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Critical issues in ADR

Neutrality and power: myths and reality

Rachael Field

Introduction

Neutrality is a key concept in the process of mediation, with 'definitions of mediation frequently assert[ing] that the mediator is a neutral intervener in the parties' dispute'.¹ For example, one of the most commonly accepted and often cited definitions provided by Folberg and Taylor refers to mediation as a process involving 'the assistance of a neutral person or persons',² while Moore's definition refers to an '... *impartial and neutral* third party'.³ This firm connection between neutrality and fundamental definitional aspects of mediation theory is also related to neutrality's 'important legitimising function for mediation'.⁴ People are drawn to the mediation process on the basis of the perceived promise that neutrality holds. The concept of neutrality in mediation is also seen as counterbalancing the ideology of judicial neutrality.⁵

And yet the concept of neutrality is fraught with difficulty.⁶ As Professor Boule acknowledges, '[s]ome writers refer to neutrality as the most pervasive and misleading myth about mediation, arguing that it is neither a possible attainment nor a desirable one'.⁷ And Astor and Chinkin warn that '[i]t is not sufficient simply to claim mediator neutrality [as] mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome'.⁸

It is positive that advocates for and commentators on mediation are prepared to acknowledge that it is a reflection of misconceptions of the practice and theory of mediation to consider that 'the mediator is neutral'.⁹ It is positive because there *are* many myths about the mediation process and these need to be dispelled if parties

are to access justice through mediation as an increasingly used dispute resolution process.

So what is the problem? The problem is that although the theory on the concept of

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neutrality acknowledges its difficulties, these *theoretical* musings have not filtered adequately to impact sufficiently on the *practice* of mediation. On the contrary, most mediators continue to claim that they are neutral, even though some also claim that they are able to do things that fly in the face of an asserted neutral persona. One of these claims is that mediators can redress power imbalances between the parties.

I am particularly concerned with the place at which claims about neutrality and claims that mediators are able to redress power imbalances intersect. That intersection occurs at the point where the theory and practice of mediation collide — with the *parties* using the mediation process to resolve a dispute. And my main

underlying concern in thinking about these issues is in relation to the implications for women parties in family disputes of the inconsistencies arising out of the juxtaposition of these claims.

Neutrality and mediation

What does mediator neutrality mean in both theoretical and practical senses?

Theoretically, neutrality is a concept with many different elements of meaning and understanding. The broadest sense of the term includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior knowledge of the dispute and/or the parties, the absence of the mediator making a judgment about the parties and their dispute, and the idea that the mediator will be fair and even-handed. But, as I have already mentioned, the theory of mediation acknowledges that this broad notion of neutrality is not real. That is, theoretically, it is acknowledged that 'not all mediators are neutral in all senses'.¹⁰

The theory, then, reflects a relatively measured and reasonable approach to the concept of neutrality — and it is important to this measured approach that neutrality is distinguished from impartiality.¹¹ So whereas neutrality is used more to describe a mediator's sense of disinterest in the outcome of the dispute, impartiality is said to refer to 'an even-handedness, objectivity and fairness towards the parties during the mediation process'.¹²

It is said that while a mediator should always be impartial, that is, even-handed, objective and fair, they may not always be neutral.¹³ And so in the writing on mediation we find statements such as: 'in the reality of mediation practice, neutrality needs to be seen as multi-dimensional, with not all dimensions present in all instances'.¹⁴

This all sounds fine. And, based on the semantics of the differences between neutrality and impartiality, it is possible to justify certain mediator interventions or actions in the mediation process, which might strictly contradict the notion of neutrality but still sit within the concept of impartiality. The idea of redressing ➤



➤ power imbalances, however, contradicts even the notion of impartiality, and this is discussed further later.

So how do theoretical and practical notions of neutrality sit together? Practically, what do mediators believe their neutrality means and what are mediators saying to clients about mediator neutrality?

The Mediator's Handbook, as the cover says, is written by two of Australia's most experienced mediators — Ruth Charlton and Micheline Dewdney.¹⁵ It is a 'how to do it' manual of mediation for use by beginners and experienced mediators. It is a practical and invaluable text — and one which many delegates at this conference possess a copy of I'm sure.

What does this book, with its focus on the nuts and bolts of practice, have to say on mediator neutrality? Very early in the book there is a table setting out the mediation model the authors advocate. Stage 1 of that model refers to the mediator's opening statement and includes a dot point on the role of mediators next to which it is said: 'neutral and impartial facilitator'.¹⁶ A mediation checklist a few pages later acts as a reminder to mediators to say in their opening statement, in relation to their role, that they are a neutral and impartial facilitator.¹⁷

So even Australia's most experienced mediators do not advocate that we discuss the reality of neutrality with parties to a mediation. Notwithstanding all the theoretical distinctions, there is no dot point on the checklist reminding mediators to address the myth of neutrality or to distinguish neutrality and impartiality. There isn't any sort of flagging that mediator's should take care with portraying themselves as entirely neutral or impartial, or any reminder to identify for the parties what element of neutrality's multidimensional nature might be applying that day.

This sort of approach is confirmed by practice in both the intake of parties to mediation and the mediation process itself. For example, when I was an intake officer with the Dispute Resolution Centre here in Queensland I know that in almost every conversation I had with potential clients I gave assurances of mediator neutrality (without usually providing or being asked to

provide a deeper description of what that concept meant). And those assurances seemed often to be a convincing factor in many parties' decision to take part. We certainly did not at that time distinguish between the concepts of impartiality and neutrality over the phone. Nor did we ever explore the idea of the myth of mediator neutrality!

To see what the current intake practice is I rang the Dispute Resolution Centres of Queensland while preparing this article and, posing as a potential client of the service, made enquiries about the process.¹⁸ 'What does the mediator do in

'The seriousness of this issue is that if we continue to assert mediator neutrality in our intake processes and introductory statements we are in effect misrepresenting what it is that mediators can provide to parties.'

a mediation?' I asked. 'They help you talk to each other, they are neutral and impartial,' came the reply. 'What does that mean?' continued my query. 'Well, it means that they don't take sides.'

Further evidence that in practice we are not as honest about neutrality as we are in the theory of mediation is found in the introductory statements of mediators with the Family Court of Australia and the Legal Aid conferencing process. Merrilyn, a survivor of violence who I met at a domestic violence conference last year, used both of these services recently and was assured in introductory statements that the mediators were entirely neutral and impartial. Again there was no reality check provided on that statement, no acknowledgement of the myth of what they were claiming.

So there are many mediators who, despite much of what is written on mediator neutrality continue to assert, in line with the many definitions of mediation, that they are neutral and impartial. In texts and articles there is often a considered and well balanced approach to what neutrality can realistically mean for the parties using mediation. But in practice the concept is not well enough explored or explained.

The seriousness of this issue is that if we continue to assert mediator neutrality in our intake processes and introductory statements we are in effect misrepresenting what it is that mediators can provide to parties. We must somehow work out ways to clearly explain to parties the reality of the mediator's role.

If we continue to assert that mediators are neutral and impartial then additional claims about also being able to address imbalances of power in mediation entrench the seriousness of the misrepresentation. The only way that a claim that mediators can address imbalances of power can stand up is if mediators openly forego the neutrality/impartiality rhetoric and make their intervention on behalf of the party who is at a power disadvantage transparent.

Claims about redressing power imbalances in mediation¹⁹

So do the claims about redressing power imbalances in mediation do this? Do the people making the claims openly acknowledge that if a mediator is to intervene to assist the party at a power disadvantage that this in effect means that they cannot then be seen as being even-handed in their treatment of the parties?

The issue in relation to these claims has gone beyond *whether* mediators can or should take steps to redress power imbalances by increasing the power of the weaker party or reducing that of the stronger,²⁰ although this question of itself is still considered by many to be '... a major issue in mediation theory and practice'.²¹

The issue in relation to these claims is how power imbalances can be addressed, and what the impact of such action is on concomitant claims of neutrality and impartiality. It should however be acknowledged ➤



➤ that many mediators are still considering the 'whether or not' question. They are still considering the juxtaposition of the fundamental issues, which are: to be even-handed with parties who are unequal in their bargaining power is to entrench the disadvantage one party already suffers, but to intervene to aid or assist the disadvantaged party most certainly undermines a mediator's neutrality and impartiality.

The two examples of claims about mediators' ability to redress power imbalances that I will focus on are both chapters from the widely read and respected *Mediation Quarterly*.

The first is an article by Davis and Salem from 1984²² in which the authors go so far as to say that it is 'the essential values and characteristics of mediation [that] make it a particularly effective means of dispute resolution in situations where power imbalances play a role'.²³ The second is a 1992 article by Diane Neumann.²⁴ Both these articles have titles that reflect a 'how to' approach: Davis and Salem's article is called 'Dealing with power imbalances in the mediation of interpersonal disputes', and Diane Neumann's article is titled 'How mediation can effectively address the male-female power imbalance in divorce'.

Davis and Salem's approach to the issue is to detail an 11 point plan under a heading of 'How to address power imbalances in mediation'. There is so much to critique in this article, but I will try to restrict myself to the issues at hand!

Briefly, the 11 points, with which some of you may be familiar, are these: do not make unnecessary assumptions about existing power relationships,²⁵ exploit mediation's innate ability to address power imbalances,²⁶ encourage the parties to share knowledge,²⁷ use the parties' desire to settle as a lever,²⁸ compensate for low level negotiating skills,²⁹ interrupt intimidating negotiating patterns,³⁰ make accommodations for language differences when the parties speak different languages,³¹ respect the needs of young parties,³² watch to see that one party does not settle out of fear of violence or retaliation,³³ conduct mediation in a context

that offers information and support to the parties,³⁴ and do not rush settlement.³⁵

The only point where Davis and Salem acknowledge the issue of neutrality in all this is in relation to compensating for low level negotiating skills.³⁶ The compensation they envisage takes the form of actively helping a party to identify his or her concerns, assisting in developing options and considering their consequences, and seeing that all the necessary information has surfaced.

They go on to say:

The mediator must be able to provide such support within the context of serving and being perceived as an impartial third party to the dispute. It may be necessary to explain to

'... in relation to the point about the surfacing of information, how can a mediator honestly say that they are in any position to know, and thus ensure, that all the necessary information has been disclosed?'

the parties that the mediator is not taking a position on the outcome but rather that he or she is trying to create an equitable negotiation setting so that a settlement can be reached that each party will perceive as reasonable and therefore be more apt to honor its terms.³⁷

My initial response to this is to suggest that it needs to be reality tested! Firstly, in relation to the point about the surfacing of information, how can a mediator honestly say that they are in any position to know, and thus ensure, that all the necessary information has been disclosed? The mediator, unlike lawyers in more adversarial contexts, is in no position to order discovery of relevant documents.

And, if we can imagine a situation where

the power imbalance results from domestic violence, how realistic is it to expect a perpetrator of violence to accept a claim from mediators that even though they are actively assisting the victim of his violence, it doesn't mean they are taking a position on the outcome? It seems to me more likely that a perpetrator would question the mediator's neutrality, question the process that he feels is suddenly working against him, and either sabotage the process, become violent or walk out.

But the key issue here is that Davis and Salem have no compunction in claiming that a mediator can maintain their impartiality but also actively assist a disadvantaged party. And the worrying thing is that they don't feel it necessary to explain how this can be so. They simply don't address the issue.

Diane Neumann is no different. In her article she identifies two factors relating to mediations so-called innate ability to address the power imbalance between divorcing parties. These factors are said to be the 'mediation process' and 'the role of the mediator'. (A third related factor is identified as being the nature of the divorce crisis itself.)

In relation to the mediation process, interestingly enough, Neumann relies largely on Davis and Salem's work to support her statement that 'the structure of the mediation process allows the *neutral* mediator to *balance spousal power* by controlling the *procedure, determining the course of negotiations, and reaching the final settlement*'.³⁸ This reference to the 'neutral mediator' is the only time in the section dealing on process where the word neutrality is mentioned.

In the section on the role of the mediator, Neumann refers to impartiality in the following way: 'Though a mediator is impartial, his or her impartiality should not be construed as a lack of power.'³⁹ She continues: 'A mediator's power derives from his or her control of the entire process ... [t]he mediator actually has the most power in the room.'⁴⁰ Surprisingly, it isn't explicitly stated but the implication is that this power allows mediators to redress power imbalances, although despite the 'how to' nature of the article, there is no ➤



➤ elaboration of how this might be done. And there is certainly no analysis of how the process of redressing power imbalances impacts on the concept of mediator neutrality.

Of these authors, Davis, Salem and Neumann, two are experienced mediators and one is an academic and dispute resolution consultant. So how is it that they could fail to address the single most fundamental issue for mediators in this context? There is simply no analytical discussion on the dilemma at all. It is almost as if the dilemma doesn't exist.

Perhaps we come back to the fact that neutrality is such an important legitimising concept for mediation that it is anathema for the mediation community to contemplate talking of mediation in terms that don't include it. Certainly it helps the façade if the dilemma about neutrality isn't mentioned, let alone discussed, analysed or deconstructed. But the consequences of such an approach are, I believe, serious.

Implications of the intersection of claims about neutrality and mediators' abilities to redress power imbalances

The consequences of failing to acknowledge the reality of the intersection of these issues are serious because they impact on the parties who are using mediation to resolve their dispute. And with mediation finding increasing favour with government as a dispute resolution process, especially in the context of family disputes, the number of parties who are potentially affected by these matters is increasing.

As I said earlier, the particular concern is that if we don't speak in real terms about what mediation can or cannot offer parties in terms of providing a neutral and impartial third party, and what mediators can or cannot do in terms of redressing power imbalances, then we are seriously misrepresenting the process. And if people engage in mediation, a private process, on the basis of a misrepresentation then the context is right for injustice in the form of inequitable outcomes.

In terms of my specific concerns, if we don't describe the process honestly and accurately, then women who participate in

mediation in the context of family matters may be taken unawares and ambushed, with agreements resulting that reflect largely the demands of the more powerful, usually male, party.

We need to get the words used to describe mediation to potential parties right and accurate. Probably this means that mediators and mediation services have to change the way they promote mediation and the ability of mediators to be neutral — or perhaps there needs to be an entire reassessment of the concept of neutrality.

For the sake of those at a power disadvantage in mediation we need to ensure that our promises about neutrality reflect real possibility. But if we don't actively articulate what neutrality means in practical terms, we at least have to abandon rhetoric about an ability to redress power imbalances while mediators remain neutral.

Only where parties, and women parties in particular, have full and extensive information about the potential disadvantages they may face as a result of power imbalances, and the possible impact the disadvantages may have on the equitability of any mediated outcome, can mediation really offer a just process to the power disadvantaged. The preparations these parties make for their participation in mediation must not be smothered with hopeful assertions that mediators are neutral and impartial facilitators or that the power disadvantage they suffer can be redressed or nullified.

Conclusion

There are currently many mediators and mediation agencies that are mediating family disputes where there is a power imbalance between the parties, the Legal Aid Office of Queensland for example. If we truly want to ensure that parties have access to justice through mediation in such circumstances then we cannot simply rely on mediation's so-called innate ability to redress power imbalances. We need to thoroughly assess mediation practice in this area and allow it to be better informed by theoretical understandings.

The theory of mediation is more honest about the reality of mediator neutrality than

appears to be the case in practice. If the practice of mediation is to be better informed by theory then mediators and mediation service providers need to be more honest about the level of neutrality and impartiality they can provide. More specifically, however, if mediators are to lay claim to any level of neutrality then we have to stop saying and hoping that they can appropriately redress power imbalances. On the other hand, if mediators do want to work in contexts where power imbalances exist then it is very important that they drop aspirations to, and claims of, neutrality. ●

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This article was presented at the conference under the title 'Mediation Praxis: The Myths and realities of the Intersection of Mediator Neutrality and the Process of Redressing Power Imbalances'.

Endnotes

1. Boulle L, *Mediation: Principles, Process, Practice* Butterworths Sydney, 1996 p 18.
2. Folberg J and Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* Jossey-Bass, San Francisco 1984 pp 7-8.
3. Moore C W, *The Mediation Process* Jossey-Bass, San Francisco 1986. Interestingly, Sir Laurence Street's three fundamental principles of mediation do not include a reference to neutrality on the part of the mediator: Street L, 'The language of alternative dispute resolution' (1992) 3 *Australian Dispute Resolution Journal* 144 at 146.
4. Boulle L, above note 1 pp 18-19.
5. Boulle L, above note 1 pp 18-19.
6. 'Definitions of mediation and codes of conduct for mediators often overlook the multiple dimensions of neutrality in their characterisation of mediators as neutral facilitators': as above, p 19.
7. As above. See also Tillet G, *Resolving Conflict — A Practical Approach* Sydney University Press Sydney, 1991 and Kurien G, 'Critique of Myths of Mediation' (1995) 6 ➤

➤ *Australian Dispute Resolution Journal* 43.

8. Astor H and Chinkin C, *Dispute Resolution in Australia*, Butterworths Sydney, 1992 p 102. Professor Wade has said that 'Virtually every step taken by a mediator involves the exercise of power': Wade J, 'Forms of Power in Family Mediation and Negotiation' (1994) 6 *Australian Journal of Family Law* 40 at 54.

9. Tillet G, *The Myths of Mediation* The Centre for Conflict Resolution, Macquarie University, 1991.

10. Boule L, above note 1 p 19.

11. 'In the case of mediation, each concept (of neutrality and impartiality) has a different significance. Impartiality must be regarded as a core requirement in mediation, in the sense that its absence would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly. Neutrality, however, is a less absolute requirement and could be waived without prejudicing the integrity of the mediation process, for example in relation to a mediator's prior contact with one of the parties or his or her previous knowledge about the dispute'; Boule L, above note 1 p 20.

12. Boule L, above note 1 p 19.

13. Boule L, above note 1 p 20.

14. Boule L, above note 1 p 21.

15 Charlton R and Dewdney M, *The Mediator's Handbook: Skills and Strategies for Practitioners* LBC Information Services Sydney, 1995.

16. As above, p 4.

17. As above, p 10.

18. I rang the Dispute Resolution Centres of Queensland and spoke with an intake officer on 27 April 2000 with a made-up scenario of a dispute in order to hear their explanation of the mediation process.

19. Although claims are made about the fact that mediators can address imbalances of power it is very difficult to find specific and articulated guides about how the practicalities of redressing power imbalances in mediation are to be effected. See, however, Gribben S, 'Violence and Family Mediation: Practice', (1994) 8 *Australian Journal of Family Law* 22, and the 11 point plan proposed by Davis A M and Salem R

A, 'Dealing with power imbalances in the mediation of interpersonal disputes', (1984) 6 *Mediation Quarterly* 17 at 18-23 to be

Field: Neutrality and power: myths and reality discussed in this section. See also Lerman L, 'Stopping domestic violence: a guide for mediators' in Davidson H, Ray L, and Horowitz R (eds), *Alternative Means of Family Dispute Resolution*, American Bar Association Washington DC, 1982, pp 429-43; and also Marlow L and Sauber S, *The Handbook of Divorce Mediation* Plenum Press New York, 1990.

20. Boule L above note 1, p 133.

21. As above.

22. Davis A M and Salem R A, above note 19.

23. Davis A M and Salem R A, above note 19 at 18.

24. Neumann D, 'How mediation can effectively address the male-female power imbalance in divorce' (1992) 9(3) *Mediation Quarterly* 227.

25. Davis and Salem, above note 19 at 18.

26. Davis and Salem, above note 19 at 18.

27. Davis and Salem, above note 19 at 20.

28. Davis and Salem, above note 19 at 20.

29. Davis and Salem, above note 19 at 20.

30. Davis and Salem, above note 19 at 20.

31. Davis and Salem, above note 19 at 20.

32. Davis and Salem, above note 19 at 21.

33. Davis and Salem, above note 19 at 21.

34. Davis and Salem, above note 19 at 23.

35. Davis and Salem, above note 19 at 20.

36. Davis and Salem, above note 19 at 20. The word neutrality is mentioned at 22 where Davis and Salem refer to the US National Center on Women and Family Law which takes the position that mediation is inappropriate in any divorce or family law dispute. One of the bases for this stance is that 'few mediators are neutral and most have sexist biases'.

37. Davis and Salem, above note 19 at 20.

38. Neumann D, above note 24 at 232.

39. Neumann D, above note 24 at 232.

40. Neumann D, above note 24 at 232.

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