

ARTICLES OF RELEVANCE

THE RISKS OF NEUTRALITY—RECONSIDERING THE TERM AND CONCEPT

By Robert D. Benjamin

As mediators, we seem to be drawn to the word “neutral” as a descriptive term for what we do and as a conceptual frame for our professional role. The terms “neutral” and “neutrality” are peppered throughout our discussion of mediation in much of the literature, and in the standards of practice of many, if not most, professional mediation organizations, in court rules, and even in enabling legislation. AFM Standards encourage mediator “impartiality and neutrality” in Section IV, while the Society of Professionals in Dispute Resolution (SPIDR) makes ongoing reference to the role and responsibility of the “neutral,” as a generic term to describe both mediators and arbitrators in their Standards.

Most experienced mediators learn early on that the ideal of remaining neutral is quickly battered when faced with the realities of effectively managing conflicts. Some have even reached the point of challenging the notion that neutrality is worthy of our aspirations as a goal at all. (See Gibson, K., Thompson, L. and Bazerman, M., “Shortcomings of Neutrality in Mediation,” *Negotiation Journal*, Jan. 1996.)

Beyond the theoretical discussion, however, there are some very practical risks for mediators to consider in continuing to describe themselves as neutrals. Specifically, a disproportionate number of grievances against mediators are based in the claim that the mediator did not appear to act, or in fact act in a neutral manner. This raises the problematic situation that while the mediator may believe he or she is clear as to meaning of neutrality, the parties are not nearly as clear. Deborah Kolb has catalogued the disparity between what mediators purport to say they do and how they in fact practice. (*When Talk Works*, 1994) In short, when a mediator describes him or herself as being neutral, that sets up for the parties expectations of behavior that may not, cannot and maybe should not be considered realistic in mediation.

This becomes more than a mere semantics discussion because, when the mediator has been perceived to have been more attentive to one party than the other at a particular point in the mediation process, that extra attention is often viewed by the other party as partiality. This can easily become the source of a formal grievance. Most mediators appreciate that, in order to develop the requisite level of trust with each party, they must engage and validate the perspective of each disputant. Some mediators resist validating a client’s thinking for fear that it will be taken or understood as agreeing with him or her and is considered inconsistent with neutrality. There are many examples of mediator technique and strategy which are clearly useful, but are nonetheless construed by clients as contravening neutrality and therefore suspicious, if not unethical. The caucus (meeting with each party separately) can be precarious, especially for the self-described neutral mediator. Asking reflective questions that probe the efficacy of one or the other of the parties’ negotiation perspective can be likewise difficult. While a judge can and perhaps should remain “above the fray,” distant, poker-faced and neutral, a mediator has no such luxury available to him or her. In fact, the mediator may have a duty to question each party about their respective perspectives, raise concerns and anticipate unintended consequences implicit in a potential course of action in order to assure that the parties’ understandings and agreements are informed and consensual.

It is just these sorts of issues that constitute the bulk of grievances against mediators.

Neutrality has many and varied meanings, and therein lies the difficulty. It refers both to the role of the mediator and how he or she will supposedly act. In the classic sense of the term, “neutral,” the mediator: (1) will not intervene in the substance of the dispute; (2) is indifferent to the welfare of the clients; (3) has no previous or present relationship with the parties outside of the mediation; (4) will not attempt to alter perceived power balance variances; (5) is disinterested in the outcome; (6) is unconcerned with the impact of the settlement on un-represented parties. Sarah Cobb and Janet Rifkin, have noted that there are at least three different conceptions of neutrality at work in mediation and that the rhetoric of neutrality reinforces assumptions that are widely held but not made explicit or clear. (“Practice and Paradox: Deconstructing Neutrality in Mediation”, *Law and Social Inquiry*, vol. 16, 1991) The ambiguity of the term is even more confusing for clients in conflict, many of whom come to mediation with the preconceived notion that a mediator is or should be just like a judge. No amount of explanation may be sufficient to dislodge their notions and clarify the ambiguity. What is more, the clients’ misconstruction of the mediator’s role is reinforced and further confused by the use of the term “neutral.”

The term “neutral” is attractive because it is anchored in our techno-rational belief system and derived from methods of scientific inquiry. In that sense it is culturally linked—we want to think that if the mediator is neutral and disengaged, he or she will be more objective, rational, dispassionate and unbiased. Etymologically, the word “neutral” is derived from neuter, meaning neither active nor passive or disengaged. The opposite of “neutral” is not “partial” or “partisan,” but rather, “involved” or “engaged.” A car in neutral goes nowhere, the power of the engine is not transmitted to the gears. For the mediator to present him or herself as neutral may lead to faulty assumptions by the mediator which lead to the misunderstandings of the mediator’s role by the clients. (Benjamin, R.D. “Thy Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice,” *Mediation Quarterly*, vol. 8, 1990). In many other cultures, the last person people want to help them settle their conflict is a remote, unfamiliar neutral. Even in our own culture, parties in conflict may think they want a neutral, but when questioned, they are really looking for a third party who will hear and validate their concerns. Perhaps too many mediators seize upon neutrality as a role descriptor because the term is convenient and familiar—it is a kind of shorthand to explain a complex activity.

However, the risks of what the term “neutral” sets up in clients’ thinking about the mediator role outweigh the usefulness of the word, even as shorthand. “Impartial” is an alternative descriptor, but perhaps still suffers from sounding distant and detached. Another more dynamic term to describe the mediator’s role that is increasing in popularity is “balanced.” In contrast to the more static neutral mediator, who has no responsibility to protect either party, a balanced mediator has the responsibility to protect both parties. In being balanced, the mediator has permission to question both parties about their negotiating perspectives and inquire about any circumstances or matter germane to an effective, resilient agreement. In short, a mediator is not hog-tied and bound by the traditional narrow role limitations of a neutral. Most importantly, in avoiding the confusion surrounding the meaning of neutrality, the mediator runs less risk of client misunderstanding and a potential grievance.

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The Natural Mediator

By R. D. Benjamin

Clear rules and simple answers have always been troubling for me. While I acknowledge the allure they hold, too often their application leads to greater confusion and unintended consequences, especially in complex matters. A good measure of my personal affinity and professional interest in negotiation and mediation is derived from the release I am allowed from the necessity of determining who is right or wrong and what is the right answer. I have found my naturally confused state of mind to be useful.

However, while I have found some refuge in mediation practice, I find the evolving belief in the profession about the nature and personality of a mediator to be too simple and bland. The conventional wisdom in the field is that a mediator is a humanistic, compassionate, patient, empathetic and rational listener, slow to anger and frustration and eternally optimistic that all issues can be resolved and have a right and proper resolution.

While I would like to believe I exhibit some of those traits sometimes, much of the time I fall short. Listening to other mediators discuss the subject, perusing conference workshop offerings, or reading literature in the field, often makes me feel even more isolated and out of step. Some have even suggested that natural mediators can be discovered through psychological testing using such tests as the Meyers-Briggs Inventory. Some mediation training participants come fortified by a career counselor who, after careful analysis, has determined the candidate to be well suited to mediate by virtue of the fact that he or she is a "caring individual and a good listener."

I think that what many say the character traits of a good mediator should be are not what they actually are. Some research has confirmed that there is a gap between what mediators say they think they are doing and what others observe them to be doing. As well, truth be told, my own experience suggests that mediators are not particularly thoughtful, empathetic or rational when dealing with their own conflicts. (Something akin, I suppose, to "the shoemaker has no shoes"). I do not intend to impugn the integrity of mediators-quite the opposite. I am only suggesting that the personality traits that best serve mediators may not be the most obvious or commonly presented.

In contrast to the conventional belief of which traits make a good mediator, (or perhaps as justification for my poorly evolved personality), I have distilled four important attributes of the natural mediator. They are as follows: (1) confused, (2) voyeuristic, (3) compulsive, and (4) marginal. Rationality and empathy are strategically useful but they are second tier attributes that can be learned if the first tier attributes are present.

CONFUSED.

Those who naturally possess this trait know who they are. There is a simple test: when confronted with the query, "Are you part of the problem or part of the solution?" you find yourself unable to respond. Like a deer caught in the headlights, you are immobilized. Not wanting to be part of the problem, you want to respond quickly and categorically, but upon hearing the solution set forth, just can't join the cause. Those of us of this ilk endure the chronic malady of a sore rear end from constantly sitting on the fence. This confusion serves a mediator well-it allows him or her to naturally understand there are no easy answers and to help confuse parties who presume otherwise. The confused mediator more readily sees the validity to each person's perspective and more naturally resists aligning with any particular person. They recognize that heroes can be scoundrels, and victims can be perpetrators, and vice versa. It's never easy or clear.

VOYEURISTIC.

This attribute is troublesome; most assume voyeurism to be a form of sexual perversion. While it can be that, in this case it is associated with an endless fascination with how other human beings engage each other, construct their realities, and pursue their intimate relations. This attribute allows the mediator a greater ability to resist being judgmental, knowing that "there but for the grace of God, go I." How else to explain the popularity of Oprah Winfrey, Jerry Springer, and The National Enquirer? A mediator does not so much do disputing parties a favor by helping them settle conflict, but is rather being honored by being invited by them to aide in managing some of the most intimate matters of their lives.

COMPULSIVE.

This personality trait is probably the result of conflictual early toilet training. It is the penchant to bring order out of chaos. It should not necessarily be confused with the neurotic behavior Freud termed "anal compulsion," although that may be part of it. If one assumes that a good measure of conflict is less about allocation of resources and more about people being overwhelmed and fearful that they will be taken advantage of and made to look like a fool, then compulsive

organizing-with the use of maps, charts, and a clear structure are essential. The mediator is the wilderness tour guide and must be well prepared. The mediator can't just wander along with them, but must instead sense and anticipate the parties' fears before they become overwhelmed.

MARGINAL.

I don't mean to suggest that mediators exhibit the characteristics of borderline personality disorder, although I suspect from time to time we have all wondered about ourselves. The implications of being marginal are that the mediator is not aligned or associated with any cause or purpose other than to help the parties make decisions for themselves. Groucho Marx said it best: "Any group that would have me as a member isn't worth joining." It means letting go of attachments to what life should be in a perfect world-one good for children, women, men, minorities, and other people of every stripe and kind. The mediator has to be on the fringe-an outsider-less concerned about what is right, than with what will work to settle a dispute in the present circumstance. Mediation is not about social justice.

Perhaps as mediators we try to hard to impose on ourselves unrealistic and artificial expectations of what we should be. In other words, we try to be saints when what may serve us the best is to recognize and use our basic nature. I suspect that many more of us are naturally confused, voyeuristic, compulsive and marginal than we are rational, patient and understanding in the path of conflict. The difference is that a good natural mediator has learned not to deny his or her basic nature, but rather to harness and use those amply provided attributes or vulnerabilities to our advantage.

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Gut Instinct: A Mediator Prepares

By Robert D. Benjamin

Mediation is commonly touted as a rational enterprise. Most people—and many mediators--- see it as essentially head stuff where parties come and reason together. As the field matures and mediator qualifications are considered, invariably training regimens focus on legal, psychological and financial knowledge. Some would go so far as to require degrees. Those credentials are useful. However, my fear is, that formal education and training are being given an undue emphasis and tending to displace the development of intuitive abilities and instinctual understanding.

I am a lawyer and social worker by training. By traditional standards I am well prepared. My own sense of that experience suggests that study was helpful but not in the way expected. Specifically, I was usefully confused. I was professionally schizophrenic—not easily accepted in legal circles or by mental health professionals. Lawyers and Judges could not reconcile my concerns for therapeutic considerations with the legal frame of inquiry, and social workers often thought I was preoccupied with legal rights. Mediation was attractive to me because it appeared to allow for the simultaneous integration and balancing of both disciplines, as well as others. In looking back, I think other experiences were more germane, more useful and formative than my professional training. Those experiences required the quick development of street sense for my survival and sanity. There I gained the core skills and confidence I use to this day as a mediator.

For a number of years I was an aid in an adolescent psychiatric facility. Prior to that, I worked in an institution for the mentally retarded—back when those places could still be aptly described as “snake pits.” In both institutions, suffice it to say that there was not much help or supervision by the staff professionals. If a twelve year old was about to throw a chair through the nurses’ station window with me and six other kids in between, the attending psychiatrist was nowhere to be found, and if present, it seemed he could not get off the ward fast enough. Over his shoulder, on the way out, he would mutter something like, “you handle it.” That was my early introduction to conflict management.

The situation might be better today, although I am not sure. I know there are more rules and supervision, but whether or not the quality of care has improved is still an open question. I am sure that I had the benefit of invaluable experience—probably and admittedly at the expense of a few clients. I was required to figure out what works and what does not and had the opportunity to examine my own responses and develop instincts essential for negotiating and managing conflict. While most people in mediation are not psychiatric patients, their responses under stress bear a remarkable resemblance to the ward behavior I observed. In both circumstances the people concerned feel trapped and are often angry and frustrated. If I had my way, part of training would require would-be mediators to work in just such a setting. If you show me an effective mediator, there will likely be some experience in his or her background that offered a similar opportunity to learn.

Formal professional education cannot offer the kinds of experience critical for the training of effective mediators. We have become over intellectualized—so caught-up in the throes of our theories that we have shelved our intuitive sensibilities or

abandoned them altogether, relying instead on rules and formulas for how to respond.

Some of what I learned back then runs counter to what is commonly taught in mediator training programs. Insisting on rules of behavior, punishing infractions, or appealing to reason often work no better with a twelve year old chair thrower than they do with a client in mediation exercised about the unfairness of his or her predicament. I quickly learned tricks of the trade: what tactics tended to moderate and the things to avoid saying or doing that would tend to exacerbate the situation. While it is accurate that intuition cannot be taught, there are ways to encourage its' development. At the very least, instinct and intuition should not be ignored.

Teaching and practicing the strategies, techniques and skills of mediation are as much about unlearning and re-learning as they are about learning anew. The best professional practitioners in any field, mediators included, come to appreciate the value of 'tacit knowing', hunches and intuitive understanding. (Donald Schon, *Educating the Reflective Practitioner*, 1987). Albeit subjective and not given their due in our techno-rational world, they are critical to success. We are all socialized and educated to follow formulaic, scripted approaches. This is especially true for mediators. For example, often those practitioners who take a facilitative approach disdain any technique that shows a hint of being directive. Others, seeing mediation as only about outcome, hesitate to discuss the emotional aspects of a dispute. The stroke of genius occurs, and the mediator turns from being a novice to sophisticated practitioner when he or she leaves the beaten path of received wisdom and allows their creative instinct to run free. Too often we are held prisoner by our theories that dictate what we should do and our training runs roughshod over our instincts.

Many mediators have been conditioned to believe their role as an impartial third party obligates them to be thoughtful, empathic and reasoned. Conventional wisdom about the process—encapsulated seeds of truth about what we think, know and should do—typically holds sway. While that notion has some value, it should be carefully scrutinized. Crazy wisdom—incongruous, paradoxical and instinctual thinking—can often release energy and allow for different views to emerge. For instance, the calculated and strategic use of anger and frustration can sometimes be necessary and effective. Sometimes the mediator might usefully be strategically anything but empathetic. Crazy wisdom, anchored in instinct, can often break the most intractable log jam.

No theory can take the place of gut instinct. When your own gut is telling you the situation is aggravating and frustrating, that energy can be converted and used constructively. That does not mean blurting out the first thing that comes to mind, or telling a party their view is illogical or stupid. After editing, however, the mediator can offer his or her own frustration for collective examination and that reflective process can be turned back on the issue at hand. People in conflict deserve to have the presence of a passionate, active and engaged mediator, not an impassive functionary. Mediators would do well to remember that the heart of practice is not technical expertise, but gut instinct and intuition.

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MEDIATION AS THEATER AND NEGOTIATION AS PERFORMANCE ART

By Robert D. Benjamin

Most conflicts are about circumstances or situations that happened in the past—a doctor’s errant treatment, a spouse’s thoughtless behavior, an automobile accident, or a hostile work place. The event sparks feelings that solidify into the emotions of frustration, anger or righteous indignation. By the time those conflicts are addressed in a court or mediation session, the stories of what happened have been spun, revised and redacted in a way that supports and justifies each parties’ emotions and each will prepare a script, casting him or herself as the hero/protagonist/good person and ascribe to the other party(s), the role of villain/antagonist/bad guy.

Most conflicts conform to the structure of the original Passion Play, recounting the death and resurrection of Jesus. There is a wrongful act alleged, a suffering endured, and the denouement in justice being served---either by righteous revenge or an act of God. For centuries it has been part of the oral tradition and dramaturgy of the Christian Church to re-energize the emotional base for religious faith and belief. As with any play, the accuracy of the historical facts are essentially immaterial; the drama serves an altogether different purpose—like an Oliver Stone movie. Likewise, the mediation is about a present reality—the dramatic recreation of the conflict--- not about what actually took place. It is not just metaphorically a theater, but a theater in fact. Regardless of context, every conflict is a Passion Play of sorts, be it a divorce or business dispute This view offers some insights into the nature of conflict and the role of the mediator.

Conflict arises out of the collision of passionate beliefs; thinking dispassionately hinders rather than helps to manage the conflict. For a matter to be a conflict, there must be an element of passion---even in seemingly sterile business disputes that are presumed to be “just a matter of money.” The parties must believe in their role and the justness of their cause. Passion is anchored in emotion and thus virtually no conflict, in any context, at any time, is without emotion. With that being so, it is unlikely that any conflict can be managed purely by a rational problem solving or the “interest-needs” approach. The non-rational passions of the dispute must be not only tolerated but accepted and effectively integrated into the process. Although contrary to the conventional wisdom of our techno-rational culture which pressures professionals to separate and isolate reason from emotion, Antonio D’Amasio has suggested in his work as a neuro-biologist that our ability to reason is as likely to be harmed by the lack of emotion as by the excess. (Descartes’ Error: Emotion, Reason, and The Human Brain, G.P. Putnam’s Sons, N.Y. ,1994; and The Feeling of What Happens: Body and Emotions in The Making Of Consciousness, Harcourt Brace & Co., N.Y., 1999.)

“Coolheaded” reasoning, popularly encouraged, may actually constrain and limit problem solving ability and effectiveness. Especially in complex matters, what is required in along with analytical method is nimble thinking and reliance on intuition, gut instinct, and hunches— nonconscious biases borne from experience that lead in a particular direction. The conflict drama is composed in equal parts of both reason and emotion and both must be simultaneously accommodated for the play to go on.

The mediator is not a remote, neutral, off-stage expert, but rather an active participant in the drama. The mediator, in fact, has a number of roles in the staging of the mediation process. He or she is at once a director, set designer, script editor, narrator, and sometimes a character actor playing a supporting role. While the drama is not hers or his, the mediator must conjure up sufficient inspiration and passion to play the roles convincingly and authentically.

While seeming far removed from mediation practice, Constantin Stanislavski, the great Russian actor and director, offered in his now legendary book, *AN ACTOR PREPARES* (Theatre Arts Books, N.Y., 1936), important suggestions as useful to mediators as they have ever been to actors. The best actors are so studied in their technique that they can be carried away by the play without losing themselves in it. They live their parts inwardly, and rely on their intuition and subconscious—their practiced instincts. By contrast, beginning actors--- and mediators---often resort to mechanical acting, over relying on worked out stencils and structures to replace real feelings. They tend to over-act in compensation for a lack of experience or training.

Even though the mediator is acting does not mean he or she is less authentic if she is genuinely engaged and involved in the reality of the present drama and committed to the resolution of the conflict. While it is true that the mediator does not go home with the parties or have to live with the outcome, she does need to live with the quality of preparation and effectiveness of her performance. Just as the best actor must be able to transport an audience to a different reality, so must a mediator be able to tweak and reconstruct reality so that people in conflict are afforded the opportunity to find some measure of resolution for themselves.

All negotiators, and especially mediators, are performance artists; against the backdrop of a carefully analyzed strategy, with practiced and disciplined technique and skill, they are able to improvise. The mediator—like the accomplished actor—is totally involved with the dramatic environment---- intellectually, physically, and emotionally or intuitively. Too often the intellectual side of mediation is stressed and the physical and intuitive dimensions are lost. The mediator needs a great comedian's sense of timing (think Lily Tomlin in the Search for Intelligent Life in the Universe), and stage presence to create and congeal dramatic moments that shift the focus of the parties in conflict (think John Gielgud in Hamlet). But timing and presence cannot be taught; the mediator must choose to learn that intuitive sense of saying just the right words at the right time, without thinking.

Improvisational techniques and exercises are the way an actor learns intuition—to feel the role—and that preparation is directly useful to mediators. Virginia Spolin in her classic work, *IMPROVISATION FOR THE THEATER*, (Northwestern Univ. Press, Evanston, 1963) helps actors tap their ability to be spontaneous and intuitive—to work with the present moment. From her perspective, “mediation training” is a misnomer; good courses should be as much or perhaps more, about “un-training” ourselves, and learning how to reach that intuitive core, rather than teaching reliance on mechanistic and formulaic techniques. The difference between the good actor or mediator and the great one, is the ability to feel the rhythms of the unfolding drama.

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