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## **Impartiality and Neutrality in Mediation**

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# Impartiality and neutrality in mediation

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## Abstract

This paper explores the concepts of impartiality and neutrality in mediation. It draws on literature to define the terms and explores the impact they may have on the mediation process, the parties involved, and the challenge created for the mediator to implement these core principles in practice. It explores power imbalance in mediation and how the mediator risks their neutrality and impartiality by supporting a weaker party in the mediation process. It presents an alternative term from the literature, which describes the mediator as multi partial, as a possible alternative to address the lack of clarity currently experienced by mediators and bridge the gap between theory and practice.

## Introduction

Impartiality and neutrality are core principles of mediation. The Mediators' Institute of Ireland Code of Ethics and Practice (2021: 7), states that "impartiality means freedom from favouritism, bias or prejudice". A definition of neutrality is not provided in the code. However, it does state that "mediators must remain neutral as to the context and the outcome".

Mediators are governed by this code of practice and therefore expected to operate under these guidelines. The challenge that this presents to the mediator is highlighted

in the code of practice, but the issue is not explored in any detail, and there is no guidance on how to manage this anomaly. The various definitions of neutrality and impartiality create a challenging environment for the mediator to navigate and this highlights the disconnect between theory and practice in the mediation process.

The importance of mediator neutrality and impartiality is a high priority for mediators and governing bodies, as well as the importance of a fair process and outcome. When mediators are managing conflict in a mediation, they may not have the option to remain neutral if they want the process and outcome to be fair for the parties involved (Maiese, 2005).

This article will explore the concepts of impartiality and neutrality in the context of the literature reviewed. It will look into the challenge presented to mediators trying to implement these core principles in practice. It will examine the concept of power in mediation, as it relates to neutrality. This article will examine the importance of avoiding confusion during mediation by explaining to both parties before commencing mediation what the terms neutrality and impartiality mean. Finally, we will discuss the use of an alternative term, multi-partial, to bridge the gap between theory and practice.

### **Defining Impartiality**

Being impartial means each party is given the same time and the same opportunity to participate in the mediation process. It requires the mediator to facilitate the process in a manner which is fair and respectful to both parties. This requires significant skill

on behalf of the mediator, and it is acknowledged that it might not always be possible to give each party the same time and opportunity to make their case (Beer and Packard, 2012). Another view is that being impartial means maintaining equal distance from both parties, or demonstrating a similar attitude to both parties without relating to their personalities (Zamir, 2011). It is not possible for an individual to be fully impartial as we are all biased to some extent based on our previous experience (Adjabeng, 2006). A different perspective taken is that the use of the term impartial is distant and detached and therefore not an appropriate term in the field of mediation (Benjamin, 1998).

These multiple and conflicting ideas portray a lack of clarity around the definition of impartiality as it relates to mediation and this in turn presents the mediator with a lack of clarity in relation to their practice. It could be interpreted that being an impartial mediator means creating a distance between the mediator and the parties involved. This would be in direct conflict to the fundamental values of the mediation process. There is even a suggestion that to be impartial may be unhelpful and may be detrimental to the mediation process and is in direct opposition to the Mediators' Institute of Ireland Code of Ethics and Practice (2021). This has the potential to cause some concern for mediators in terms of their practice.

A broad range of requirements in relation to impartiality include: that it is the freedom from bias on the part of the mediator; that it includes both spoken and unspoken communication; the set-up of the environment; and any conflict of interest that may present (Exon, 2008). Furthermore, the lack of guidance available in the

written definitions and standards available to mediators varies greatly in the information they provide. Therefore, mediators are required to abide by core principles that are not clearly defined in the guiding documentation. This may result in different understandings of impartiality and a lack of consistency in the manner in which the term is explained in the mediation process. This may lead to confusion for both the mediator and the parties involved.

### **Defining neutrality**

While impartiality creates some ambiguity in the field of mediation, the term neutrality creates a greater challenge. Multiple broad definitions are offered in the literature. Neutrality is defined as being open minded, not personally connected to the parties yet mutually acceptable to both parties (Maiese, 2005) where there is an unbiased relationship between the mediator and the parties (Bailey, 2014). Bailey adds that it is also the mediator's role to promote the development of the conversation between the parties to enable them to reach a mutually acceptable outcome.

The neutral mediator shows indifference to the parties' welfare, a lack of interest in the outcome and no attempt to balance any power inequities that may present in the mediation (Maiese, 2005) as well as being someone who is disinterested in the parties' interests and needs and is only interested in the process (Winslade and Monk, 2000). These definitions present a mediator as someone removed from the process and the parties, which is not congruent with the core principles of mediation. Some definitions even contradict each other, creating greater confusion.

The lack of a clear definition in relation to neutrality in the context of mediation leaves the concept open to interpretation by each individual mediator. This could result in an inconsistent approach in mediation and poor-quality processes being implemented. It may also result in the parties involved in the mediation having a lack of understanding or incorrect understanding of the mediator's role. Therefore, if mediators are to abide by their code of ethics and practice and avoid so many pitfalls, how can they do this in an effective and empowering way and create shared understanding of neutrality in the mediation process with the parties?

Neutrality can be applied at a number of different levels in the mediation process. The mediator makes an informed decision about the approach they are going to take, how they will manage the mediation process and how they will facilitate the differences that emerge between the parties during the process.

The mediator is remaining neutral to what the parties decide but focuses instead on the process (Bradley, 2016). This is supported by Stulberg (2012:854) who states that “the mediator must be neutral with respect to the negotiated outcomes but not neutral to the process”. In fact, neutrality in mediation is impossible if “the mediator is to be fair to both parties in the process” (Bailey, 2014: 55). The role of the mediator is to ensure a fair process while ensuring the parties determine the outcome for themselves (Zamir, 2011). Therefore, it is reasonable to conclude that neutrality can relate to the outcome of mediation and does not have to relate to the manner in which the mediator manages the process.

To ensure the process is fair, the mediator must engage with the parties, explain the process, and use their skills as a mediator to support and empower the parties to reach a mutually acceptable outcome. In doing so, the mediator is acting in a manner that promotes self-determination of the parties while still ensuring they remain neutral to the outcome.

### **Power imbalance and neutrality and impartiality**

Bogdanoski (2009) highlights the challenges that mediators face when they are required to intervene in a mediation if they perceive an unfairness in the process. Furthermore, he questions whether the mediator is still neutral if they do intervene to address the unfairness.

It is acknowledged that maintaining neutrality and impartiality is an almost impossible task (Moore, 2017). Furthermore, it is suggested that if the mediator supports a weaker party in mediation and readdresses the power imbalance, they are no longer a neutral party (Maiese, 2005; Exon, 2008) and that addressing any imbalance in power is contradictory to impartiality (Field, 2000). Therefore, the mediator is placed in an impossible position, as balancing the power impacts on their neutral position and not balancing the power increases disadvantage for the weaker party.

The process of mediation includes reflecting back, reframing, and asking powerful questions. All of this shapes the power balance in mediation (Douglas 2008). On one hand the mediator has a responsibility to ensure that parties have the opportunity to explore all possibilities in relation to the outcomes of the mediation process, yet on

the other hand the mediator is required to be neutral and impartial. Therefore, by using the skills of mediation to empower a weaker party to actively participate in the mediation process, the mediator could be accused of undermining the core principles of neutrality and impartiality outlined in their code of practice. This validates the position that the lack of clarity around the meaning of neutrality may lead to parties taking a grievance against the mediator (Maiese, 2005). She contends that mediators need to clarify what is meant by neutrality before mediation begins to avoid any confusion and ensure that the parties have a clear understanding before the process commences.

Parties can be suspicious of someone who claims to be neutral and this may impact on building trust with the parties (Bailey, 2014), especially if parties do not really want neutrality in the mediation process in the first place (Benjamin, 1998). They may, for example, want someone who will hear and understand their position. This raises the question of the value of using the terms neutrality and impartiality when they may have a very negative impact on the mediation process.

It is evident that the terms neutrality and impartiality are not clearly understood by either the mediators or the parties in mediation and this increases the risk of misunderstandings and grievances. Therefore, it is reasonable to conclude that while the mediator states that they are neutral and impartial at the beginning of their session, they need to take this a step further and explain to the parties what they mean by the terms neutral and impartial to ensure a mutual understanding is achieved.



## **Alternative option**

Impartiality and neutrality are portrayed on one hand as integrated principles, fundamental to mediation and, on the other hand, as separate entities that cannot coexist within the process. There is an increasing move towards balanced mediation which requires the mediator to protect both parties in the mediation process. In doing so, they reduce the risk of their role being misunderstood. This reduces the risk of a grievance against them (Benjamin, 1998). This is similar to balanced mediation where the mediator has a responsibility to both parties in the mediation. The mediator will question and reframe to enable the parties to reach a mutually acceptable agreement.

The challenge for the mediator is to find the balance between being neutral or impartial and empowering both parties to reach an agreed outcome. The key to achieving this balance lies in the skill of the mediator to know how and when to intervene effectively (Bailey, 2014). Neutrality is not about the absence of views but rather the manner in which the mediator manages the process and facilitates the conversation between the parties (Bradley, 2016).

An alternative option is the concept of multi-partiality, which is defined as an interest in supporting both parties to achieve satisfaction in relation to their issues and interests. The mediator that is multi-partial supports the parties to explore a variety of alternative options they may not have previously considered and, in doing so,

provides a greater understanding and empathy between the parties (Moore, 2003). Multi-partial is described as “balancing the power of the narratives”. The multi-partial mediator asks the right questions at the right time and this enables the parties to think, analyse and consider alternative narratives. This provides options for the parties to consider other alternatives and to move closer towards a mutually acceptable outcome (Routenberg and Sclafani, 2010: 6). It is further suggested that being multi-partial means being partial to both parties in equal measure (Zamir, 2011). This requires the mediator to be open to all viewpoints, narratives, and unique stories. It purports that the reflective nature of the mediation process will create new meaning and understanding between the parties, which in turn will allow for a mutually acceptable outcome to be achieved.

It is evident that the terms neutrality and impartiality are not clearly understood by the mediator or the parties in mediation and therefore could lead to confusion for all. A possible alternative is the use of a different term, multi-partial, which offers both the mediator and the parties’ clarity and creates an environment where everyone feels heard and understood in equal measure. This has the potential to create a greater link between theory and practice and to avoid the confusion that could lead to a grievance against the mediator.

## **Conclusion**

The terms impartiality and neutrality are core principles of mediation outlined in the code of ethics for mediators. However, there are a variety of definitions offered in the literature in relation to both neutrality and impartiality and many of them

contradict each other. The most common definition of impartiality presented that fits with the mediation process is that the mediator will be free from bias and will be fair with regard to the parties.

In relation to neutrality, there is an understanding that it is possible to be neutral to the outcome without being neutral to the process. In fact, being neutral to the process could result in the mediator being uninterested in the parties' needs and interests which could be detrimental to the mediation process and create an environment where the parties do not feel they can trust the mediator. Being neutral may also result in power differences in the mediation not being addressed and the weaker party being further disadvantaged by the process.

A key issue highlighted in the literature is the lack of understanding of the term's neutrality and impartiality. The mediator must go further than just saying they are neutral or impartial. The mediator must explain to the parties what they mean by these terms and ensure that the parties have understood. A failure to do this may lead to a lack of trust as well as a grievance against the mediator due to confusion or lack of understanding. Furthermore, it is acknowledged that parties may not want a mediator to be neutral but rather may want to be heard and understood.

An alternative term is presented in the literature which describes the mediator as multi-partial or balanced. The multi-partial or balanced mediator supports both parties through the process and considers both parties' interests and needs, empowering them to reach their own outcome. This is offered as an alternative to the

terms neutral and impartial and as a possible way to address the lack of clarity and conflict currently present in mediation between theory and practice.

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