‘Inducing demand for family mediation – before and after LASPO’ (2017) 39(2) *Journal of Social Welfare and Family Law* 189.

³A Barlow et al *Mapping Paths to Family Justice: Resolving Family Justice in Neoliberal Times* (London: Palgrave Macmillan, 2017) p 211; also see R Blakey ‘Cracking the code: the role of mediators and flexibility post-LASPO’ (2020) 32(1) *Child and Family Law Quarterly* 53.

organisation has taken significant strides to unite its members and promote consistent mediator practice. This includes its first Code of Practice in 2010 and Standards Framework in 2014,⁴ as well as the streamlining of accreditation through FMC Accredited Family Mediator (FMCA) status.⁵ By Autumn 2018 the FMC had undertaken a Standards Review, considering various areas such as accreditation and the documentation to be submitted to court following mediation.⁶ These developments are to be welcomed, though Robert Creighton, the Chair of the Family Mediation Standards Board, acknowledges that reform will take time:

... All of this constitutes a large agenda, but given the investment of time and energy by the members of the Working Group and the evident commitment in the wider profession I am confident that we will make progress. Inevitably the more substantial changes will require careful planning.⁷

The FMC is undoubtedly dedicated to improving the regulatory framework for family mediators. However, it is questioned whether this momentum is enough to support mediation in the post-LASPO landscape. This paper argues that the success of any reform agenda will be heavily limited if problems within the family mediator profession are left unresolved. More specifically, it draws together unanticipated data from qualitative interviews with family mediators that uncovers serious tensions within the profession, particularly in light of mediators' professional backgrounds. The disjointed nature of the mediator profession hampers the impetus for change, even if the FMC Standards Review leads to reform around professionalising and regulating family mediators. Whilst these repercussions are significant, the hostilities felt amongst mediators are understudied in the family justice literature.

This paper uses new empirical data to fill this gap. It first sets out the background to this investigation by tracking the development of family mediation since the late twentieth century. The discussion considers how mediation's scope was initially limited to children's matters, and services were largely run by mediators from a *therapeutic* background. It is recognised that this distinct and restricted role was not incidental, but constructed to preserve solicitors' dominance in family disputes. As mediation was extended to cover financial matters, tensions between therapeutic mediators and the new *lawyer* mediator sub-group began to arise. After setting out the methods to the empirical study, the third section of this paper outlines three broad findings from the mediator interviews. First, the data confirm significant tensions between therapeutic mediators and lawyer mediators. Secondly, the interviews show a concerning lack of national identity for family mediators alongside a general feeling of frustration with the FMC. By contrast, the final set of analyses reveals a contradiction within interviewees' perceptions of the other professional sub-group, whereby the sample continued to express a desire to collaborate and co-mediate. The end of the paper considers the implications of these findings and calls for further research into the skills of family mediators according to professional sub-group. It also highlights the potential value, as well as the risks, of a *hybrid* mediator type with significant training (and/or experience) in both therapeutic and legal backgrounds. As a result, this paper underscores the importance of investigating the fragmented mediator profession, and begins to reveal possible routes to reform. Whilst there is a realistic prospect of uniting the mediator profession, this unification must come sooner rather than later to sustain mediation in the long-term.

⁴J McEldowney 'Family Mediation in a Time of Change: FMC Review Final Report' (FMC, 2012) available at https://www.familymediationcouncil.org.uk/wp-content/uploads/2014/02/fmc_review_mceldowney_report.pdf para 60.

⁵Family Mediation Council 'FMC accreditation scheme' (FMC, 2022) available at www.familymediationcouncil.org.uk/mediator-area/standards-codes-guidance/fmc-accreditation-faqs/.

⁶Family Mediation Council and Family Mediation Standards Board 'Summary of context and the work streams in FMC Standards Review' (FMC, 2018) available at www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-FMSB-Standards-Review-Summary.pdf.

⁷Family Mediation Council 'FMC/FMSB Review of the Accreditation Process' (FMC, 2019) available at www.familymediationcouncil.org.uk/2019/04/30/fmc-fmsb-review-of-the-accreditation-process/.

1. Family mediation in the late twentieth century: an incidental restriction?

The tensions amongst family mediators cannot be properly understood without exploring the broader context in which family mediation was introduced in England and Wales. This includes tracing the structural shifts surrounding mediation from the late twentieth century to modern day.

The English and Welsh family justice system underwent significant reform in the late twentieth century. Following the Divorce Reform Act 1969, petitioners could apply to the court for divorce on the ground of 'irretrievable breakdown', proven by one of five facts.⁸ Alongside increased societal acceptance of relationship breakdown, the number of divorce petitions rose.⁹ The state quickly looked to offload pressure from the court system. In 1974, the Committee on One-Parent Families criticised the disjointed application of the law on family breakdown and the reality that many parties had no choice but to issue court proceedings where direct negotiations were unsuccessful. The Committee subsequently recommended that the family law courts be reorganised 'to provide the best possible facilities for conciliation'.¹⁰ Family conciliation was defined as:

... assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict... arising from the breakdown which calls for a decision on future arrangements.¹¹

Shortly after this recommendation, conciliation was piloted through the Bristol County Court in 1976 and the Bristol Courts Family Conciliation Service (BCFCS) in 1978.¹² Whilst conciliation services have long operated on a continuum ranging from organisations that are fully embedded into the legal procedure to those with no connection to the court or legal system, this paper (and much of the family justice literature preceding it) focuses on the idea of out-of-court conciliation, later termed mediation.¹³

The introduction of (out-of-court) mediation in the English and Welsh family justice system was supported by numerous pilot projects, including the BCFCS. Yet rather than scrutinise the role of the family mediator, the primary focus of these studies was to assess mediation in terms of settlement rates and satisfaction levels. For instance, Gwynn Davis' report on the BCFCS pilot showed that full or partial agreement had been reached in 78% of mediation cases.¹⁴ Other examples of a settlement-driven research agenda included the work on the Bromley Conciliation Bureau in 1979 and the Conciliation Project Unit in 1985.¹⁵ Interestingly, very little attention was paid to the role of the family mediator: her practices, behaviours and values were left unscrutinised. While Davis' report into the BCFCS pilot included interviews with solicitors and an analysis of case records, no conversations with mediators or their clients took place. The role of the mediator was, in effect, outside the study's scope. In a later article, Davis herself criticised the 'painfully wide gap' between the aims of the research and its findings.¹⁶ Robert Dingwall voiced a similar criticism, and highlighted the lack of empirical evidence on 'what conciliators [mediators] have done and how this has contributed to, or impeded, the resolution

⁸Petitioners no longer need to claim one of five facts following the Divorce, Dissolution and Separation Act 2020.

⁹See M Freeman 'Divorce: contemporary problems and future prospects' in M Freeman (ed) *Divorce: Where Next?* (Aldershot: Dartmouth Publishing, 1996) p 32.

¹⁰Committee on One-Parent Families *Report of the Committee on One-Parent Families: Volume 1* Cmd 5619, 1974, para 4.283.

¹¹*Ibid*, para 4.288.

¹²J Walker 'Divorce mediation – an overview from Great Britain' in J McCarty (ed) *The Role of Mediation in Divorce Proceedings: A Comparative Perspective* (Vermont: Vermont Law School, 1987) pp 37–38.

¹³*Ibid*, p 36.

¹⁴G Davis *Report of a Research to Monitor the Work of the Bristol Courts Family Conciliation Service in its First Year of Operation* (Bristol: University of Bristol, 1980) p 6.

¹⁵G Davis and M Roberts *Access to Agreement* (Milton Keynes: Open University Press, 1988) p 51; A Ogus et al *The Costs and Effectiveness of Conciliation in England and Wales* (Newcastle: University of Newcastle, 1989) para 17.1.

¹⁶G Davis 'A research perspective' in J Westcott (ed) *Family Mediation: Past, Present and Future* (Bristol: Jordan Publishing, 2004) p 60.

of the material dispute'.¹⁷ A significant backdrop to family mediation's introduction in the late twentieth century was, therefore, the limited appraisal of the family mediator.

Despite the lack of scrutiny during this period, a traditional role for the family mediator can still be identified. Early mediation services tended to be not-for-profit and reliant on the voluntary work of therapists, social workers and counsellors to act as mediators. These types of mediators are often called *therapeutic mediators*. To quote Dingwall, family mediation began as a 'social workers' movement'.¹⁸ Marian Roberts similarly recognised that the first two phases of family mediation, from the 1980s to 2000s, reflected the work of welfare professionals and family therapists.¹⁹ Therapeutic mediators' counselling or social work background would, in the words of Davis, 'inevitably colour their approach, as well as determine those issues which they feel competent to take on'.²⁰ Coincidentally, family mediators operated in the very restricted arena of children's matters. The main regulatory body at the time, the National Family Mediation Council, agreed with the Law Society that financial and property disputes should be reserved for lawyers.²¹ Children's issues were seen as 'emotional' and thus better suited to mediators, whereas financial and property matters were best handled by the 'matter of fact' solicitors.²² Underpinning this dichotomy was the notion that different disputes necessitated different levels of oversight, different skillsets, and therefore different family justice professionals.

The restriction on therapeutic mediator practice was not incidental: it was devised to continue lawyers' dominance over family justice in the late twentieth century. Originally, family mediation providers had to prove that the process warranted government funding through high satisfaction and settlement rates.²³ Yet support from the legal profession was also crucial to mediation's success. Lisa Parkinson, one of the pioneers of family mediation in England and Wales, acknowledged that lawyers' approval was pivotal to the 'credibility' of mediation, particularly where the state only valued the process in terms of settlement.²⁴ How then were mediators to obtain approval from a long-standing, prominent profession in family justice? Family mediators responded in two parts. First, mediation providers sought to avoid opposition and developed mediation to not encroach on lawyers' terrain. As acknowledged by Davis in 1988, 'mediation has been developed in such a way as to promote the interests of one professional group, whilst not posing any fundamental threat to the boundaries of another'.²⁵ Carrie Menkel-Meadow later commented that the narrow focus of family mediation meant lawyers did not see mediation as 'a serious pursuit', nor as 'the practice of law'.²⁶ Second, family mediation was designed to focus on the parts of family disputes that solicitors were uninterested in or reluctant to advise on. Evidence from Davis' research showed that solicitors were often uncomfortable when acting as a 'counsellor' for clients, and viewed mediation as a 'source of emotional support'.²⁷ Mediation was, in effect, an escape route for lawyers who felt ill-equipped to deal with the more emotional disputes often seen in family disputes. The scope of mediation was subsequently limited to children's matters.

Family mediation's restricted conceptualisation, alongside its supposed therapeutic focus, proved beneficial to the legal professions. Solicitors in the BCFCS pilot were said to have 'no fear' that mediation would become 'an alternative source of legal advice'.²⁸ Legal practitioners in the Conciliation

¹⁷R Dingwall 'Some observations on divorce mediation in Britain and the United States' (1986) 11 *Mediation Quarterly* 5 at 19.

¹⁸*Ibid.*, at 10.

¹⁹M Roberts 'A view from the coal face: interdisciplinary influences on family mediation in the United Kingdom' (2014) 9(2) *Journal of Comparative Law* 108 at 110–112.

²⁰G Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Oxford: Clarendon Press, 1988) p 59.

²¹Dingwall, above n 17, at 9.

²²Davis, above n 16, p 92.

²³M Roberts *Mediation in Family Disputes: Principles of Practice* (Farnham: Ashgate Publishing, 3rd edn, 2008) p 49.

²⁴L Parkinson *Family Mediation* (London: Sweet and Maxwell, 1997) p xvii.

²⁵Davis, above n 16, p 59.

²⁶C Menkel-Meadow 'Is mediation the practice of law?' (1996) 14 *Alternatives to the High Cost of Litigation* 59 at 59.

²⁷Davis, above n 16, p 88.

²⁸Davis, above n 14, p 3.

Project Unit were also positive about mediation's 'non-partisan, controlled environment'.²⁹ There is thus evidence that the rise of family mediation during the late twentieth century was supported by the limited therapeutic mediator type, continuing the dominance of lawyers in orthodox family justice. In order to receive the support necessary to establish mediation, family mediators could not provide a comprehensive service alone, and instead had to work alongside – and appease – the legal professions.

(a) 'Boundary crossing' and 'turf battles': the introduction of the lawyer mediator

It is no surprise that mediators' responsibilities increased as the family justice landscape developed to encourage families to attempt mediation. The mid to late 1980s saw fresh demand for mediators to expand their traditional practices and mediate disagreements not relating to children.³⁰ The 1985 to 1988 'Solicitors in Mediation' project, headed by several mediation pioneers including Henry Brown and Lisa Parkinson, adopted an all-issues mediation model that covered children's matters in addition to both financial and property disputes.³¹ This scheme led to the creation of the Family Mediators Association as an alternative regulatory body to the National Family Conciliation Council (later named National Family Mediation), followed by a three-year study on five all-issues mediation pilots.³² Janet Walker, Peter McCarthy and Noel Timms concluded that all-issues mediation obtained higher settlement rates compared to child-focused mediation, and simultaneously encouraged communication between the separating couple.³³

The success of all-issues mediation was swiftly followed by the Family Law Act 1996.³⁴ Part I of the legislation intended to introduce no-fault divorce, a period of reflection when applying for divorce and, crucially, mandatory meetings for divorcing couples that included information about mediation. Numerous studies suggested that these provisions did little to improve the divorce process, and the majority of the Family Law Act 1996 was scrapped.³⁵ Nevertheless, Part III of the Act, which introduced legal aid for family mediation, remained in force.³⁶ To encourage the take-up of mediation, section 29 stipulated that a party could not receive legal aid for private family law court proceedings unless they attended an intake meeting with a mediator.³⁷ A three-year pilot on publicly funded mediation, led by Davis et al, showed that screening took up a significant amount of mediators' workload when conducting section 29 meetings.³⁸ The Family Law Act 1996 had furthered mediators' responsibilities within the family justice system, particularly where screening for suitability was originally carried out by a solicitor. With family mediation no longer confined to the niche market of children's matters outside the legal aid system, the professional boundaries between mediators and solicitors began to blur.

The slight merging of professional territories expanded not only the work of family mediators, but also the role of the legal profession. Solicitors were previously prohibited from working as mediators

²⁹Ogus et al, above n 15, para 19.4.

³⁰For instance, the Conciliation Project Unit report recommended that mediation should be extended to cover financial and property matters. See *ibid*, para 20.19.

³¹H Brown 'Standards and survival: enhancing the practice model' (2015) *Fam Law* 202; H Brown and L Parkinson 'Mediation history' (2014) *Fam Law* 1495.

³²Brown, above n 31, at 202.

³³J Walker et al *Mediation: The Making and Remaking of Co-operative Relationships* (Newcastle upon Tyne: Relate Centre for Family Studies, 1994) p 13.

³⁴Helen Reece, who investigated the 1996 legislation in detail, sees the state's promotion of mediation as representative of a behaviour modification objective that teaches parties 'how to divorce responsibly', creating a sharp distinction between *good* divorce via mediation and *bad* divorce via court. See H Reece *Divorcing Responsibly* (London: Bloomsbury Publishing, 2003) p 149.

³⁵Barlow et al, above n 3, p 11.

³⁶See the Family Law Act 1996, s 27.

³⁷These intake meetings are largely replicated by the Mediation Information and Assessment Meetings (MIAMs) in the contemporary family justice system. Under a Pre-Action Protocol, parties wishing to attend court for a private family matter must first meet with a mediator to discuss whether mediation is appropriate for their dispute. See FPR PD 3A.

³⁸G Davis et al *Monitoring Publicly Funded Family Mediation* (London: Legal Services Commission, 2000) p 208.

because transitioning between professions was perceived to involve a significant conflict of interest.³⁹ However, the ‘Solicitors in Mediation’ scheme, as insinuated in the name, involved solicitors acting as mediators. The Law Society was positive about the scheme, and thereafter allowed solicitors to mediate (so long as they were not acting in their capacity as a solicitor at the same time).⁴⁰ This development firmly established the second family mediator sub-group: *lawyer mediators*. Lawyers could continue to work as a solicitor or barrister, yet also provide a different service beyond legal advice and support by becoming a mediator. This process was described by Walker as ‘boundary-crossing’, with both lawyers and mediators encroaching on the work of the other profession to broaden their professional remit.⁴¹

As legal aid declined and the state looked to reduce the role of solicitors in family justice,⁴² a noticeable degree of ‘mutual mistrust’ arose between mediators and lawyers.⁴³ Section 27 of the Family Law Act 1996 stipulated that any mediator conducting mediation through the legal aid scheme must follow a Code of Practice. The UK College of Family Mediators (UKCFM) was subsequently established as an overarching regulatory body.⁴⁴ Walker wrote that the UKCFM was created ‘to address the development of a separate and discrete profession’.⁴⁵ However, the Law Society, home to most lawyer mediators at the time, did not sign up to the UKCFM’s regulatory standards.⁴⁶ The legal organisation instead introduced its own Code of Practice and accreditation process for lawyers seeking to become mediators.⁴⁷ The attempts to unify and regulate the mediator profession were therefore of limited effect. This was recognised by Roberts, who argued that the Law Society ‘undermine[d] the national project to establish uniform standards of mediating practice’.⁴⁸ In reality, the late 1990s and early 2000s saw increased numbers of family mediators – influenced by the introduction of lawyer mediators – which intensified competition amongst different services. Roberts acknowledged that training providers ‘withdrew their increasingly ambivalent support’ for the UKCFM, and mediators’ perception of the organisation quickly declined.⁴⁹ Early signs of hostilities amongst the mediator profession were apparent.

The wider literature on dispute resolution has recognised the merging of the two professions.⁵⁰ Lesley Allport recently commented that the roles of lawyers and mediators became ‘increasingly blurred’ after civil justice reforms in the 1990s.⁵¹ Since this period, mediation has seen numerous ‘bids for professional and commercial turf’.⁵² Simon Roberts was unsurprised by this development, whereby different practitioners became mediators in an attempt to ‘colonise’ the new profession.⁵³ If successful, the practitioner (whether therapists, counsellors, lawyers or so on) would become the ‘legitimate’ mediator. The rise of the lawyer mediator would, therefore, have a significant impact on the goals and aspirations of the mediation process. Their introduction alluded to a growing view of mediation as ‘legal practice’, upon which Menkel-Meadow identified a key question: ‘should mediators

³⁹Parkinson, above n 24, p 2.

⁴⁰Ibid, p 22. See also Brown and Parkinson, above n 31, at 1495.

⁴¹J Walker ‘Is there a future for lawyers in divorce?’ (1996) 10(1) *International Journal of Law, Policy and the Family* 52 at 58.

⁴²For further information, particularly on the latter, see P Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (London: Lord Chancellor’s Department, 2000).

⁴³Walker, above n 41, at 58.

⁴⁴The UKCFM was founded by National Family Mediation, the Family Mediators Association and Family Mediation Scotland.

⁴⁵Walker, above n 41, at 53.

⁴⁶Barlow et al, above n 3, p 32. The authors also write that the UKCFM ‘proved unstable’.

⁴⁷Roberts, above n 19, at 114.

⁴⁸Ibid, at 117.

⁴⁹M Roberts ‘Quality standards for family mediation practice’ (2010) *Fam Law* 661 at 663.

⁵⁰This includes hybrid procedures such as med-arb. See M Palmer and S Roberts *Dispute Processes: ADR and the Primary Forms of Decision-making* (Cambridge: Cambridge University Press, 2020).

⁵¹L Allport ‘Square pegs and round holes: the divergent roles of lawyers and mediators’ in MF Moscati et al (eds) *Comparative Dispute Resolution* (Cheltenham: Edward Elgar Publishing, 2020) p 190.

⁵²Roberts, above n 19, at 118.

⁵³S Roberts ‘Mediation in the lawyers’ embrace’ (1992) 55(2) *Modern Law Review* 258 at 261.

be lawyers?⁵⁴ It is perhaps from these growing debates that the tensions between mediator sub-groups have emerged.

Another crucial question arises: does the tension between therapeutic mediators and lawyer mediators remain today? The FMC was established in 2007 to act as ‘a unified body for family mediation to negotiate with government and other parties’.⁵⁵ The umbrella body comprises five Member Organisations: the Family Mediators Association, the Law Society, National Family Mediation, Resolution and the College of Mediators (previously UKCFM).⁵⁶ Many of the changes introduced by the FMC were prompted by a growing concern in policy that the regulation of family mediation was piecemeal and inconsistent.⁵⁷ This included the 2011 Norgrove report:

... we are aware that the FMC, which brings together delegates from representative bodies, has found it difficult to work effectively. The risk is agreement only on a lowest common denominator... We recommend that government should closely watch and review the progress of FMC to assess its effectiveness in maintaining and reinforcing high standards. Government should if necessary create an independent regulator to replace the FMC.⁵⁸

The McEldowney report, published in the same year, considered these regulatory issues before concluding that the FMC was best placed to incite change.⁵⁹ Nevertheless, the report criticised the FMC’s ‘light touch’ approach that was ‘in need of strengthening’.⁶⁰ John McEldowney referred to the relationship between the two mediator sub-groups, albeit briefly:

... the professional role of mediators is not always easy to discern. Some family mediators are legally qualified practitioners and their dual expertise may overshadow their relationship with non-legally qualified mediators. There is some degree of distrust between legally and non-legally qualified mediators, which may lead to disagreement or professional tensions. Family mediation may be the loser in any professional rivalry.⁶¹

McEldowney highlighted the ‘distrust’, ‘disagreement’ and ‘tensions’ between lawyer mediators and therapeutic mediators (described as ‘non-legally qualified mediators’). Unfortunately, further discussion on the potential tensions amongst family mediators is scarce, particularly after LASPO.

Several prominent family justice researchers have recognised the two professional sub-groups. Mavis Maclean and John Eekelaar, for instance, observed a lawyer mediator giving direct, legal guidance to a client and asked if a therapeutic mediator would carry out these actions ‘with the same confidence’.⁶² The authors considered the day-to-day work of lawyer mediators and therapeutic mediators, though did not directly contrast the two sub-groups nor consider their perceptions of one another. Similarly, Emma Hitchings and Joanna Miles found that both lawyer mediators and therapeutic mediators from their sample sought to obtain a client-led mediated outcome.⁶³ They questioned if a mediator’s professional background affected whether she felt capable of informing clients about various issues or options, or if differences amongst the sample were caused by ‘professional choice

⁵⁴Menkel-Meadow, above n 26, at 59.

⁵⁵Resolution ‘New group will be “voice of mediation” in UK’ (Resolution, 2007) available at https://web.archive.org/web/20140704054725/http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=21&n_year=2007&n_month=10.

⁵⁶The ADRgroup, another Member Organisation, was removed from the FMC’s list of affiliated institutions in 2019.

⁵⁷For further information, see Barlow et al, above n 3, pp 32–33.

⁵⁸Family Justice Review, above n 1, para 4.104.

⁵⁹McEldowney, above n 4, para 75.

⁶⁰Ibid, p 3 (foreword).

⁶¹Ibid, para 14.

⁶²M Maclean and J Eekelaar *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Oxford: Hart Publishing, 2016) p 114.

⁶³E Hitchings and J Miles ‘Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum’ (2016) 38(2) *Journal of Social Welfare and Family Law* 175 at 185.

exercised by the individual mediator'.⁶⁴ The two commentators acknowledged that these inquiries were outside the scope of their research. Barlow et al's 'Mapping Paths' project involved interviews with 31 family mediators, 25 of whom had a legal background, though findings are not related back to the participants' professional sub-groups.⁶⁵ Whilst this collection of work begins to allude to the differences in mediator practice in light of background, there is no empirical data on the potential tensions between therapeutic mediators and lawyer mediators in England and Wales.

By comparison, the American mediation literature considered the fragmented status of the mediator profession as early as the 2000s, with Jacqueline Nolan-Haley identifying 'unnecessary turf battles between lawyers and non-lawyers' across the dispute resolution community.⁶⁶ She further acknowledged 'blurred boundaries' between the roles of lawyers and mediators that caused these confrontations. Numerous American commentators have subsequently expressed a preference for lawyer mediators or therapeutic mediators in the mediation setting. For the former, Jaime Abraham argues that therapeutic mediators 'will never achieve the level of knowledge' provided by a legal background.⁶⁷ For the latter, Matthew Daiker comments that giving preference to lawyer mediators overlooks the crucial contributions made by therapeutic mediators to mediator practice, as well as the ability of therapeutic mediators to understand the emotional aspects of divorce.⁶⁸ The dispute resolution literature in the United Kingdom acknowledges the merging of different professionals, though discussion on the tensions amongst mediator themselves would still benefit from fresh empirical data.

The primary focus of this paper, therefore, is to analyse the possible hostilities between therapeutic mediators and lawyer mediators in the post-LASPO climate. Furthermore, it asks whether the FMC has achieved its main task, specifically in uniting mediators and promoting cohesion across the profession.

2. Methods

The findings discussed in this paper are part of a larger project examining the modern conceptualisation of family mediation.⁶⁹ The project sought to understand whether, and if so how, the role of the family mediator had developed since the late twentieth century, with further consideration as to how this modern role could support access to justice in the long term. The research also uncovered unanticipated data on significant obstacles to mediation reform, including the fragmented status of the mediator profession.

Semi-structured interviews with 17 family mediators were conducted. The participants were located across South Wales, the South West of England and London.⁷⁰ When commencing the study, potential participants were identified via the FMC's 'Find a Mediator' tool.⁷¹ Three interviewees were also recruited through snowballing. All participants were sent information on the study and signed a consent form prior to the interview. Interviews were then conducted between July and September 2019.

A purposive sample was used to elicit views from family mediators with a range of professional backgrounds, experience and legal aid provision. Professional background is a frequent way through which research and commentary has categorised different mediators. For example, Maclean and

⁶⁴Ibid, at 186.

⁶⁵Barlow et al, above n 3, p 62.

⁶⁶J Nolan-Haley 'Lawyers, non-lawyers and mediation: rethinking the professional monopoly from a problem-solving perspective' (2002) 7 *Harvard Negotiation Law Review* 235 at 240.

⁶⁷J Abraham 'Divorce mediation – limiting the profession to family/matrimonial lawyers' (2008) 10(1) *Cardozo Journal of Conflict Resolution* 241 at 246.

⁶⁸M Daiker 'No JD required: the critical role and contributions of non-lawyer mediators' (2005) 24(3) *The Review of Litigation* 499 at 521.

⁶⁹This study was conducted following ethical approval from Cardiff University (Internal Reference: SREC/050618/10).

⁷⁰These three locations were selected in order to identify any geographical differences in mediators' conceptualisation of family mediation, though no variance was found in relation to the findings covered in this paper.

⁷¹Family Mediation Council 'Find your local mediator' (FMC, 2022) available at <https://www.familymediationcouncil.org.uk/find-local-mediator/>.

Eekelaar opted to use the terms ‘lawyer mediator’ and ‘non-lawyer mediator’.⁷² The current research is reluctant to adopt the term ‘non-lawyer mediator’ because its use potentially overlooks how the original family mediator tended to have a therapeutic or counselling background. Furthermore, the ‘lawyer’ and ‘non-lawyer’ distinction may insinuate that lawyer mediators are the preferable professional sub-group. Returning to the American literature on mediation, Ericka Gray argues against the term ‘non-lawyer mediator’ due to the likely ‘value judgment’ underpinning its use,⁷³ whereas David Hoffman acknowledges that the term still holds value when it ‘provide[s] a relevant distinction rather than a gratuitous form of disparagement’.⁷⁴ In line with these suggestions, the current research originally grouped interviewees into the categories of ‘therapeutic mediator’ and ‘lawyer mediator’.

Interestingly, five lawyer mediators within the sample had additional therapeutic training and/or further experience with non-legal roles, typically therapy or counselling. One solicitor had trained as a psychotherapist, and another as a counsellor. A third participant was a trustee for a relevant charity, and later provided training to therapists and counsellors. Two other interviewees were solicitors with previous experience in education. Whilst the range of backgrounds of these five participants was broad, these participants brought additional experience to their practice as a lawyer mediator. The decision was therefore made for sampling to use a third category of *hybrid mediator*: a lawyer mediator who also had experience (or training) in a therapeutic (or non-legal) field.⁷⁵ This is a similar idea to Barlow et al’s ‘hybrid professional’ who practises across two or more family dispute resolution procedures.⁷⁶ The hybrid mediator is a controversial development, and will be returned to towards the end of this paper.

To summarise the sample from the current study, five interviewees were lawyer mediators (all of whom were members of the Law Society), seven were therapeutic mediators (with four from the College of Mediators and three from FMA), and five were hybrid mediators (three of whom were from Resolution, and another two from FMA). These profiles are depicted in Table 1.

The arguments made within the paper cannot claim knowledge of the views and opinions of every mediator within England and Wales. Limited generalisability is also a consequence of small-scale qualitative research. Nevertheless, this study provides a crucial, investigatory insight into the different views and opinions that may be held throughout the mediator profession. Many of its findings have been speculated for some time: this project begins to provide evidence of these developments, and provides a foundation for further research and debate.

3. Findings

The findings from this study are grouped into three parts. First, the discussion considers mediators’ negative perceptions of the other professional sub-group. It then turns to the subsequent lack of a national identity within the sample. Finally, the analysis concentrates on several participants who acknowledged the issues with a fragmented mediator profession, before considering the sample’s desire to collaborate.

All interviewees are referred to by a pseudonym. Letters are then used to denote interviewees’ professional backgrounds: therapeutic (T), legal (L) or hybrid (H).

(a) Tensions across the professional sub-groups

It became apparent in the early stages of data collection that mediators generally held negative perceptions of the other dominant sub-group (therapeutic and lawyer). This finding is consistent with earlier

⁷²Maclean and Eekelaar, above n 62.

⁷³EB Gray ‘What’s in a name? A lot when “non”- is involved’ (1999) 15(2) *Negotiation Journal* 103 at 103.

⁷⁴DA Hoffman ‘Is there a niche for lawyers in the field of mediation?’ (1999) 15(2) *Negotiation Journal* 107 at 108.

⁷⁵The term ‘hybrid mediator’ would also include therapeutic mediators that went on to practise (or have additional training in) law, though this experience was not reflected within the current sample.

⁷⁶Barlow et al, above n 3, p 62.

Table 1. Breakdown of participants according to professional background

| Professional background | Number of mediators | Member Organisation |
|-------------------------|---------------------|--|
| Therapeutic | 7 | College of Mediators (4) Family Mediators Association (3) |
| Lawyer | 5 | Law Society (5) |
| Hybrid | 5 | Resolution (3) Family Mediators Association (2) |
| Total | 17 | 17 |

research on the family justice landscape, with Walker identifying a concern amongst both mediators and lawyers that the other group would monopolise family dispute resolution.⁷⁷ A similar fear of invasion was later identified within the legal profession itself by Lynn Mather, Craig McEwen and Richard Maiman, who discovered a lack of community between generalist lawyers and divorce specialists.⁷⁸

Most interviewees in the study made a distinction between the two traditional mediator sub-groups. In many instances, this discussion was raised without any prompt from the interviewer. Rosie, a lawyer mediator, spoke about the different stereotypes:

I trained with FMA and they did this lovely exercise, because half of us were lawyers and half of us were therapists. It was really funny because after we had been together for quite a few days, they then asked us to explain to the other group what our perceptions were of them, coming from their background. They thought we would be really snooty and posh, and I thought that they'd be in tie-dye, caftans and dangly earrings. (Rosie, L)

Lawyers were stereotyped as arrogant, 'posh' upper-class professionals, and therapists as relaxed, laid-back 'hippies'. These stereotypes may appear to be harmless reflections of how the public perceives the two professions, but in actuality illustrate a strained relationship amongst mediators. From the perspective of lawyer mediators, therapeutic mediators lacked both the knowledge and legal training required to mediate. Returning to Rosie:

I think family therapists [therapeutic mediators] are needed – particularly in children's work. But where I do think they struggle is when it's money. They don't understand what the court can or will do. You get arrangements back which just don't make sense. Whereas if I've got clients who want to go to mediation for money, I get them to choose a lawyer mediator because they would then come back with something that's more realistic. (Rosie, L)

The lawyer mediators in the sample felt that this gap in training and experience was particularly problematic when mediating financial or property matters. This was reiterated by Judith, even though she had a vast amount of experience working with, and training, counsellors:

It's quite important that the mediator has ENOUGH legal background to understand that what might happen here is X, or might accidentally be triggering on tax. For example, in that case, one party has moved out and wants to transfer their interest to the other party. That would trigger capital gains tax. I have to know that. You find a lot of mediators without a legal background don't know it. That could be HORRENDOUS. Sometimes they even do the transfer then realise they've got a tax problem. (Judith, H)

⁷⁷Walker, above n 41, at 58.

⁷⁸L Mather et al *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York: Oxford University Press, 2001) p 53.

Judith recalled a previous case where she acted as a solicitor and the therapeutic mediator ‘had no legal knowledge at all’ regarding cohabitation. She felt this damaged the mediation process and could have led to an impracticable or unworkable agreement. When considered altogether, the mediators with a lawyer or hybrid background thought their therapeutic counterparts were unable to produce accurate agreements that followed the law. These mediators subsequently believed that they provided a more holistic service:

I say to them that I am a solicitor but acting as a mediator. Not as a solicitor so I can’t give you advice, but I can give you information. As I said I have a lot of experience in doing this. This is what I do. I go to court with people, so I know what the court does. I think it’s just an extra layer than if you’re SIMPLY – that sounds a bit rude – simply a family mediator. (Amy, L)

We’re fortunate enough still in [LOCATION] to have a few of my old colleagues, who I used to work for, who are family lawyers. You need a family lawyer to do the finance. I don’t generally think that social work type trained mediators know enough. I’ve certainly come across some mediated agreements that are appalling. You see them and think if that’s the standard of your expertise, no wonder mediation is taking a hit. (Michael, L)

Both Amy and Michael felt that their legal background provided an ‘extra layer’ to their mediation practice. Michael even attributed the lack of legal training for therapeutic mediators to the decline in mediation cases post-LASPO. In general, the lawyer and hybrid mediators in the study devalued the work of therapeutic mediators to promote their own skillset.

This underplay was not one-sided, as the interviews also revealed negative attitudes amongst therapeutic mediators towards lawyer mediators. Therapeutic mediators perceived lawyer mediators as unavailable, uncommitted and too preoccupied with their legal practice.⁷⁹ Jessica spoke about the high numbers of lawyer mediators that stopped practising mediation after realising that its profit margins were much lower than legal practice:

... the biggest change [to mediation practice] is a LOT of lawyers training as mediators. Which isn’t a BAD thing on some accounts. I think in my experience what I’ve found is the ones that then trained, they didn’t have the time commitments to get their accreditation... I think what they actually found was you don’t make anywhere near as much money as a mediator. If you’re a trained solicitor, your time is far more valuable using your law degree as a solicitor than it is a mediator. So, they all sort of GAVE UP. (Jessica, T)

Some interviewees went beyond Jessica’s frustration and claimed that lawyer mediators lacked the skillset required to respond to the emotional needs of parties. Lauren (T) was doubtful that lawyer mediators ‘have the headspace’ to consider the parties’ emotions and well-being, questioning that ‘maybe they [lawyer mediators] push them [the parties] both out the door in a hurry’. Mary was a hybrid mediator, but emphasised her therapeutic training throughout the interview:

Sometimes they [the parties] just want to use mediation to beat each other up. (Mary, H)

Ah, is that common? (Interviewer)

Yes. (Mary, H)

What do you do in that scenario? (Interviewer)

I may mention it. I think a lot of solicitors wouldn’t do that. They wouldn’t say, ‘What I’m noticing is that you’re being – you’re using these sessions to express a lot of the anger that you’ve got’. I think a lot of solicitors will just try and suppress it. You know, ‘Well, moving to THE WHITEBOARD’. So, the clients have got an opportunity. (Mary, H)

⁷⁹This problem was acknowledged by a hybrid mediator, Mary (H), who claimed that ‘they’ve [lawyer mediators] got enough on their plates trying to be solicitors’. She later added that ‘solicitors are just very, very busy people’.

In a similar vein, Lydia believed that her previous experience working in education gave her an advantage over mediators from an adversarial background:

... they [lawyer mediators] don't go into law necessarily for the same reasons that I went into my career. So, I think they might develop that over time and think, "Actually it's quite nice talking to people and making something work, rather than fighting for things". But, for me... I've always understood the importance of listening well. (Lydia, T)

These participants suspected that pure lawyer mediators would overlook the party dynamic and avoid any anger or resentment between parties, preferring to focus on settlement. Consequently, the therapeutic mediators (in addition to Mary as a hybrid mediator) believed they were best placed to deal with the emotional aspects of divorce. They promoted their therapeutic training, parallel to the lawyer mediators who felt they provided a more holistic legal service. This alludes to the sub-groups' different understandings of mediation, with therapeutic mediators potentially becoming concerned that the complexities of family dynamics may be overshadowed by the resolution of legal issues. In the words of Roberts, mediation could become 'co-opted as adjunct to some existing role', losing the original attributes and focus that justified the therapeutic mediator.⁸⁰

The family mediators in the study frequently promoted their work and professional background by undermining the skills of the other mediator sub-group. As argued by Menkel-Meadow, mediator turf battles involve 'each profession claiming its disciplinary knowledge is essential to the task'.⁸¹ Therapeutic mediators were supposedly unprepared to deal with legal issues (notably in financial matters). By comparison, lawyer mediators were uncommitted and unappreciative of parties' emotional needs. These perceptions return to the historic divide between lawyers and mediators: the former traditionally claimed a monopoly over financial and property disputes, whereas the latter was limited to children's matters.

To return to the earlier quote from McEldowney, it is the mediator profession that suffers the most from these negative perceptions. The views of the sample not only demonstrate boundary-crossing, but also reflect an effort amongst mediators to create a distinction that divides the profession according to background. This is analogous to when different professions sought to establish themselves as the 'better' mediator, extending their professional territory as a result. The divide is perhaps an ill-fitting boundary that shrouds mediator practice in ambiguity, though this argument can only be corroborated through further research on the effect of a mediator's professional background on their skillset. Whilst this study did not consider the abilities of different mediator sub-groups, as well as the training offered to trainees, it highlights the importance of such research being undertaken in the future.

(b) Participants' views of the FMC

Most of the sample recognised the value of the FMC as a regulatory body and thought the organisation had taken many steps to unify mediators. It was regarded as a visible spokesperson for the profession:

[The FMC] are making improvements. So, when I started you had to be a member of the Council, but you were kind of like, 'Who- who is the Council? What do they do? What part do they play in our role?' They were very sort of REMOVED from practice. (Jane, T)

But the FMC I do think has had a unifying effect. They've had some rough passages, but it is much, much stronger. I think they've raised standards. (Lauren, T)

So, the FMC have made lots of- not lots of, but have changed certain things, like short-term fixes,

⁸⁰Roberts, above n 53, at 261.

⁸¹C Menkel-Meadow 'When dispute resolution begets disputes of its own: conflicts among dispute professionals' (1997) 44 UCLA Law Review 1871 at 1881.

to make things easier for the mediators. It's feeling a much more cohesive body of people than it's ever been before. I think that's really positive. Yeah. Long may that last. (Kate, H)

Later in her interview, Kate praised the January 2019 introduction of a Professional Practice Consultant (PPC) Code of Practice.⁸² She mentioned that these developments were 'all about trying to make it more of a profession' and thought there had been 'enormous progress' since the 2014 Standards Framework.

Whilst the sample largely recognised the value of the FMC, criticism remained. Michael was critical – and at points sceptical – of the FMC as an organisation:

To be honest, [the FMC is] not a great organisation. It can be very frustrating working with other mediators and I'm afraid they're not easy to agree with. There are things that they've been doing which – I get the sense that they're actually in it for other reasons rather than doing the day-job. I think a lot of the UK market – MY take is that it's more to sort of do with helping those who make money out of training for mediators and the costs of all the assessing. (Michael, L)

In a similar line, Judith (H) claimed that the FMC was 'not very respected by mediators' and 'takes money for jam'. Michael was noticeably exasperated with the FMC: his frustration became accusatory and he suggested that the organisation was ultimately driven by profits. This high level of disengagement with the regulatory bodies could create serious problems if identified across the profession. Widespread disenfranchisement may hamper any attempts to unify family mediators, encourage standard practice and, crucially, promote the profession's national identity.

Michael's detachment from the FMC was not representative of the entire sample. The more general criticism was that the organisation had not resolved a number of issues relating to the training and accreditation process. Interviewees described these procedures as 'really tedious' (Rosie (L)), 'unclear', 'ambiguous' and 'SO time-consuming' (Mary (H)), in addition to 'a bit haphazard' (Emma (L)). The FMC Manual of Professional Standards stipulates that a mediator seeking accreditation must submit three case commentaries.⁸³ Previously, these three cases must have reached completion and involved a children's dispute, financial dispute, and all-issues dispute respectively.⁸⁴ Megan (T) struggled to reach this standard because, from her experience, 'to get those three cases from start to finish is not that easy, especially if you're only doing one day a week'.⁸⁵ Whilst the FMC now allows trainee mediators to submit one commentary where the case was uncompleted, the parties must still reach 'partial agreement' on some issues in addition to 'substantial disclosure' for financial matters.⁸⁶ There is more flexibility for those seeking accreditation, though the continued focus on agreement does not necessarily reflect the skill of the mediator. This example not only demonstrates the barriers to obtaining accreditation (which could deter people from joining the profession), but mediators' dissatisfaction with the accreditation process.

The sample acknowledged that other areas of contention had yet to be resolved, such as the lack of protection for the title of 'family mediator'. Solicitors are a controlled profession, meaning any

⁸²Family Mediation Council 'Professional Practice Consultant (PPC) Code of Practice' (FMC, 2019) available at <https://www.familymediationcouncil.org.uk/wp-content/uploads/2019/01/PPC-Code-of-Practice-v.1-January-2019.pdf>.

⁸³Family Mediation Council 'FMC Manual of Professional Standards and Self-Regulatory Framework' (FMC, 2019) p 14, available at <https://www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/FMC-Manual-of-Professional-Standards-Regulatory-Framework-v1.3-Updated-June-2019.docx.pdf>.

⁸⁴Mediators could alternatively submit four case commentaries consisting of two children's disputes and two financial disputes. See *ibid*, p 14.

⁸⁵Victoria (H) also recognised this problem: 'You need to do it in three years, and you need the outcomes. Cases don't always get an outcome, and neither should they'.

⁸⁶Family Mediation Council and Family Mediation Standards Board 'Changes to the FMC Standards Framework agreed by the FMC Board 12.6.19' (FMC, 2019) available at <https://www.familymediationcouncil.org.uk/wp-content/uploads/2019/06/Changes-to-Standards-Framework-Agreed-12.6.19.pdf>.

individual must fulfil various training and accreditation requirements before describing themselves as a ‘solicitor’ to a public audience. By contrast, anyone can promote themselves as a ‘family mediator’. To incentivise individuals to join a Member Organisation (and subsequently the FMC), a family mediator can only conduct a Mediation Information and Assessment Meeting or publicly funded mediation upon obtaining FMCA status.⁸⁷ Nonetheless, some interviewees were concerned about the scant protection afforded to the profession’s name:

... there is no qualification to become a mediator. It is not a controlled profession. I think that’s a real worry because we have ENORMOUS power in people’s lives. Solicitors are of course protected. Therapists I would always tell a client to check that they’re on the right registers. But mediation’s not like that. You can get people who call themselves mediators who REALLY aren’t clued up. (Amy, H)

Obviously I did the accreditation which was the biggest pain in the world. It took ages. *sighs* There is, I suppose, a bureaucracy as well. It all makes a mockery when you’ve got any person in the street who can call themselves a mediator anyway. Yet they bend you over backwards. (Rosie, L)

Both excerpts provide an insight into the national identity of mediators. Amy felt the mediator profession should be controlled because mediation could have a significant impact on the parties’ futures. By the same token, Rosie was frustrated with the lengthy accreditation process when ‘any person in the street’ could call themselves a mediator. While the regulation of the ‘mediator’ title goes beyond the FMC and may require statutory reform, Rosie’s frustration could cause her to become detached from the accreditation process and her profession at large. This finding reveals the value in ring-fencing the profession in order to protect the mediator name. Reform could set out the type of training required for mediators, regardless of their professional history. Such change may also aid in creating a ‘soundly established groups of mediators’, minimising tension amongst the sub-groups.⁸⁸

If left unresolved, these issues will hamper the efforts to create a national community of family mediators. According to Mather, McEwen and Maiman, the national community was a ‘source of both identity and esteem’ for lawyers.⁸⁹ In contrast, the findings from the mediator interviews allude to frustration with the lack of protection around the profession. This could lead to decreased morale amongst family mediators, potentially furthering the divide between the professional sub-groups. There is demand for a national identity for family mediators, though the FMC must continue to develop a regulatory framework to unify its profession.

(c) The desire to collaborate

Reform around family mediation has been piecemeal and sporadic. This may have significant implications for mediation’s future, leading to a noticeable level of pessimism within the mediator sample. As acknowledged by Lauren:

I’m afraid I’m pessimistic, having seen forty years of it [mediation]. There is such a lot of half-hearted talk... it’s very sad because if the whole thing was stronger and there was a more concerted effort, I think much more could be achieved and NEEDS to be. (Lauren, T)

A small group of mediators recognised that the profession was heavily divided, particularly with regards to the regulatory structure. David was critical of the FMC and its Member Organisations,

⁸⁷Legal Aid Agency ‘Family mediation guidance manual’ (Legal Aid Agency, 2018) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738258/Family_Mediation_GuidanceManual_V5_Sep2018.pdf paras 5.1 and 15.1.

⁸⁸Roberts, above n 53, at 261.

⁸⁹Mather et al, above n 78, p 46.

describing the structure as ‘out of this world’. When asked what could be done in response, he proposed to ‘close them [the Member Organisations] all down’:

We’re all members of the FMC. It’s a complete duplication. So, it’s as simple as that. (David, H)

To David, the five Member Organisation structure was unnecessarily complicated and prevented family mediators from seeing themselves as ‘members of the FMC’. Two other mediators recognised the hypocrisy of a fragmented mediator profession that aimed to bring people together and foster agreements. Their responses provided a valuable insight into the tensions within the national mediation community:

All the regulatory bodies were just such a shamble before. It’s just ironic that they’re all fighting with each other, and you think, aren’t we mediators here? (Emma, L)

The irony has been lost on NO-ONE that the mediation community is ridden with strife. *laughs*... my view when we’re talking at the Family Mediation Council who has representatives from all the regulatory bodies – I think there is this sort of passive aggression from ALL sides. We know that there’s these issues that divide us and we haven’t really got them on the table. My view is, let’s talk about them. We’re mediators. We expect our clients to do EXACTLY that. We expect our clients to have ALL those issues onto the table and tackle them. WHY oh WHY have we not been doing that? Isn’t it odd? You know, mediators mediating ourselves. (Rebecca, L)

Both Emma and Rebecca doubted if mediators could mediate the discussions amongst the profession. A concerning image comes to light. When parties attend mediation, they are expected to be open, understanding towards each other and willing to reach a solution. Do mediators uphold the same values when engaging with their wider profession? At this point, the answer is unclear. Yet what is apparent is that more must be done to mediate the national discussions around family mediation, in turn promoting cohesion across the profession.

Despite the negative perceptions between the mediator sub-groups, there was evidence that mediators recognise the value of collaboration. Many interviewees engaged with their peers through local communities involving mediators of different professional backgrounds. Lydia provided an example:

...there is a group called [MEDIATION GROUP]. So [MEDIATOR] does these talks [several] times a year, with lots of different people. Mediators and solicitors will come, and we’ll have a chance to chat. Plus, we get to hear really interesting people. And it’s free! (Lydia, T)

The sample generally praised these events as an opportunity to develop their skills and keep in touch with other mediators. Mediators also established communities in their mediation services or law firms, as explained by Harley:

How do you find working in a mediation service? (Interviewer)

It’s nourishing. When I was working in [LOCATION], I spent a lot of time doing venues. I would be on my own. You aren’t able to offload. Being able to give mediators an opportunity to offload, it’s wonderful and lovely. (Harley, T)

Harley suggested that working with other mediators promoted reflexivity and open practice. It enabled him to ‘offload’ about any issues and feel part of a community. In a similar vein, Amy (L) was positive about the support she received when contacting other mediators for advice. She mentioned two mediators who would review her notes from a mediation session, stating that ‘it’s just quite nice to have

somebody independent looking at it'. Effectively, communication with peers reassured these participants that they were acting within the confines of their role. Mediators may, therefore, enhance their understanding of family mediation through interactions with other mediators.

The preference for collaboration was also demonstrated through participants' discussion of the co-mediation model, whereby two mediators mediate the same case. Following the introduction of all-issues mediation, co-mediation tended to involve a lawyer mediator and therapeutic mediator.⁹⁰ The model is still used in the contemporary justice system, with ten mediators in the sample either advocating its use or saying they had co-mediated in the past. Megan (T) qualified in 2018 and thought co-mediation helped her understand the purpose of family mediation: '... I found it [co-mediation] made a big difference. Really noticing how the family mediators didn't go into the past. It was future-focused'. She recognised that family mediation was 'future-focused' through co-mediation, suggesting that the model also supported her professional development. Judith similarly praised the use of the co-mediation model during the early stages of a mediator's career, recalling a case when her co-mediator flagged up a potential solution:

We were talking about how much money he would give her and it was quite a lot, it was quite generous. My co-mediator who was an ENORMOUSLY skilled family therapist... he just sort of sat back a bit, which is a signal between the two of us. And he turned to her and said, 'Have you ever looked for somewhere to live by yourself?' Bingo. It was brilliant. She had NEVER looked for her own place. I'd hope now that I would pick that up but I wonder then – I was much more new to the whole thing. And [the co-mediator] was brilliant at it. We worked closely together. I think that's a really important thing. If you're going to co-mediate, certainly for the first few years, it's a really good thing to do. Judith (H)

Other mediators in the sample praised the involvement of both mediator sub-groups as it introduced both legal and therapeutic expertise into the sessions.⁹¹ As explained by Michael:

The other mediator that you would co-mediate with, was their background different or were they also a solicitor? (Interviewer)

No, no. Often a social-type mediator. (Michael, L)

How did that work? (Interviewer)

Much better, yeah. Because you have somebody from both backgrounds, they might deal more with the – you can rely on their expertise a bit more for the children and me for the finance. It's sad that THAT library of experience is fast disappearing. (Michael, L)

These participants clearly appreciated co-mediation as a model that encouraged collaboration between mediators from different professional backgrounds. To quote Charlotte (T): 'the more inputs and the more influences, the better. You can see what worked really well and nick it'.⁹² However, a noticeable issue with the co-mediation model is the inevitable increase in cost, a problem previously identified by

⁹⁰L Parkinson *Family Mediation: Appropriate Dispute Resolution in a new family justice system* (Bristol: Family Law, 2nd edn, 2011) p 92.

⁹¹This was mentioned by David (H): 'Back in the early 1990s, there was always a lawyer and a family trained person. It was also a man and a woman. I used to work with a lovely lady who was a transactional analysis therapist. We did a LOT of work together and she would stop me at times, if I was being too lawyerish and say, 'David, can you just explain that?' That was of course her way of enabling the conversation to be explained...'

⁹²In the American literature, Nichol Schoenfield notes that co-mediation means that parties do not have to choose between a therapeutic mediator and lawyer mediator. See NM Schoenfield 'Turf battles and professional biases: an analysis of mediator qualifications in child custody disputes' (1996) 11(2) *Ohio State Journal on Dispute Resolution* 469 at 486.

Barlow et al.⁹³ With fewer opportunities in place for mediators to engage with one another, the negative and often stereotypical perceptions of the mediator sub-groups may become further entrenched.

The sample's positive views around collaboration and co-mediation are relevant to the tensions within the mediator profession. In 2002, Nolan-Haley recognised that the 'unnecessary battles' between therapeutic mediators and lawyer mediators occurred alongside 'a new ethic of problem-solving that encourage[d] collaboration'.⁹⁴ Likewise, a noticeable proportion of the mediators in this study recognised the benefits of partnership and cooperation through engaging with the co-mediation model, but simultaneously created a boundary that separated the mediator profession into two groups. It is perhaps paradoxical that the family mediators in the sample regularly downplayed the skills and techniques of the other professional sub-group to promote their own services, yet at the same time recognised that they could learn and develop their strategies by engaging with that sub-group. The participants believed that they had the more relevant skillset to mediate, and could 'top-up' these skills through knowledge transfer with their peers and colleagues. A desire to learn from one another and appreciate the skills of the other sub-group may underpin this collaboration. On the other hand, there is a risk that these mediators are working with the other sub-group to improve their own service, revealing a somewhat self-serving collaboration from both sides. This is not to suggest that the different practitioners are constantly in 'perpetual crisis' but, as mentioned by Linda Mulcahy, regularly 're-conceptualising and re-constructing' their role in light of other professions.⁹⁵

4. The potential path to reform

The prevalent feelings of superiority across the sample are problematic. With the analysis revealing contrasting statements of sanctimony and collaboration amongst the mediators interviewed, future discussion and debate on the issue must emphasise the latter. This is not the first time such a suggestion has been made, and is unlikely to be the last. A similar observation was made by Walker in 1996: '[c]ooperation rather than competition would seem to offer a constructive way forward'.⁹⁶ In the American literature, Nolan-Haley suggested that 'the time has come to recognise the powers of collaboration and compromise', though acknowledged that this first requires 'systemic change' within the family mediator profession.⁹⁷ Perhaps rather than constructing a boundary between lawyer mediators and therapeutic mediators, attention should be placed on recognising the benefits of a diverse profession and how the different skillsets can merge to create a comprehensive mediation process.

Of course, the difficult question that follows is how this change can be enacted. How exactly can the family mediator profession be brought together in such a way that supports the momentum for reform and development? Walker continues to be a strong advocate for a unified mediator profession and called for an end to the professional sub-group divide in 2017. She writes:

Indeed, it would be preferable if all terms such as lawyer-mediator were dropped once and for all. We should simply refer to mediation and mediators (with no descriptive qualifiers) as one option in a comprehensive network of services, preferably accessed through a single door...⁹⁸

One option is to discard the therapeutic mediator and lawyer mediator terminology, no longer opting to distinguish mediators based on their professional background. However, the problems identified through this research are not solely down to a lexical choice. Categorising family mediators based

⁹³Barlow et al, above n 3, p 129.

⁹⁴Nolan-Haley, above n 66, at 241.

⁹⁵L Mulcahy 'Can leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation' (2010) 8(3) *International Journal of the Legal Profession* 203 at 219.

⁹⁶Walker, above n 41, at 52.

⁹⁷Nolan-Haley, above n 66, at 299.

⁹⁸J Walker 'What's in a name? Reflections on the messages from family justice research for mediation practice' (2017) *Fam Law* 104 at 110.

on their professional background acknowledges the different experiences and potentially different attributes they hold. It is plausible that lawyer mediators are more attuned to the legal issues in a dispute, whereas therapeutic mediators are switched on to the emotional aspects of divorce and family matters. There is an apparent cultural distinction amongst mediators according to professional background, and this notion would remain even if the terminology was removed.

The playing field could be levelled by introducing further training that renders a trainee mediator's professional background near obsolete. Such a strategy would mean a therapeutic mediator needs to undergo additional legal training, and a lawyer mediator has further therapeutic or counselling training. This is not a straightforward resolution, as the FMC would need to decide whether to introduce a mandatory or optional training scheme. Returning to the mediator sample, Rebecca was in favour of specific training in the legal and therapeutic areas:

Maybe family law solicitors need MORE of the sort of information about children or whatever. And those who've come from CAFCASS [therapeutic mediators] don't need that but they need a LOT more in terms of the finances. Particularly if people are drafting consent orders, you perhaps need a different level of training altogether. A bit like child inclusive mediation which is now a thing where you go to get yourself accredited. You go to the training and get a badge I suppose. (Rebecca, L)

Under Rebecca's recommendation, mediators would attend different training modules and receive a 'badge', allowing them to advertise their areas of expertise. She mentioned that this was similar to the recent reforms on child-inclusive mediation. Since September 2019, all mediators working towards accreditation have been required to attend a training course on child-inclusive mediation.⁹⁹ From one perspective, this training may weaken the claim that a mediator with a therapeutic background is better suited to mediating children's matters. However, an excessive amount of mandatory training could lead to frustration and criticism. Michael (L) was frustrated that he had to attend a child-inclusive training course; the training cost 'a LOT of money' in terms of the fee for the course as well as the missed income for that day. He may have preferred for the course to be optional, echoing Judith's proposal:

I think there should be DIFFERENT levels of qualification for mediators. A bit like you have for financial advisers. For example, some of them can advise on mortgages, some can advise on different products. They have different professional exams to do that. (Judith, H)

An opt-in training system could have different tiers of accreditation. The voluntary nature of such a scheme may reduce mediators' levels of frustration and enable them to tailor their training to their particular interests. A similar recommendation was made by Barlow in 2017, who suggested 'a system of specialist accreditation' to enable mediators to undergo training in areas such as 'high conflict couple mediation, child inclusive mediation or complex financial cases'.¹⁰⁰ The proposed system may additionally promote triage amongst the profession, as it encourages mediators to refer cases to their peers depending on the specialism required.

This recommendation remains reliant on a strong and cooperative relationship amongst the professional sub-groups. A system solely based on voluntary training could inadvertently result in a hierarchy of mediators. Mediators possessing the badges that are deemed more important would become the more qualified – and "the better" – mediator.¹⁰¹ Thus, the same issue of superiority

⁹⁹Mediators with FMCA status had to attend this course by January 2020. See Family Mediation Council 'Important information for family mediators about the new FMC Standards for Child-Inclusive Mediation' (FMC, 2018) available at <https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/05/Important-Information-new-FMC-standards-re-CIM-14.5.18.pdf>.

¹⁰⁰Barlow, above n 2, at 212.

¹⁰¹The same could also be said of a mediator who goes on to acquire all available badges, which is likely to be an expensive and time-consuming venture.

identified within the mediator sample continues. The FMC could potentially look at a blend of training schemes, with further mandatory training at the foundational level, supported by specific courses to enhance knowledge and expertise. Such a balanced approach must be managed carefully, and will operate most effectively when tensions across the mediator profession are first resolved. This is a critical implication of the paper.

The fragmentation amongst mediators is heightened by concerns that the other sub-groups will 'steal' cases (and therefore income) if they can specialise in the same area. Mary mentioned this problem:

People are very in their own kind of professional ambits. I would like to see something start to – that those walls start to dissolve. To enable more help to be given to people. But I think the professions are frightened of that. (Mary, H)

In what way? (Interviewer)

Well, I think the professions are frightened of being invaded. Each profession is frightened of being invaded by the other. (Mary, H)

In Mary's words, the mediator sub-groups are 'frightened of being invaded'. If a family mediator's monopoly over an area (law or therapy) is removed, she has fewer opportunities to promote her services by distinguishing it from mediators in the other sub-group, in turn weakening her claim as the ideal practitioner to become a mediator. Barlow also recognised this issue, suggesting that reform 'require[d] more solidarity and less direct internal competition among mediators'.¹⁰² The fragmentation of family mediators has led to decades of territory marking and turf battles, and looks to continue long into the post-LASPO climate unless change is enacted. Without professional restructuring, the likelihood and value of future regulatory reform is reduced.

Is there a case for complete hybridity within the family mediator profession? Much of orthodox family justice has been eroded since the late twentieth century, including the strict separation of powers amongst family justice professionals. In 1999, Davis and Pearce identified a 'degree of merging, or hybridity' within the work of solicitors, welfare officers and district judges.¹⁰³ This hybridity has expanded in the last two decades, and involves a space for both legal and non-legal professionals (as well as non-professions, such as the friends and families of disputants).¹⁰⁴ The space is occupied by solicitors and court workers, in line with Davis and Pearce's argument, but now includes services such as McKenzie Friends,¹⁰⁵ Citizens Advice (or other advice services),¹⁰⁶ and, relevant to this analysis, mediators. The size of the space is unclear, but appears to have grown exponentially since LASPO.

It is no surprise that this hybridity has occurred within the mediator profession itself, with nearly a third of the mediators in the sample being categorised as hybrid mediators. The discussions around mediation reform tend to separate mediators into two firm categories of *lawyer* and *non-lawyer*. However, the identification of the hybrid sub-group is an important and original contribution of this paper to the literature on family mediation and family justice more widely. Their existence, even if limited at this stage, indicates that the legal and therapeutic backgrounds can be combined. In fact, the expansion of this sub-group is a potential way forward for the FMC and its Member

¹⁰²Barlow, above n 2, at 211.

¹⁰³G Davis and J Pearce 'The hybrid practitioner' (1999) *Fam Law* 547.

¹⁰⁴For further information on informal partisanship (and informal mediation) see Davis, above n 16, p 35.

¹⁰⁵'it is not just the scope of the role [of McKenzie Friends] that has altered; the people playing the role have changed too': L Smith et al *A Study of Fee-charging McKenzie Friends and Their Work in Private Family Law Cases* (Cardiff: Cardiff University, 2017) p 5.

¹⁰⁶Maclean and Eekelaar comment that 'many of the matters dealt with by lawyers under the previous legal aid system could be treated in a different way by advisers with enhanced training': M Maclean and J Eekelaar *After the Act: Access to Family Justice after LASPO* (Oxford: Hart Publishing, 2019) p 171.

Organisations. The hybrid mediator may provide a service that is more ‘responsive’ to the needs of disputants, an advantage of hybrid professionals that is noted by Allport.¹⁰⁷ Nevertheless, she warns that mediation may lose its original features to hybridity, becoming ‘absorbed into other processes’. The distinction between different professions can become ‘confused’ as a result, and even create further ‘competition’. The hybrid mediator, then, is not a clear representation of unification, and may intrrench tensions further. There is value in the separation of different roles, and the hybrid mediator is an affront to these distinctions.¹⁰⁸

Concluding matters: the next steps for the FMC

This paper has tracked the tensions between family mediators since the late twentieth century to demonstrate that this fragmentation remains heavily embedded today. It began by outlining the development of family mediation in England and Wales, recognising that the limited role of the family mediator was deliberately constructed to uphold lawyers’ pivotal position in family justice. At this time, most family mediators had a professional background in therapy or counselling and mediated child-related disputes. Mediation was eventually extended to financial and property, paving the way for the lawyer mediator type. This led to tensions between the two sub-groups, echoing the earlier apprehensions felt between mediators and lawyers.

Through new empirical findings, this paper has identified a lack of a strong national identity for family mediators, heavily underpinned by a constructed divide between professional sub-groups. The analysis provides a much-needed response to the dearth of literature on tensions within the mediator profession across England and Wales, and acts as a strong foundation for further research on the topic.

A significant implication of this research is the potential value, or risks, of the hybrid mediator type. Whether the hybrid mediator can unite the mediator profession heavily rests on whether this new sub-group provides a more effective mediation service (and also what an effective mediation service specifically entails), or whether it brings the different professions so close together that all distinction is lost. The research discussed in this paper is a crucial starting point for subsequent work that recognises the concerning levels of fragmentation within the family mediator profession. It furthermore reveals the potential of the hybrid mediator in uniting the profession. The next step, then, is to investigate how these perceptions play out in practice, and whether the different mediator sub-groups do provide different services depending on the dispute. Interestingly, this opportunity can also be used to investigate the hybrid mediator. Future research should consider how the mediation provided by a hybrid mediator differs from that carried out by the two dominant sub-groups. Even if it is argued that the hybrid mediator is a worrying development, acknowledging her existence is the first step towards deciding how to reinstate the family mediator’s distinct role. It is hoped that the hybrid sub-group can reinvigorate debate, as well as help mediators to mediate discussions about the best way forward in the contemporary landscape.

¹⁰⁷Allport, n 51 above, p 200.

¹⁰⁸Roberts similarly recognised that court and alternative dispute resolution procedures both benefit from their ‘isolation’ to other systems. See Roberts, above n 53, at 263.