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The professional challenge to ADR

Ethics for a mediation 'profession': an answer to the neutrality dilemma?

Rachael Field

Introduction

The idea of a neutral mediator persists as a critical concept in how we define the mediation process,[1] and yet it has long been acknowledged as a controversial and flawed notion.[2] Efforts to address the theoretical and practical dilemmas that neutrality creates have failed to make a lasting impression.[3] Neutrality remains an unsatisfactory concept that mediation cannot seem to do without. This article argues that a possible way forward for the mediation community can be found in enforceable professional ethics for mediators. This position is grounded in the argument that the legitimacy of mediation should rest on a strong ethical paradigm, rather than on an unworkable concept such as mediator neutrality.

Neutral mediators?

The concept of a 'neutral' mediator continues to be central to definitions of mediation. It is common, for example, to read that 'the mediator is a neutral intervener in the parties' dispute'.[4] Indeed, neutrality plays a critical role in legitimising the mediation process, making it credible, because neutrality promises fair practice and links mediation with the authority and legitimacy of adjudicative processes in which the judge is impartial.[5] And yet neutrality in mediation has no clear or precise meaning, and is even acknowledged as being manifestly under-defined.[6] Indeed, the mediation community lacks a shared understanding about neutrality and how it functions in the reality of the mediation room.[7]

Although neutrality is an elusive and idealistic concept,[8] we do have some idea of what it is we ask neutrality to provide. For example, we expect that a neutral mediator will have no interest in the outcome of a dispute, will not be biased, will make no judgment about the parties and their dispute, and will be fair and even-handed.[9]

Hilary Astor has argued recently that there is a way to provide mediators with a real and workable system of practice to achieve these things.[10] This argument develops Astor's previous recommendations that a situated, contextual approach can move the mediation community away from a binary construct of neutrality (as something that is either existent or non-existent), to a broader concept of legitimising mediation through focusing on notions of consensuality and party control.[11] The five key elements of Astor's approach include:

(1) an acknowledgment on the part of mediators of their own perspective (self-reflexivity);[12]
(2) an openness on the part of mediators to seeing the perspectives of others;[13]
(3) a valuing of multiple vantage points;[14]
(4) maximising party control;[15] and
(5) dealing with power appropriately.[16]

Astor's argument is persuasive. I argue, however, that the characteristics of mediation practice that we seek through neutrality can be better guaranteed by a strong ethical requirement of professional mediation practice. In other words, appropriate professional ethics in mediation can give credibility to the process and ensure that mediator practice is appropriate and fair. However, before professional ethical standards and practice can be relied on to provide a stronger framework for the legitimacy of mediation than neutrality, the mediation community must embrace the idea that it is now deserving of the title and status of a 'profession'.[17]

An Australian mediation 'profession' as a framework for ethics

In Australia, the current dominant view is that mediation cannot yet satisfy the requirements of a profession in its own right.[18] This perspective is based on the premise that mediation fails to satisfy, or at least can only establish a limited claim to, three of the key characteristics that define traditional professions.[19] These characteristics can be identified as: first, 'a sustainable claim to exclusive technical competence in a field'; second, 'a service ideal to distinguish them from business or commercial activities'; [20] and third, 'a sense of community.'[21] It is also arguable that there is, as yet, insufficient public recognition of mediation as a profession. Further, critically, mediators themselves remain reluctant to claim that they belong to a 'profession'. As Alexander has noted, mediation practice in Australia has been regulated more by

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'the forces of a free market' than as a profession.[22]

And yet NADRAC, in its 2001 Report, acknowledged that the practice of ADR was moving towards 'increased coordination and collaboration to address common challenges and achieve joint objectives.'[23] In the US, also, there is a similar trend towards 'institutionalisation, regulation, legalisation, innovation, internationalisation and coordination in ADR'.[24] In short there is now 'a recurring theme of increased professionalisation in ADR.'[25] This is also evident in Australia's new mediation accreditation system.[26]

My position is that we do not have to be limited by the traditional definitions of a 'profession' in moving the practice of mediation forward in this way. Rather, there are alternative criteria by which a profession can be identified that allow mediation to be considered a *nascent* profession.[27]

The first criterion relates to members of a profession holding a 'fidelity to a particular good'.[28] This 'good' 'justifies and grounds a profession's institutional existence'[29] and is the foundation of the profession's ethical responsibilities and obligations.[30] Mediation practitioners profess the good of party self-determination. Essentially, the principle of self-determination focuses on having mediated outcomes ostensibly come from, and belong to, the parties. Self-determination values the parties as individuals by providing opportunities for subjective and contextualised approaches to resolving their dispute.[31] It is therefore the core commonly shared ideal of mediators, and provides philosophical structure to their professional practice. As mediators can be said to profess fidelity to the good of self-determination, mediation, as a result, can be said to satisfy at least one criterion of a nascent profession.

A second alternative criterion of a profession is that it is a practice that can be considered a 'public office'.[32] As De Coste has said, 'all true professions create offices'.[33] This means that members of a profession hold 'a position of trust and a warrant of authority, under constituted authority, which has as its purpose *service to others*'.[34] Mediation can well satisfy this definition of 'office' in relation to all three central concepts found in it; namely the existence of a high level of party *trust* in mediators, agreed party *authority* for mediators to intervene in the dispute, and a commitment from mediators to *serve* and assist the parties in dispute. Therefore, mediation can be said to satisfy an additional criterion of a 'profession'.

Third, professions require that their practitioners are 'fit for office'.[35] The recent critical development in Australia of a national mediator accreditation system allows mediation to satisfy this criterion also.[36] That system will work to ensure that mediators (or at least, at this stage, those who voluntarily comply with the accreditation process) are 'fit and proper to practice as mediators and have attended an education, training and assessment course'.[37] Significantly, the system also introduces formal complaints and disciplinary processes, and mediators who fail to uphold their fitness for office will risk de-accreditation. The system will also provide a uniform Code of Practice which will describe 'the ethical and professional obligations of accredited mediators'.[38]

In addition, it should be noted that ethical codes and standards of practice for mediation already currently exist, although they are not enforceable. Greenwood identifies the *existence* of such codes as a key trait of a profession.[39] Certainly, although the existing codes and standards are not universally accepted or consistently applied, the fact such codes exist at all is, of itself, evidence that mediation is moving towards accepting the status of a 'profession'.

Conclusion

The mediation community must squarely address the standing of the mediation process, and the roles and responsibilities of mediation practitioners. It is no longer satisfactory to rely on the mythical notion of mediator neutrality, or to ignore the dilemmas it creates for practice. The key good that mediators profess is self-determination, not neutrality. In order for mediation practice to uphold the good of self-determination, enforceable professional ethics must exist. Therefore, the mediation community must begin to accept that it is a developing profession in its own right. As professionals who have a strong ethical framework to inform their practice, mediators will be free of any continuing reliance on the unsatisfactory concept of neutrality. ●

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Endnotes

1. For example, H Astor, 'Rethinking neutrality: a theory to inform practice — Part I' (2000) 11 *Australian Dispute Resolution Journal* 73; H Astor, 'Rethinking neutrality: a theory to inform practice — Part II' (2000) 11 *Australasian Dispute Resolution Journal* 145–154; H Astor and C Chinkin, *Dispute Resolution in Australia*, Sydney: Butterworths (2nd ed, 2002); and H Astor, 'Mediator neutrality: making sense of theory and practice' (2007) 16(2) *Social and Legal Studies* 221–239

2. L Boulle, *Mediation: Principles, Process, Practice*, Australia: Butterworths (1996) at 18.

3. Hilary Astor's most recent work provides the most comprehensive and practical way to date for mediators to conceive of neutrality: Astor (2007) above note 1.

4. See, for example, Boulle above note 2 at 18. See also, for example, J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, San Francisco: Jossey-Bass (1984) at 7–8; CW Moore, *The Mediation Process*, San Francisco: Jossey-Bass (2nd ed, 1996); ME Laflin, 'Preserving the integrity of mediation through the adoption of ethical rules for lawyer-mediators' (2000) 14(1) *Notre Dame Journal of Law, Ethics and Public Policy* 479, KK Kovach and LP Love, 'Mapping mediation: the risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71.

5. See Astor above note 1 at 74 referring to S Cobb and J Rifkin, 'Neutrality as a discursive practice: the construction and transformation of narratives in community mediation' (1991) 11 *Studies in Law and Politics* 69 and C Harrington and S Engle Merry, 'Ideological production: the making of community mediation' (1998) 22 *Law and Society Review* 709. See also B Mayer 'The dynamics of power in

mediation and negotiation' (1987) 16 *Mediation Quarterly* 75 at 83.

6. B Wilson, 'Mediation and morality' (2000) *Family Law*, 853 at 853. See also, RM Fuller, WD Kimsey, BC McKinney (1992) 'Mediator neutrality and storytelling order' 10(2) *Mediation Quarterly* 187 at 187; and LM Cooks and CL Hale 'The construction of ethics in mediation' (1994) 12(1) *Mediation Quarterly* 55 at 63; RB McKay 'Ethical considerations in alternative dispute resolution' (1989) 45 *Arbitration Journal* 15 at 21.

7. A Taylor, 'Concepts of neutrality in family mediation: contexts, ethics, influence and transformative process' (1997) 14 *Mediation Quarterly* 215 at 217. See also J Rifkin, J Millen and S Cobb 'Toward a new discourse for mediation: a critique of neutrality' (1991) 9(2) *Mediation Quarterly* 151 at 152.

8. H Gadlin and EW Pino 'Neutrality: a guide for the organisation ombudsperson' (1997) 13 *Negotiation Journal* 17 at 17; see also Rifkin, Millen and Cobb above note 7 at 152. Boulle concedes that neutrality can be considered as 'the most pervasive and misleading myth about mediation.' Boulle above n 2 at 19. See also G Tillet (1991) *Resolving Conflict — A Practical Approach*, Sydney: Sydney University Press; G Tillet (1991) *The Myths of Mediation,* The Centre for Conflict Resolution, Macquarie University and G Kurien, 'Critique of myths of mediation' (1995) 6 *Australian Dispute Resolution Journal* 43 at 52.

9. See for example, Astor (2007) and Astor and Chinkin (2002) above note 1. See also, GB Walker 'Training mediators: teaching about ethical concerns and obligations' (1988) 19 *Mediation Quarterly* 33.

10. Astor above note 1 (2007).

11. Astor above note 1 (2007). See also B Wolski, 'Voluntariness and consensuality: defining characteristics of mediation?' (1997) 15 *Australian Bar Review* 213.

12. Astor (2007) above note 1 at 230 referring to D Bagshaw, 'The three Ms: mediation, postmodernism and the new millennium' (2002) 18 *Mediation Quarterly* 205–220, and D Bagshaw, 'Language, power and mediation' (2003) 14 *Australasian Dispute Resolution Journal* 130–141.

13. Astor (2007) above note 1 at 231.

14. Astor (2007) above note 1 at 232.

15. Astor (2007) above note 1 at 234.

16. Astor (2007) above note 1 at 235.

17. Compare JB Thomas, *Judicial Ethics in Australia*, Sydney: LBC Information Services (2nd ed, 1997) at 9, and see C Menkel-Meadow, 'Ethics in alternative dispute resolution: new issues, no answers from the adversary conception of lawyers' responsibilities' (1997) 38(2) *South Texas Law Review* 407 at 419.

18. L Boulle, *Mediation: Principles Process, Practice* Australia: Butterworths (2005) at 328.

19. Above note 18 at 326–327. See also, for example, J Scimecca, 'Conflict Resolution in the United States: An Emerging Profession?' in K Avruch, P Black, and J Scimecca (eds) *Conflict Resolution: Cross-Cultural Perspectives New* York: Greenwood Press (1991).

20. See also SF Barker, 'What is a profession?' (1992) 1 (1 and 2) *Professional Ethics* 73 and A Tidwell, 'It's the process that counts: professionalising mediation in NSW' (1999) 6(2) *Murdoch University E-Law Journal* 21 at para 20.

21. Boulle above note 18 at 326 citing H Wilensky, 'The professionalisation of everyone?' (1964) *The American Journal of Sociology* 137, J Sammons, *Lawyer Professionalism* Durham NC: Carolina Academic Press (1988) at 3–12, and D Weisbrot, *Australian Lawyers* Melbourne: Longman Cheshire (1990) at 4.

22. N Alexander, 'What's law got to do with it? Mapping modern mediation movements in civil and common law jurisdictions' (2001) 13 *Bond Law Review* 335 at 349.

23. National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for ADR Standards*: *Report to the Commonwealth Attorney-General* (2001) at 15.

24. Above note 23.

25. Above note 23. This theme is reflected in the relatively common references to a mediation profession in the literature. See for example, LM Cooks and CL Hale, 'The construction of ethics in mediation' (1994) 12(1) *Mediation Quarterly* 55 at 72–73; L Weidner, 'Model standards of conduct for mediators (2005)' (2005–06) 21 *Ohio State Journal on Dispute Resolution* 547 at 548; and S Wellik, 'Ethical standards for mediation: embracing philosophical method' (1999) 10 *Australasian Dispute Resolution Journal* 257 at 257.

26. *Mediator Accreditation in Australia* in National Alternative Dispute Resolution Advisory Council (NADRAC), *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* (2006) at appendix 3.

27. These criteria are adapted from FC De Coste, 'Towards a comprehensive theory of professional responsibility' (2001) 50 *University of New Brunswick Law Journal* 109.

28. Above note 27 at 114 referring to D Koehn, *The Ground of Professional Ethics* London: Routledge (1994) at 178.

29. De Coste above note 27 at 114.

30. De Coste above note 27 at 114.

31. See RA Baruch Bush and JP Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* San Francisco: Jossey-Bass (2005).

32. De Coste above note 27 at 117 referring to M Walzer, *Spheres of Justice* New York: Basic Books (1983) at Chapter 5 'Office'.

33. De Coste above note 27 at 117.

34. De Coste above note 27 at 117.

35. Note NADRAC's 2004 Discussion Paper *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* recommended the development of a national accreditation system for mediators: available at <www.nadrac.gov.au>. See also, for example, CW Moore, 'Training mediators for family dispute resolution' (1983) 2 *Mediation Quarterly* 79.

36. *Mediator Accreditation in Australia*, in NADRAC above note 26.

37. *Mediator Accreditation in Australia*, in NADRAC above note 26 at 123.

38. Part II clause 3 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC above note 26 at 121.

39. E Greenwood, 'Attributes of a profession' in R Pavalko (ed), *Sociological Perspectives on Occupations* Illinois: FE Peacock (1972) at 16.

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