

Impartiality: a mediator's superpower or kryptonite?
An analysis of the feasibility and potential limitations of mediator impartiality.
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In Western mediation, “impartiality” is a chief requirement of a mediator. This requires a mediator to be free from “favoritism, bias or prejudice”¹ when facilitating a negotiation (and subsequent settlement) between parties. Therefore, the impartial mediator will not “act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs or performance at a mediation, or any other reason.”² Further, the impartial mediator is “equally concerned with the needs and perspectives of both (all) disputing parties”³ and “does not assume the role of advocate,”⁴ except as an advocate for the mediation process itself.

Impartiality is one of the many principles of mediation, including self-determination, voluntary participation, fair process and confidentiality. These principles are essentially “codified” in the Model Standards of Conduct for Mediators (**Model Standards**). Although the Model Standards are not mandatory, they serve as the “fundamental ethical guidelines”⁵ of mediation. Compliance with all of these (often “vague”⁶) principles is “difficult to attain”⁷ especially when they are applied concurrently as it can create undue burden and contradiction for the mediator.

¹ Model Standard II, *Model Standards of Conduct for Mediators 2005*, as developed by the American Arbitration Association, American Bar Association and Association for Conflict Resolution.

² *Id.*

³ Claudia L. Hale and Chris Nix, *Achieving Impartiality: The Ultimate Challenge for Peer Mediators*, 14 *Mediation Quarterly* (Summer 1997), at 338.

⁴ *Id.*

⁵ See Preamble, Model Standards.

⁶ Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, *Journal of Dispute Resolution* (2006), at 389.

It can be argued, however, that we mandate and emphasize the importance of impartiality without really understanding why. Additionally, we rarely question the feasibility of impartiality and whether the task of impartiality is unduly burdensome for mediators. Is the requirement of impartiality effectively asking mediators to be “superheroes” and defy human psychology by stripping themselves of their natural bias and prejudice?

This paper seeks to examine the benefits and limitations of mediator impartiality, if there is an alternate approach and the potential future of mediator impartiality in Western mediation.

1. *Impartiality distinguished from neutrality*

The concepts of impartiality and neutrality are often “confused”⁸ and intertwined in mediation. For this reason, it is important to distinguish them from one another. Interestingly, both neutrality and impartiality are “typically defined negatively,”⁹ in terms of what they are not: not biased toward a side; not invested in any particular outcome and not expecting any special reward from either side.

Neutrality has become synonymous with mediation, to such an extent that mediators are often called “neutrals.” Despite its pervasiveness, neutrality often appears “without any definition or description.”¹⁰ For the purposes of this paper, however, “neutrality” is defined as being without any “preference regarding the terms of

⁷ *Id.*

⁸ Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality and Conflict of Interest in State Codes of Conduct*, 23 *Conflict Resolution Quarterly* (Winter 2005), at 181.

⁹ Michelle Maiese, *Insider-Partial Mediation, Beyond Intractability*, Conflict Information Consortium, University of Colorado, Boulder (March 2005), at 2.

¹⁰ Hale & Nix, *supra* note 3, at 339.

agreement”¹¹ or the outcome. This is distinct from impartiality, which pertains more to the mediation process.

Despite the concepts being different, both a lack of impartiality and neutrality attracts the same remedy of recusal. A mediator is required to “withdraw or not accept a case if the integrity of the process is harmed.”¹²

2. Why do we mandate our mediators to be impartial? What are the benefits?

Impartiality has become an inextricable part of Western mediation, to the extent that a party may resist or even reject mediation “if it perceives [the] mediator could not maintain impartiality.”¹³ The underlying logic behind the requirement of “impartiality” is “that a mediator with a significant bias toward one party will be perceived as its ally.”¹⁴ If the mediator is biased, the opposing party may regard the mediator with suspicion and/or hostility while the favored party, “feeling strengthened by the mediator’s support,”¹⁵ may be less likely to compromise and resolve the matter. Similarly, if a mediator is perceived to be aligned with a party, the opposing party is likely to reactively devalue anything the mediator says as he or she may be perceived as a “mouthpiece” of the favored party. For these reasons, impartiality is given great importance in the Western mediation model.

¹¹ William Ury, Jeanne Brett, & Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Jossey-Bas Publishers (1988).

¹² McCorkle, *supra* note 7, at 175. See also Model Standard II, A.

¹³ In Class Packet 7, *Why an Adversary May Resist Mediation*, see point 21.

¹⁴ William P. Smith, Effectiveness of the Biased Mediator, *Negotiation Journal* (October 1985), at 363.

¹⁵ *Id.*, at 364.

3. The importance of impartiality and its indicators

As discussed, the importance of impartiality is mostly evident in Western societies, being individualist and egalitarian societies.¹⁶ Non-western societies adopt a different approach to mediation, which will be discussed in paragraph 5.2 of this paper. In the context of international conflict, the United Nations has been established on the very notion of impartiality and the premise that its ability to be impartial makes it a more effective mediator between countries in conflict.

Impartiality is incorporated and almost “institutionalized” in the following components of Western mediation:

1. *Fee structure*: generally, mediation fees are split between the parties as an indicator that the mediator is not a “gun for hire” by one of the parties but rather is engaged by both parties and therefore less likely to favor one party over the other.
2. *Choice of the mediator*: generally, the parties will mutually agree on the mediator. However, in some cases, where mediation is the preferred method of dispute resolution for one party but not the other, the party that prefers mediation may allow the other party to choose the mediator. This is a show of “good faith” and demonstrates a strong belief and trust in mediator impartiality.
3. *Role of facilitator*: most mediators will clarify their role as mere facilitators. Those mediators will confirm that they are not acting in any other professional capacity (for example, as an attorney or judge) and, accordingly, will not provide any such advice to the parties. However, this element will vary depending evaluative and facilitative mediation styles.

¹⁶ Maiese, *supra* note 8, at 2.

4. *Conflicts of interest*: mediators must disclose any “actual or potential conflicts of interest”¹⁷ to the parties. In the spirit of self-determination, the parties can then decide whether to proceed with that particular mediator.
5. *Qualifications to any appearance of partiality*: due to the importance placed on impartiality, mediators feel the need to preface every semblance of impartiality with a reassurance of their even-handedness. This clarifies that he or she is reality testing or applying pressure to both sides equally.

4. The difficulties with and limitations of impartiality

It is imperative to question whether the requirement of impartiality helps or hinders our mediators in discharging their duty as facilitators of conflict resolution. As such, we must consider the difficulties and limitations of impartiality and its role in mediation.

4.1 A human impracticality

Mediators, like all other human beings, “often come to like one party more than the other or view one as more reasonable than the other.” Psychology suggests that bias and prejudice are normal human reactions, particularly when in the midst of adversarial conflict. It therefore seems impractical that mediators, with all of their own life experience, can be impartial “to the content and the personality or style of disputants.” They can, however, practice techniques to guard them against outwardly demonstrating any bias or favoritism.

¹⁷ Model Standard III.

4.2 Impartiality vs Fairness: a trade off?

The principle of impartiality is often at odds with the principle of fairness, particularly in the context of conflicts between power imbalanced parties. How can a mediator maintain impartiality if he or she must address a power imbalance in an attempt to ensure a “quality process.”¹⁸ This begs the question whether mediation techniques, including power balancing or coaching (less sophisticated) parties, involve partiality to a one party over the other. Employing the definition in Model Standard II, it is arguable that such techniques do constitute partiality based on a party’s “background” or “performance at mediation.” However, such techniques are required to fulfill a mediator’s obligations under Model Standard I (Self-Determination) and Model Standard VI (Quality of the Process). This potentially creates “chaos for the ethical mediator.”¹⁹

4.3 Limitations of the “detached” mediator

It can be argued that an impartial mediator has no connection to the parties or the dispute and as such is unable to “discern any nuances and the communication preferences of the parties.”²⁰ As Western mediators take on many cases, they are more interested in resolving disputes for financial and reputational reasons, rather than having any personal or emotional involvement. This means that they are less likely to “stick around” and help resolve any issues that may develop in the implementation phase as they have usually moved onto the next case.²¹

¹⁸ Model Standard I.

¹⁹ Exon, *supra* note 5, at 392.

²⁰ Maiese, *supra* note 8, at 2.

²¹ Maiese, *supra* note 8, at 3.

5. Is it ever appropriate or beneficial for a mediator to be partial?

There appears to be a cultural divide on when mediators can and should be partial so we will examine these cultures separately.

5.1 Partiality in Western mediation

An interview with an LAUSD representative who mediates special education cases revealed that a mediator acting in a manner that shows partiality to the other side is acceptable and even beneficial, in *certain circumstances*. The LAUSD representative requires that a mediator only act partially in caucus and as a means of reality testing LAUSD's position or proposed solution. The representative advised that a mediator's partiality in this context made him "understand the other side's point of view" and made him "think more about the issues and possible solutions." The representative reiterated that while partiality is beneficial, it should *only* be done in caucus and it is appreciated if the mediator can "flag" when he or she is going to be partial and for what purpose. In joint session, if partiality is shown, he added that it can be very damaging to the case as it can "put ideas in the other side's head and give them false hope" in unviable solutions. This is consistent with Model Standard II, which requires that a mediator "avoid conduct that gives the *appearance* of partiality." The argument therefore is that if partiality is shown in caucus, it will not be apparent to the other side, thus preserving the benefits of impartiality outlined in paragraph 2.

5.2 Mediation in Eastern and South American Cultures

The western style of mediation is not generally used in collectivist societies that prioritize “hierarchies, harmony and trust.”²² It is fascinating that most non-Western societies prefer “insider-partial mediation” which is mediation conducted by “a person who is already involved in the conflict (thus, someone who is an “insider”), and, at least to some extent, is aligned with one side or the other (hence, someone who is “partial”).”²³ This mediator is usually of “high stature,”²⁴ has credibility with all parties to the conflict and is trusted to be “fair.”²⁵ It is important to note that this style of mediation accounts for approximately *two thirds* of the world’s population.

The benefits of a mediator being an insider and partial are as follows:

1. they “know the situation better, have cultural ties and are more easily trusted,”²⁶ this means that they know the history and context of the conflict of the parties:
2. they are likely to have a personal interest in a successful outcome and therefore a greater interest in ensure that the agreement reached is durable and implemented.
3. they are likely to be involved in implementing the agreement due to the personal connection between the mediator and the parties.

²² Maiese, *supra* note 8, at 2. Note that this also includes Ho’oponopono, a traditional tribal dispute resolution practice using third parties in Hawaii, see McCorkle, *supra* note 7, at 182.

²³ Maiese, *supra* note 8, at 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*, at 2.

6. The future of impartiality in Western mediation

U.S. Supreme Court Justice Sotomeyer commented that, “all judges have cases that touch our passions deeply, but we all struggle constantly with remaining impartial.” In our Western society, we have burdened not only our judges, but also our juries, ombudsmen, arbitrators and mediators with the “struggle” of maintaining impartiality. To combat this, the following solutions are offered as a way of reducing the burden on mediators:

6.1 Possible abolition of impartiality

After having reviewed mediation models of other cultures for which impartiality is not a requirement, as well as hearing the benefits of partiality in Western mediation, there is a strong argument to abolish the requirement for impartiality. This would involve redefining mediation as “a conciliatory process of using a third party to assist disputants to reach a desired goal.”²⁷ While this removes the requirement of mediator impartiality, it aligns more consistently with the principles of fairness.²⁸

6.2 Reduce importance of impartiality

If abolition is too radical, the importance of “impartiality” could be reduced in an acknowledgment of the fact that a biased/partial mediator may also be effective. This may involve clarifying the level of priority of the various mediation principles. For example, if fairness is prioritized then a mediator can feel more comfortable in “letting go” of his or her impartiality.

6.3 Flexibility towards impartiality

The western model of mediation “fails to take into account the needs and values of many cultures.” Given the burgeoning multiculturalism of western society and the

²⁷ Exon, *supra* note 5, at 422.

²⁸ *Id.*

blurring of international borders, it follows that the principles should be adapted to allow for more flexibility around the concept of impartiality and its role in mediation. In order to cater to mediations with parties of different cultures, mediators may consider co-mediators with an impartial mediator and an insider-partial mediator to develop “trust among many parties in a complex, multi-party conflict.”²⁹

6.4 Adopt an insider-partial mediation approach

Some scholars argue that insider-partial mediators are “equally or even more legitimate mediators in certain context”³⁰ than impartial mediators. In respect of this, mediator conduct guidelines should expressly sanction the use of insider-partial mediation. Additionally, it could be taught as part of a mediation curriculum, thus providing an extra tool for the mediator’s toolkit. This would allow mediators to offer their parties with a choice of styles. Parties could then take advantage of mediators that “know the history and context of the conflict of the parties.”³¹

A mediator that claims impartiality but acts inconsistently, “may do more harm than good.”³² Accordingly, whether impartiality is abolished, altered or reduced in importance, mediators must remain vigilant and consistent in their approach to mediation ethics. Such vigilance will secure party faith in the mediator and the process.

²⁹ Maiese, *supra* note 8, at 3.

³⁰ *Id.*

³¹ *Id.*, at 2.

³² Smith, *supra* note #, at 371.