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Key concepts in ADR

Neutrality and impartiality in mediation

Hin Hung

In the mediation process the parties in dispute usually come with conflicting positions, interests and arguments that they strongly hold to be right and the opposite parties' to be wrong. The mediator, as an independent third party to the dispute, is there to assist the disputants to communicate with each other in a rational and problem solving way, to identify and clarify disputed issues, consider available options and reach a consensual settlement that is fair and equitable to all parties.

To achieve such an objective, it seems only proper that the mediator remains 'neutral and impartial' at all times, as recommended in most codes of conduct for mediators. Furthermore, it is important that the disputants respect and believe the mediator to be trustworthy in order for the mediation process to function smoothly and efficiently. If, in any situation, the disputants question the neutrality and impartiality of the mediator, he or she will not be trusted and respected. For these reasons, it is said that being 'neutral and impartial' is an important quality that a mediator should possess.

What, however, does it mean to be 'neutral and impartial'? The terms may have different meanings to different people and an action of a mediator may seem neutral and impartial to one party and biased to another. Furthermore, can a mediator be truly 'neutral and impartial'?

A eunuch from Mars

A neutral mediator has been described by Roger Fisher as 'an eunuch from mars, totally powerless (and totally neutral)'.[1] The description may imply that a neutral and impartial mediator should be asexual and without any kind of worldly connection. Even if there is such a person, should he or she be absolutely 'neutral and impartial'? What if there arise circumstances where the mediator needs to be 'biased' in order to be neutral and impartial in a higher level of ethical consideration? Should he, she or it remain a Martian eunuch and uphold a superficially neutral and impartial position, or should he, she or it act according to conscience? What about the clients' self-determination? Should the mediator intervene or remain neutral and impartial if the agreement appears to be unfair or unethical to one of the parties?

There are many questions relating to 'neutrality and impartiality', important questions that mediators need to address. Here consideration is given to the definition of, and what it means to be, 'neutral and impartial'. Then there is a discussion of the ethical issues behind 'neutrality and impartiality' that mediators need to be aware of and deal with in understanding and caring ways.

How to define neutral and impartial?

Neutral and impartial are terms often seen in mediators' codes of ethics. But what do they really mean? Looking up dictionary definitions is simple enough. In the *Oxford Dictionary*, 'neutral' means 'not supporting or belonging to either side in an argument or war' and 'impartial' means 'fair or neutral; not preferring one to another'. Unfortunately, in most mediator codes of ethics the terms are usually not well defined. Existing definitions are inconsistent and concepts are entangled. The result is confusion. The reason for this confusion is that 'the terms have been defined in various and sometimes contradictory ways, reflecting the fact that they are intertwined linguistically, conceptually and practically'.[2] Catherine Morris[3] has pointed out that impartiality and neutrality have been variously defined or described as follows:

- 'impartiality' or 'neutrality' are not defined, or the terms are used synonymously; or
- 'impartiality' means unbiased, and fair to all parties equally; or
- 'impartiality' refers to an unbiased attitude and 'neutrality' refers to unbiased behaviour and relationships; or
- 'neutrality' is comprised of two contradictory concepts — impartiality and 'equidistance' between the parties; or
- 'neutrality' means non-intervention; or
- 'impartiality' and 'neutrality' mean (or include) objectivity.

Some of these meanings overlap and others are contradictory with one another.

More important than what the words signify is the parties' feeling that the mediator is acting with 'neutrality and impartiality'. According to Morris, buried beneath the terms 'neutrality' and 'impartiality' are the four concepts of non-partisan fairness, the degree of mediator intervention, role limitation, and objectivity. If mediators can skillfully and appropriately attend to these concepts, which in essence are the responsibilities of being a mediator, they will promote the image of being 'neutral and impartial' and gain respect and enhance their credibility and trustworthiness. These concepts are dealt with in turn.

Non-partisan fairness

Only with a non-partisan attitude can a mediator attain fairness. Such an attitude is different from that of an 'indifferent' reaction or an 'I don't care' attitude, which are sometimes associated with the term 'neutrality'. For Morris, it is this association that causes the confusion in understanding the concept of 'neutral and impartial'.

According to the *Mediation UK Practice Standards*, the concept of non-

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partisan fairness is equivalent to 'impartiality', which they define as 'attending equally to the needs and interests of all parties with equal respect, without discrimination and without taking sides'.[4]

A joint undertaking by the American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR) produced the *Model Standards of Conduct for Mediators*,[5] which defines 'impartiality' as evenhandedness and lack of 'prejudice based on the parties' personal characteristics, background or performance at the mediation'.

Behind the concept of non-partisan fairness is a rejection of corruption, conflict of interest and other self-interests. Unlike litigation, which has developed over many years with precise checks and balances, mediation has no such built in and well developed checks and balances.[6] Therefore, in mediation the principal agent of fairness is a skilled, reasonable and trusted mediator. It is for this reason that the principle of non-partisan fairness is the foundation of the ethics of mediation.

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Degree of mediator intervention

As stated above, being 'neutral and impartial' does not mean that a mediator is totally indifferent to the outcome or the process of mediation. In fact, the empirical researches done by Rifkin, Millen and Cobb and by Cobb and Rifkin have substantially contributed to challenging the notion that it is possible for mediators not to influence process and outcome.[7] There will be situations where the mediator will intervene and the question is when should the intervention take place and to what degree.

There is no simple answer to the question and different mediator codes of conduct have different positions. Some tend to be non-interventionist (neutralist) and others interventionist in philosophy. For example, Family Mediation Canada's (FMC) *Code of Professional Conduct*[8] guides mediators to distinguish 'impartiality toward the participants' from 'neutrality on the issue of fairness'. Mediators are told to express their concern to parties if they think a proposed agreement is unfair. Furthermore, it also states that it is a mediator's duty to terminate mediation:

- when they are unable to eliminate manipulative or intimidating negotiating techniques;
- whenever continuation of the process is likely to harm or prejudice one or more of the participants;
- if they are not able to restrain parents from coming to arrangements that are perceived by the mediator not to be in the best interest of the children; and
- when parties appear to be making an agreement which the mediator thinks is unfair or unreasonable.[9]

However, the Academy of Family Mediators (AFM) Standards emphasise party self-determination, stating that 'decision making authority rests with the parties' and clarifying that the 'role of the mediator includes reducing the obstacles to communication, maximising the exploration of the alternatives, and addressing the needs of those it is agreed are involved or affected'. Further, AFM outlines the value principles on which mediation is based: 'fairness, privacy, self determination, and the best interest of all family members.'[10] In comparing AFM's guidelines with those of the FMC, it can be seen that the former are substantially less interventionist in philosophy.

As for the individual mediator, it is a matter of why and how they should or will intervene. Should they intervene in accordance with a code of what is legally or ethically right and proper, as the deontological theory would propose? Or should it be in the best

interest of the parties, as utilitarianism would champion? What does it mean to be 'reasonable and fair', and who is the arbiter of reasonableness and fairness — the parties, the mediator, the law, or some other standard?

These are ethical questions that the mediator needs to settle or, at least, to be aware of. In a pluralistic society, however, there are 'significant ethical and practical problems in identifying universally acceptable ethical criteria for "fairness"'.[11] Some mediators may accept autonomy and control over outcome for the parties as their primary ethical value in mediation. To them, as long as the outcome remains in the hands of the parties, it is acceptable. For example, the American *Model Standards of Conduct for Mediators*, referred to above, explicitly recognises self-determination as 'the fundamental principle of mediation' and that mediation relies upon the 'ability of the parties to reach a voluntary uncoerced agreement'.[12] Mediators operating under these standards will try to limit their intervention to a minimum.

There are also those concerned with social justice who are unsatisfied with answers that may disadvantage disempowered groups in society. To them, weakness of one of the parties, risks of woman and/or child abuse and other social justice issues are important. They would advocate a more interventionist role for the mediator in resolving family disputes. There is a growing suggestion among family mediators that the bargaining weakness of one of the parties, risks of woman or child abuse and family power dynamics, make neutrality on these issues inappropriate in family mediation.[13]

The Mediation UK Practice Standards and the Canadian and US family mediation standards all provide for significant intervention on process issues, with less intervention to influence outcomes. For example, the UK standards provide that mediators maintain conditions that will exclude violence, threats, shouting and discriminatory or provocative language 'by adequate preparation and temporary or permanent abandonment of the mediation if necessary'.[14] Regarding outcomes, mediators are told they should not 'seem to recommend' a particular settlement but may suggest options. Mediators are also urged to encourage independent legal advice and to voice concerns about an agreement that is 'unjust, deleterious to any party (involved or not involved in the mediation) and in any other way unsatisfactory'.[15]

In discussing the advantage of the transformative approach to mediation over the problem solving approach, Bush and Folger, in *The Promise of Mediation*,[16] state that one benefit of the former is that the inevitable tendency of the mediator to influence can be resolved. To Bush and Folger, in problem solving mediation, the mediator's interest is in finding a good solution to a problem that is blocking the parties' satisfaction. This interest leads mediators to be directive in shaping both problems and solutions. They wind up influencing the outcome of mediations in favour of settlement generally and in favour of terms of settlement that comport with their views of fairness, optimality, and so forth. But such influences could produce settlements that do not satisfy anyone.[17]

By changing orientation and adopting a transformative approach to mediation, Bush and Folger believe this problem can be solved, not by eliminating the tendency for mediators to influence (which is impossible given the real dynamics of third party intervention in conflict) but by changing the nature of the influence. In a transformative approach, the mediator's interest is not in outcome at all, but is an interest in making sure that the outcome remains in the parties' hands in a very explicit way. Hence, the inevitable tendency to influence is channelled in such a way that it becomes harmless. Furthermore, it is enlisted in a valuable service — empowerment.[18]

Bush and Folger further suggest that the meaning of neutrality, in the context of inevitable influence, is 'commitment to use influence only for the sake of keeping the ultimate decision on outcome in the parties' hands'.[19] Therefore, the mediator is not neutral in the sense of being non-influential, but is influential in one way only, and that is a way that does not attempt to influence outcome, whether through shaping how the conflict is framed or by directing how the issues framed are decided.[20]

In terms of this logic, one could deduce that for Bush and Folger, 'fair' would mean that the parties involved in mediation are empowered to negotiate and have recognition and full knowledge of their rights and duties. The content of a settlement, if there is one, may not be important factors that Bush and Folger use to evaluate the mediation as being fair or not.

Role limitation

Mediation UK refers to role limitation under the topic of 'impartiality', saying that mediators 'should not act as such in cases where one party is a client in another professional role, such as advocate or counsellor. Mediators should at all times keep their role as mediator distinct from any other roles they might play in other situations'.[21] The ethical issues surrounding role limitation involve conflict of interest and non-partisan fairness. AAA, ABA and SPIDR define a conflict of interest as 'a dealing or relationship that might create an impression of possible bias' and hold mediators responsible for disclosure of conflicts.[22] FMC provides that mediators 'must avoid any activity that could create a conflict of interest'. Included in prohibited behaviour that 'that might impair their professional judgment or … increase the risk of exploiting clients' is to mediate among 'close friends, relatives, colleagues/supervisor or students' or 'to engage in sexual intimacies with a participant in the mediation process'.[23]

As for non-partisan fairness, the concern for role limitation is the possibility that one party may benefit over another through a previous professional or social relationship. AFM warns that a mediator 'may be compromised by social or professional relationships with one of the participants at any point in time and prohibits mediation unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants given the opportunity freely to choose to proceed'.[24]

Objectivity

Western dispute resolution practice tends to aspire to the ideal of objectivity in which the ideal mediator has an objective sense of fairness and is unaffected by the context or the parties. But how can a mediator be truly objective? Most people have values and

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biases. Eunuchs from Mars are hard to come by. The ideal of autonomous objectivity does not recognise the fact than mediators are influenced far more than they may realise by the culture and social setting in which they live and the political, social and power structures within which they operate.[25]

Under these circumstances, it is important that a mediator be aware of his or her own ethical values and the assumptions behind them. Furthermore, a mediator should also be aware of the parties' ethical values and the assumptions behind them. During the course of mediation, there may be situations where it would be appropriate for the mediator to provide options for the parties or empower a party. When these situations arise, the mediator should be careful not to impose his or her own values and beliefs on the party.

Conclusion

Neutrality and impartiality are important qualities of a respected mediator. Here I have not tried to define 'neutral' and 'impartial' but hopefully, through the discussion of the four essential concepts behind these terms, have clarified some confusion and made some suggestions as to how to project an image of being neutral and impartial.

It is difficult and may not be appropriate to draw a simple conclusion as to what degree of intervention a mediator should apply in a given case. There will always be ethical decisions that a mediator needs to make. Hence, a mediator should be aware of his or her own ethical values and the assumptions behind them, and at the same time, be aware of the particular ethical issues arising during each particular dispute. Furthermore, a mediator's ethical values and decisions should be made so that they will enhance:

- respect, trust, credibility and legitimacy;
- understanding and caring; and
- procedural fairness. ●

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Endnotes

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2. Above note 1 p 319.
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7. Above note 1 p 322.
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16. Bush RAB and Folger JP *The Promise of Mediation* Jossey-Bass Publishers 1994 San Francisco.
17. Above note 16 p 104.
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19. Above note 16 p 105.
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21. Above note 1 p 327.
22. Above note 1 p 329.
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24. Above note 1 p 327.
25. Above note 1 p 330.

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