
The Limits of the Mediator's Neutrality

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The subject of this article is neutrality in the role of the family mediator. The question it addresses is whether spouses in a conflict situation on the interpersonal level are capable of cooperating on the parental level to reach sensible decisions as to their children's welfare. The article discusses the dilemma of the mediator as to whether, and how, to intervene in the couple's parental decisions regarding their children's welfare; it ends with a case study and conclusions.

The concept of mediator neutrality is central to our understanding of the role as that of a third-party intervener. Mediator neutrality has always been of the highest value and concern.

This article addresses one of the dilemmas facing the divorce mediator: finding oneself in a conflict between the various views of neutrality and its professional value and one's understanding of what is best for the child. It begins by reviewing aspects of the concept of "neutrality," and the unique nature of the parents' decision-making process during the divorce crisis. The article also includes a case study that illustrates the mediator's dilemma, and it ends with a suggestion for new ways of coping with this situation.

What Is Neutrality?

Neutrality is a sort of umbrella term that embraces a number of concepts. One of the first definitions offered was that of Laue (1982, quoted in Bernard, Folger, Weingarten, and Zumeta, 1984), who argued that in achieving a settlement neutrality includes having

- Little or no power over the parties
- High credibility with the parties
- A focus on process rather than outcome
- Good information

With few exceptions, mediation documents specifically identify the mediator as a “third party neutral” (Bernard, Folger, Weingarten, and Zumeta, 1984).

Professional organizations to which mediators belong have turned attention to this matter and attempted to formulate professional codes on neutrality for their members. Definitions of the professional neutral and ethical standards for mediators have been developed by such groups as the Academy of Family Mediators (AFM, 1985), the Association of Family and Conciliation Courts (AFCC, 1989), the American Arbitration Association (AAA, 1994), and the Society of Professionals in Dispute Resolution (SPIDR, 1995). Neutrality as defined by these organizations and their members means scrupulously giving each disputant equal attention and doing exactly what is needed by each disputant (Taylor, 1997).

Neutrality is not singular in nature, though; it comprises several parts. It is important to seek out these parts or aspects, such as fairness, justice, appropriateness (Fong, 1992). Neutrality includes a sense of respect, as well as acceptance of naïve curiosity, fascination, and even admiration, for the clients and their perceived problem. The neutral mediator is not interested in blame, cause, or effect, but rather in understanding how the clients are tied together in deadlock (Fong, 1992). Gibson, Thompson, and Bazerman (1996) think that it is an intuitively appealing concept.

Neutrality, however, is also an ambiguous term. Moore (1985) believes the mediator should not be neutral in relation to the process, but only in relation to the content. At some point in the process, the mediator must play an active part. A similar opinion is voiced by Haynes (1981), who argues conversely that the neutrality of the mediator should relate to the content, not to the process. He enumerated the criteria forming the basis for the mediator's decision to intervene—who is weak or strong, who has information and who does not—and notes that the mediator makes these decisions according to personal values.

All of these approaches to neutrality have several points in common. They raise general questions about neutrality in relation to the process, the content, or both, and the term itself is not clearly and unequivocally defined in any of them.

Another point to be considered is whether anyone can be neutral in a conflict situation, especially in a family conflict, where he or she is emotionally involved because of his or her own knowledge, experiences, and values. According to psychological theories dealing with the giver and receiver of help, transference and countertransference between therapist and patient is unavoidable. It is always present, whether we are aware of it or not.

The uncertainty about the meaning of neutrality and how it is applied has given rise to two additional concepts. In the mediation literature, Rifkin, Millen, and Cobb (1991) suggest that neutrality is traditionally understood as incorporating two qualities. The first is *impartiality*, which refers to the ability of the mediator to maintain an unbiased relationship with the disputants.

Impartiality demands an unbiased approach to mediating. Another definition states that "impartiality implies a commitment to aid all the parties as opposed to a single party, in reaching a mutually satisfactory agreement" (Cooks and Hale, 1994, pp. 63–64).

The second quality, which relates to another aspect of mediation, is *equidistance*, which is referred to by Rifkin, Millen, and Cobb (1991). Equidistance identifies the ability of the mediator to assist the disputants in expressing their "side" of the case (Odom, 1986). To ensure that information is disclosed, the mediator must sometimes temporarily align herself with individual parties as they elaborate their positions. Thus the concept of equidistance refers to those practices by which mediators support or encourage disclosure of information by the disputants. It works to the extent that the mediator can assist each person equally. In contrast to impartiality, where neutrality is understood as the ability to suspend judgment, equidistance is the active process by which *partiality* is used to create symmetry (Kolb, 1985). Cooks and Hale (1994) think that equidistance is the active process by which parties create sympathy.

Impartiality and equidistance do not stand as competing definitions of neutrality. Rather, they represent two different aspects of neutrality that have surfaced in the realm of mediation. In this discourse (namely, how neutrality is understood and described in mediation), both impartiality and equidistance are necessary. Yet they are obviously contradictory by definition (Rifkin, Millen, and Cobb, 1991). Feer (1992) criticizes this approach. In his view, equidistance, empathy, and attentiveness constitute a tool that is used during the process to create impartiality. Is the mediator supposed to remain insensitive, sitting there like a "bump on a log?" he asks. The discussion on this issue takes various turns, but the question is whether in a situation of family mediation it becomes sharper and more relevant.

Neutrality in Divorce Mediation

What is peculiar to family mediation that casts this concept in a different light? The divorce transition is a crisis fraught with many psychological problems, which oblige two people who are in profound emotional turmoil to make decisions regarding their own future and that of their children. It is customary for parents to make decisions for their children. In most cases, these children do not express their own views, and their parents (who supposedly know what is best for them) are the ones to decide. The major source of concern here is whether two parents in this troubled psychological state are capable of making the right decisions for their children, and whether in the process itself, they will put the well-being of their children before their own personal needs (Cohen, Dattner, and Luxenburg, 1996). We often see how hard it is for parents to summon up the emotional strength to meet their children's needs at a time when they are so preoccupied with their own problems. They also find it difficult to cooperate with one another if they are in the midst of a spousal conflict.

Questions arise: What is the well-being of the child in a litigating family? What are the needs of the children? Who defines them? In the case of differences of opinion (or even in the case of agreement) between the spouses about their children's needs, or if the mediator believes the children's interests are not being represented in the process, does he express his professional opinion? There is, in fact, a conflict here between two values, regarding which should take preference: neutrality or the well-being of the child. At times, the mediator is so preoccupied by these questions that he may become involved in the content of the talks, not just in the process.

Do all mediators see eye to eye about this dilemma? That depends on their profession and the professional positions they have formulated for themselves. Haynes (1981) asserts that in divorce mediation the concept of neutrality does not exist, because the mediator may see the family in terms of her own moral code.

In our opinion, there is greater emphasis on what is best for the child among those mediators who have been trained in the field of psychology and social work, and who, during their socialization, were brought up to shoulder public responsibility for children's well-being. Does the mediator represent the children's interests based on her professional assessment, or her concept of role and of neutrality? The case study in this article casts the dilemma in a sharper light.

Case Study

Dan is an engineer, thirty-four years old; Sara is a graphic artist, age thirty. They have eighteen-month-old twins, a boy and a girl. The children have motoric problems and are cared for in a special institute for preschool children.

Six months ago, Sara initiated divorce proceedings, after a period during which their relationship deteriorated. They asked for a divorce mediator since they were unable to communicate on their own. They agreed on custody and alimony. The only disagreement was about the extent of the father's visiting rights. The father wanted the children to stay at his home every other day, stating that after all it was not a strange house. The mother disagreed. She thought the children must have one home, one "secure base," particularly during the coming three years, and was prepared to have the children sleep at the father's home once a week and every other weekend.

Dan felt sure that he, as a father, knew what was best for his children. Sara did not believe Dan's suggestion was good for the children, but she was afraid he would not agree to give her a divorce if she didn't accept it.

In dealing with this case, the mediator enabled each of the parents to declare his or her position. She asked each spouse to explain directly to the other how he or she had reached a decision and also asked each spouse how he or she had taken into consideration the interests of the children.

The mediator then outlined for them the arrangement each one had suggested, by drawing a diagram showing where the children would sleep each day. She also asked each spouse to think about all the elements they had proposed.

At this point, the mediator felt that the mother was accepting the father's suggestion only because she wanted to obtain the divorce as soon as possible. The mediator hesitated to go on formalizing the arrangement, even though the couple seemed to have reached a consensus on the issue. She thought that the parents knew their own children better than she did (she had never met them but only seen their pictures). She was uncomfortable with the situation and felt that Dan was insisting on his fatherhood. The mediator understood Dan's confidence in his role as a father and his need to gain support for his declared confidence. She understood Dan's need to demonstrate his concern for his children and told him she respected his confidence in his fatherhood and his conviction that he knew what his children's needs were. In this way, she bolstered Dan's self-respect rather than become engaged in a conflict with him. At the end of the session, she asked them to think about the whole arrangement.

At the next session, Dan said he would agree to have the children sleep at his home only twice a week and for a "short weekend."

Sara, very surprised, asked how he had reached that decision. He replied that he had realized it would be difficult for him to have them every other day, that he would be very tense and pressured, and in that situation the children would also be uncomfortable.

At this point, the mediator asked their permission to make her proposal, which was to accept the father's new arrangement gradually. This would mean that at first the children would sleep at Dan's house once a week and every other weekend, and after a period—which the parents would decide on—they would come there twice a week and every other weekend.

The mediator also suggested that Dan and Sara ought to decide, at this point, how and in what framework they would deal with any future disagreements that might come up.

The Mediator's Dilemmas in This Case

In this case the mediator was, of course, confronted by the predominant dilemma, namely, the tension between two professional approaches: neutrality versus concern for the welfare of the children.

In addition, a few other dilemmas presented themselves in the course of this process. Bernard, Folger, Weingarten, and Zumeta (1984) relate to the view that the needs of the children should always be the foremost consideration, by posing several questions: Who determines their needs, and who decides in case there are differences of opinion? Who holds the key to the child's welfare: the parents, or the mediator? Is the mediator's acquired and accumulated professional knowledge about the well-being of very young children appropriate and relevant to the children of this family?

We tend to believe that parents know their children well; they live with them, share their joys and pain, know what they can give their children, and contribute to their quality of life. Do parents—who want an immediate

separation, or freedom to pursue any other interests—have a correct picture of what is best for their children, or are their decisions guided mainly by their desire for an official end to the process? Are their statements about what is best for their children biased by the specific emotional state of divorce?

Another problem preoccupied the mediator. If the parents were to accept the mediator's view only on the surface as it were, without internalizing it, she wondered if they could actually carry out their decisions. There was yet another concern, similar to what Sara expressed in the separate talks but not when the joint agreement was being drawn up. It was that the mediator might be perceived as taking sides in the conflict.

The Mediator's Mode of Intervention

In mediating this case, the mediator helped each spouse express her or his needs and feelings. She showed empathy for Dan's need to express his fatherhood and his feelings for his children, and she also encouraged Sara to become aware of his caring attitude.

The mediator did not show her initial attitude toward Dan's suggestion, although she felt it would not work—an example of impartiality. When she asked them to go home and think about their suggestions, she was helping each to clarify his or her own point of view—an example of equidistance. Instead of dealing immediately with the details of the arrangement, she related to Dan's fatherhood needs first.

The mediator gave the process a chance to work by not pressuring the couple to reach an immediate solution. The timing was important. She only expressed her opinion, as a suggestion, after the process had already begun to move in the right direction. Together with the couple, she constructed facts on the basis of the children's needs, shown on the diagram. Consequently, the couple had to deal with the material and not with the mediator, her personality, or her views.

In cases when the parties only express their opinions in caucuses, and not when the other party is present, it is then the mediator's task to help them define their own or their children's interest in the joint talks. In the present case, because of considerations relating to the nature of the conflict, the described approach was selected.

Suggestions for Coping with this Type of Conflictual Situation

We support Cooks and Hale's view (1994) that the mediator should define for himself, as well as for the parties, in what situations he will intervene, and share his values and views with them, thus giving them control over the complex situation.

Gibson, Thompson, and Bazerman (1996) suggest the SPA (systematic perspective advice) approach, according to which the mediator should give rational advice to both parties, even though doing so means not being neutral but instead playing an intervening role. However, in this way, the mediator serves the two parties and may help them settle their dispute. In the event that the mediator decides to express a personal opinion, he or she may be able to do so in caucuses with each spouse. In a separate conversation, the mediator can work with each party on the significance of the information and on how each party feels about it, as well as on the degree of neutrality the mediator has adopted.

Our professional experience suggests that in certain situations if the spouses are unable to accept the mediator's position as someone taking sides, they should be advised to seek help, advice, or information from a third-party professional.

Summary

The mediation encounter may provide a space in which the divorcing parents can resolve unsettled issues constructively despite the complicated emotional situation they are in. Neutrality is a fundamental element in the mediator's role. In this encounter, the mediator, who is sensitive to and professionally responsible for the welfare of the children, faces ethical questions that are linked to this element of neutrality. The mediator copes with these questions with the aid of the professional compasses we have suggested: awareness and definition of the dilemma posed by the couple in this situation, recognition of the prominent place of the children's welfare, a clear contract between the mediator and the couple, and introduction of other professionals into the process.

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