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

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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 intervenor 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


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.


mediation and negotiation’ (1987) 16 Mediation Quarterly 75 at 83.
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.
29. De Coste above note 27 at 114.
30. De Coste above note 27 at 114.
33. De Coste above note 27 at 117.
34. De Coste above note 27 at 117.
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.