**The Impartiality – Self-determination Paradox in Mediation.**

David Mitchell

Mediation allows two human beings with a grievance, a dispute or in conflict to eyeball, speak, hear and listen to each other, aiming for an amicable solution. A third person in the room , is the mediator, who, using wisdom, knowledge, skills, compassion, body language and carefully chosen words, is able to create for the disputants, with their deeply rooted convictions, wants, needs and expectations, a “caring conversation”[[1]](#footnote-2). Pfetsch would hold that an interested, caring third party would act at an equidistance from each of the disputants and take an active equal role within the conversation [[2]](#footnote-3). Rooney would describe mediation interactions as a complex process of

“disturbance, disruption and dissonance out of which something emerges which is greater than the sum of the parts. Scientists call this process ‘emergence’”[[3]](#footnote-4)

Into this intimate triadic (“talking with”) relationship was imposed, successively, the ethical principles of *neutrality* (pre 2015) and *impartiality* (post 2015) from the mediator and *self-determination* (autonomy) for the disputants.

Such constraints primarily affected the commonest form of mediation, Facilitated Mediation (and arguably, to a lesser degree, Transformational mediation and Narrative mediation). The other category of mediation includes evaluative and determinative mediation which generally involve lawyers who work within a lawyer/Court of Law set of ethics.

The stumbling blocks begin with the various, and, often, obtuse definitions of neutrality and impartiality. Field’s summation was:

“ … neutrality is used 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 and *lack of bias* (writer’s addition) towards the parties during the mediation process'.”[[4]](#footnote-5)

PROBLEMS with Neutrality/Impartiality  
  
1. …“neutrality and impartiality mean the same thing, with the terms often used interchangeably.”[[5]](#footnote-6)

2. …“that a traditional ethic of neutrality or impartiality is not only theoretically unsound, but also unrealistic, because it does not help mediators understand or negotiate common ethical dilemmas”[[6]](#footnote-7).

3.“It is unrealistic for mediators to be wholly neutral, because they are human beings with their own perspectives and biases. Mediator neutrality …..robs the mediator of the ability to intervene actively in the process where needed and ensure that all parties achieve meaningful self-determination.”[[7]](#footnote-8)

4. A ‘neutral’ or ‘ impartial’ “ mediator cannot intervene in the process to deal with issues of power”[[8]](#footnote-9)

5. “mediators will inevitably impact upon content and outcomes due to their very presence in mediation and their personal, cultural and professional situatedness”[[9]](#footnote-10)

**The rise of the** **Impartiality – Self-determination Paradox**

Co-incident with the Rights movements and, separately, the rise of feminism in USA came the emphasis on self-determination (or autonomy) and on gender and/or power imbalance within the umbrella of impartiality.

“Moral theories couched in terms of rights, justice and abstract rationality… gave way to moral theories which emphasise care, compassion and contextualisation”[[10]](#footnote-11)

Interestingly there were concomitant changes in medicine with a change from the dispassionate observer-doctor model to a patient-centered healthcare model:

““Patient centeredness encompasses qualities of compassion, empathy and responsiveness to the needs, values and expressed preferences of the individual patient.”[[11]](#footnote-12)

and echoes Shapira’s assertion:

“Mediation's body of knowledge draws on the more established disciplines of, among others, psychology, sociology, management, political science, and law.”[[12]](#footnote-13)

For a mediator to stay outside of a dyadic disputant conversation and not intervene, for fear of breeching neutrality or become partial and intervene on behalf of one mediatee who was disempowered or merge into a mediation as an even handed, fair and equidistant part of a triadic group (party) became **a paradox** and a burden.

Douglas[[13]](#footnote-14) found that almost all mediators stray outside of the neutral-impartiality constricts to achieve better, mutual self-determined emotional and/or financial resolutions within mediation: neutrality was considered an unachievable aspiration and the balancing of power, influence and fairness subsumed impartiality at times. Crowe suggests such decisions were made impulsively/intuitively (Group 1 thinking) and rationalised later (Group 2).[[14]](#footnote-15) Crowe develops this concept describing how, if the technique works, it can be shared with like-minded mediators and become a repeatable ‘practice’ within the group.

**Party self-determination.**

The aim was to achieve a mutuality within the mediation ‘trio’, at all times respecting and honouring the self-determination of the duo mediatees. This came to be termed ‘party self-determination’

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**Possible Solution to the Impartiality - Self-determination Paradox**

Field and Crowe[[15]](#footnote-16) in their recent book , *‘Mediation Ethics: From Theory to Practice’* espouse an elaboration of party self-determination that allows ethical shifts in mediator neutrality/impartiality , in attempts to protect and balance power imbalances and self-development and mutuality in both disputants:

“… our position is that party self-determination requires an ethic of responsiveness to the parties’ needs and interests that may involve both neutral and non-neutral (or impartial and non-impartial) actions and interventions.”[[16]](#footnote-17)

**Field and Crowe’s four point process**

1. Active Reflective Practice in a mediator’s life with extra emphasis on ‘Reflection -in-action’
2. Mediator’s openness and acceptance of each mediatee’s perspectives/world view
3. Contextual decisions to maintain party self-determination
4. Active management of power and influence within the mediation, to facilitate self-determination

**How can this be achieved by a mediator?**

The following suggestions are not taught in mediator courses. I hold that these concepts should be part of the mandatory training requirements for a mediator to be a ‘good’ mediator.

A mediator needs to

1. maintain an ethical lifestyle, incorporating regular reflection, compassion meditation, loving-kindness meditation or other forms of meditative practice.
2. maintain self-awareness and self-acceptance
3. have the ability to control self-bias and emotions
4. accept each mediatee’s beliefs and world-view
5. be prepared to move the boundaries of neutrality/self-determination if the context erodes or threatens party self-determination
6. be flexible and aware that the universal variability in individuals ensures no one size (ethical theory) fits all mediations
7. engage in active listening and talk with ( not at or to) the mediatees
8. have developed some expertise in communication skills and psychoanalytical/authentic leadership skills
9. know when to stop/pull back.
10. consider regular peer-to-peer review, or mentoring or regular supervision by a more experienced mediator

11. join a community of practice (CoP) incorporating Barbara Wilson’s *mediator expertise live interview* (MELI) techniques.[[17]](#footnote-18)

**Conclusion**

The ethics of neutrality, impartiality and self-determination within mediation are poorly defined and difficult to interpret within the ambience of any one mediation. The perseverance and maintenance of party self-determination takes priority over neutrality and impartiality. Field and Crowe currently provide the best format for successful mediations.

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2. Frank Pfetsch 2011 Power in International Negotiations: Symmetry and Asymmetry. *Négociations*, 2(2), 39-56. DOI: 10.3917/neg.016.0039 [↑](#footnote-ref-3)
3. Greg Rooney [*Introducing A New Definition of Mediation*](http://mediationblog.kluwerarbitration.com/2020/03/20/introducing-a-new-definition-of-mediation/). Downloaded 20/03/2021 from http://mediationblog.kluwerarbitration.com/2020/03/20/introducing-a-new-definition-of-mediation/ [↑](#footnote-ref-4)
4. Rachel Field *Neutrality and Power: Myths and Reality*. *ADR Bulletin Vol 3 No 1 May/June 2000, p16-19."* [↑](#footnote-ref-5)
5. Jonathan Crowe and Rachael Field, [‘The Empty Idea of Mediator Impartiality’](https://www.academia.edu/39760965/The_Empty_Idea_of_Mediator_Impartiality) (2019) 29 *Australasian Dispute Resolution Journal* 273. [↑](#footnote-ref-6)
6. Jonathan Crowe and Rachael Field, 2020. Mediation Ethics: From Theory to Practice. Edward Elgar Pub Cheltenham UK.. ISBN 978 1 78643 778 5(ebook) [↑](#footnote-ref-7)
7. Jonathan Crowe and Rachael Field, see supra 6 [↑](#footnote-ref-8)
8. ## Tony Bogdanoski. "The Neutral Mediator’s Perennial Dilemma: To Intervene Or Not To Intervene?" [2009] . QUTLawJJl 3; (2009) 9(1) Queensland University of Technology Law and Justice Journal 26

   [↑](#footnote-ref-9)
9. Susan Douglas. (2012). Neutrality, self-determination, fairness and differing models of mediation. *James Cook University Law Review*, *19*, 19–40. https://search.informit.org/doi/10.3316/informit.363252330693485 (Original work published January 2012) [↑](#footnote-ref-10)
10. Susan Mendus. (1993), Different Voices, Still Lives: Problems in the Ethics of Care. Journal of Applied Philosophy, 10: 17-27.  
    <https://doi.org/10.1111/j.1468-5930.1993.tb00059.x> [↑](#footnote-ref-11)
11. International Alliance of Patients' Organizations. What is Patient-Centred Health Care? A Review of Definitions and Principles. Second ed. London: IAPO, 2007:1-34. [↑](#footnote-ref-12)
12. Shapira, Omer, Exploring the Concept of Power in Mediation: Mediators’ Sources of Power and Influence Tactics (October 22, 2009). 24 Ohio State Journal on Dispute Resolution 535 (2009), Available at SSRN: <https://ssrn.com/abstract=1492632> [↑](#footnote-ref-13)
13. Susan Douglas ibid see 10 [↑](#footnote-ref-14)
14. Jonathon Crowe *Two Models of Mediation Ethics* [↑](#footnote-ref-15)
15. Field and Crowe. Ibid see 8 [↑](#footnote-ref-16)
16. Field and Crowe ibid [↑](#footnote-ref-17)
17. Barbara Wilson, Mediator Expertise Live Interviews (November 22, 2012). Available at SSRN: <https://ssrn.com/abstract=2179587> or [http://dx.doi.org/10.2139/ssrn.2179587](https://dx.doi.org/10.2139/ssrn.2179587)   
    ….MELI is an interview of an expert by one or more members of the CoP using a suite of questions that vividly recalls and relives the chosen mediative experience of the expert. The questions are provided within Barbara’s article. A great training/learning tool. [↑](#footnote-ref-18)