**[Rethinking Impartiality in Mediator Ethics](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \o "Permalink to Rethinking Impartiality in Mediator Ethics)**

* 27 November 2020

****[**Srishti Mahant**](https://www.fortyfourdegrees.com.au/nicole-wilson)**, Lawyer at Forty Four Degrees, rethinks impartiality in mediator ethics by exploring the definition of impartiality and reconceptualising neutrality and impartiality based on the Practice Standards. In this article, Srishti shares her thoughts on how such a reconceptualisation can be implemented in practice.**

Mediation is a form of Alternative Dispute Resolution (ADR) which provides an alternative to adversarial litigation[[1]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn1) and about 90% of civil disputes are settled out of court through ADR.[[2]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn2) Mediation has certain advantages over traditional litigation, in that, it is relatively quicker, more accessible and affordable.[[3]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn3) While adversarial litigation focuses on individual rights, mediation attempts to uncover the current and future interests of the parties so that the outcomes can be tailored to suit the needs and interests of both the parties.[[4]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn4) Therefore, agreements reached in mediation are both voluntary and flexible.[[5]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn5) Parties enter mediation with conflicting views, and the mediator as an independent third party assists the parties to communicate in a rational, problem-solving manner, to identify the issues in dispute, account for available options, and if possible, reach an agreement which is acceptable to all the participants.[[6]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn6)

**Models of Mediation**

The facilitative model is the dominant model in the mediation field.[[7]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn7) Pursuant to the Practice Standards (2)(2.2), ‘a mediator does not evaluate or advise on the merits of, or determine the outcome of disputes’.[[8]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn8)  The Standards further require a mediator to demonstrate an understanding of the ethical principle of procedural fairness and to possess the ability to conduct the mediation in a manner that exhibits procedural fairness.[[9]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn9) Accordingly, substantive fairness in mediation is ensured by restricting the mediator’s control over procedural fairness alone.[[10]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn10)

The facilitative mediation model operates on a presumption that mediating parties are both competent and empowered, and have the ability to understand the dispute, think through the issues, and negotiate satisfactory self-determined outcomes.[[11]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn11)

Impartiality and neutrality have traditionally been conceived as the ‘critical defining characteristics’ of an independent mediator.[[12]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn12) In the context of mediation, neutrality is regarded as in indicator of what is ‘good’ for mediators to do, and practicing neutrality is said to help the parties in achieving self-determination.[[13]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn13) This quality of self-determination and fair and voluntary process is regarded as the hallmark of mediation.[[14]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn14)

Over time, it has been recognized that absolute mediator neutrality is unattainable in practice, even if mediators restrict their interventions only to process related issues[[15]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn15) and that ‘mediators will inevitable impact upon content and outcomes due to their very presence in mediation and their personal, cultural and professional situatedness’.[[16]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn16) It is suggested that even subtle actions of the mediator have an impact on the outcome of the dispute and the nature of any agreement reached.[[17]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn17)

Critics have called for a complete abandonment of neutrality, or a reconceptualization of it in light of other principles of mediation ethics.[[18]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn18) In response to this, neutrality was entirely omitted from the new Practice Standards as of 1st July 2015 and replaced with ‘impartiality’. Nevertheless, it must be acknowledged that in mediation training, it is necessary to demonstrate an understanding of neutrality to gain accreditation.[[19]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn19)

**What is impartiality?**

If impartiality is ascribed a meaning on the basis of a literal interpretation of Clause 7.1 of the Standards, then under such a construction, mediators are obliged to ignore any differences between the parties and to treat them similarly in all respects.[[20]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn20) In other words, impartiality is treated as a lack of bias by the mediator towards the parties. This is directly comparable to an interpretation of neutrality as even-handedness, which treats neutrality as an attribute inherent in the mediator and is deemed to be exercised based on an equal treatment of both the parties.

Even if a genuine attempt to remain impartial is made, merely listening to the parties’ description of the dispute and presentation of their issues initiates a thought process whereby the mediator (consciously or subconsciously) begins to assess, judge, and evaluate’.[[21]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn21) This judgment is based on the mediator’s own ‘set of cognitive and motivational biases’.[[22]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn22) Impartiality as lack of bias therefore misrepresents the practical workings of mediation.[[23]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn23) On the contrary, ‘mediators regularly exercise influence, either passively or actively, and such influence serves to assist in an outcome palatable to the mediator, corresponding to his own ideas and interests’.[[24]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn24) Process control may also be influenced by a mediator’s personal agenda, such as the need to obtain a settlement, thereby allowing self-interest to permeate the process and manifest itself through techniques such as pressure and coercion.[[25]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn25) Impartiality as lack of bias requires the mediator not only to keep aside conscious bias, which is unworkable in practice, but also implicit bias which is a paradox in itself.

**Reconceptualizing Neutrality and Impartiality based on the Practice Standards**

Parties in conflict require ‘assistance, advocacy, power, resources, connections or wisdom’, and neutrality is not necessarily a primary concern for them.[[26]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn26) Mediators are largely expected to assist people to engage in constructive interactions, and to help them communicate and understand each other, analyze the conflict, articulate concerns, assist in developing options and assist in evaluating those options.[[27]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn27) In most cases, parties enter mediation because alternative pathways are undesirable for them in terms of factors such as cost and time, and what they expect is to be heard in a meaningful forum and to have their issues resolved in a legitimate and safe setting.[[28]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn28)

**The Role of Mediators – Pathway to Reform**

The principle of self-determination has proven to be a key guiding principle in mediation practice, especially where the traditional conception of neutrality and impartiality have presented difficulties for mediators.

Clause 2(2.2) of the Practice Standards states that Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator: (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other; and (f) reach and make their own decisions.

Clause 7(7.7) of the Standards requires mediators to ‘encourage and support negotiations that focus on the participants’ respective interests, issues and underlying needs and encourage participants to assess any proposed agreements accordingly and with reference to their long- term viability’.

In mediation, the self-determination of each party is relational in nature, meaning, that it cannot be achieved in an absolute sense.[[29]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn29) This is because i) the very notion of a mediator assisting the parties itself contradicts the idea of absolute self- determination, ii) control of the process by a mediator affects the course of dispute, and iii) the self determination of each party is limited to some extent by the needs and interests of the other party.[[30]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn30) Therefore, ‘relational party self-determination is achieved where both parties are supported in reaching an integrated solution to their dispute and where the outcome can be said to respond to each party’s concerns, needs and interests – not just those of one party. Relational party self-determination cannot exist on an individual level; it exists at a level that enables mediation process to be just to all parties. If only one party achieves self- determination, the mediation process has failed’.[[31]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn31)

One aspect of this relationalism (*sic*) presents itself in the relationship between impartiality and self-determination. It becomes necessary to view both concepts in the context of the relationship between the mediator and the parties, and amongst the parties themselves.[[32]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn32)  Clauses 2(2.2) and 7(7.7) read together mean that party self-determination is undermined where the mediator allows a party to negotiate unfair settlements in the presence of clear power imbalances or a lack of substantive knowledge.[[33]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn33)

It is therefore important to re-conceptualize the meaning and application of impartiality in light of this relationship, rather than in the form of a distinction between process and content.156 There is an argument to be made that the promotion of mediation’s core value of self-determination requires a substantive construction of impartiality which enables intervention in circumstances where parties are seemingly unable to exercise self-determination. [[34]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn34)

Self-determination is promoted when the mediators focus not only on their own agendas, but also on the parties’ preferences and views and on attempts to resolve them. Therefore, self-determination is given meaning not just based on restricting mediator control over process, but also based on whether the mediator could properly engage in facilitating dispute resolution amongst the parties.[[35]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn35)

**Reconceptualizing Impartiality**

In light of these arguments, a reconceptualization of mediator impartiality can be described through the following ideas:

1. Power is a fluid concept which moves between the mediator and the parties, and between the parties themselves;
2. The principle of self-determination is the promotion of party power;
3. Proper exercise of mediator power is to be understood in relation to exercise of self-determination by the parties;
4. The meaning of impartiality is to be understood not just in its literal sense, but also based on a substantive construction; and
5. The proper exercise of impartiality by the mediator is to be assessed based on whether it promotes self-determination of the parties.

Such a reconceptualization may be meaningfully implemented in a practical sense. In the context of power imbalances for example, Douglas conducted a study where mediators found it uncomfortable to restrict their interventions to process, especially where the self- determination of one party was limited by inadequate knowledge, misinformation or apparent gender and cultural differences.[[36]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn36) In this scenario then, an application of impartiality would be a proper exercise of mediator power when it operates to remove impediments creating inequality between the parties, so as to promote the self-determination of the disadvantaged party.[[37]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn37) If impartiality is expressed as a proper exercise of mediator power, then a substantive construction would allow the mediator to provide information about legislative standards, or assist parties in generating options consistent with those standards.[[38]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftn38)

**Conclusion**

A reconceptualization of the meaning of impartiality has been proposed that falls outside of the current understanding of the principle in mediation ethics. The aim of this paper is to generate discussion and ideas on how such a reconceptualization can be implemented in practice. While a discussion of the practical implementation of such a conceptualization is beyond the scope of this paper, I look forward to your thoughts on this subject.

[[1]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref1) Bornali Borah, ‘Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice’ (2017) 28 *Alternative Dispute Resolution Journal* 98 (**Borah**) 98.

[[2]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref2) Ibid.

[[3]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref3) Will Hardy, *Mandatory Mediation* (2008) < [http://willhardy.com.au/legal-essays/mandatory-mediation/view/>](http://willhardy.com.au/legal-essays/mandatory-mediation/view/) (**Hardy**) 5.

[[4]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref4) Ibid.

[[5]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref5) Ibid.

[[6]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref6) Hin Hung, ‘Neutrality and Impartiality in Mediation’ (2002) 5(3) *ePublications@bond* < http://epublications.bond.edu.au/adr/vol5/iss3/7> (**Hung**) 45.

[[7]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref7) Susan Douglas, ‘Neutrality, Self-Determination, Fairness and Differing Models of Mediation’ (2012) 19 *James Cook University Law Review* 19 (**Douglas**) 22.

[[8]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref8) National Mediation Accreditation System (NMAS) 2015, pt. III(2)(2.2) <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf> (**Practice Standards**).

[[9]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref9) Practice Standards, Cl 10(10.1)(c)(v) and Cl 7(7.1).

[[10]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref10) Douglas, above n 7, 24.

[[11]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref11) Borah, above n 1, 98.

[[12]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref12) Arghavan Gerami, ‘Bridging the Theory-and-Practice Gap: Mediator Power in Practice’ (2009) 26(4) *Conflict Resolution Quarterly* 433 (**Gerami**) 435.

[[13]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref13) Rachael Field, ‘Proposing a System of Contextual Ethics for Mediation for a Range of Mediation Models and in Both Ad Hoc and Institutional Environments’ (2017) 10 *Contemporary Asia Arbitration Journal* 300 (**Field**).

[[14]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref14) Leah Wing, ‘Whither Neutrality? Mediation in the Twenty-first Century’ in Mary Adams Trujillo, S. Y. Bowland, Linda James Myers, Phillip M. Richards, and Beth Roy (eds), *Re-Centering: Culture and Knowledge in Conflict Resolution Practice* (Syracuse University Press, 2008) (**Wing**).

[[15]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref15) Douglas, above n 7, 25.

[[16]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref16) Douglas, above n 7, 25.

[[17]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref17) Katherine Chalkey and Martin Green, ‘In the Context of Mediation, is Safeguarding Mediator Neutrality and Party Autonomy More Important Than Ensuring a Fair Settlement?’ (2016) 8(2) *International Journal of Law in the Built Environment* 161 (**Chalkey and Green**) 164.

[[18]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref18) Susan Douglas, ‘Neutrality in Mediation: A Study of Mediator Perceptions’ (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 139, (**Douglas**) 140.

[[19]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref19) Douglas, above n 7, 20.

[[20]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref20) Field, above n 13, 304.

[[21]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref21) Gerami, above n 12, 436.

[[22]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref22) Field, above n 13, 303.

[[23]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref23) Ibid.

[[24]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref24) Philip Hugh Gulliver, ‘On Mediators’ in Ian Hammett (ed), *Social Anthropology and Law* (London: Academic Press, 1977) 15.

[[25]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref25) Gerami, above n 12, 437.

[[26]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref26) Bernard Mayer, *Beyond Neutrality – Confronting the Crisis in Conflict Resolution* (Jossey-Bass, 2004) (**Mayer**) 17.

[[27]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref27) Bernard Mayer, ‘What We Talk about When we talk about Neutrality: A Commentary on the Susskind- Stulberg Debate, 2011 Edition’ (2012) 95 *Marquette Law Review* 859 (**Mayer**) 864.

[[28]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref28) Mayer, above n 27, 865.

[[29]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref29) Ibid.

[[30]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref30) Ibid.

[[31]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref31) Field, above n 13.

[[32]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref32) Omer Shapira, ‘Conceptions and Perceptions of Fairness in Mediation’ (2012) 54 *South Texas Law Review* 281, 309.

[[33]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref33) Chalkey and Green, above n 17, 168.

[[34]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref34) Douglas, above n 7, 23.

[[35]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref35) Douglas, above n 8, 154.

[[36]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref36) Douglas, above n 8, 152.

[[37]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref37) Douglas, above n 8, 156.

[[38]](https://legalwiseseminars.com.au/insights/rethinking-impartiality-in-mediator-ethics/" \l "_ftnref38) Ibid.