



LEEDS
BECKETT
UNIVERSITY

Citation:

Chalkey, K and Green, MB (2016) In the context of mediation, is safeguarding mediator neutrality and party autonomy more important than ensuring a fair settlement? *International Journal of Law in the Built Environment*, 8 (2). ISSN 1756-1450 DOI: <https://doi.org/10.1108/IJLBE-10-2015-0016>

Link to Leeds Beckett Repository record:

<https://eprints.leedsbeckett.ac.uk/id/eprint/2411/>

Document Version:

Article (Accepted Version)

The aim of the Leeds Beckett Repository is to provide open access to our research, as required by funder policies and permitted by publishers and copyright law.

The Leeds Beckett repository holds a wide range of publications, each of which has been checked for copyright and the relevant embargo period has been applied by the Research Services team.

We operate on a standard take-down policy. If you are the author or publisher of an output and you would like it removed from the repository, please [contact us](#) and we will investigate on a case-by-case basis.

Each thesis in the repository has been cleared where necessary by the author for third party copyright. If you would like a thesis to be removed from the repository or believe there is an issue with copyright, please contact us on openaccess@leedsbeckett.ac.uk and we will investigate on a case-by-case basis.

MEDIATOR NEUTRALITY AND THE FAIR SETTLEMENT OF DISPUTES

STRUCTURED ABSTRACT:

Purpose:

Explores the appropriate role and approach of mediators and investigates whether mediator neutrality and party autonomy should prevail over mediators' obligations to remain neutral where non-intervention would result in unfair settlements.

Methodology:

Arises from polarising and paradoxical opinions of the legitimacy of mediator intervention. This paper relies upon theories proposed in peer-reviewed journals, together with secondary data.

Findings:

Mediator neutrality has no consistent or comprehensible meaning and is not capable of coherent application.

Requirements for mediator neutrality encourage covert influencing tactics by mediators which itself threatens party autonomy.

Mediator intervention ensures: (a) ethical and moral implementation of justice; (b) removal of epistemological implications of subjective fairness; (c) compensation for lack of pure procedural justice in the mediation process.

Party autonomy requires mediators to intervene ensuring: (a) parties adequately informed of the law; (b) equal balance of power.

Research Limitations:

Peer-reviewed journals and secondary data giving meaningful insight into perceptions, opinions and beliefs concerning mediator neutrality, party autonomy and fair outcomes. This data comprised of unstructured-interviews and questionnaires containing 'open-ended' questions.

Practical Implications:

Mediator neutrality and party autonomy are less important than fair settlements.

Social Implications:

Mediator neutrality should be given a contextual meaning;

Mediation should be more transparent affording the parties opportunity to select a particular type of mediator;

Transformative and narrative approaches to mediation should be further developed.

KEYWORDS:

Mediator; Neutrality; Party autonomy; Fair settlement; Intervention; Justice

INTRODUCTION

Neutrality on the part of the mediator and the principle of party autonomy are regarded by many as being indispensable requirements of the mediation process (Douglas, 2012, p.19-20). It is contended that mediator neutrality informs the ideology of mediation such that mediation cannot exist in its absence (Zamir, 2011, p.467). Many have endeavoured to define the meaning of mediator neutrality (Exon, 2008, p.578) but, given that neutrality is an elusive concept, the meaning attributed to the term is far from clear (Becker, 2013, p.7). Furthermore, the concepts of mediator neutrality and party autonomy, in their purest form, prohibit mediator intervention even in circumstances where the objective of such intervention

1
2
3 is to ensure a fair settlement as between the parties (Zamir, 2011). Unsurprisingly, there is
4 much debate as to whether the principles of mediator neutrality and party autonomy should
5 remain a requirement of the mediation process. Accordingly, the aim of this research paper
6 is to address the appropriate role and approach of the mediator, in particular, whether
7 safeguarding mediator neutrality and party autonomy is more important than ensuring a fair
8 settlement.
9

10 11 **PART ONE: WHAT IS MEANT BY MEDIATOR NEUTRALITY?** 12

13 There are countless definitions afforded to the concept of mediator neutrality and equally as
14 many criticisms of those definitions (Mayer, 2011, p.860). Neutrality is a difficult concept to
15 delineate as its meaning is context dependant (Mayer, 2011, p.860). Further, the concept
16 can engender adverse connotations and, accordingly, Mulcahy (2001, cited in Noone and
17 Ojelabi, 2014, p.164) opines that the concept is synonymous with “invisibility” and “passivity”.
18 In contrast, mediator neutrality is frequently considered a prerequisite to establishing respect
19 and integrity in the mediation process (Izumi, 2010, p.77-78). Further, while neutrality may
20 be comparable with the concepts of fairness, justice, impartiality and lack of bias, it is not
21 *entirely* analogous with those concepts (Izumi, 2010, p.78).
22

23 Astor (2007, p.223-225) identifies three elements that are comprised within the concept of
24 neutrality. He states that the first element is the requirement for the mediator to refrain from
25 *influencing* the content and/or outcome of the mediation as the mediator’s role is to facilitate
26 a procedure whereby the parties decide how the dispute is to be resolved. Further, Astor
27 contends that the second element of neutrality is the *consensual decision-making* by the
28 parties, while the third element is *non-bias* on the part of the mediator such that the mediator
29 treats the parties *equally* and abstains from *favouring* one party over the other.
30

31 Cobb and Rifkin (1991, p.41-46) conducted research into the practice of mediator neutrality
32 by undertaking ‘open-ended interviews’ with 15 mediators and they concluded that there are
33 two competing components of neutrality, namely *impartiality* and *equidistance*. Cobb and
34 Rifkin submit that impartiality is akin to the *absence of bias*, whereby the mediator refrains
35 from siding with a particular party. They submit that in order for impartiality to prevail,
36 mediators are to dissociate themselves from both their conscious and unconscious values,
37 feelings and agendas. Further, Cobb and Rifkin assert that equidistance is the requirement
38 for mediators to conserve a *balance of power* between the parties and, therefore, mediators
39 may, in certain circumstances, legitimately favour one side over another as “...neutrality is
40 the active process by which bias is used to create symmetry.” Equidistance is required as
41 mediation ideology incorrectly assumes that each party has the ability to articulate its
42 position and formulate solutions, thereby having equal power and influence in the mediation
43 (Wing, 2009. p.391). Notably however, Becker (2013, p.60), in analysing 86 completed
44 questionnaires (which included both ‘closed’ and ‘open-ended’ questions) found that 73% of
45 mediators believed that the need to address a power imbalance “definitely did not justify a
46 departure from neutrality.” Furthermore, Cobb and Rifkin’s study found that the fundamental
47 difference between impartiality and equidistance is entrenched within the concept of *bias* as
48 impartiality interprets bias as a destructive component while inversely, equidistance
49 construes bias as an affirmative concept provided it is *symmetrical*. In view of the foregoing,
50 Cobb and Rifkin proclaim that impartiality and equidistance are mutually exclusive concepts.
51 In addition to impartiality, non-influence, equidistance and non-bias, the concept of neutrality
52 also evokes a sense of *fairness* and *even-handedness*, both of which refer to the *equal*
53 *treatment* of the parties by the mediator (Douglas, 2008, p.156).
54
55

56 Douglas (2008, p.143) conducted ten unstructured and in-depth interviews with experienced
57 mediators with the objective of analysing the “...process of meaning creation that
58 participants use to construct their understanding of neutrality...” Douglas found that the
59
60

1
2
3 distinction between the *process* of the mediation and its *content/outcome* is relevant to the
4 understanding and application of the concept of mediator neutrality and further, that the
5 requirement for neutrality only permits *procedural intervention* and necessitates content and
6 outcome neutrality. Procedural intervention refers to the mediator *facilitating* and *controlling*
7 the mediation by encouraging dialogue, supporting the parties in identifying the contested
8 issues and developing alternative solutions without the mediator imposing options upon the
9 parties or influencing the content/outcome of the mediation (Bogdanoski, 2009, p.30).
10 Content neutrality is associated with the consensual decision-making by the parties and
11 prohibits mediators from restricting the parties' control over the way in which the dispute is
12 resolved, while outcome neutrality requires the mediator to refrain from promoting either
13 party's interests (Izumi, 2010, p.82). On this analysis, mediator neutrality is safeguarded
14 when intervention is limited to controlling the process, as opposed to controlling the content
15 or substantive outcome (Douglas, 2008, p.153).
16

17 18 **PART TWO: WHAT IS MEANT BY PARTY AUTONOMY?** 19

20 Party autonomy is regarded as the prime directive for mediation and this concept is
21 manifested in various ethical codes of practice (Coben, 2004, p.71). The meaning of party
22 autonomy in the context of mediation is *relatively* uncontroversial (when compared to the
23 concept of neutrality) and Douglas (2008, p.148) found that it refers to the participants'
24 control and ownership of the dispute and their capacity to govern the outcome of the
25 mediation. Similarly, Becker (2013, p.10-11) found that party autonomy renders the parties
26 free to determine potential solutions and affords the parties the responsibility to decide the
27 nature of the agreement and the terms therein. Further, Welsh succinctly summarises the
28 concept of party autonomy by stating that it necessitates the disputants being at the
29 epicentre of the mediation process, actively participating in dialogue, creating potential
30 solutions and determining which norms inform the decision-making (2004, cited in Coben,
31 2004, p.71). Furthermore, Coben (2004, p.68-69) submits that party autonomy is
32 synonymous with party empowerment and self-determination and extends to the very
33 beginning of the mediation process at the point at which the parties *voluntarily agreed* to
34 participate.
35

36 The concepts of mediator neutrality and party autonomy "...intricately interface with one
37 another..." as party autonomy is intrinsically dependent upon the mediator's neutrality (Exon,
38 2008, p.582). Boule et al. submit that party autonomy is the "flip side" of the neutrality
39 principle, as the imposition of one expedites the imposition of the other (2008, cited in,
40 Becker, 2013, p.10-11). Indeed, Becker (2013, p.49) found that the concept of self-
41 determination "...most closely captured..." a mediator's understanding of the concept of
42 neutrality. Accordingly, references within this research paper to mediator neutrality should be
43 interpreted as including a reference to the principle of party autonomy as such principles are,
44 to a large degree, mutually inclusive.
45

46 47 **PART THREE: THE DIFFICULTIES WITH THE CONCEPT OF MEDIATOR NEUTRALITY** 48

49 As explicated above, the concept of neutrality is an umbrella term incorporating a variety of
50 concepts and is, therefore, a multifaceted notion which is imprecise, unclear and fluid
51 (Douglas and Field, 2006, p.4). Notwithstanding the uncertainty as to the *exact meaning* of
52 neutrality, the concept itself is riddled with difficulties as the terms used to explain its
53 meaning (namely non-influence, non-bias, even-handedness, impartiality, fairness and
54 equidistance) are, to a large extent, incapable of practicable application. Accordingly, while
55 many mediators (in particular those practicing the facilitative model) regard neutrality as an
56 ethical requisite of the mediation process, they are incapable of articulating *how* neutrality
57 actually functions in practice (Douglas and Field, 2006, p.4).
58
59
60

1
2
3
4
5 **(a) Mediator Influence**
6

7 The concept of mediator neutrality presupposes that the mediator is able to facilitate the
8 mediation process without imposing their own ideological predispositions upon the
9 content/outcome, however, in practice, the boundary between facilitating the process and
10 determining the content/outcome is indistinct (Bogdanoski, 2009, p.33). Accordingly, Becker
11 (2013, p.20) submits that mediator neutrality is a fallacy as the slightest action, or inaction,
12 will affect the outcome of the dispute and the nature of the settlement and, therefore,
13 mediator influence is unavoidable. Mayer (2011, p.861) explains that simple body language,
14 such as affording one party more eye contact than the other, or allowing one party to vocally
15 express themselves at greater length, are actions capable of promoting one party's interests
16 over the other. Similarly, Cobb and Rifkin (1991, cited in Wing, 2009, p.397) found that, in
17 over 80% of its case studies, the party who was permitted by the mediator to present its
18 argument first delineated the content of the settlement agreement. Although, Garcia et al.
19 (2002, p.224), who observed and analysed the video-types from 30 mediations, found that
20 this particular bias *may* be overcome if the parties themselves decided who would present its
21 argument first, thereby avoiding feelings of unfairness.
22

23
24 **(b) Non-bias and Impartiality**
25

26 Defining neutrality using the concepts of impartiality and non-bias is erroneous as it is
27 unfeasible to expect mediators wholly to dissociate themselves from their emotions, beliefs,
28 and values (Rock, 2006, p.153) and the mediators' actions and decisions in connection with
29 the process will invariably be guided by such feelings (Douglas and Field, 2006, p.9)
30 Similarly, Douglas (2012, p.25) submits that *all* interventions (or non-interventions as the
31 case may be) by the mediator are founded upon the mediator's internal perceptions and
32 opinions and, accordingly, a mediator cannot be regarded as non-biased or impartial and will
33 inexorably seek to influence the outcome of the mediation. Furthermore, Garcia et al. (2002,
34 p.223) found that legitimate mediator techniques, such as summarising the parties' positions,
35 are capable of creating a *perception* of bias.
36

37 While the absence of internal neutrality only becomes a concern when it is externalised in
38 the mediator's actions or in-actions, it is contended that the mediator's awareness of its own
39 internal emotions, values and agendas can help dispel external bias behaviour (Rock, 2006,
40 p.349-353). Accordingly, while internal neutrality is unattainable, external neutrality can be
41 achieved if the mediator is able to recognise and suppress its own psychological processes
42 and emotional reactions (Rock, 2006, p.349-353). Although, even if the mediator was
43 cognisant of such internal bias, he/she may "overcompensate for less-than-impartial
44 feelings" thereby promoting the interests of the party which it is less sympathetic towards
45 (Mayer, 2011, p.863). Moreover, if such emotions, values and agendas are within the
46 mediator's *unconsciousness*, mediator neutrality would necessitate the paradoxical
47 monitoring by the mediator of an indecipherable psychological process (Rock, 2006, p.359).
48
49

50
51 **(c) Even-handedness and Fairness**
52

53 Douglas (2008, p.144) found that defining mediator neutrality using the concept of even-
54 handedness is misguided and asserts that the equal treatment of parties by the mediator can
55 engender unequal and unfair outcomes due to the fact that disputants are seldom equal
56 prior to commencing mediation as, for example, one party is likely to be more influential and
57 knowledgeable than the other. Similarly, Astor (2007, p.226-236) submits that the
58 expectation for a mediator to be both fair and neutral is a contradiction as fairness requires
59
60

1
2
3 the mediator to actively re-balance power between the parties. By way of example, Wing
4 (2009, p.398) avers that allowing an equal amount of time to each party to present its
5 argument can privilege the party whose position is more easily understood. Further, the
6 obligation upon the mediator to act fairly extends only to the mediation *procedure* and does
7 not include an obligation to ensure a substantively fair settlement agreement (Shimokaji, n.d,
8 p.5 and p.13). It is submitted that such differentiation renders the obligation to act fairly as
9 somewhat ambiguous.

10 11 12 **(d) Equidistance**

13
14 Cobb and Rifkin (1991, p.44-46) submit that, in order to practice equidistance, the mediator
15 must represent the interests of one party over the other which necessarily compels the
16 mediator to act in a biased manner thereby violating an integral component of mediator
17 neutrality and party autonomy. Although, Kolb (cited in Cobb and Rifkin, 1991, p.44-46)
18 suggests that this type of bias can be differentiated from the “negative psychological
19 phenomenon”. Further, Astor (2007, p.227-229) submits that when mediators treat parties
20 differently in order to re-balance power, they rely upon their own assessments which are
21 invariably dependent upon their own values and perceptions. Therefore, in honouring the
22 equidistance element of neutrality, the mediator indirectly imposes upon the parties (in the
23 absence of any guidance) its own values and perceptions. Moreover, being able to
24 effectively recognise complex power relations is difficult, if not impossible, for even the most
25 experienced mediator (Bogdanoski, 2009, p.34).

26 27 28 **PART FOUR: INFLUENCING A FAIR SETTLEMENT**

29
30 It is contended by Hyman & Love (2002, p16) that an *objectively fair settlement* is one that
31 reflects the result which would have been achieved had the dispute been litigated (though
32 presumably they mean without the imposition of legal costs). Although, as it is not possible
33 to be certain as to the likely litigated outcome, determining objective fairness is likely to
34 include the mediator’s *subjective* perception (Exon, 2008, p.19). Conversely, a *subjectively*
35 *fair settlement* is one which the parties themselves perceive to be fair, irrespective of an
36 independent standard of fairness or objective assessment.

37
38 Mediators should be able to implement whatever tactics and methods of intervention they
39 deem necessary to enable them to facilitate an objectively fair settlement, *provided* that,
40 before the mediation, the mediator *informs* the parties as to his/her intentions and
41 intervention boundaries and the parties are agreeable to his/her proposal (Rick, 2009, p.10).
42 However, in practice, the mediator is unlikely to disclose such intention and it will be
43 assumed by the parties that the mediator will adopt a *facilitative approach* to the mediation.
44 Noone and Ojelabi (2014, p.179) conducted semi-structured interviews with 21 experienced
45 mediators in which participants were asked to identify potential ethical and practical issues in
46 five mediation scenarios. They concluded that *objectively fair settlements* are often facilitated
47 by the mediator employing *covert* strategies in order to address power imbalance and
48 influence the outcome of the mediation.

49
50 Noone and Ojelabi (2014, p.187) found that covert mediator strategies included ascertaining
51 whether a party understands its own position and the implications of the potential agreement
52 as such ascertainment can manipulate and direct the party’s decision-making. Covert
53 strategies also include tactical questioning and leading inquiries, both of which are capable
54 of guiding the parties to a preferred settlement (Bogdanoski, 2009, p.33). Moore (1996, cited
55 in Coben, 2004, p.76), drawing upon his 12 years of experience as a mediator, concluded
56 that a mediator is able to surreptitiously influence the outcome by: (a) determining the
57 negotiation process; (b) managing the dialogue between the disputants; (c) encouraging the
58
59
60

1
2
3 parties to consider the likely outcome at trial; (d) deciding when offers should be made; and
4 (e) encouraging doubt in order to moderate a party's argument. Similarly, Bogdanoski (2009,
5 p.33) submits that the mediator is able to underhandedly direct and influence particular
6 outcomes as, for example, they can facilitate less opportunity to discuss solutions which they
7 do not favour. In view of the foregoing, it is contended that party autonomy will be
8 unattainable if the myth of neutrality remains as this myth necessitates *clandestine mediator*
9 *strategy* which undermines self-determination and party empowerment (Coben, 2004, p.77).

10
11 Further, as the boundary between facilitating the process and determining the
12 content/outcome is indistinct (Bogdanoski, 2009, p.33), and as the meaning of neutrality is
13 elusive and contentious, it is not possible to satisfactorily ascertain which mediation
14 techniques compromise the concept of mediator neutrality and party autonomy (Becker,
15 2013, p.10). By way of example, Becker's (2013) study found that mediators were unsure as
16 to whether advising the parties as to the likely outcome in litigation constituted a departure
17 from neutrality.
18

19 20 **PART FIVE: THE REASONS WHY INTERVENTION IS REQUIRED TO ENSURE A FAIR** 21 **SETTLEMENT** 22

23 There is fierce disagreement as to whether mediators are under an obligation to ensure an
24 objectively fair outcome. The concepts of mediator neutrality and party autonomy, in their
25 purest form, prohibit the mediator from consciously influencing the outcome, whether by
26 employing *covert* tactics or adopting an *overtly* evaluative approach (Noone and Ojelabi,
27 2014, p.164). Further, Becker (2013, p.63) found that 50% of mediators would not "depart
28 from neutrality in order to promote achieving a fair and just outcome."
29

30 Despite the foregoing, and irrespective of the requirements of neutrality and party autonomy,
31 it is contended that mediator intervention to ensure a fair settlement is essential as the
32 mediator is under an obligation to: (a) implement to the rules of justice and discharge moral
33 and ethical responsibilities; (b) remove the epistemological implications of subjective
34 fairness; (c) guarantee party autonomy; and (d) compensate for the lack of pure procedural
35 justice in the mediation process. Furthermore, the submission that safeguarding mediator
36 neutrality and party autonomy are not more important than ensuring a fair settlement is
37 further supported by the fact that the concept of mediator neutrality: (a) has no consistent
38 meaning (as detailed in Part One); (b) is not capable of application (as detailed in Part
39 Three); and (c) encourages the employment by the mediator of covert influencing tactics (as
40 detailed in Part Four).
41

42 The forthcoming analysis of the reasons why intervention is required by the mediator to
43 ensure a fair settlement is subject to the fact that mediators express differing views as to
44 whether intervention to ensure a fair outcome constitutes a departure from neutrality and
45 party autonomy (Becker, 2013). Further, it is submitted that if the parties are unrepresented,
46 the mediator's accountability to ensure a fair settlement is greater as legal representatives,
47 when present, are accountable to their client for the outcome of the mediation (Maute, 1990,
48 p.361).
49

50 51 52 **(a) *The requirements of justice and ethical and moral responsibilities of the*** 53 ***mediator*** 54

55 It is generally accepted that the preservation of justice is an essential requirement for all
56 dispute resolution procedures, and while it is difficult to offer a meaningful explanation as to
57 what justice is, one can often intuitively identify those outcomes which are, by their very
58 nature, 'unjust' (Stulberg, 2005, p.213). Accordingly, Hyman and Love contend that the
59
60

1
2
3 *primary role* of the mediator is to facilitate justice by ensuring a fair outcome (2002, cited in
4 Noone and Ojelabi, 2014, p.154). Furthermore, it is submitted that a mediator is under an
5 ethical duty (Shapira, 2013, p.957) and moral obligation (Maute, 1990, p.359) to prevent the
6 parties from reaching an unfair settlement agreement *regardless* of the implications that this
7 may have upon the requirements of mediator neutrality and party autonomy. However, it is
8 contended that the aforementioned requirements of justice and ethical and moral obligations
9 only require the mediator to intervene to ensure that the parties *believe* the agreement to be
10 fair, as opposed to ensuring that the agreement is *objectively fair*, and this contention is
11 explicated in section (b).

12
13
14 **(b) A subjectively fair agreement overrides an objectively fair agreement**

15
16 Hyman and Love (2002, p.164-186) contend that the concern is whether the disputants
17 *experienced* a sense of justice in the mediation process and *believe* the outcome to be fair,
18 irrespective of whether the settlement is *objectively* fair. They submit that a party may
19 concede an objectively fair settlement in order to avoid the costs of litigation and/or prevent
20 further stress, and that this may be as important to the party as achieving an objectively fair
21 outcome. Further, Hyman and Love's study also found that the mediation outcome may be
22 perceived as fair by participants if it restored harmony and improved the relationship
23 between the parties. Furthermore, they opine that the perception of fairness is also
24 embodied in the party's experience of the process, such as being treated with dignity and
25 having the opportunity to express their argument. Similarly, advocates of the transformative
26 approach submit that the primary objective of mediation is to restore the inter-party
27 relationship, as opposed to achieving an objectively fair settlement (Harper, 2006, p.599).

28
29 However, Stulberg (2005, p.216) raises concerns in connection with Hyman and Love's
30 thesis and is critical of their position as it fails to provide a standard independent of the
31 process against which to assess the fairness of the mediation outcome. Accordingly, he
32 contends that Hyman and Love's thesis raises epistemological and jurisprudential
33 implications as it is "not compelling conceptually or practically" to aver that moral terms, such
34 as fairness and justice, have no objective meaning and, by way of analogy, he states that
35 "we certainly do not believe that it is morally fair to discriminate against women...because a
36 large group of all male individuals agree that such a practice is acceptable".

37
38
39 **(c) Party autonomy compels a fair settlement**

40
41 The principle of party autonomy is undermined if the mediator permits a party to negotiate an
42 unfair settlement by reason of its unequal influence and power in the mediation and lack of
43 substantive knowledge and, therefore, the mediator is under an obligation to intervene
44 (despite its obligation to be neutral) in order to re-balance power and provide relevant
45 information. Accordingly, on this analysis, the principle of party autonomy and the
46 requirement for a fair settlement are mutually inclusive.

47
48
49 The participants in the study conducted by Noone and Ojelabi (2014) submitted that the
50 concept of party autonomy required informed decisions, including being informed as to the
51 law, as such knowledge will enable the party to negotiate a fair settlement. As stated by
52 Nolan et al. "...for if the self is unknowing, just what is it determining?" (1996, cited in Coben,
53 2004, p.80). Further, Stulberg (2005, p.239) avers that the veracity and tolerability of any
54 legal system is founded upon each citizen being knowledgeable of their legal rights and,
55 therefore, a party must possess the relevant legal information when seeking to resolve its
56 dispute in a mediation forum. If the disputants do not appreciate their legal positions,
57 including the likely outcome of litigation, they are unable to make informed decisions and
58 negotiate a settlement which is objectively fair (Maute, 1990, p.362). However, Stulberg
59
60

1
2
3 (2005, p.238) states that a fair result does not necessitate the parties having *perfect*
4 information and further, that if both parties were not aware of a particular condition, and such
5 condition would have influenced the negotiations, it does not, in itself, inhibit fairness and
6 such an agreement, while perhaps unfortunate, is not unfair. He also contends that a
7 settlement will only be unfair, and party autonomy will only be compromised, in
8 circumstances where the settlement is *asymmetric* to the correct information and has
9 significantly benefited one party over the other.

10
11 In addition, it is submitted that mediator intervention is essential to re-balance the power
12 between the parties and that failure to intervene in such circumstances renders the mediator
13 responsible for: (a) procuring an unfair and exploitative settlement; and (b) preventing the
14 disadvantaged party from exercising its autonomy (Bogdanoski, 2009). Bogdanoski (2009)
15 states that encouraging and supporting a party's autonomy through "...maximising their
16 respective control of the mediation process in relation to one another is a legitimate principle
17 of the mediator's role in the process". Furthermore, in Douglas' study into mediator
18 perceptions of neutrality, it was found that practicing mediators were uncomfortable with
19 restricting their interventions to matters of process in circumstances where one party's
20 autonomy was disadvantaged in terms of influence and power (2012, p.25-26). Although,
21 there may be circumstances where no amount of mediator intervention is able to facilitate a
22 fair settlement for a disadvantaged party who is inarticulate or unable to assert its own
23 interests (Bogdanoski, 2009, p.38).

24 25 26 **(d) Pure procedural justice ensures a fair settlement**

27
28 The concept of pure procedural justice, pioneered by John Rawls (Legal Theory Lexicon,
29 2004), is such that there is no independent standard for the assessment of justice and
30 fairness and, therefore, there can be no assessment as to whether a mediation outcome is
31 fair. This is because, on Rawls' analysis, the fair procedure will, by its very nature, *guarantee*
32 a fair outcome and further, the outcome will be fair irrespective of what that outcome *actually*
33 is (Legal Theory Lexicon, 2004). Advocates of the facilitative approach associate procedural
34 justice with substantive justice, and proclaim that ensuring procedural justice will inevitably
35 engender a fair settlement (Noone and Ojelabi, 2014, p.156). Similarly, Maute (1990, p.349)
36 submits that, in theory, mediator accountability as to the outcome is achieved by facilitating a
37 procedurally fair process as a fair process will invariably render the agreement fair. Pure
38 procedural fairness may (theoretically) ensue if: (a) the parties are given the opportunity to
39 express their position; (b) the mediator is even-handed; and (c) the parties are treated with
40 dignity and respect (Welsh, 2004, p.52). Further, Stulberg contends that mediation *could* be
41 regarded as a process of 'pure procedural justice' as it has the "...capacity to address issues
42 of injustice through codes of conduct, through allowing legal representation in the mediation,
43 or through the skills of the mediator" (2005, cited in Noone and Ojelabi, 2014, p.156). On this
44 analysis, and provided that the process was one of pure procedural justice, mediator
45 intervention to ensure a fair settlement is not required.

46
47 Alternatively, imperfect and perfect systems of procedural justice are capable of producing
48 outcomes which can, and ought to be, independently assessed as there is no guarantee as
49 to the fairness of that outcome (Stulberg, 2005, p.220). It is submitted that pure procedural
50 justice cannot be present in the mediation process as: (a) mediator influence is inevitable;
51 (b) the boundary between process and content is indistinct; (c) the mediator cannot be free
52 from bias; and (d) even-handedness can engender unfair outcomes (as to which see Part
53 Three). Therefore, mediation, regardless of the attempts to ensure a just procedure, cannot
54 guarantee a fair result. Further, Susskind submits that the fundamental role of the mediator
55 is to facilitate good process, and as good process is intended to yield a good outcome,
56 mediators ultimately have a responsibility to intervene in order to ensure an objectively fair
57 outcome (Mayer et al., 2011, p.816). Similarly, it is contended that it is somewhat illogical to
58
59
60

1
2
3 permit intervention to ensure a fair process yet prohibit decisions to ensure a fair outcome
4 (Shapira, 2013).
5
6
7
8

9
10 **PART SIX: SHOULD THE CONCEPT OF MEDIATOR NEUTRALITY AND PARTY**
11 **AUTONOMY BE SAFEGUARDED?**
12

13
14 **(a) *Abandonment of the concept of mediator neutrality and party autonomy***
15

16 Due to the obligation upon the mediator to ensure a fair settlement (as detailed in Part Five)
17 it seems clear that the concept of neutrality (and, by implication, the concept of party
18 autonomy) should be abandoned. In any event, attempts to safeguard the concept of
19 neutrality are futile as it has no consistent meaning (as detailed in Part One) or coherent
20 application (as detailed in Part Two).
21

22 Douglas and Field (2006, p.9) submit that the concept of mediator neutrality should be
23 replaced with the concept of mediator impartiality as impartiality, unlike that of neutrality,
24 permits mediator interventions, provided such interventions are invoked for legitimate
25 reasons. Although, they do acknowledge that such semantic distinctions are not particularly
26 helpful for mediators or disputants. Further, Noone and Ojelabi (2014, p.166) suggest that
27 the abandonment of the concept of neutrality is required in order to permit the mediator to
28 address power imbalances between the parties as such re-balancing cannot legitimately be
29 undertaken under the guise of neutrality. Furthermore, Zamir (2009, p.49) states that
30 neutrality ought to be disregarded as it embodies the two paradoxical concepts of impartiality
31 and care and submits that "...impartiality necessitates a distinction between process and
32 content, whereas care may obligate intervention by a third party, the mediator, in the content
33 of the dispute".
34

35 Neutrality ideology is largely embodied within the traditional approaches to mediation,
36 including facilitative and evaluative methodologies (Douglas and Field, 2006, p.6), and these
37 approaches are the most dominantly practiced (Boullé, 2011, cited in Douglas and Field,
38 2006, p.6). It is submitted that facilitative and evaluative mediators are unable to be neutral
39 as their principal objective is for the mediation to result in a settlement, and, therefore, all
40 their interventions are geared towards solving the dispute (Bogdanoski, 2009, p.31-33).
41 However, the newer approaches to mediation, including transformative and narrative
42 mediation, discard the concept of neutrality in its entirety and value mediator intervention in
43 order to *transform* party relationships and create *alternative and non-adversarial conflict*
44 *narratives* (Astor, 2006, p.228). Douglas and Field (2006, p.10) state that as the
45 transformative and narrative methodologies acknowledge the inevitable influence of the
46 mediator upon not only the process, but the outcome, they provide a more "theoretically
47 robust" approach.
48

49 Alternatively, Bogdanoski (2009, p.35-37) emphasises that many commentators aver that
50 facilitative mediators need to adhere to a theory of neutrality as, while *pure neutrality* may be
51 unattainable in the practical absolute sense, the *perception* of neutrality is crucial. He
52 explains that the resolution of disputes is dependent upon the mediator being *regarded* as
53 neutral, as a party who *believes* the mediator to be biased is likely to withdraw from the
54 process. Further, Astor (2007, p.228) is cynical of disregarding the concept of neutrality as,
55 while he acknowledges that the concept is riddled with difficulties, it still, to some degree,
56 regulates and guides mediation practice. Similarly, Douglas states that the concept of
57 neutrality positively directs the mediator's conduct, irrespective of the dichotomy which exists
58
59
60

1
2
3 (2008, cited in Noone and Ojelabi, 2014, p.163). It is also averred that abandoning the
4 concept of neutrality will result in: (a) loss of trust in the mediator; (b) reduced willingness of
5 the parties to engage in the process; and (c) decreased durability in the agreement as the
6 parties are more likely to feel aggrieved (Becker, 2013).
7

8 9 **(b) Reformulating the concept of mediator neutrality**

10
11 Douglas (2008, p.149) submits that, rather than abandoning neutrality in its entirety, the
12 concept should be *reformulated* in order to give it a *contextual* meaning. This contention is
13 supported by Bogdanoski (2009, p.39) who states that neutrality, in the absolute sense,
14 cannot be present or absent as its meaning is “complex, contextual and contingent” and “has
15 different practical meanings depending on the circumstances of the mediation”. By way of
16 example, he submits that mediator intervention to *re-balance power* and maximise party
17 autonomy should not invariably be regarded as compromising the mediator’s neutrality as
18 such intervention can only be assessed in light of the particular relationship between the
19 parties. Similarly, Boulle et al. contend that the concept of neutrality is multifaceted and has
20 “several shades of meaning” depending upon the circumstances encountered during the
21 mediation and it ought to be accepted that “not all elements of neutrality will be present all of
22 the time” (2005, cited in Bogdanoski, 2009, p.39-40). On the above analysis, neutrality ought
23 to be accepted as having multiple meanings, thereby permitting the mediator to make
24 *legitimate interventions* in order to circumvent an unfair outcome. Further, it is submitted that
25 if the concept of neutrality was given this *contextualised* meaning (as opposed to a pure
26 interpretation), the debate as to the absolute meaning of the neutrality, and the implications
27 of mediator intervention, becomes sterile (Douglas, 2012).
28

29
30 This reformulation of the concept of mediator neutrality does appear, *prima facie*, to counter
31 the problems inherent within the meaning and application of the concept, permitting mediator
32 intervention where the objective is to ensure a fair settlement, thereby addressing the
33 implications which arise in the absence of such intervention. Further, a context dependant
34 meaning would arguably permit the mediator to re-balance the power between the
35 participants and provide relevant information should the circumstances so require, thereby
36 bolstering the principle of party autonomy and empowerment. However, Douglas and Field
37 (2006, p.15) contend that “proposals to re-contextualise the concept of neutrality to give it
38 meaning or to re-conceptualise it to make it more relevant to practical issues and realities,
39 are not clear enough to make a sound practical impact.” Indeed, such contextualisation
40 questionably provides an unsatisfactory and overly simplified solution to an exceptionally
41 complex dilemma. Notwithstanding the foregoing, it is submitted that the contextualisation of
42 the concept of neutrality is more palatable than a pure and absolute interpretation.
43

44 45 **CONCLUSION**

46
47 The aim of this research paper was to evaluate the appropriate role of the mediator and, in
48 particular, it sought to answer the question as to whether safeguarding mediator neutrality
49 and party autonomy is more important than ensuring a fair settlement.
50

51
52 Firstly, the evidence demonstrates that the concept of mediator neutrality, in its purest form,
53 has no coherent or comprehensible meaning or consistent application. The inherent
54 difficulties with the concept of neutrality support the conclusion that it ought not to take
55 precedence over mediator intervention to ensure a fair outcome as it is, arguably,
56 nonsensical to preserve a concept which is fundamentally defective. Secondly, the evidence
57 concludes that the requirement of mediator neutrality is often (albeit not always) inferior to
58 the mediator’s obligation to intervene to ensure a fair outcome as such intervention is
59 required in order to: (a) adhere to the rules of justice and discharge moral and ethical
60

responsibilities; (b) remove the epistemological implications of subjective fairness; (c) guarantee party autonomy; and (d) compensate for the lack of pure procedural justice in the mediation process. Thirdly, this paper also found that the principle of party autonomy is undermined if the mediator permits a party to negotiate an unfair settlement by reason of its unequal influence and power in the mediation and lack of substantive knowledge and, in conclusion, the mediator is under an obligation to intervene (despite its obligation to be neutral) in order to re-balance power and provide relevant information. Accordingly, the concepts of party autonomy and mediator neutrality can, in certain circumstances, be paradoxical. Finally, the evidence indicates that the incessant requirement for the mediator to be neutral encourages the deployment of covert influencing tactics by the mediator which in itself threatens the principle of party autonomy.

In view of the aforementioned findings, the overall conclusion is that safeguarding mediator neutrality and party autonomy is not more important than ensuring a fair settlement. Although, it is acknowledged that the research question is somewhat misleading as it presupposes that the principle of party autonomy and mediator intervention to ensure a fair outcome are mutually exclusive.

Given these conclusions a number of recommendations follow. Firstly, the concept of neutrality ought not to be afforded an absolute and pure interpretation, rather, the concept should be reformulated in order to provide it with a context dependant meaning which would, to some degree, legitimatise intervention to ensure fairness and absolve the difficulties inherent within the pure understanding of the concept. Secondly, the mediation process should be more transparent and the parties should be asked before the mediation commences (either by the mediator or the relevant mediator nominating body) whether they desire the mediator to intervene in circumstances where the mediator believes the agreement to be unfair. If the parties opt for such mediator intervention, the debate regarding mediator neutrality, party autonomy and the requirement of fair outcomes becomes somewhat sterile. Alternatively, if the parties reject such intervention, the mediator would, to a large extent, be justified in permitting an objectively unfair settlement. Finally, mediator training bodies, such as the Centre for Effective Dispute Resolution, should place greater emphasis on the newer approaches to mediation, such as the transformative and narrative approaches, and these newer forms of mediation should be provided to potential parties as an alternative to the traditional approaches. The transformative and narrative methodologies do not insist upon the neutrality folklore as they acknowledge the inevitable influence of the mediator and, therefore, they offer a more legitimate and theoretically robust approach. Accordingly, this research paper recommends that more research into the transformative and narrative approaches to mediation is undertaken so that such approaches can be further developed.

BIBLIOGRAPHY

Articles

Legal Theory Lexicon (2004) **Legal Theory Lexicon: Procedural Justice**. [Online], Available at <www.lsolum.typepad.com> [Accessed 8 May 2015].

Shimokaji, M. (n.d) **The contradiction of mediator neutrality and fairness: a possible solution**. [Online], Available at <www.mediate.com> [Accessed 8 March 2015].

Texas University Library (2015) **Peer Reviewed Journals**. [Online], Available at <[://www.lib.utexas.edu](http://www.lib.utexas.edu)> [Accessed 8 March 2015].

Books

Bush, R. and Folger, J. (2005)(a) **The promise of mediation: the transformative approach to conflict**. San Francisco: Jossey-Bass.

Dawson, C. (2009) **Introduction to research methods: a practical guide for anyone undertaking a research project**. 4th Ed. London: Constable & Robinson Ltd.

Denzin, K. and Lincoln, Y. (1994) **Handbook of Qualitative Research**. Sage Publications.

Fellows, R. and Lui, A. (2008) **Research Methods for Construction**. 3rd Ed. Wiley-Blackwell Publishing Limited.

Finch, E. and Fafinski, S. (2013) **Legal Skills**. 4th Ed. Oxford: Oxford University Press.

King, G., Keohane, R., and Verba, S. (1994) **Designing Social Inquiry: Scientific Inference in Qualitative Research**. New Jersey: Princeton University Press.

Lowry, R. (2004) **Evaluative Mediation**. In: Folberg, J. Milne, A. and Salem, P. ed. *Divorce and Family Mediation: Models, Techniques, and Applications*. New York, Guilford Press, pp. 72-92.

Naoum, S. (2012) **Dissertation Research and Writing for Construction Students**. 3rd Ed. Oxon: Routledge Publishing.

Thomas, R. (2003) **Blending Qualitative and Quantitative Research Methods in Theses and Dissertations**. Corwin Publishing.

Journals

Aaron, C. (1996) ADR Toolbox: The Highwire Act of Evaluation. **Alternatives to the High Cost of Litigation**, 14 (5) May, pp. 62-64.

Astor, H. (2007) Mediator Neutrality: Making Sense of Theory and Practice. **Social and Legal Studies**, 16 (2), pp. 221-239.

Bogdanoski, T. (2009) The 'Neutral' Mediator's Perennial Dilemma: To Intervene or Not to Intervene? **Queensland University of Technology Law and Justice Journal**, 9 (1), pp. 26-43.

Brooker, P. (2007) An investigation of evaluative and facilitative approaches to construction mediation. **Structural Survey**, 25 (3), pp. 220-238.

Brown, J. (2004) Facilitative Mediation: The Classic Approach Retains Its Appeal. **Pepperdine Dispute Resolution Law Journal**, 4 (2), pp. 279-296.

Bush, R. (2002) Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field. **Pepperdine Dispute Resolution Law Journal**, 3 (1) December, pp. 111-131.

Bush, R. and Folger, J. (2005)(b) A response to Gaynier's Transformative mediation: In search of a theory of practice. **Conflict Resolution Quarterly**, 23 (1) autumn, pp. 123-127.

1
2
3 Bush, R. and Folger, J. (2012) Mediation and Social Justice: Risks and Opportunities. **Ohio**
4 **Stare Journal on Dispute Resolution**, 27 (1), pp. 1-51.

5
6 Cobb, S. and Rifkin, J. (1991) Practice and Paradox: Deconstructing Neutrality in Mediation.
7 **Journal of American Foundation: Law & Social Enquiry**, 16 (1) January, pp. 35-62.

8
9 Coben, J. (2004) Gollum, Meet Smeagol: A Schizophrenic Ruminaton on Mediator Values
10 beyond Self Determination and Neutrality. **Cardozo Journal of Conflict Resolution**, 5,
11 pp.65-86.

12
13 Currie, C. (2004) Mediating off the Grid. **Dispute Resolution Journal**, 59 (2) summer, pp. 9-
14 15.

15
16 Douglas, S. (2008) Neutrality in Mediation: A Study of Mediator Perceptions. **Queensland**
17 **University of Technology Law and Justice Journal**, 8 (1) pp. 139-157.

18
19 Douglas, S. (2012) Neutrality, self-determination, fairness and differing models of mediation.
20 **James Cook University Law Review**, 19, pp. 19-40

21
22 Douglas, K. and Field, R. (2006) Looking for Answers to Mediation's Neutrality Dilemma in
23 Therapeutic Jurisprudence. **eLaw Journal**, 13 (2).

24
25 Etcheson, S. (1999) Transformative Mediation: A New Current in the Mainstream. **Policy**
26 **Studies Journal**, 27 (2), pp. 393-396.

27
28 Exon, S. (2008) The Effects That Mediator Styles Impose on Neutrality and Impartiality
29 Requirements of Mediation. **The University of San Francisco Law Review**, 42 Winter, pp.
30 577-620

31
32 Garcia, A., Vise, K. and Whitaker, S. (2002) Disputing Neutrality: A Case Study of a Bias
33 Complaint during Mediation. **Conflict Law Quarterly**, 20 (2) Winter, pp. 205-230.

34
35 Gaynier, L. (2005) **Transformative Mediation: In Search of a Theory of Practice**. Conflict
36 Resolution Quarterly, 22 (3) spring, pp. 397-408.

37
38 Hansen, T (2004) The Narrative Approach to Mediation. **Pepperdine Dispute Resolution**
39 **Law Journal**, 4 (2), pp. 297-308.

40
41 Harper, C. (2006) Mediator as Peacemaker: The Case for Activist Transformative-Narrative
42 Mediation. **Journal of Dispute Resolution**, 2(10), pp. 1-19.

43
44 Hyman, J. and Love, L. (2002). If Portia were a Mediator: An Inquiry into Justice in
45 Mediation. **Clinical Law Review**, 9 (1), Fall, pp. 157-193.

46
47 Izumi, C. (2010) Implicit Bias and the Illusion of Mediator Neutrality. **Washington University**
48 **Journal of Law and Policy**, 34.

49
50 Levin, S. (2001) The Propriety of Evaluative Mediation: Concerns about the Nature and
51 Quality of an Evaluative Opinion. **Ohio State Journal on Dispute Resolution**, 16, pp. 267-
52 296.

53
54 Love, L. (1997) The Top Ten Reasons Why Mediators Should Not Evaluate. **Florida State**
55 **University Law Review**, 24 (4) summer, pp. 937-948.

1
2
3 Maute, J. (1990) Mediator Accountability: Responding to Fairness Concerns. **Journal of**
4 **Dispute Resolution**, 2 (4), pp. 347-369.

5
6 Mayer, B. (2011) What We Talk About When We Talk About Neutrality: A Commentary on
7 the Susskind Stulberg Debate. **Marquette Law Review**, 95 (3) spring, pp. 158-872.

8
9 Mayer, B., Stulberg, J., and Susskind, L. (2012) (Panel discussion) Core Values of Dispute
10 Resolution: Is Neutrality Necessary. **Marquette Law Review**, 95 (3), pp. 805-828.

11
12 Menkel-Meadow, C. (1995). The many ways of mediation: The transformation of traditions,
13 ideologies, paradigms, and practices. **Negotiation Journal**, 11(3), pp. 217-242.

14
15 Noce, D. (2009) Evaluative Mediation: In Search of Practice Competencies. **Conflict**
16 **Resolution Quarterly**, 27 (2) winter, pp. 193-214.

17
18 Noone, M. (2008) The Disconnect between Transformative Mediation and Social Justice.
19 **Australasian Dispute Resolution Journal**, 19 (2), pp.114-123.

20
21 Noone, M. and Ojelabi, L. (2014) Ethical Challenges for Mediators around the Globe: An
22 Australian Perspective. **Washington University Journal of Law & Policy**, 45 (1), pp. 145-
23 193

24
25 Rick, A. (2009) Evaluation within Mediation and the Ideal of Neutrality. **American Journal of**
26 **Mediation**, 3, pp. 1-11.

27
28 Riskin, L. (1996) Understanding Mediators' Orientations, Strategies, and Techniques: A Grid
29 for the Perplexed. **Harvard Negotiation Law Review**, 1 (7), pp.7-51.

30
31 Rock, E. (2006) Mindfulness Meditation: The Cultivation of Awareness, Mediator Neutrality,
32 and the Possibility of Justice. **Cardozo Journal of Conflict Resolution (CJCR)**, 6 (2), pp.
33 347-365

34
35 Shapira, O. (2013) A Theory of Sharing Decision-Making in Mediation. **McGeorge Law**
36 **Review**, 44, pp.923.

37
38 Stempel, J. (1997) Beyond Formalism and False Dichotomies: The Need for Institutionalizing
39 a Flexible Concept of the Mediator's Role. **Florida State University Law Review**, 24 (4)
40 summer, pp. 949-984.

41
42 Stipanowich, T. (1996) Beyond Arbitration: Innovation and Evolution in the United States
43 Construction Industry. **Wake Forest Law Review**, 31 (1), pp. 65-182.

44
45 Stulberg, J. (1981) The Theory and Practice of Mediation: A Reply to Professor Susskind.
46 **Vermont Law Review**, 6, pp. 85-117.

47
48 Stulberg, J. (1997) Facilitative versus Evaluative Mediator Orientations: Piercing the Grid
49 Lock. **Florida State University Law Review**, 24 (4) summer, pp. 985-1005.

50
51 Stulberg, J. (2005) Mediation and Justice: What Standards Govern? **Cardozo Journal of**
52 **Conflict Resolution**, 6, pp. 213-245

53
54 Susskind, L. (1981) Environmental Mediation and the Accountability Problem. **Vermont Law**
55 **Review**, 6 (1), pp. 1-47.

1
2
3 Waldman, E. (1998) The Evaluative-Facilitative Debate In Mediation: Applying The Lens Of
4 Therapeutic Jurisprudence. **Marquette Law Review**, 82 (1), pp. 155-170

5
6 Wall, J. Dunne, T. and Chan-Serafin, S. (2011) The Effects of Neutral, Evaluative, and
7 Pressing Mediator Strategies. **Conflict Resolution Quarterly**, 29 (2), pp. 127-150.

8
9 Welsh, N. (2004) Remembering the Role of Justice in Resolution: Insights from the
10 Procedural and Social Justice Theories. **Journal of Legal Education**, 54, pp.49-59.

11
12 Wing, L. (2009) Mediation and inequality reconsidered: Bringing the discussion to the table.
13 **Conflict Law Quarterly**, 26 (4) Summer, pp. 383-404

14
15 Winslade, J., Monk, G. and Cotter, A. (1998) A Narrative Approach to the Practice of
16 Mediation. **Negotiation Journal**, 14 (1), pp. 21-41.

17
18 Zamir, R. (2011) The Disempowering Relationship between Mediator Neutrality and Judicial
19 Impartiality: Toward a New Mediation Ethic. **Pepperdine Dispute Resolution Law Journal**,
20 11 (3) April, pp. 1-52.

21 22 **Thesis**

23
24 Becker, D. (2013). **The Controversy over Mediator Neutrality: Input from New Zealand**
25 **Mediators**. [Master of Laws Thesis]. University of Otago.
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60