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Theory and practice in mediation

The 'partial' mediator: balancing ideology and the reality

Dr Patricia Marshall

The traditional concept of mediators' ability to be either neutral or impartial, or both, has been challenged over time by many researchers and writers, for example, Greatbatch and Dingwall,¹ Cobb and Rifkin,² Mulcahy³ and Astor.⁴ There appear to be multiple interpretations of these terms, even in documented standards for practice. McCorkle's extensive study across national and State codes of conduct in the US 'found significant differences across the entities' in their use of the key terms of mediator neutrality and impartiality,⁵ and confusion about the definitions.⁶

The impossibility of the claim to be neutral and impartial is underlined by the fact that even judges (the supposed epitome of independence and neutrality) do not always make their decisions on precedent and the facts of the case in a deliberative way, but on their own intuitive systems, that is, on their hunches.⁷

The *Australian National Mediator Standards: Practice Standards* make passing reference to the term 'neutrality'⁸ but specify that the mediator's conduct must display 'impartiality', that is, 'freedom from favouritism or bias in word or action or the omission of word or action, that might give the appearance of such favouritism or bias'.⁹ Most mediators declare their impartiality at the start of a mediation meeting; in fact, the mantra 'I am impartial' is a statement every bit as positional as those made by the parties whose disputes we are mediating.

My study on stress and coping among 43 experienced mediators¹⁰ showed that mediators still uphold the ideal of impartiality, even though there is no shared interpretation of the term, and although they judge neutrality (in the sense of having no vested interest

in the outcome) to be impossible because mediators are: paid for their services; mindful of the 'fairness' of any outcome; and aware of their professional role in ensuring 'duty of care'.

Indeed, the latter point caused some anguish, with one mediator in a focus group declaring:

When an agreement has been drawn up I want that person to be absolutely sure they know what they're doing ...

I know it's their mediation and their decision, but I'm also a professional person who has my own views. I don't want to be a party to something unless I have tested it. I'm here as a participant in this drama, however much I call myself neutral and impartial (1Ffga4¹¹).

Her comment captures the difficulty: mediators are not separate from the 'drama'. Unlike the judge who is remote from the courtroom antagonists by a bench, by distinctive clothing, and by the accoutrements of authority associated with the law, mediators *engage* with the disputants. Our strategies such as reality testing, posing questions, and careful listening, reflect this engagement and intervention.

However, to be *considered* biased was anathema to my mediators, even though most recognised that 'inevitably you make judgments about the parties and their capacities — it's human nature' (18Fint3). And the mediator's situation is exacerbated, not ameliorated, by the fact that her conduct is not subject to impartial external scrutiny. Instead:

The two parties who are viewing your performance are not impartial ... They are very self-absorbed and perhaps more interested in their own performance (15Fint2).

Drawing on those findings, and on

my own experience, I attempt in this article to analyse the situations which potentially compromise the mediator's appearance of non-bias, and suggest strategies which might enable us to handle our inevitable partiality. Just as we accept that conflict is inevitable and help parties deal with that fact, we can accept and manage our partiality.

The challenging situations — the clash between the ideal and the practice

Traditionally, the cornerstones of mediation have been not only impartiality, but also voluntariness, 'no blame', self-determination, 'empowerment' and the validity of perceptions, rather than objective 'truth'.

Getting parties 'on board'

Even when required by court or workplaces to attend, parties retain the power not to speak or listen. So the mediator must engage them if an outcome is to be achieved. In my study, mediators were not asked to identify their skills specifically; rather, they were asked about their coping strategies. Yet, close analysis of the transcripts revealed that the skill most identified as a resource was their ability to build rapport with clients. But the act of building rapport can be misconstrued by the parties. One mediator expressed the difficulty this way:

No matter how much you reflect back to them the principle of impartiality, they believe you're aligned with them. Then everything that you do that counters that, you're almost insulting them, almost letting them down ... I work really hard to engage with them. They come on board. But there's a fine line between staying engaged and at the same time



accepting that the other person might feel exactly the same way (8Fint2).

This raises 'the interactional problem ... of how to play to two audiences simultaneously'.¹²

Confronting behaviour which offends our own values (but to which we are not permitted to attach blame)

Every interview or focus group uncovered mediator's reactions to parties' attributes or behaviour which they found objectionable, so the 'freedom from bias' advocated in our standards is challenging.

Last year I was confronted in a co-mediation with a party who: was 30 minutes late; arrived without apologising to us or the other party; raced into the room and took up a seat ahead of all of us; in the private session, actually jumped onto the table; and attempted to goad the other party by referring once to his 'mad' sister. We could have terminated, but the other party (who was representing his elderly parents) was quietly assertive, had been kept waiting for a long time, and appeared keen to resolve the matter. Both mediators spent a good deal of time on the usual strategies of assertively enforcing the groundrules, listening, questioning and reframing, so that, in the end, the parties were only \$300 apart (from thousands having been claimed), but with each threatening to take the matter to court. With the privilege of hindsight, I think we missed an important interest of the 'objectionable' party, and I shall return to that later.

What we find 'objectionable' is, of course, a personal reaction. Mediators will not agree on the behaviours which 'push our buttons' and cause us to react in a way that compromise our impartiality. Even co-mediators, faced with the same situation and behaviour, may react quite differently.

Feeling compelled to intervene to prevent disadvantage — confronting self-determination

The ideal of party self-determination is advocated in our standards,¹³ but the ideal may prove frustrating for the mediator. The associated tensions were evident in a focus group where a

mediator recounted a workplace situation in which a secretary had been accused of being late and lazy:

She had a range of powerful reasons she hadn't put to her supervisor ... Clearly there was a scheduling that could have happened, but she just accepted that she was tardy and lazy. I tried whatever the hell I could. But she said, 'I'm happy to leave the organisation.' I kept asking, 'Are you sure?' and she kept saying, 'I'll sign whatever needs to be done.' I tormented myself after that, and felt that I shouldn't be practising my skills on real people (4Ffgb6).

'Protecting people from themselves' was considered to be a strain on the mediator because it involved some compromise of impartiality and distance. One mediator saw himself as 'boundary rider' who had to be alert to when a party might be heading in a direction that was disadvantageous (5Mfga3). Another mediator who practised 'transformative' mediation confessed:

I have to deal with the contradiction about following the parties when it is clear that I suspect that they could be endangering themselves in one way or another (2Mfga7).

Feeling compelled to intervene when one party seems disadvantaged — when 'empowerment' can compromise impartiality

In fact, self-determination runs counter to the 'ideal' of empowerment. If we abided by the principle of parties being fully self-determining, we would not intervene in order to 'empower'. The two 'cannot be achieved simultaneously'.¹⁴

Much has been written about 'empowerment' in mediation, and the role of the mediator in ensuring that one party does not 'overpower' the other. But we cannot 'balance power' as if it were a commodity;¹⁵ instead, we need to 'harness power'.¹⁶ Yet mediators are disturbed by the threat to their impartiality when they take the stance of assisting a party. For example, an interviewee questioned:

When you have a belligerent person and someone who's more reasonable, how do you challenge someone

without being on the side of the more reasonable persons? I find that stressful (21Mint2).

Trying to create a level playing field by 'empowering' the weaker party can seem unfair to the other. And our judgments may be wrong about who needs the most assistance, as occurred in the case analysed by Garcia et al.¹⁷ Here the mediator had been accused of bias by a party who perceived the mediator to be paying her less attention. When the mediator explained that the other party needed her more, the complainant claimed that she required just as much consideration.

The validity of perceptions rather than objective assessment

To be accused of bias can be devastating. One mediator in my own study said her reaction was to feel 'really, really shocked', so much so that she questioned herself, 'How could I have got it so absolutely wrong? Did I really stuff that up?' (15int5)

Again our ideology does not protect us, because the mediating environment is one where all opinions are considered equally valid. So when a party says, 'You are biased', the opinion must be considered to be true.¹⁸ But the mediator cannot share her own thoughts about the behaviour of the parties which may have caused this perception, so she accepts their judgment and turns her gaze inward to self-examination. This may have a positive consequence of useful reflection on practice, but it may also lead to self-doubt which threatens wellbeing.

But instead of focusing on our own reactions, we can focus more on our clients, and on their experience of the mediation process. Rather than stating the mantra, 'I am impartial', we can focus on criteria which, in effect, 'operationalise' impartiality and establish standards for checking our partiality.

A criteria-based approach

Adopting a criteria-based approach encourages us to understand 'procedural justice' from the viewpoint of our clients. We know the factors that enhance the perception of natural justice, and that satisfy substantive,



psychological and procedural interests. Specifically these interests are:

- the opportunity for 'voice' and participation — the chance to speak freely about the facts as parties see them, to 'present one's case' even if that case is not favoured in the outcome;¹⁹
- the importance of being genuinely listened to and understood — the perception that the authority has understood one's concerns, taken them into account,²⁰ and been attentive in the process;²¹
- the fact that the third party is not biased *against* them — this seems to be the implication, not always stated, of the research that aims to discover what constitutes procedural 'fairness'. Perhaps it is defined more by its absence than its presence. People may care less if an authority is biased in their favour, as long as they are not disadvantaged by a biased judgment. Public comments on the decisions of football umpires would suggest this;
- a sense of control — when parties feel pressure to settle, they are less likely to perceive the mediation process as fair.²²

So, rather than stating that we are impartial, we can, and should, concentrate on delivering to clients the means by which they perceive themselves to receive procedural justice, while still adhering to self-determined outcomes. Instead of relying on a positivist statement about our impartiality, we can invite parties to take the opportunity to:

- 'speak about what is important to you so that your concerns are heard and understood'; and
- 'hear some challenges to your views so that you are better informed about your options and can make wise choices because the decision is in your hands, not mine'.

Ensuring that concerns are heard and understood

Appearing trustworthy

Arnold²³ posits that trustworthiness is assessed by how well the mediator gains 'insight into a disputant's interests and needs'.²⁴ Therefore, I argue that a major factor in building

rapport without compromising impartiality is through the mediator's respectful attitude to the party, the promise that they will have the chance to have their say, and the reassurance that their views are valued and will be listened to attentively. Interpersonal skill, or the 'ability to feel at ease and comfortable [and] showing sensitivity towards others',²⁵ encourages the trust necessary for people to believe that their concerns will be heard and understood. But interpersonal skills have the potential to encourage excessive friendliness that militates against impartiality. In my study, I was able to show that there was an association between the social/emotional competency of interpersonal relations and what I termed 'political competence', the subtle judgments which the mediator makes about appropriate strategies to address power relationships.²⁶ While writers of management theory speak of this competence as 'the ability to read, understand, and exert influence and control in a way that is not seen as overt and controlling',²⁷ I defined it as 'the judicious use of interpersonal skill: building rapport; engaging parties and their supporters; even managing the relationship with a co-mediator'.²⁸

Patnoe claims that 'most disputants see the mediator as a kind of authority figure' and will judge their social acceptance by how they are received by the authority, because:²⁹

What people really worry about is rejection or the implication of rejection by society ... a rejection by authorities carries the implication that one is less of a person than others ... People tend to view their treatment by authorities as especially diagnostic of how they are seen by society, because they view authorities as a personification of society.

It is therefore incumbent on mediators to demonstrate what Lind and Tyler call 'ethicality', or 'politeness and concern for rights, that is, respectful treatment by authorities'.³⁰ So ethicality may be summed up as treating people with 'dignity and respect'.³¹ Gladwell³² affirms this thinking when he argues that the majority of doctor

malpractice lawsuits are not about medical treatment but about the way the patient was treated.

Empathy

Empathy involves understanding the situation from the viewpoint of the other. Part of that understanding is trying to grasp how the party wants to be perceived — what is the view of themselves that they are trying to convey?

This is the opportunity my co-mediator and I missed in the situation I referred to earlier. I was so intent on controlling my own reactions to a man who, I thought, was behaving obnoxiously, and so intent on assertively 'protecting' the other party that I missed how he wanted to be seen, yet all his actions, from hindsight, appear so obvious. I think that he wanted to be perceived as a 'man of action'. This hypothesis did not come out of the ether — it should have been clear to us as mediators because the cause of the dispute had been his approach to his elderly neighbours, and his intrusion (from their point of view) onto their land to 'fix' a problem created by his new pool. Acknowledgement to him that we understood his motives and his preferred method of acting may have enabled him to experience procedural justice, and prevented 'digging in' by both him and the other party.

Even so, empathy must be used judiciously. Saposnek, when describing a situation where domestic violence had occurred, makes the salient point that empathy shown in this situation towards the offender has the potential to 'not only create a sense of betrayal and the loss of a sense of safety in the other party, but may also encourage more abuse'.³³ In such situations, he argues, mediators cannot be 'naively empathic'.³⁴ The situation, once again, demands astute judgment.

Patience and respect

Genuine listening, or empathy in action, requires considerable patience and respect, but while demanding, these attributes seem more relevant for parties' outcomes than does the declaration of impartiality. The value is evident through the revelation by



one mediator of how she deals with the experience of being ‘triggered’:

I try really hard to understand that person... and that might change my body language as well. Changing *my* demeanour causes them to change *their* demeanour... They will probably be more flexible if they know you’re trying to understand (9Fint2).

Respect is also conveyed through clarity — about the process, the mediator’s role, information about what happens to any agreement — all the things which we recite at the start from memory, but whose significance we sometimes overlook. Despite our assurances that mediation is not a ‘hearing’, people are understandably nervous and have to be made to ‘feel comfortable; otherwise, they won’t spill their stuff’ (4Mfgc2).

Posing challenges — making the right judgments

When I pose a challenge to a party’s way of thinking, I am also affording them their right: to disagree; not to comment; to challenge my challenge! There are three competencies which can help in this task:

- creating the appropriate ‘hypothesis’;
- putting my ‘hypothesis’ tentatively; and
- ensuring that parties ‘save face’.

Creating the appropriate hypothesis

Many of the mediators in my study referred to their ‘intuition’ or instinct, drawn from their experience and knowledge of people. For example, one said her teaching background provided her with the ability to read body language and to be aware of critical moments when subtle body movement indicated a change in attitude (14Fint6).

Others referred to self-knowledge; so that knowing their own weaknesses was as important as knowing their own strengths. Focusing on her possible effect on the parties, one mediator showed a great deal of insight when she said:

I have the capacity to be a heavy operator. I can really go in there and pinpoint a vulnerability and I could misuse it (1Ffga7).

How we educate our intuition is another topic in itself. But one important way is to analyse the situations we find challenging. One mediator thoughtfully determined the source of her own instinctive responses in this way:

Because you rely on a level of instinct or gut reaction, the important thing is to work it through afterwards, analyse and think whether that was the correct decision. It is sort of an instinct reaction but you can work on it in learning (12Fint6).

Her ‘instinctive’ analysis of ‘intuition’ is supported by academic literature on how intuition is developed. Intuition has been described as ‘the end product of learning and experience’,³⁵ so that intuitive responses are ‘reached with little apparent effort, and typically without conscious awareness’.³⁶ However, mere ‘reliance on intuition can misguide us and be a systematic source of error in human judgment’.³⁷ It may be more safely ‘acquired through domain-relevant experience and ... improved through instruction and practice’.³⁸

The most effective way for mediators to hone their intuition is through reflective practice, and through thorough knowledge of the relevant theoretical principles, which I have discussed in another article.³⁹

However, mere ‘reliance on intuition can misguide us and be a systematic source of error in human judgment’.

Inculcating the appropriate theoretical principles which have been empirically tested will stand us in greater stead than reliance on ideological mantras. Indeed, ‘practitioners who do not have a grounding in theory do not have the ability to evaluate and assess their interventions with clients’.⁴⁰ Such grounding is even more important given that we operate in what Hogarth⁴¹ would call a ‘wicked’, rather than a

‘kind’ environment, that is, one where feedback can be misleading and the environment is not ‘lenient’ but chaotic.

Putting hypotheses tentatively

In the co-mediation I referred to earlier, we could have tentatively posed our reading of the situation so that we might have said to the party, ‘Would it be fair to say that you like to get things done, and so you tried to fix the problem as soon as you were aware of it?’ Participants in my study explained their use of this subtlety. For example, one described how she checked things out by prefacing a statement with ‘I’m just wondering if ...’ (13Fint4). A tentative statement prevents disrespectful categorising of people in a way that ignores their sense of identity.

Face saving

Because ‘individuals want to *present themselves positively* and they will frequently *support the positive attributions of others*’,⁴² another aspect of treating people with dignity and respect is ‘face saving’. The skill was referred to by a number of the experienced participants. For example, for one, it involved determining when people are ready to participate — ‘are they able to put their best foot forward?’ (15Fint6);

for another, it meant always being conscious of his use of strategies in a way that ‘makes no one look bad’ (22Mint6). In a focus group, a participant discussed how she sometimes reveals to parties that she knows ‘what it’s like not to be believed — it’s devastating’ (6Ffgc9).

Of course, reframing, when used effectively, achieves the purpose of face saving, in that ‘it alters the language



used by the parties and changes the target to which it is directed — from the other party to what amounts to a mutual and neutral “pasteboard”.⁴³

Conclusion

I have argued that mediators' claims to impartiality are challenged not only

I believe we can take their warning further. We must be able to reassure parties that **we have no vested interest in seeing one party have a more favourable outcome than the other(s)**. If we cannot do this, we are not abiding by our own standards. This is different from declaring that

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by the threats to our own preferences and biases, but also by the ideological imperatives of our practice. Expecting that we will act with consummate impartiality imposes unnecessary role strain on ourselves, and promising it does disservice to our clients. Rather, we can handle our inevitable partiality by sharpening the ways we show dignity and respect to those with whom we are engaged in this process. In doing so, we reduce the focus on ourselves and our reactions, and focus on how we think parties wish to be perceived. We can then check tentatively our reading of the situation rather than making definitive statements which may be perceived to be disrespectful.

What we can promise about our role

Although we feel obligated to promise 'impartiality' in the sense of not **possessing** bias, we cannot do so honestly. My thinking supports the caveat offered by Cooper and Field,⁴⁴ who concluded that family dispute resolution practitioners should refrain from using terms such as 'neutral' and 'impartial'. Rather:

To accurately state their role, FDRPs could state that they are independent of the parties in that they have no conflict of interest, and that they will endeavour to ensure that both parties are treated fairly in the process.⁴⁵

we have no vested interest in the outcome, which is not possible if we are being paid for our services, either directly or indirectly, or if we judge an outcome to be disadvantageous to one party.

What we can promise about procedural justice

We can promise parties that they will have the opportunity to speak about the matters which concern them, and the right to be treated with dignity and respect when they do so, and that they will not be told what they should do. These statements are probably firmly fixed in the repertoire of most mediators. However, we must also warn them beforehand that part of the 'deal' in mediation is that they are required to listen to perspectives with which they may not agree, and that their views may be challenged by the mediator(s), not to get at 'the truth' but to ensure that they clarify their options. A warning such as this allows us to intervene if, for example, we believe that 'venting' of an opinion or anger is not being productive.

Mediating requires astute judgment and the delivery of 'justice' to disputants in a manner which engages them but without the safeguards of the legal system. Robert Frost once lamented that free verse was like playing tennis without a net. Sometimes, mediating is similar. Awareness of our biases is essential if



we are to achieve our role. Rather than focusing on our possession of bias, we can focus on what the parties find most helpful as they cope with the pain of conflict. Meeting parties' expectations about voice, respect and control may provide a more effective net than mantras about our supposed impartiality. ●

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