

# **The ‘partial’ mediator: balancing ideology and the reality**

**Dr Patricia Marshall MA Dip Ed Dip HR PhD**

This paper discusses facilitative mediation, not evaluative, and begins with two assumptions:

1. That the outcome sought is for parties to resolve the dispute to their own satisfaction
2. That the mediator’s presence is significant in the meeting; that is, the mediator is active, not passive.

Central to mediation conducted on these grounds has been the understanding that mediators will be either neutral or impartial, or both. However, this traditional concept has been challenged over time by many researchers and writers, for example, Greatbatch and Dingwall (1989), Cobb and Rifkin (1991), and Mulcahy (2001). Furthermore, it has become evident that there are multiple interpretations of these terms, even in documented standards for practice. McCorkle’s extensive study across national and state codes of conduct in the U.S. ‘found significant differences across the entities’ in their use of the key terms of mediator neutrality and impartiality (2005, p.165), and even when definitions were provided, ‘some codes of conduct confuse the concepts’ (p.181). This lack of precision in the meaning attached to the terms has been confirmed in Douglas’s research in Australia (2008) although Douglas argues that neutrality may be retained as a central principle provided it is ‘reconstructed’ within the limits of party self-determination and a ‘proper exercise of mediator power’ (p. 157).

Other research papers have questioned the possibility of neutrality as an attribute of the mediator. For example, Cooper and Field (2008), after exploring the possibility of ‘independence’ among family dispute resolution practitioners, concluded that:

Only certain elements of practitioner ‘independence’ are realistically achievable for accredited family dispute resolution practitioners (FDRPs). It is, therefore, important for practitioners, when describing their role to parties, to refrain from using terms such as ‘neutral’ and ‘impartial’. To accurately state their role, FDRPs could state that they are independent of the parties in that they have no conflict of interest, and that they will endeavour to ensure that both parties are treated fairly in the process (p. 175).

In similar vein, Astor advocates:

Instead of pursuing an undefined and unattainable goal of neutrality, mediators should seek to understand and acknowledge their own input into mediation; think carefully about what is appropriate input...and how they can ethically minimise their input and maximise the control of the parties (2007, 235).

These warnings are particularly salient given that some studies have claimed that even judges (the supposed epitome of independence and neutrality) do not always make their decisions on precedent and the facts of the case in a deliberative way, but on their own intuitive systems, that is, on their hunches (Guthrie et al., 2007-8).

The Australian National Mediator Practice Standards (2007) make passing reference to the term ‘neutrality’ (p. 11) and specify that the mediator’s conduct must display ‘impartiality’, that is, ‘freedom from favouritism or bias in word or action or the omission of word or action, that might give the appearance of such favouritism or bias’ (p. 8). Most mediators declare their impartiality at the start of a mediation meeting; in fact, the mantra ‘I am impartial’ is a statement every bit as positional as those made by the parties whose disputes we are mediating. So it may be helpful to uncover the interests which lie behind this positional statement.

My own study on stress and coping among mediators showed how challenging is the ideal of neutrality and impartiality for mediators, with no shared interpretation of the terms (Marshall, 2008b). One of the 43 experienced mediators who participated expressed the confusion in this way:

The concepts of neutrality and impartiality – they’re easy to say, but what do they mean? I think I have a pretty clear sense of what my role should be, but it’s not black and white – it’s grey (16Fint5).<sup>1</sup>

Not one mediator claimed to be ‘neutral’, with many declaring that neutrality (in the sense of having no vested interest in the outcome) was not possible. They offered varying reasons: mediators are paid for their services; they are always mindful of the ‘fairness’ of any outcome; and very aware of their professional role in ensuring ‘duty of care’.

The latter point caused some anguish, with one mediator in a focus group declaring:

I have been anxious when an agreement has been drawn up and I wanted that person to be absolutely sure they knew what they were doing. That raises an ethical concern for me, and a justice concern for the parties. I know it’s their mediation, I know it’s their decision, but I’m also a professional person who has my own views. I don’t want to be a party to something unless I have tested it. I’m here as a participant in this drama, however much I call myself neutral and impartial (1Ffga4).

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<sup>1</sup> The participants are identified by a code which protects their anonymity. The person and the words quoted here are identified as 16Fint5. The numbers and letters are determined by: the identity of the speaker in the data set (eg 16); the gender of the speaker (M or F); the type of their participation, focus group (fg) or interview (int); the number of the focus group where applicable (a, or b, or c); and the page in the transcript (eg 5). In this case, the participant is no 16 in the data set, a female interviewee, and the words appear on page 5 of her transcript.

Her comment captures the difficulty: as mediators, we are not separate from the ‘drama’. Unlike the judge who is remote from the courtroom antagonists by a bench, by distinctive clothing, and by the accoutrements of authority associated with the law, mediators engage with parties while they make decisions which will affect their lives. Our strategies of reality testing, even listening carefully, reflect this engagement and intervention.

‘Freedom from bias’, however, seemed to be an issue of even greater concern, with one admitting:

Even if most of the time I manage to be impartial, I am keenly aware of the times when I see one of the parties as being in the wrong...The impartiality aspect is so essential. I find myself thinking of this a lot, and I get worked up about that (10Fint1-2).

To be considered to be biased is anathema, even though most recognized that ‘inevitably you make judgments about the parties and their capacities – it’s human nature’ (18Fint3). And the mediator’s situation is exacerbated, not ameliorated, by the fact that her conduct is not subject to impartial external scrutiny. Instead:

The two parties who are viewing your performance are not impartial...They are very self absorbed and perhaps more interested in their own performance (15Fint2).

Drawing on those findings, and on my own experience, I attempt in this paper to analyse the situations which potentially compromise the mediator’s impartiality, and suggest strategies which might enable us to handle our inevitable partiality. We accept readily the understanding that conflict is inevitable and help parties deal with that fact. Evidence from research and personal experience suggests the necessity of accepting our partiality and finding ways to manage it.

### ***The challenging situations – the clash between the ideal and the practice***

Traditionally, the cornerstones of mediation have been not only impartiality, but also voluntariness, ‘no blame’, self determination, ‘empowerment’ and the validity of perceptions.

#### **Getting parties ‘on board’**

Increasingly, mediation is being court-directed and also requisite in workplaces, so the traditional view of ‘voluntariness’ is also being challenged. But ‘attendance’ does not equate with participation; parties retain the power not to speak or listen. So the mediator must engage them if the meeting is to have any outcome, and this raises ‘the interactional problem, from the point of view of the mediator, - how to play to two audiences simultaneously’ (Garcia et al., 2002, 209).

In my study, mediators were not asked to identify their skills specifically; rather, they were asked about their coping strategies. Yet, close analysis of the transcripts revealed that the skill most identified as one they could rely on was their ability to build rapport with clients. But the act of building rapport can be misconstrued by the parties. One mediator expressed the difficulty this way:

No matter how much you reflect back to them the principle of impartiality, they believe you're aligned with them. Then everything that you do that counters that, you're almost insulting them, you're almost letting them down...I work really hard to engage with them. They come on board. They are engaged. But there's a fine line between staying engaged and at the same time accepting that the other person might feel exactly the same way (8Fint2).

### **Confronting behaviour which offends our own values but to which we are not permitted to attach blame**

Every interview or focus group uncovered mediator's reactions to behaviour which they found objectionable. For example, in a focus group one participant asked another, 'Don't you ever get triggered, and you think, "You bastard!"?' (9Mfgb7). An interviewee explained how 'men who are stubborn, acting silly, loud and overbearing trigger something in me, and I have to be extra vigilant' (9Fint2). Yet another said that she thought she conveyed 'neutrality' in a particular situation but, 'in my mind I was being terribly judgmental because his character was one I just can't bear' (20Fint1). Difficult clients attracted the descriptors: 'a jerk' (14fgc2); 'recalcitrant' (7Ffgc10); and 'not honest, just going through the motions' (4Mfga5).

Indeed, as a practitioner, I continue to find such a situation challenging. This year I was confronted in a co-mediation with a party who: was 30 minutes late; arrived without apologising to us or the other party; raced into the room and took up a seat ahead of all of us; in the private session, actually jumped onto the table; and attempted to goad the other party by referring once to his 'mad' sister. We could have terminated, but the other party (who was representing his elderly parents) was quietly assertive, had been kept waiting for a long time, and appeared keen to resolve the matter. Both mediators spent a good deal of time on the usual strategies of assertively enforcing the groundrules, listening, questioning and reframing, so that, in the end, the parties were only \$300 apart (from thousands having been claimed), but with each threatening to take the matter to court. With the privilege of hindsight, I think we missed an important interest of the 'objectionable' party, and I shall return to that later.

What we find 'objectionable' is, of course, a personal reaction. Even as mediators we will not agree on the behaviours which 'push our buttons' and cause us to react in a way which compromises our impartiality. This is evident among co-mediators who, faced with the same situation and behaviour, may react quite differently.

## **Feeling compelled to intervene to prevent disadvantage – confronting self determination**

The ideal of self determination is advocated in our standards, which state:

Mediation is essentially a process that maximizes the self determination of the participants. The principle of self determination requires that mediation processes be non-directive as to content (p.5).

Most mediators are professionals in other fields, so our antennae are alert to the limits of self determination. The associated tensions were evident in a focus group. Here a mediator recounted a workplace situation in which a secretary had been accused of being tardy and lazy.

She had a range of reasons she hadn't put to her supervisor. I said to her that this was quite a powerful range of reasons. Clearly there was a scheduling that could have happened, but she just accepted that she was tardy and lazy. I tried whatever the hell I could. But she said, 'I'm happy to leave the organisation.' I kept asking, 'Are you sure?' and she kept saying, 'I'll sign whatever needs to be done.' I tormented myself after that, and felt that I shouldn't be practising my skills on real people (4Ffgb6).

'Protecting people from themselves' was considered to be a strain on the mediator because it involved some compromise of impartiality and distance. One mediator saw himself as 'boundary rider' who had to be alert to when a party might be heading in a direction that was disadvantageous (5Mfga3). Another mediator who practised 'transformative' mediation confessed:

I have to deal with the contradiction about following the parties when it is clear that I'm being suspicious that they could be endangering themselves in one way or another (2Mfga7).

## **Feeling compelled to intervene when one party seems disadvantaged – when 'empowerment' can compromise impartiality**

In fact, self determination runs counter to the 'ideal' of empowerment. If we abided by the principle of parties being fully self determining, we would not intervene in order to 'empower'. The two 'cannot be achieved simultaneously' (Marshall, 2008b, 304).

Much has been written about 'empowerment' in mediation, and how it is the role of the mediator to ensure that one party does not 'overpower' the other. The most current literature suggests the impossibility of 'balancing power' as if it were a commodity (Astor, 2005), and posits the desirability of 'harnessing power' (Marshall, 2008a). Yet mediators are disturbed by the threat to

their impartiality when they take the stance of assisting a party. For example, an interviewee questioned:

When you have a belligerent person and someone who's more reasonable, how do you challenge someone without being on the side of the more reasonable person? I find that stressful (21Mint2).

Trying to create a level playing field by 'empowering' the weaker party can seem unfair to the other. And our judgments may be wrong about who needs the most assistance. Garcia et al. (2002) analysed a case where the mediator had been accused of bias by a party who perceived the mediator to be paying her less attention. The mediator appeared to justify her actions by explaining that the other party needed her more, and this led the complainant to claim that she required just as much consideration. Pruitt et al. (1993), however, have advocated that the mediator 'pay special attention to respondents' more than to complainants because:

They need to hear respondents out and bend over backwards to seem fair to them. They also need to work extra hard on respondent attitudes toward complainants, seeking ways to change those attitudes and thus reduce the likelihood of a return to the controversy. Paying special attention to respondents will often be difficult because complainants, being more aggrieved, tend to be more demanding and less easily pleased. Yet the respondent's state of mind appears to be critical for long-term success (p. 328).

### **The validity of perceptions rather than objective assessment**

To be accused of bias can be devastating. One mediator in my own study said her reaction was to feel 'really, really shocked', so much so that she questioned herself, 'How could I have got it so absolutely wrong? Did I really stuff that up?' (15int5)

Again our ideology does not protect us, because the mediating environment is one where opinions are all held to be equally valid. So when a party says, 'You are biased', the opinion must be considered to be true (Marshall, 2008b, 185). But the mediator cannot share her own thoughts about the behaviour of the parties which may have caused this perception, so she accepts their judgement and turns her gaze inward to self examination. This may have a positive consequence of useful reflection on practice, but it may also lead to self doubt which threatens wellbeing.

## *Strategies to safeguard our own wellbeing*

Faced with challenges such as these, the mediators in my study were asked to identify their ways of coping. In this paper I refer only to those which relate directly to safeguarding their reactions to their perception of the importance of impartiality.

### **Peer support**

Not surprisingly, mediators found helpful the opportunity to ‘offload’ immediately their own negative thoughts about their clients to someone who understood the challenges; only two stated very specifically that they did not need or want to talk with anyone immediately after mediating. Even though co-mediation which ‘went wrong’ was identified as stressful by the highest number of participants, it was considered to be the greatest resource when it involved a partner who was on the same ‘planet’ (14Fint) and to whom one could speak freely without fear of being judged. This allowed for opportunity to ‘get off our chest the judgmental comments about the clients that we’d been holding back’ (19Fint4). But there were limits on the effectiveness of this support. It had to reflect honest listening and be non-judgmental, not seized by the ‘listener’ as an opportunity to give advice on what should have happened. Interestingly, the mediators were asking that their peers operate according to the principles of mediation.

### **Formal organisational support and supervision**

Formal supervision as experienced by those working in agencies was held in high regard. In this forum, biases could be aired and strategies worked out for handling partiality. For example, one mediator working in an agency dealing with high-conflict families, recounted how the kitchen was used as a ‘venting room’ for washing impatient and negative thoughts about clients ‘down the sink’ (12Fint8). It was particularly useful when they appeared to be intransigent, and the mediator’s reaction was, ‘Come on, get over it!’ Not only was the strategy a coping mechanism for the mediator but it had positive outcomes for the client because:

You can actually get over the ‘Come on, get over it’ part in the kitchen and wash it down the sink, so that when you come back in, this part is not getting in the way – you can discard the biased part...and get back to what it’s really about (12Fint8-9).

### **Mediator attributes**

My study involved mixed methods – focus groups, personal interviews, and the completion of two inventories, one on social/emotional competence and the other on coping strategies. The

competencies most strongly reported by this sample of experienced mediators and where the means were found to be above the population norms (Marshall, 2008b) were:

- emotional self awareness, the ‘ability to know what one is feeling and why’
- independence, ‘the ability to function autonomously versus needing protection and support’
- interpersonal relations, ‘the ability to feel at ease and comfortable...[showing] sensitivity towards others’
- empathy, ‘the ability to be aware of, to understand and to appreciate the feelings of others’
- and assertiveness, ‘the ability to express feelings, beliefs and thoughts...without being aggressive or abusive’ (Bar-On, 1997).

Prima facie, these competencies seem particularly relevant in countering the deleterious effects of both feeling and revealing bias. Certainly, the intrapersonal skills of awareness of what one is feeling and why (emotional self awareness), and the ability to function without being bolstered by external supports (independence), should allow the mediator to avoid being overrun by biased feelings. But, from the client’s point of view, the other competencies may create a false impression, as some of the mediators already discussed have alluded to. For example, competence in interpersonal relations may lead to ‘chumminess’ and the expectation of favoured treatment; excessive empathy may be confused with sympathy; and assertiveness displayed more to one party than another may be regarded as unfair. So protecting the mediator’s sense of wellbeing cannot be the whole story. The focus must be on our clients.

### ***A CRITERIA-BASED APPROACH***

Of course, the mediation profession is not alone in facing the desirability of acting without bias towards those to whom they may feel bias. Health professionals must offer care to those whose behaviour they personally abhor, and educators need to assess fairly the work of students who may have behaved ‘badly’ in class, even suspected of cheating.

To ensure ‘fairness’, educators rely more on criteria-based assessment than on subjective responses. In the discipline of mediation as well, we can move to criteria which, in effect, ‘operationalise’ impartiality and establish standards for checking our partiality.

Adopting a criteria-based approach encourages us to understand ‘procedural justice’ from the viewpoint of our clients. We are assisted in this undertaking by studies which have ascertained the factors which enhance the perception of natural justice, and which satisfy substantive, psychological and procedural interests. Specifically these interests are:

- The opportunity for ‘voice’ and participation – the chance to speak freely about the facts as parties see them, to ‘present one’s case’ even if that case is not favoured in the outcome (Pruitt et al., 1993, 315; Thibaut & Walker, 1975)
- The importance of being genuinely listened to and understood – the perception that the authority has understood one’s concerns and taken them into account (Lind & Tyler, 1988) and been attentive in the process (Tyler, 1987)
- The fact that the third party is not biased against them. This seems to be the implication, not always stated, of the research which aims to discover what constitutes procedural ‘fairness’. Much of the literature refers to procedural fairness without defining it. Perhaps it is defined more by its absence than its presence. Perhaps people care less if an authority is biased for them, as long as they are not disadvantaged by a biased judgment. Public comments on the decisions of football umpires would suggest this.
- A sense of control. When parties feel pressure to settle, they are less likely to perceive the mediation process as fair (Wissler, 2002).

So, rather than stating we are impartial, we can, and should, concentrate on delivering to clients the means by which they perceive themselves to receive procedural justice, while still adhering to self determined outcomes. This means that instead of relying on the positivist statement about our impartiality, we can invite parties to take the opportunity to:

- ‘speak about what is important to you so that your concerns are heard and understood’
- ‘hear some challenges to your views so that you are better informed about your options and can make wise choices because the decision is in your hands, not mine.’

### ***Ensuring that concerns are heard and understood***

#### **Appearing trustworthy**

Of course, inviting parties to put on the table their concerns requires them to place considerable trust in the mediator, trust which they have not been able to place in the other party. Many mediators in my study referred to their ability to engender trust in their clients, for example:

I put a lot of focus on developing a high degree of trust both in the intake and in the early phase with each of the parties. I create an environment which has them trust me (22Mint5-6).

Another emphasised that she explained the process by reassuring parties that:

You both get a turn, and how you spend that time is for you to decide. It’s important that you feel comfortable that you’ve said it in the best way you can. So I suppose it’s the art of communication which I try to focus on and explain that to people (11Fint8).

Deciphering exactly how trustworthiness is gained was difficult, and certainly credibility is generally assessed through competence. Relating the concept to mediation, Arnold (2000) posits that trustworthiness is assessed by how well the mediator gains ‘insight into a disputant’s interests and needs’ (p. 321). Therefore, I argue that a major factor in building rapport without compromising impartiality is by the mediator’s respectful attitude to the party and by the reassurance that they will have the chance to have their say, and that their views are valued and will be listened to attentively. Interpersonal skill, or the ‘ability to feel at ease and comfortable [and] showing sensitivity towards others’ (BarOn, 1997), encourages the trust necessary for people to believe that their concerns will be heard and understood. But, as I have stated, interpersonal skill has the potential to encourage excessive friendliness which militates against impartiality. In my study, I was able to show that there was an association between the social/emotional competency of interpersonal relations and what I termed ‘political competence’, the subtle judgments which the mediator makes about appropriate strategies (Marshall, 2008a). Writers of management theory speak of this competence as ‘the ability to read, understand, and exert influence and control in a way that is not seen as overt and controlling’ (Ahearn et al. 2004, 311). In fact, this competency needs to be distinguished far more acutely in mediation training – for example, how do mediators build engagement for the process, then prepare parties for the ‘independence’ of the mediator’s role.

We may be aided in this balancing act by the argument that ‘most disputants see the mediator as a kind of authority figure’ and ‘will perceive her behaviours as “diagnostic” of their social standing’ (Patnoe, 2002, 28). Patnoe quotes Tyler and Lind (2001) who claim:

What people really worry about is rejection or the implication of rejection by society. To lose any specific hoped-for outcome is a normal part of social life, but a rejection by authorities carries the implication that one is less of a person than others...People tend to view their treatment by authorities as especially diagnostic of how they are seen by society, because they view authorities as a personification of society (Tyler & Lind, 2001, in Patnoe, 2002, 28).

There is thus a certain latitude which parties may afford mediators as authority figures, but this can only work when mediators show what Lind and Tyler describe as ‘ethicality’, or ‘such processes as politeness and concern for rights, that is, respectful treatment by authorities’ (1988, p.109). Ethicality may be summed up as treating people with ‘dignity and respect’ (Patnoe, 2002, 31). Gladwell (2005) pursues this line when he argues that the majority of doctor malpractice lawsuits are not about medical treatment but about the way the patient was treated.

In the end it comes down to a matter of respect, and the simplest way that respect is communicated is through tone of voice, and the most corrosive tone of voice that a doctor can assume is a dominant tone (p. 43).

## **Empathy**

Participants in my study defined their ability to ‘put yourself in their position’ (15Mfgc16), to ‘be quickly and accurately responsive to what it means for the parties’ (2Ffga2), so that:

No matter how aggressive and how nasty they are being to me, I never assume that it is a personal attack, but rather it’s coming out of their fear and pain in going through the process. I assume it’s a reaction to the process, not a reaction to me (6Ffgc13).

Empathy involves understanding the situation from the viewpoint of the other. Part of that understanding is trying to grasp how the party wants to be perceived – what is the view of themselves that they are trying to convey.

This is the opportunity my co-mediator and I missed in the situation I referred to earlier. I was so intent on controlling my own reactions to a man who, from my viewpoint, was behaving obnoxiously, and so intent on assertively ‘protecting’ the other party that I missed how he wanted to be seen, yet all his actions, from hindsight, appear so obvious. I think that he wanted to be perceived as a ‘man of action’. This hypothesis did not come out of the ether – it should have been clear to us as mediators because the cause of the dispute had been his approach to his elderly neighbours, and his intrusion (from their point of view) onto their land to ‘fix’ a problem created by his new pool. Acknowledgement to him that we understood his motives and his preferred method of acting may have enabled him to experience procedural justice, and prevented ‘digging in’ by both himself and the other party.

Even so, empathy must be used judiciously. Saposnek, when writing of a situation where domestic violence had occurred, makes the salient point that empathy shown in this situation towards the offender has the potential to ‘not only create a sense of betrayal and the loss of a sense of safety in the other party, but may also encourage more abuse’ (2006, 271-2). In such situations, he argues, mediators cannot be ‘naively empathic’ (p, 272).

## **Patience and respect**

Genuine listening, or empathy in action, requires considerable patience and respect, but, while demanding, these attributes seem more worthwhile for parties’ outcomes than does the declaration of impartiality. The following warnings indicate that this approach is not always easy:

You can feel yourself tensing up with the way people are acting. You have to control that, and that’s where patience comes in (14Mfgc6).

With irritation, your tone of voice starts to change and you have to consciously manage that (16Fint3).

Indeed, one mediator revealed how she dealt with the experience of being ‘triggered’:

I try really hard to understand that person... and that might change my body language as well because what tends to happen is that they start to relate to me much more positively. Changing my demeanour causes them to change their demeanour... They will probably be more flexible if they know you’re trying to understand (9Fint2).

Respect is also conveyed through clarity – about the process, the mediator’s role, information about what happens to any agreement – all the things which we recite at the start from memory, but whose significance we sometimes overlook. Despite our assurances that mediation is not a ‘hearing’, people are understandably nervous and have to be made to ‘feel comfortable; otherwise, they won’t spill their stuff’ (4Mfgc2).

Other mediators identified skills which they believed assisted them in countering bias: ‘maintaining your calm in the heat of the venting’ (13Mfgc6) and tolerating uncertainty and ambiguity because such tolerance ‘takes you out of the role of passing judgment’ (7Mfgb5).

### ***Posing challenges – making the right judgments***

The ability to pose challenges to what parties are saying and proposing requires another set of attributes and competencies, but it is not my intention to explore here the variety of strategies which enable mediators to reality test options and agreements. These are well covered in the literature. Rather, I want to focus on the principles which underlie the way we pose those challenges in order to satisfy the criteria of procedural justice. For example, we judge when it is appropriate to pursue an option or when to let it go. But because this is ‘an area of mediator discretion which opens the possibility for differential treatment of the disputants’ (Garcia, 2000, 329), it may encourage perceived compromise of impartiality.

I referred earlier to the attribute which I identified in my study as ‘political competence’ because it referred to the management of the power relationships between disputants. I have described it to be ‘the judicious use of interpersonal skill: building rapport; engaging parties and their supporters; even managing the relationship with a co-mediator’ (Marshall, 2008a, 192). But if we apply the criteria of procedural justice, we can broaden the concept. When I pose a challenge to a party’s way of thinking, I am also affording them their right: to disagree; not to comment; to challenge my challenge! There are three competencies which can help in this task: creating the appropriate ‘hypothesis’; putting my ‘hypothesis’ tentatively, and ensuring that parties ‘save face’.

## Creating the appropriate hypothesis

Many of the mediators in my study referred to their ‘intuition’ or instinct. This was emphasised in comments such as: ‘I know it’s the strength I have, that I’m intuitive’ (17Fint3); ‘You trust your instincts’ (20Mint3); and:

If you find yourself getting irritated or frustrated...it helps if you can deal with that. Where’s that coming from? ...and you’re intuitive enough, or there’s enough insight – whatever – to deal with the personality (18Mint10-11).

In a focus group, one mediator identified his mediation from hell to be one where he had felt physically threatened. He referred to the masterful way his co-mediator had handled the situation. She was in the same focus group and was asked for her response. She explained:

I saw the dynamic, the conflict escalating between my co-mediator and the party. I could see what was happening and instinctively used a technique to try to switch the focus, to leave my co-mediator out of the picture. I kept saying to the person, ‘Look at me, talk to me, tell me how angry you are’ (2Ffga6).

The source of this ‘intuition’ for most mediators proved to be their experience and knowledge of people. For example, one said her teaching background provided her with the ability to read body language and to be aware of critical moments when subtle body movement indicated a change in attitude (14Fint6). Others referred to self knowledge, so that knowing their own weaknesses was as important as knowing their own strengths. Focusing on her possible effect on the parties, one mediator showed a great deal of insight when she said:

I have the capacity to be a heavy operator. I can really go in there and pinpoint a vulnerability and I could misuse it (1Ffga7).

How we educate our intuition is another topic in itself. But one important way is to analyse the situations we find challenging. One mediator thoughtfully determined the source of her own instinctive responses in this way:

Because you rely on a level of instinct or gut reaction, the important thing is to work it through afterwards, analyse and think whether that was the correct decision. It is sort of an instinct reaction but you can work on it in learning (12Fint6).

Her ‘instinctive’ analysis of ‘intuition’ is supported by academic literature on how intuition is developed. Intuition has been described as ‘the end product of learning and experience’ (Sternberg et al. 2000, 58), so that intuitive responses are ‘reached with little apparent effort, and typically without conscious awareness’ (Hogarth, 2001, 14). However, mere ‘reliance on intuition can misguide us and be a systematic source of error in human judgment’ (Sternberg et al., 200, 57). It may be more safely ‘acquired through domain-relevant experience and ... improved through instruction and practice’ (Hogarth, 2000, 23).

The most effective way for mediators to hone their intuition is through reflective practice, and through thorough knowledge of the relevant theoretical principles, which I have discussed in another paper (Marshall, 2009, 159). Inculcating the appropriate theoretical principles which have been empirically tested will stand us in greater stead than reliance on ideological mantras. Indeed, ‘practitioners who do not have a grounding in theory do not have the ability to evaluate and assess their interventions with clients’ (Lang & Taylor, 2000, 21). Such grounding is even more important given that we operate in what Hogarth (2000) would call a ‘wicked’, rather than a ‘kind’ environment, that is, one where feedback can be misleading and the environment is not ‘lenient’ but chaotic.

### **Putting hypotheses tentatively**

We could have posed tentatively our reading of the situation in the co-mediation I referred to earlier, so that we might have said to the party, ‘Would it be fair to say that you like to get things done, and so you tried to fix the problem as soon as you were aware of it?’ Participants in my study explained their use of this subtlety. For example, one described how she checked things out by prefacing a statement with ‘I’m just wondering if...’ (13Fint4); another emphasised the need for an apology if he misread a situation (20Mint8).

A tentative offering prevents categorising people in a way which is not respectful. Most of us resist being ‘boxed’, particularly by those with whom we have little contact; classifying us somehow diminishes our identity.

### **Face saving**

Because ‘individuals want to *present themselves positively* and they will frequently *support the positive attributions of others*’ (Littlejohn & Domenici, 2006, 230, emphasis in original), another aspect of treating people with dignity and respect is ‘face saving’. In my study, the skill of helping people ‘save face’ I identified to be an aspect of ‘political competence’. The skill was referred to by a number of the experienced participants. For example, for one, it involved determining when people are ready to participate– ‘are they able to put their best foot forward?’ (15Fint6); for another, it meant always being conscious of his use of strategies in a way that ‘makes no one look bad’ (22Mint6). In a focus group, a participant discussed how she sometimes reveals to parties that she knows ‘what it’s like not to be believed – it’s devastating’ (6Ffgc9).

Of course, reframing accomplishes the purpose of face saving, in that ‘it alters the language used by the parties and changes the target to which it is directed –from the other party to what amounts to a mutual and neutral “pasteboard”’ (Marshall, 2008b).

## ***Conclusion***

I have argued that mediators' claims to impartiality are challenged not only by the threats to our own preferences and biases, but also by the ideological imperatives of our practice. Expecting that we will act with consummate impartiality imposes unnecessary role strain on ourselves, and promising it does disservice to our clients. Rather, we can handle our inevitable partiality by sharpening the ways we show dignity and respect to those with whom we are engaged in this process. In doing so, we reduce the focus on ourselves and our reactions, and focus on how we think parties wish to be perceived. We can then check tentatively our reading of the situation rather than making definitive statements which may show disrespect.

### **What we can promise about our role**

Although we feel obligated to promise 'impartiality' in the sense of not possessing bias, we cannot do so honestly. However, we must be able to reassure parties that we have no vested interest in seeing one party have a more favourable outcome than the other(s). If we cannot do this, we are not abiding by our own standards. This is different from declaring that we have no vested interest in the outcome, which is not possible if we are being paid for our services, either directly or indirectly, or if, from our assessment, an outcome is disadvantageous to one party.

### **What we can promise about procedural justice**

We can promise parties that they will have the opportunity to speak about the matters which concern them, and the right to be treated with dignity and respect when they do so, and they will not be told what they should do. These statements are probably firmly fixed in the repertoire of most mediators. However, we are not treating them with dignity and respect if we do not warn them beforehand that part of the 'deal' in mediation is that they are required to listen to perspectives with which they may not agree, and that their views may be challenged by the mediator(s). They should also be informed that these challenges are not designed to get at 'the truth' but to ensure that they clarify their options. A warning such as this allows us to intervene if, for example, we believe that 'venting' of opinion or anger is not being productive.

Mediating is not an easy task; it requires astute judgment and the delivery of 'justice' to disputants in a manner which engages them but without the safeguards of the legal system. Robert Frost once lamented that free verse was like playing tennis without a net. Sometimes, mediating is similar. Awareness of our biases is essential if we are to achieve our role, but, rather than focusing on our possession of bias, we can focus on what the parties find most helpful as

they cope with the pain of conflict. Parties' expectations about voice, respect and control may provide a more effective net than mantras about our supposed impartiality.

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