Maintaining Mediator Neutrality: An Assessment of the Standard of Neutrality in the Mediation Process

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Abstract

Traditionally, mediator neutrality has been considered a critical component of a fair and successful mediation. In fact, mediator neutrality is regarded as a defining feature of mediation that distinguishes the process from other methods of conflict resolution. However, researchers and practitioners in the emerging field of mediation often question whether neutrality in mediation is achievable due to a number of challenges present in mediation today.

This paper argues that absolute neutrality is impossible in mediation and that the standard of mediator neutrality needs to be redefined so that both mediators and parties to mediation have a clear understanding of what constitutes a “neutral” mediator. The specific challenges to neutrality are addressed to demonstrate why absolute neutrality is both undesirable and unobtainable. The paper then proceeds by proposing changes that need to be made in the field in order to settle the debate surrounding mediator neutrality.
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Introduction

Bridging the gap between what is ideal in theory and what is realistic in practice is a challenge faced by all professions at one time or another. Although difficult, the process of adapting theory to practice in and of itself is an important field-building activity, one that challenges and improves upon the foundational values of a given profession. The need for evaluation of professional practices can occur at any period of time but is often times more urgent for new professions that are working hard to gain credibility from those outside the profession.

This is precisely the case for the young but rapidly growing practice of mediation in the United States. While the practice of mediation has existed in some form since biblical times, the contemporary practice of mediation as an institutionalized alternative dispute resolution method has occurred primarily over the past twenty-five years. Although mediation is considered a newer form of conflict resolution, especially as an alternative to litigation, its use is growing rapidly. To provide a sense of the wide use of mediation, the state of Florida, for example, has reported over that over 100,000 cases are being mediated in a single year. Thus, while mediation is still considered “new” and “alternative,” the process still attracts a significant number of clients each year.


2 Gewurz, Ilan G. “(Re)designing mediation to address the nuances of power imbalance.” Conflict Resolution Quarterly 19.2 (Winter 2001): 135.

The challenge that results from the rapid growth of mediation at this stage is that there are issues surrounding the practice of mediation that remain unresolved. For example, the question remains unanswered as to who can qualify as a mediator. Individuals interested in practicing mediation can do so through a variety of venues and, traditionally, in combination with another professional field such as law, counseling, or education. Professionals in the field of Alternative Dispute Resolution also tackle questions such as what separates the mediation process from other forms of conflict resolution. These are both important field-building questions that, once answered, will shape the way mediation is practiced in the United States.

Related to these two aforementioned issues is the concept of neutrality in mediation. Undoubtedly, anyone with just limited knowledge of the mediation process has come to understand that mediator neutrality is usually considered a defining element of the process, one that can determine whether or not a mediator is considered successful. Yet, even with this general consensus that neutrality plays a critical role in mediation, at least in the academic sense, there remain several obstacles that make it difficult for practitioners to fully understand and agree upon what constitutes a neutral mediator. As a result, it is often difficult to know for certain if the mediator has met his duty of neutrality. Moreover, within the international mediation community, new models of mediation are being explored that reject the traditional standard of the neutral mediator.

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The primary focus of this paper is to identify the obstacles that have raised questions as to how neutrality should or should not be approached within this profession. This study will attempt to resolve the disparities found between current mediator codes of conduct as well as books and articles published within the field. Through an analysis of the individual obstacles that prevent a solid and universal understanding of what it means to be a neutral mediator, it is the goal of this paper to present professionals with a standard of neutrality that can co-exist within the realities of mediation practice today. To provide context for the discussion on mediator neutrality, this paper will first define the mediation process and then discuss the features that make mediation a unique conflict resolution method. Once these important definitions have been established, the next task will be to define the word neutrality as it currently applies to mediation.

Here, it is important to note that mediators are not the first professionals to have ever struggled with the concept of neutrality. For example, judges and accountants are both in some way held to the standard of neutrality, but in each of these professions the application of the word varies slightly. Since these professional roles have existed longer in the U.S. than the role of the formal mediator, a section of this paper will be devoted to discussing neutrality as it applies to these other professions in order to provide examples of the challenge neutrality poses in other settings. These sections will serve as the background that is needed to fully understand the complex issue of mediator neutrality.

The sections that follow will accomplish two things. The first is to introduce the standards of practice found in the current mediator codes of conduct. The deficiencies of these codes will be discussed to show that in practice mediators are given very little guidance when trying to navigate their duty to be neutral. The remaining sections will then discuss and analyze the variety of ways in which neutrality is challenged by practical concerns. Ultimately, this paper
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attempts to bridge the gap between theory and practice by first identifying the ways in which mediator neutrality becomes challenged in practice and then by constructing solutions that redesign the notion of neutrality as it applies to this particular field.

**Background**

**Definitions**

In order to understand the importance of the role that neutrality has in mediation, it is helpful to review first what mediation is and what it is not. Mediation has been defined by Christopher Moore as, "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issue in dispute."\(^7\) The language found in the Uniform Mediation Act defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."\(^8\) A third source to consider for a definition of mediation comes from the Association for Conflict Resolution, an organization dedicated to enhancing the practice and public understanding of multiple forms of conflict resolution, which explains mediation as a "voluntary and confidential process in which a neutral third-party facilitator helps people discuss difficult issues and negotiate an agreement. Basic steps in the process include gathering information, framing the issues, developing options, negotiating, and formalizing agreements. Parties in mediation create their own solutions, and the mediator does not have any decision-

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\(^7\) Moore, *supra* note 1 at 8.

making power over the outcome.”9 The last definition to consider comes from Black’s Law Dictionary. Given mediation’s close proximity to the legal system, it important to take into account how the process is defined from a legal standpoint. Black’s Law Dictionary defines mediation as “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”10

These definitions are similar in that they define mediation as a process that involves the use of a third party to assist conflicting parties in reaching an agreement. There are, however, some differences in these definitions that are worth mentioning. For example, Moore and the Uniform Mediation Act reflect that the agreement (or lack thereof) is voluntary whereas the ACR’s definition seems to suggest that the process itself is also voluntary. This is not always the case, especially given that the use of court-ordered mediation is commonplace in today’s legal system. Parties to a legal proceeding can be referred to mediation and may be required to make a good faith effort to resolve their dispute through mediation; however, they are not required to reach an agreement. Black’s Law Dictionary reflects this circumstance by stating that mediation is a nonbinding ADR process.

The slight variations among the definitions, although minor, are the first of many inconsistencies between different sources that discuss mediation. This reveals the first problem that contributes to the challenges surrounding mediator neutrality, and that is that the boundaries of mediation practice are sometimes not clearly defined. The other interesting difference that

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exists among these definitions is that while the ACR and Black’s Law Dictionary make specific mention of the word “neutral,” this word or its variations are not anywhere to be found in the definitions provided by Moore or the UMA. It is possible that the definitions provided by the UMA and by Moore take for granted the fact that mediators are supposed to be third party neutrals, but given the confusion surrounding neutrality and the existence of theories that question whether neutrality is even a necessary component of mediation, it is crucial that nothing is taken for granted.

To further the understanding of what mediation is, it is helpful to understand what mediation is not. There are a number of formalized avenues one might take in order to resolve a dispute, including the judicial approach (litigation), arbitration, and early neutral evaluation. Of all of these, the judicial approach is the process that is most unlike mediation and is also the conflict resolution method with which most people in the United States are most familiar. The judicial approach “involves the intervention of an institutionalized and socially recognized authority in a dispute. This approach shifts the resolution from the private domain to the public.”11 Unlike mediation, parties involved in litigation bring their respective cases before an impartial and neutral judge or a jury that is charged with the task of deciding the case based on law. In this respect, the parties involved with litigation do not control the outcome of their dispute as they do through mediation. Moreover, the outcomes of cases that are litigated usually involve win-lose outcomes where one party’s interests are granted over the other party’s interest. In the range of conflict resolution options that exist, litigation is the most adversarial of the formalized processes that are available to parties in conflict.

11 Moore, supra note 1 at 10.
Arbitration, like mediation and litigation, utilizes a neutral third party but differs from each process in a few respects. Arbitration, like mediation, is a private and voluntary process, but, unlike mediation, arbitration still keeps the decision-making power in the hands of a third party neutral.\textsuperscript{12} The decisions made by arbitrators can either be binding or advisory, depending on the agreement made by parties at the time the agreement to arbitrate was made. Unlike the judicial approach, the outcomes that result from arbitration proceedings are private and therefore not subject to public scrutiny. In the spectrum of conflict resolution approaches, arbitration has an increased likelihood of a win-lose outcome in comparison to mediation but involves more flexibility and less coercion to the parties involved than litigation can offer.\textsuperscript{13}

Finally, there is a process called early neutral evaluation. According to the ACR, this process “involves using a court-appointed attorney to review a case before it goes to trial. The attorney reviews the merits of the case and encourages the parties to attempt resolution. If there is no resolution, the attorney informs the disputants about how to proceed with litigation and gives an opinion on the likely outcome if the case goes to trial.”\textsuperscript{14} This type of process is sometimes referred to as evaluative mediation; although debate definitely exists as to whether this type of process should be labeled as mediation at all. Mediation is meant to encourage parties to develop a resolution based on their own negotiations, and the evaluative nature of this process does not encourage parties to be pro-active in the resolution of the dispute. The neutral in this process does not make a judgment but rather advises parties as to what the likely outcome of the case would be at trial.

\textsuperscript{12} \textit{Id.} at 9.

\textsuperscript{13} \textit{Id.} at 7 Fig. 1.1.

\textsuperscript{14} Frequently Asked Questions About Conflict Resolution,” \textit{Supra} note 9.
Thus, in the context of other conflict resolution approaches, mediation differs in the following ways. First, of all of the approaches listed above, mediation is the least likely to result in a win-lose outcome since parties must both agree to the contents of their agreement. Second, mediation is the least adversarial approach to resolving conflicts in that parties are not trying to argue the merits of their case in order to win favor with the neutral involved. Mediation does, however, share one important quality with these processes, and that is the use of an impartial third party neutral. Yet, although mediators share this quality with other professionals, mediators are faced with unique circumstances that challenge their ability to be neutral in a way that is different from the other professionals. The biggest difference is the fact that mediators are not decision-makers. Instead, they are facilitators whose job it is to guide negotiations between conflicting parties in a way most likely to result in resolution. Since mediators are not decision-makers, they have to take extra care to ensure that they do not form opinions as to the merits of the cases they work on. Noting that significant differences exist between mediation and other conflict resolution approaches, the findings of this research are only applicable to mediation. While it is possible that some of the recommendations made can be adapted for use by other neutrals, the scope of this paper attempts only to correct issues of neutrality as they apply to mediation.

**Critical Elements of Mediation**

Even with slight variations found among definitions of mediation, there are certain elements of the process that are generally agreed upon. First of all, as stated before, the voluntary nature of mediation agreements is essentially undisputable. The phrase ‘self-determination’ is used to talk about the voluntary nature of mediation and mediated agreements. It implies that
parties are in charge of their decision to mediate as well as any outcome that may result from the mediation. Party self-determination is critical for successful mediation because it is believed that "the conditions for mediation are best in cases where both parties are interested in having the conflict resolved." The element of self-determination is one aspect of mediation that creates the need for mediators to be neutral. In order to fully support the idea that parties are in control of the outcome of their dispute, mediators must show restraint from inserting their own opinions, biases, and interests during mediation. Doing so limits the parties' ability to resolve the case for themselves.

Related to the principle of self-determination is the belief that mediation should be a party-centered process that is conducted by a trained professional. This means that the disputing parties should be the most active participants in resolving their dispute even though they are being assisted by a third party. Furthermore, this element means that the mediator should not be concerned with how settlement agreements will affect anyone other than the parties involved since the parties, not society, are the focus of the process. This is unlike the judicial process in which judges must consider how their decisions will impact society as a whole.

Confidentiality is another element that is critical to the mediation process. Ideally, parties should partake in mediation with the reassurance that what is disclosed during mediation is to remain confidential. Confidentiality usually exists not only between the parties but also between the mediator and the parties as well. For example, in most cases where confidentiality is protected, what is said during mediation cannot be used later as evidence in a court if the parties

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16 Moore, Supra note 1 at 218.
decide to litigate the matter instead of settling it during mediation. The promise of a confidential process essentially gives parties the freedom to “show their cards” without risking repercussions in the future if a mediated agreement is not achievable. Unfortunately, as critical as confidentiality is to the mediation process, it is not always a guaranteed privilege. The research presented in this paper will demonstrate how limits on confidentiality can also threaten a mediator’s ability to be viewed as a true neutral and how these two things combined contribute to unsuccessful mediations.

A critical element of mediation that is most related to mediator neutrality is the fact that mediators are expected to be impartial. Impartiality is commonly defined as “freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties as opposed to a single party in reaching a mutually satisfactory agreement.” The mediation process again depends on this element in order for it to succeed due to the fact that mediators are only in a position to be involved with a case if the authority to do so is given to the mediator by the parties involved. In order to gain that authority with clients both before and during mediation, mediators need to build trust and confidence. One way to gain this trust is by promising not to take sides in the dispute.

In some contexts, the word impartiality is used as a synonym for neutrality while in other places it is discussed as concept separate from neutrality. This ambiguity only adds confusion to the debate surrounding neutrality’s role in mediation. The findings of this paper will show that

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17 Id. at 218.

18 Sones, Supra note 5 at 47.

impartiality should consistently be treated as one of many components that contribute to the overall level of mediator neutrality. The reason for this is because impartiality is a factor dependent on the mediator’s ability to be neutral. When a mediator is neutral towards the case and the parties involved, he eliminates the possibility of becoming partial towards one side.

These elements can be said to apply to mediations in which the third party is considered an “independent mediator.” The practice of mediation comes in several varieties and some instances of mediation employ mediators with varying degrees of interest in the outcome of the mediation. For the purposes of this paper, the role of neutrality as it applies to the independent mediator is the primary concern. Independent mediators are set apart from other mediator roles by their very name. Mediators such as those with vested interests or authoritative power over the disputants have an entirely different set of dynamics that they must navigate that go beyond the scope of this research, but in cases involving the independent mediator, neutrality becomes central to the process.

**What is Meant by Neutrality?**

Having thus far reviewed the defining features of mediation, it is now appropriate to begin discussing the element of mediation to which this research is devoted: neutrality. To begin, it is helpful to review some of the ways in which neutrality has been defined in the past. Alison Taylor states that to be neutral “a mediator should determine and reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual

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20 *Id.* at 52.

21 *Id.* at 43-55.
neutrality of the professional in the performance of duties.” 22 While this definition is an excellent start towards accurately defining mediator neutrality, it does not sufficiently apply neutrality to the practice of mediation. Robert Benjamin defines mediation in a manner different from Taylor. He states:

"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 variance; (5) is disinterested in the outcome; and (6) is unconcerned with the impact of the settlement on un-represented parties." 23

Unlike Taylor, Benjamin’s definition of neutrality appears to be geared specifically towards mediators. Benjamin’s definition does, however, lack the completeness that Taylor’s definition has with respect to the broad aspects that relate to mediator neutrality. Despite their deficiencies, both definitions serve to provide useful insights as to what neutrality really means in the context of mediations.

Both definitions show that neutrality describes the kind of relationship mediators should have towards the parties they work with. It is helpful to state again that the role of the mediator is to be a neutral third party. In fact, in some contexts, the word “mediator” is used interchangeably with the word “neutral” in mediation. 24 Some argue that the mediator’s duty to neutrality is also

22 Sones, Supra note 5 at 47.


a legitimizing feature of neutrality since mediated agreements are not dependent on the law.\textsuperscript{25}

This makes sense due to that fact that mediators must gain acceptance from each party in order to be permitted to intervene in their conflict, and adhering to the principle of mediator neutrality is essential if mediators are to establish the trust that they need in order to successfully mediate.

\textit{Neutrality in other Professional Contexts}

Mediators are not the only professionals subject to the standard of neutrality and, more importantly, they are not the only professionals that find themselves challenged by this responsibility. Judges are an excellent example of professionals that must commit themselves to performing their duties impartially, independently, and free from conflicts of interest. Accountants, although not exactly bound by neutrality, must conduct themselves in a manner that is objective and also free from conflicts of interest. This section will briefly provide some background information on judges and accountants as it relates to neutrality and will also discuss ways in which each profession is challenged by neutrality.

\textbf{Judges}

Judges are public servants who make rulings that not only decide the outcome of individual cases but who also set precedents for future cases. In a democratic nation like the United States, fairness and justice are two important ideals that judges must uphold, and "deference to the judgments and rulings of courts depend upon public confidence in the integrity and independence of judges."\textsuperscript{26} For these reasons, judges are held to a strict standard of neutrality and have a duty to recuse themselves in cases where either questions about the judge's


ability to be neutral might arise or where the judge knows for certain he cannot perform his duties as a neutral. It is important to note that absolute neutrality on the part of judges is impossible due to the fact that ultimately judges must reach a decision that favors one party over another. The components of judicial neutrality include the requirements to be independent, to be impartial, and to avoid impropriety.\(^{27}\)

The *Code of Conduct for United States Judges* contain nine canons, eight of which directly relate to neutrality. They include Canon 1. "A judge should uphold the integrity and independence of the judiciary; Canon 2. A judge should avoid impropriety and the appearance of impropriety in all activities; Canon 3. A judge should perform the duties of the office impartially and diligently; Canon 5. A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties; Canon 6. A judge should regularly file reports of compensation received for law-related and extra-judicial activities; and canon 7. A judge should refrain from political activity."\(^{28}\) Additionally, the *Code of Conduct for U.S. Judges* also includes a detailed checklist to help judges determine if a conflict of interest exists.\(^{29}\)

By and large, the *Code of Conduct for U.S. Judges* is very clear and is detailed enough to prevent any ambiguities. This is probably the result of years of adapting the rules as new situations arose that challenged the ones that were already in place. However, neutrality in the judicial system is not without flaws. In 2008, at the time this paper was written, judicial neutrality made headlines and became a cause for concern when the Supreme Court could not achieve quorum to hear an appeal in a controversial case involving South African citizens and

\(^{27}\) "Judicial Ethics: An overview." Legal Information Institute, Cornell University School of Law. 21 May 2008 <http://topics.law.cornell.edu/wex/judicial_ethics>.

\(^{28}\) Code of Conduct for United States Judges, Supra note 26

\(^{29}\) This checklist can be accessed at <http://www.uscourts.gov/guide/vol2/checklist.pdf>. 
various U.S. companies. Quorum could not be achieved because four judges were forced to recuse themselves from the case due to judicial disqualification rules. The nine justices that serve on the Supreme Court are required to recuse themselves from cases in which “an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.” These rules apply to other judges as well, and this requirement is imposed on the judicial system in order to ensure a fair process free from conflicts of interests that could alter the outcomes of court cases.

However, this case and other recent cases have shown that judicial disqualification can have the potential to deny justice to parties who present a conflict of interest for justices. Not only is the ability to achieve a quorum at risk, but decisions can be affected if a majority vote cannot be obtained due to the recusal of even one judge. This is especially troubling when it occurs at the level of the Supreme Court, because as the United States’ highest court, it represents the last opportunity for parties to have their appeals heard.

At its core, the reasoning behind judicial disqualification is logical and necessary in order to maintain a fair and just legal system; however, it appears that current rules may go beyond what is necessary to maintain the legitimacy of the legal system. Although judges are not required to disclose reasons when they recuse themselves from cases, often times it becomes evident based on their financial records that judges were forced to disqualify themselves due to a

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31 To achieve quorum, six of the nine judges are needed to hear the case.

financial interest in one of the parties (i.e. through ownership of stock in a company.) The current recusal law requires judges to step aside even if they own only one share of a conflicting stock. In order to resolve this problem, the recusal laws will either need to be relaxed somewhat or judges will need to be required to convert their investments to other instruments such as mutual funds in. The point to be made with this example is that, as professions evolve, the need to evaluate and reevaluate the rules and codes of conduct that apply to members of that profession never completely ceases.

**Accountants**

Accountants engage in a range of activities such as bookkeeping, auditing, tax, and consulting. Their clients can include corporations, governments, nonprofit organizations, or individuals. Although accountants may be employed by an individual or a business, they are responsible to the public in general. The American Institute of Certified Public Accountants' code of conduct states that “the accounting profession's public consists of clients, credit grantors, governments, employers, investors, the business and financial community, and others who rely on the objectivity and integrity of certified public accountants to maintain the orderly functioning of commerce.” This level of responsibility requires accountants to be objective and free from conflicts of interests. In this way, accounts are expected to act as neutrals even though they may work for a specific entity.

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33 Mauro, *supra* note 30.


35 AICPA Code of Professional Conduct. §53 Article 2.01 <http://www.aicpa.org/about/code/et_section_53_article_ii_the_public_interest.html>. 
The AICPA's code of conduct acknowledges that its members cannot realistically maintain the appearance of independence, but they still require their members to be objective and free from conflicts of interest. Essentially, accountants are reporters of financial data, and they must not develop a bias in their reporting towards their client. Yet, this is often easier said than done because accountants also have a stake in the well-being of the companies they serve.

Given the fine line between objectivity and partiality, accountants are especially in need of clear guidelines that spell out exactly what is required of them to satisfactorily fulfill their ethical duties. One way that the AICPA assists its members in making ethical decisions is by providing a series of "Frequently Asked Questions" that discuss scenarios that raise ethical questions. While not a complete solution, providing detailed guidelines is essential to minimizing professional problems that are unclear and potentially debatable. Mediators currently do not have a level of guidance that in any way mirrors those given to members of the AICPA. This is due in part to the fact that the practice of mediation is still extremely decentralized. By examining the aforementioned professions, it can be seen that developing a more centralized set of standards will become necessary as the field of mediation evolves. The next section will highlight this point further by discussing mediator codes of conduct.

**Standards of Neutrality in Codes of Conduct and the Uniform Mediation Act**

It is well known that one of the most important milestones in the establishment of a profession is the development of a code of conduct. Codes of conduct perform two important functions with respect to professional fields. The first of these functions is to provide

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practitioners within any given field with guidance as to appropriate and inappropriate behavior. The other function of codes of conduct is to inform clients of what they can expect from the professionals that serve them. While codes of conduct always have the potential to evolve as new circumstances arise, professions such as law, medicine, and accounting have robust well-constructed codes of conduct that generally serve those professions well. In addition, those professions have established governing bodies that can assist practitioners who are faced with unique circumstances. However, in the case of mediation practice, one of the most difficult challenges facing the field today is the lack of clear, consistent, and binding professional guidelines.\footnote{McCorkle, Supra note 19.}

Currently, there exists a wide array of standards/codes of conduct to which a mediator might be subject, if he or she so chooses to subscribe to them. While it is in the best interest of a mediator to follow the standards of practice that are appropriate to their practice, the ability to practice mediation in some context does not require a mediator to follow any particular set of standards. This is especially true of mediation practice that is not strongly connected to legal proceedings. One exception to this is for mediators who want to be included on rosters for court-related mediation programs; in these cases placement on such rosters binds a mediator to the mediator code of conduct for that jurisdiction. Nevertheless, though not mandated in most cases, the majority of mediators seek professional and ethical guidance from one or more of the existing mediator codes of conduct. The various codes in existence today include those published by state and national associations as well as court-related codes.

This section seeks to provide a brief overview of a select number of codes of conduct. Discussing these codes will provide a foundation for understanding the challenges surrounding
mediator neutrality. Some of the examples provided will be revisited again as they apply to the forthcoming discussing of specific practical concerns. This section will also briefly discuss the Uniform Mediation Act as it relates to the scope of this research. Although not a code of conduct, the UMA does guide certain aspects of mediator behavior and is relevant for this reason.

Before proceeding with the individual codes, it is helpful to note that in 2005, Conflict Resolution Quarterly published a study conducted by Suzanne McCorkle that analyzed state, national, and court-related codes of conduct in great depth. Specifically, the study looked at how the terms “neutrality,” “impartiality,” and “conflicts of interests” were addressed within the various codes. The main objective of the study was to find any significant differences between the existing codes of conduct that would require a mediator subject to more than one code to change the way he or she conducted the mediation process within different jurisdictions. This study, however, did not seek to make any recommendations as to how the differences that exist should be approached. One aim of this paper will be to show why a more uniform set of guidelines would lead to more effective mediation practice.

*Models Standards of Conduct for Mediators*39

The Model Standards of Conduct for Mediators was originally drafted in 1994 by the ABA Section of Dispute Resolution, the American Arbitration Association, and the Society of

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38 Id.

Professionals in Dispute Resolution. Unlike codes of conduct that are specific to mediators practicing in a particular geographical region or in a particular case type, the stated goal of the Model Standards is to provide guidelines for mediators practicing in a variety of contexts. The publication of the Model Standards was well-received by the ADR community, and its language was adopted by several state programs either in whole or with only slight revisions. Due to changes in the field of mediation, the Model Standards were revised in 2005. The reporter's notes that accompany the 2005 version state that the committee hoped to improve on the level of clarity of the standards through the addition of enumerated paragraphs and sub-paragraphs. Through the remainder of this paper, any references made to the Model Standards will be specific to the updated 2005 version.

The first thing to be noted about the Model Standards is that the words “neutral” or “neutrality” do not appear in the context of describing mediation or the mediator. This is odd given the fact that other literature about mediation frequently uses the term in one form or another. In fact, this omission appears to be the case with most of the standards or codes of conducts in existence today. Instead, issues such as impartiality, self-determination, conflicts of interest, and fee arrangements are discussed individually. Although not explicitly stated within the body of the Model Standards, these issues all correspond to the mediator’s level of neutrality during the mediation process.

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40 Note: SPIDR now exists as part of the Association for Conflict Resolution.

41 Reporter’s Notes to Model Standards of Conduct for Mediators, Supra note 3.

42 Id.

43 McCorkle, Supra note 19 at 171.
It is difficult to know for certain because the reporter's notes accompanying the *Model Standards* do not address this omission, but there could be several reasons why the words "neutral" or "neutrality" were not included. One possibility could be that the word neutrality is so commonplace in the literature related to mediation that the drafters felt that the concept did not need to be explicitly addressed. Although possible, this explanation is unlikely given the debate that exists within the field surrounding the concept of neutrality. A more likely explanation is that the drafters of the various codes found it too difficult to include such language due to the fact that neutrality as it relates to mediation is still unclearly defined. Moreover, especially in the case of the *Model Standards* which attempts to address all mediators, specific references to neutrality may have been omitted so as not to alienate practitioners that utilize models of mediation that do not include the principle of neutrality.

Another noteworthy aspect of the *Model Standards* is the fact that the reporter's notes indicate that this code functions only as "basic ethical guidelines." The drafters of this code recognized that the guidelines provided may need to be supplemented by additional standards in certain situations.\(^4^4\) Thus, while useful, this code of conduct does not sufficiently guide mediators beyond a certain point. This fact supports the earlier claim made that the currently available codes of conduct are not yet sufficiently developed.

\(^{44}\) Reporter's Notes, *Supra* note 3.
Standards of Practice for Family and Divorce Mediation\textsuperscript{45}

Developed by the Symposium on Standards of Practice in August of 2000, the Standards of Practice for Family and Divorce Mediation is promulgated by the Association of Family and Conciliation Courts. The approach taken by the Standards of Practice differs from other codes of conduct in that it limits its reach to mediators involved with a specific case type. This decision is interesting to note when considering the role of neutrality in mediation because it provides support for the argument that different circumstances can warrant a different approach to neutrality. As with the Model Standards of Conduct for Mediators, the Standards of Practice for Family and Divorce Mediation makes no mention at all of any form of the word “neutral.” In many ways, the language with respect to “impartiality” is similar among the two codes of conduct. This code, however, outlines additional responsibilities of the mediator such as the need to take into account the best interests of children involved.

For example, in family disputes, the interests of minor children become an important factor for mediators to consider whereas in other situations mediators are instructed not to concern themselves with the interests of other third parties to a dispute. This approach can be attributed to the fact that children are not as capable of representing their interests, and thus mediators in these types of cases might be ethically required to ensure that the their best interests are considered.\textsuperscript{46} Intuitively, it makes sense that children are protected during the course of mediation; however a mediator’s obligation to children’s interest does present a challenge for


\textsuperscript{46}Id. at Standard VIII and IX.
practitioners attempting to act as a neutral party given the possibility that situations arise in which the mediator must abandon absolute neutrality in order to fulfill his or her duty to the children involved.

In addition the unique responsibilities outlined with respect to children, this code of conduct instructs family mediators on other issues in ways that seem contrary to the notion of mediator neutrality. Standard XI, for example, instructs mediators to “suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.”\(^{47}\) The circumstances cited in which this should occur include situations in which the safety of a participant is threatened or situations in which one party is abusing the mediation process to gain an unfair advantage. Mediators would have to form opinions about individual parties and make certain judgments in order to adhere to requirements outlined in this standard. To do so would require mediators to abandon absolute neutrality in favor of values such as fairness. The challenges posed by these competing responsibilities is another important goal of this paper, and specific recommendations will be made in the conclusion for how balance them.

**National Standards for Court-Connected Mediation Programs\(^ {48}\)**

The *National Standards for Court-Connected Mediation Programs*, is different in nature from the first two codes of conduct listed in that it applies specifically to court-annexed or court-referred mediators. The guidance offered in this code of conduct is far more detailed than the

\(^{47}\) *Id.* at Standard XI.

guidance found in other codes of conduct, given this type of mediation’s direct connection to our legal system.

Again, the issue of mediator neutrality is not presented in this code of conduct, but a review of the issues addressed within the National Standards for Court-Connected Mediation Programs highlights some challenges to neutrality that are specific to court-connected mediation programs. For example, section 5.0 discusses mandatory attendance by parties to mediation. The code explains that mandated mediation is acceptable so long as parties are not pressured to settle. Forthcoming in this paper will be a more detailed discussion of the challenges posed to mediator neutrality when the pressure to settle exists.

The National Standards for Court-Connected Mediation Programs also include a list of mediator qualifications developed by SPIDR (the organization that now forms part of the ACR). Many of these qualifications contribute to mediator neutrality such as the “ability to use clear, neutral language,” and the “ability to identify and separate the neutral’s personal values from issues under consideration.”

Standards of Practice for Mediators

The Standards of Practice for Mediators, promulgated by the Texas Association for Mediators, is a unique code of conduct to discuss in this paper because it is the only code of

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49 See § 6.1. of the “National Standards for Court-Connected Mediation Programs” for the complete list of qualifications

conduct in the United States that has a specific section entitled, "Neutrality."51 The code states that "Neutrality refers to the relationship that the mediator has with the disputing parties/participants. If the mediator feels, or any one of the parties or their attorneys states, that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator should withdraw from mediation unless all parties agree to proceed."

Another interesting feature of this code of conduct is the fact that it separates the term "impartiality" from the term "neutrality." As previously stated in the Introduction, these terms are sometimes used interchangeably. In Texas' code of conduct, impartiality means "freedom from favoritism or bias, either in word or action. Impartiality implies a commitment to aid all parties, as opposed to a single individual, in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role." The way in which these two terms are defined here makes possible an interesting observation about the differences between the two concepts. Here, to be impartial appears to be a choice that the mediator makes, whereas factors contributing to neutrality such as the mediator's background and personal experiences are not factors easily controlled by the mediator. For the purposes of this paper, impartiality is considered a factor in determining whether or not a mediator has fulfilled his duty to neutrality. The lack of control over certain factors is yet another reason why the pursuit of mediator neutrality seems to be an impossible one. Throughout the course of this paper, as more challenges to neutrality are identified, it will become clear that overt partiality leads to actual breaches of neutrality whereas uncontrollable factors such as mediator background can cause

51 McCorkle, supra note 19 at 171.
parties to questions a mediator’s neutrality even if in fact the mediator is able to separate these personal qualities from his role as the mediator.

*Americans with Disabilities Act Mediation Guidelines*\(^{52}\)

Drafted by ADA Work Group and published in 2000, the ADA mediation guidelines were created by a national work group composed of representatives from a variety of national organizations.\(^{53}\) While similar in nature to many of the other codes of conduct described herein, this set of standards was specifically created to provide guidelines for mediators involved in cases involving violations of the Americans with Disabilities Act. This code of conduct was included in this paper due to the fact that it contains specific language that raises questions about mediator neutrality. Section C Item 3 states that, “Provider organizations should have a diverse pool of mediators. Diversity recruiting efforts should include seeking out qualified mediators who have disabilities.”\(^{54}\) The fact that the ADA guidelines explicitly suggest the need to seek out disabled mediators may make sense when thinking in terms of the goals set forth by the Americans with Disabilities Act; however, it certainly raises some serious concerns with respect to mediator neutrality. This example deals directly with the concern that aspects of personal identity make neutrality an impossible ideal. Therefore, this code of conduct will be discussed again in the section of this paper that deals specifically with personal identity.


\(^{54}\) ADA Mediation Guidelines, *Supra* note 52.
In 2001, the Uniform Mediation Act (UMA) was finalized after a three-year long collaborative effort between a drafting committee sponsored by the American Bar Association and the Uniform Law Commission Drafting Committee. The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the final draft of the UMA and recommended that individual states enact it as law. As of this writing, states that have formally adopted the Uniform Mediation Act include: the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.

The Uniform Mediation Act differs from the preceding codes of conduct in that it is not a code of conduct at all. Instead, the UMA is a document that individual states can choose to adopt into law. The primary purpose of the UMA is to grant privileges of confidentiality to parties involved in mediation, including the privilege of mediator confidentiality. In addition to confidentiality, Section 9 of the UMA addresses the issue of conflicts of interests and a mediator's specific duty to disclose them. On a broader scope, one goal of the UMA is to promote party self-determination by leaving certain procedural concerns of mediation to their discretion rather than being bound by specific statutes. For example, in cases where a prospective mediator discloses a conflict of interest, the parties may decide whether or not they want that mediator to proceed. Other codes of conduct require the mediator to remove

55 UMA, Supra note 8.

Note: UMA states were found at http://www.acmnet.org/uma/index.htm and through a search of state codes on Lexis-Nexis.

57 UMA, Supra note 8.

58 See page 39 for a detailed discussion about mediator neutrality and conflicts of interest.
themselves from the case regardless of the expressed wishes of the party. In this way, the UMA places self-determination above absolute mediator neutrality.

Although the UMA does not directly speak on the topic of mediator neutrality, Section 9 emphasizes the importance of disclosure of conflicts of interests:

"Before accepting a case, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession."
(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise."59

What is notable about the UMA’s guidelines for mediator disclosure is the fact that mediators can still mediate a case even after facts are disclosed that may make parties question the mediator’s degree of neutrality or impartiality. Given that the UMA was designed with the hope that all states will eventually enact it as law, it is worth asking whether or not this is the best approach to take. Should mediators be allowed to mediate when it is clear that they may not be entirely neutral or impartial, even if parties agree? As previously stated, the drafters of the Uniform Mediation Act believe that party self-determination should be prioritized, and, for this reason, the language included in the UMA allows for mediators to continue. However, even if parties agree at the onset, it is still unknown what effect the accepted partiality will have on the rest of the mediation process. This matter will be discussed in more detail in the section of this paper that deals specifically with pre-mediation challenges to neutrality. The point in bringing this issue up is to demonstrate the confusion that practitioners must face when trying to conduct the mediation process in a way that is both ethical and effective.

The UMA is also an important symbol of success in the field of mediation. The right to confidentiality in mediation was another hotly debated issue within the community and was one that seemed too complicated to make sense of at first. Though it took three years of work to accomplish, the UMA was able to demonstrate to practitioners and to clients that it is possible to write clear policy that addresses difficult questions surrounding mediation. As this paper goes on to show the specific ways in which mediator neutrality is a complicated ideal to achieve, the

59 UMA, Supra note 8 at § 9.
success of the UMA should serve as a reminder that, while challenging, resolving this debate is possible.

It can be clearly seen through the sheer number of codes of conduct and the sometimes significant differences between them, that those involved in mediation have not yet come to a consensus over a number of issues. This problem affects not only practitioners but can also make it difficult for parties of mediation to know what to expect from the process. For example, suppose a party to a case encounters one mediator who believes it is her ethical duty to terminate the mediation process upon discovering a conflict of interest. For argument’s sake, suppose that that same person then employs a mediator who acknowledges that a conflict of interest exists but insists that, as long as parties agree to continue, he is sure he can remain neutral and impartial. These differences can cause the practice of mediation to seem unprofessional in the eyes of current and future clients.

Given all this ambiguity, it becomes easy to see why a mediator might have difficulty conducting mediation while feeling completely certain that he has done so in a manner that upholds the integrity of the mediation process. The uncertainties and irregularities that exist within the practice of mediation become even more obvious when an investigation of mediator neutrality occurs beyond the codes of conduct. The forthcoming sections of this paper will investigate specific challenges that can arise for a mediator before and during mediation. The standards discussed in this section will be referred to again in an effort to apply them to the individual challenges.
Pre-Mediation Challenges to Neutrality

Mediator neutrality can be compromised or questioned at all stages of mediation. This section will address the issues that contribute to the confusion surrounding the term “neutrality” during what are known as “pre-mediation pleadings.” Pre-mediation pleadings include the process of selecting a mediator and any contact that occurs between the parties before the actual mediation begins. During the pre-mediation pleadings, there are essentially four major concerns that can challenge the mediator’s ability to be neutral or to be perceived as neutral. They are: 1. The mediator’s personal identity 2. Biases/pre-dispositions that exist towards specific parties or towards specific case types, 3. The mediator’s level of substantive knowledge relative to the case type, and 4. Conflict of interests. These four challenges are discussed in an order that suggests varying levels of severity. Therefore, for example, personal identity tends to pose a lesser challenge to mediator neutrality than do overt conflicts of interest.

Personal Identity

When parties to a dispute meet with a potential mediator for the first time, aspects of the mediator’s personal identity can potentially challenge the parties’ belief in the mediator’s ability to be neutral. The personal identity of a mediator encompasses a number of characteristics and qualities about the mediator that shapes the perspectives and views of that person. There are aspects of personal identity that an individual may not be able to choose such as gender, race, ethnicity, sexual orientation, age, physical/mental disabilities, etc. Then, there are aspects of personal identity that the mediator may have some control over, and these include factors such as membership to particular organizations, interests, religion, and values.
When the concept of mediator neutrality is first introduced to someone new to the field, the obvious challenges that an individual’s personal identity brings are often cited as proof as to why a mediator could never truly be neutral. It can reasonably be asserted that no matter how much training a mediator undergoes it is impossible for him to completely detach himself from his own knowledge, experiences, and values.\textsuperscript{60} Given the variety of components that make up personal identity, it is likely that in nearly any mediation case one or both parties can find some aspect of the mediator’s identity that he or she believes will hinder the mediator from being truly neutral in the mediation.\textsuperscript{61} Divorce mediation provides an excellent example of this problem. In such cases, the gender of the mediator can, and in some cases does, affect the mediator’s ability to be completely neutral. That mediator’s experiences as one particular gender may make it easier for the mediator to empathize more with the party that is of the same gender. Even if a mediator’s ability to be neutral is not affected due to gender, the party with whom the mediator does not share the same gender may feel as though the mediator will be biased based on gender alone.

The challenge posed by personal identity is that there is really no way for mediators to truly control the effects it has on their level of neutrality, or at least the appearance of neutrality. Thus, one critical question that must be answered in order to appropriately define and regulate mediator neutrality is to what extent should personal identity matter within the context of mediation? For instance, are there situations in which aspects of personal identity are more relevant than usual which should then require some mediators to disqualify themselves if an

\textsuperscript{60} Douglas, Supra note 6 at 185.

\textsuperscript{61} McCorkle, Supra note 19 at 166.
element of their personal identity directly relates to that case? Moreover, how, if at all, should this issue be addressed in mediator codes of conduct?

Certain case types are in fact more sensitive to issues raised by personal identity. Cases involving racial discrimination, for example, can create a situation in which mediators need to think through how to navigate not only their personal ability to be neutral but also how to ensure that the parties will feel confident that they will receive a fair process. One strategy that mediators can employ is the use of a co-mediator to assist with the mediation. This strategy is really only useful if the co-mediator has personal qualities different from the original mediator. Co-mediation can serve to ease concerns with respect to the appearance of neutrality.

It is important to note that while personal identity factors should be taken into consideration at some level, it is probably not in the best interests of mediation practice to attempt to fully resolve the concerns potentially brought on by personal identity. Mediators should engage in training that will help them learn about how their personal identity might influence their performance as mediators. Practitioners should not be concerned with trying to eliminate the qualities that can create problems, but rather they should try to learn how to manage them appropriately.

The second question posed in this section was how mediator codes of conduct should address personal identity. Returning again to the language found in the ADA Mediation Guidelines, it is interesting to note that the ADA made a specific recommendation to recruit mediators who have disabilities. Again, while the intention of this language was probably to further the goals of the Americans with Disabilities Act, such language does pose an interesting challenge to neutrality. Whether or not the mediator himself has a disability might cause parties
to question the mediator’s ability to conduct the mediation neutrally. For the non-disabled party, a mediator with a disability would certainly create a situation where that party might feel as though the mediator could never truly be neutral since it is likely being disabled causes the mediator to possess certain feelings, beliefs, and biases. Thus, the language found within the ADA guidelines seems to be in conflict with the principle of mediator neutrality.

Taking into account the fact that no mediator could ever be completely neutral towards a case and its parties, what then becomes important is the appearance of neutrality. In other words, what the mediator actually thinks or believes about a particular case becomes less important than whether the mediator can conduct the process and control his behavior in such a way that demonstrates to parties that they are getting a fair process. In terms of policy, codes of conduct should explicitly state the fact that the mediator’s personal identity can be a factor that not only impacts the mediator’s ability to be neutral but also the parties’ ability to view the mediator as a neutral. The codes of conduct should then go on to instruct mediators to place the appearance of neutrality as a priority and suggest ways to counteract the challenges brought on by personal identity considerations such as the use of a co-mediator in cases where personal identity may be strongly related to the case type. Finally, mediators should be instructed that when the appearance of neutrality is irreparably challenged due to the mediator’s personal identity, the appropriate action to take would be to either decline the case or withdraw a case in progress.

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62 Sones, Supra note 5 at 48.
Biases

The third and final pre-mediation challenge to neutrality is the presence of biases on the part of the mediator. To be biased means to have some "inclination of temperament or outlook" or "a personal and sometimes unreasoned judgment."63 The word "bias" is closely related to the word "prejudice" in the sense that personal biases can cause a person to be prejudiced for or against a certain outcome or party. Bias is closely related to personal identity as biases can often stem from aspects of personal identity as well as personal experiences. Mediators can form two types of biases towards parties: positive bias and negative bias. Positive bias occurs when the mediator is prejudiced in such a way that he favors the perspective/interests of a particular party. Negative bias is the exact opposite of this. Arguably these two types of bias come hand in hand with one of each type being directed at each party. While biases can occur at any point throughout the mediation process, it is most appropriate to present their impact on the process here because the existence and extent of biases is so greatly impacted by how the pre-mediation proceedings are conducted. This subsection will investigate mediator bias and how it challenges the practice of neutrality in two ways: as it relates to specific parties and as it relates to specific interests.

Biases Towards specific parties

Bias towards a specific party, or partiality, is something that has been previously discussed within the Introduction. Clearly such biases are not acceptable within mediation.

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practice, and all codes of conduct are written in such a way that expresses this principle. However, it is worth discussing biases towards specific parties in more depth for two reasons.

The first of these reasons is to try to answer the question posed by critics of mediator neutrality: is it realistic to think that a mediator could consistently mediate cases without at times developing a bias for one side over the other? In short, the answer is no. Mediators are not superhuman and therefore cannot be expected to turn off natural responses and emotions that they may have towards the individual parties. Admitting this point seems to destroy the whole notion of mediators as neutrals, but it is unnecessary to resort to the conclusion that since mediators can't be absolutely neutral that the principle of neutrality itself should be abandoned. An important goal of this paper is to establish once and for all that neutrality is still a worthwhile goal to pursue even if it is something that mediators may never be able to fully achieve. Once this premise is established, the current debate can evolve into a discussion about how neutrality should be approached, given the realities of human nature.

One way in fact to approach neutrality would be to establish rules and practices that minimize the potential for mediator bias towards parties. For example, consider the information that a mediator is given before the mediation even begins. Too much information can create situations where the mediator has already developed strong opinions and beliefs about the case. Rules should then be established to limit the amount of information given to mediators about the parties and their respective interests before the session begins. This ensures that the parties are given the opportunity to present their sides of the case to a mediator who is not biased with outside information about the case. A second rule that should be established is that lawyers who have served one of the clients in the past should not be permitted to serve as mediators for that
same client in the future. The reasoning behind this is because the information held by the 
lawyer/mediator could potentially create biases for or against that particular client. Moreover, the 
appearance of neutrality is greatly challenged in this type of situation, and it is very difficult to 
argue that no other alternative mediator exists.

Overall, although mediators represent themselves as impartial neutrals, the truth is that to 
say that they never sympathize with one party over the other or that they never develop personal 
opinions or beliefs in any way is a lie. Again, to admit this does not require the field to abandon 
the principle of neutrality, just to acknowledge that the notion of absolute neutrality is not 
possible. There are a number of steps that can be taken to ensure that the third party neutral in 
mediation cases makes a good faith effort to at least work towards this goal. In addition to 
establishing rules that eliminate the obvious biases that can occur, mediators can develop verbal 
and non-verbal skills that are neutral. Mediators need to learn to identify words and phrases that 
reveal bias and work to avoid such language. Additionally, mediators must become keenly aware 
of the messages they send through body language as, for example, an unintentional rolling of the 
eyes can and often times will be noted by the parties involved.

*Biases Towards specific interests/issues*

This type of bias is certainly related to the first but is mentioned here to touch on a very 
specific point. Something that is not often considered in the literature related to mediator 
neutrality is how a mediator’s personal life can impact current and future clients’ views of their 
ability to be neutral. For example, let’s suppose a mediator has written a book about his view of 
the need for increased protection of fathers’ rights in custody disputes. Moreover, consider that 
this mediator has also been through a divorce and has had difficulty in the area of custody. The
fact that this particular mediator has such strong personal feelings with respect to child custody presents a problem for the mediator. If this mediator were to accept cases involving family disputes (and especially those involving custody issues), there is a clearly defined bias towards a specific side that cannot be eradicated. Even if the mediator believes that he can separate his personal experiences from his work, the very public expression of his beliefs on the subject of custody destroys the possibility that parties can view him as truly neutral.

Scenarios such as the one described above are not appropriately addressed in the current codes of conduct. The language in most codes simply directs mediators to be impartial, yet they do not provide any guidance for situations in which impartiality may not be achievable other than the situations typically thought of as conflicts of interests. It would be helpful if codes of conduct addressed the fact that mediators’ conduct outside of practice contributes to their ability to be successful mediators. Such language is already found in the code of ethics for both lawyers and judges, and so it is reasonable to think that a similar warning is appropriate for mediators.

**Degree of Substantive Knowledge Relative to Case Type**

Given mediation’s close ties to the legal system, it is often the case that many mediators either currently are or at one time were lawyers or judges. This level of familiarity with the legal system can at times be both an advantage and a disadvantage to these mediators. One advantage is that many of the skills required to be a successful mediator, such as the ability to actively listen to complex issues, can be developed through these professions. However, such dual roles can create challenges to mediator neutrality in cases where the mediator is biased by substantive knowledge relative to a specific case type. This knowledge usually comes in the form of knowing what a case might be worth if litigation were to be pursued.
The evaluative mediation model embraces this very quality in mediators. Evaluative mediation is a form of mediation in which a mediator hears both sides of a case and then advises each of the parties of the strengths and weaknesses of their case and what a judge or a jury would likely award at trial.\textsuperscript{64} The evaluation of the mediator is non-binding, but it helps parties to determine their "best alternative to a negotiated agreement." In many ways, evaluative mediation is similar in nature to settlement conferences held by judges.\textsuperscript{65} Essentially, evaluative mediation is a process that allows mediators to insert their opinions about cases based on their experiences and opinions. This model poses a number of problems with respect to mediator neutrality. The very action of judging the case requires the mediator to be partial at least to some degree. Also, although such mediations are non-binding, the authoritative role of the mediator can place pressure on the parties to settle the case based on the mediator's evaluation. While this form of mediation may be time and cost effective, it ignores the fact that mediation is supposed to assign the responsibility of decision-making to the parties.

It is worth stating again that there is room for a variety of conflict resolution processes, but how we label them will significantly impact a party's expectations of that process. Evaluative mediation certainly has its benefits, but it does not fit well with the core characteristics of mediation in general. Evaluative mediation also complicates the issue of mediator neutrality because it appears to provide an example of mediation that is not dependent on the principle of


\textsuperscript{65} Id.
neutrality. Ultimately, the field needs to determine whether this ADR process should continue to be referenced as a form of mediation.

Conflicts of Interest

Of all the pre-mediation challenges to neutrality, a conflict of interest is arguably the most severe challenge. This is because a conflict of interest constitutes a situation in which the mediator has or might have a stake in the outcome of a case. Black’s Law Dictionary defines a conflict of interest as “a real or seeming incompatibility between one’s private interest and one’s public or fiduciary duties.” While most codes of conduct acknowledge a mediator’s duty to disclose a conflict of interest, most do not specifically outline situations that result in a conflict of interest. The codes of conduct that are specific consist of examples such as “financial relationships and associations; business relationships and associations; family or social relationships; business or social relationships of family members; financial, business, or personal relationships with the clients’ attorney; past representation or counsel; pecuniary interests; board of directorships; stock or bond ownership; an attorney-mediator firm’s interest; a mediator’s employer’s interests; intimate relationships; strong views related to the issues; and sexual relationships.”

In her study, McCorkle discovered that sometimes conflicts of interest are treated as the same thing as partiality, but it is in error to think of the two concepts as synonymous. A conflict of interest can lead to partiality, but it is not the case that all conflicts of interest result in...

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66 “Conflict of Interest.” Black’s Law Dictionary, Supra note 10 at 319.

67 McCorkle, Supra note 19 at 177.

68 Id. at 176
partiality. For example, just because a mediator’s spouse is related by blood to a prospective party does not mean for certain that the mediator is prejudiced toward that in-law. What is true, however, is that a conflict of interest will usually alter the parties’ ability to view the mediator as a neutral.

The expectation that conflicts of interest must be revealed is critical in maintaining mediator neutrality because it prevents mediators from taking advantage of situations in which they can benefit. Moreover, full disclosure of conflicts of interests allows parties to build trust in the mediator.

What is still debated, however, is how a mediator should proceed in the event that a conflict of interest is discovered. In some codes of conduct, the mediator is able to proceed with the mediation as long as both parties acknowledge the conflict of interest and consent to proceed. Other models say that once a conflict of interest has been identified, a mediator has a duty to withdraw from the mediation, regardless of whether or not the parties are in agreement. Still others utilize a hybrid approach to answering this question. The Model Standards of Conduct for Mediators states that in cases where a conflict of interest exists, a mediator is able to proceed with the case if all parties agree after disclosure. However, the Model Standards goes on to say that mediators have a duty to withdraw from a case when “the conflict of interest casts serious doubt on the integrity of the process.” The problem with this approach is that it still does not provide mediators with sufficient guidance to determine in which situations a given conflict of interest should prompt the mediator to withdraw from the case regardless of the preferences of

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69 Model Standards of Conduct for Mediators, Supra note 39 at Standard III (C).

70 Id. Standard III (E).
the parties. The fact that mediators do not have a clear course of action to take when they are confronted with a conflict of interest not only demonstrates that there is still much work to be done in developing effective codes of conduct, but also poses another challenge to the principle of neutrality in mediation. In cases where a mediator is permitted to proceed with mediation even after a conflict of interest is disclosed, the mediator is essentially saying that he or she is in fact not neutral. Disclosing this fact does not thereby restore the mediator to a neutral state, and party acceptance of this conflict is essentially party acceptance of a mediator that is not neutral.

Challenges to neutrality such as this one create a very unique challenge for the field, and it is no surprise why it remains unresolved. On the one hand, it may seem as though no real problem exists as long as full disclosure occurs and parties wish to proceed with their chosen mediator. Given that mediation is a party-centered process, why shouldn’t the parties be able to make the decision to utilize a mediator they like even if, as it turns out, that mediator owns a significant amount of stock in one of the companies being represented? Shouldn’t the mediator’s expressed commitment to conduct a fair, impartial, and unbiased process be sufficient enough to allow for an effective mediation? Furthermore, doesn’t the fact that parties are free to terminate mediation at any point in time provide them with a significant protection if later down the road one party were to question the mediator’s ability to conduct himself as a neutral?

These are difficult questions to answer concretely because there are insufficient data to determine whether or not the mediation process is adversely impacted after full disclosure. As stated before, the appearance of neutrality is most certainly impacted by full disclosure, but this does not mean that the mediation itself will fail. This line of thinking lends itself to those within the field that believe that mediation has evolved in such a way that mediator neutrality is not as
relevant as it once was. On the surface, it is hard to see where the harm is done to the practice of mediation when all parties involved are in agreement, especially if the conflict of interest is discovered halfway through a mediation session. Another important point to be made here is that in smaller communities where there may not be as many mediators available, there could be instances where it is either difficult or impractical to locate a mediator where some conflict of interest does not exist. Situations such as the previous example provide support for the claim that at times absolute neutrality is unobtainable in a given case.71

These arguments are valid and need to be taken into consideration as the field determines the best approach to take regarding mediator neutrality. However, these arguments do not effectively show that the process is not harmed when mediation proceeds under these conditions. Questions remain such as how, if at all, the party that is not involved in the conflict of interest might change his or her behavior during the mediation with the knowledge of such a conflict. Or, what happens in cases where actions that occur post-mediation cause that same party to question the integrity of the mediation process? Suppose, for example, that a mediation of this nature ends with an agreement in place but months later one party discovers that the mediator benefited from the agreement in a way that was not realized at the time of the mediation. Even if the mediator had not intended for such an outcome (otherwise the mediator's actions could easily be deemed unethical), it could create a situation where that party would seek to contest the agreement. Even if legal recourse was not available, such outcomes do not benefit the field because they can lead to a negative public perception of mediation practice.

71 Astor, Supra note 25
Thus far, the codes of conducts in existence today guide mediators only by either permitting or prohibiting continued mediation upon discovery of a conflict of interest. It may be possible to find some middle ground where in certain cases the ethical choice would be to withdraw and in others it is acceptable to proceed with consent. Perhaps conflicts of interests are better handled on a case by case basis. While it would probably take time to develop a comprehensive list of guidelines, it is not impossible.

Challenges Arising During the Course of Mediation

Once all parties agree on an acceptable mediator and the mediation has begun, there are still several ways in which the appearance of neutrality can be compromised. This section will highlight the major challenges that can arise, specifically during an actual mediation. The concerns addressed can be categorized as procedural considerations, or, in other words, choices that a mediator must make during the process that can impact whether or not the mediator is viewed as being neutral. While the challenge to be and to appear neutral exists throughout the mediation, there are three major situations that especially fuel the debate surrounding mediator neutrality.

Caucus

One technique often employed by mediators is to call a caucus with individual parties at some point during mediation. A caucus is a private meeting that can serve a variety of purposes from clarifying party interests to reality-checking to allowing the parties a chance to clear their heads during intense negotiations. Caucuses can also be used to elicit settlement offers and

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72 Moore, Supra note 1 at 369-370.
demands. Depending on the case type and complexity of the conflict, a mediator may feel that a few caucuses are appropriate throughout the process. While this technique has proven to be an effective tool in mediation, it also is one that places the mediator at a higher risk of jeopardizing the appearance of neutrality.

For example, one researcher argues that part of the responsibility of a truly neutral mediator is to be equidistant. Equidistance "identifies the ability of the mediator to assist the disputants in expressing their 'side' of the case. To ensure that information is disclosed, the mediator must sometimes temporarily align herself or himself with individual parties as they elaborate their positions." Intuitively, the inclusion of equidistance as a part of a mediator's duty to be neutral seems to contradict pre-conceived notions of neutrality. If a mediator is to be impartial and neutral, how can he utilize a technique such as a caucus to align himself with individual parties? This contradiction again highlights the difficulty that mediators face in bridging theory with practice.

Caucuses are yet another prime example of why absolute neutrality should not be sought in the practice of mediation. Caucusing has shown to be extremely useful in bringing parties past deadlock, and, if mediators abandoned this technique in favor of maintaining absolute neutrality, it is likely that many more cases would not reach agreement. Instead, by redefining the concept of neutrality specifically for mediation practice, the field can allow for the use of procedural techniques such as caucusing, but can do so without losing the intended benefits of mediator neutrality.

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73 Black's Law Dictionary, Supra note 10 at 232.
74 Benjamin, Supra note 23.
75 Sones, Supra note 5 at 47.
76 Id. at 47.
For example, in some cases the mediator may only feel the need to meet with just one of the parties. Perhaps the mediator believes that that particular party is being stubborn or unrealistic with his or her demands. Yet opting to caucus with just that one party can seriously betray the image of neutrality because that party is singled out. Both parties may become suspicious as to the mediator’s reasoning for calling the private meeting. The confidential nature of caucuses makes it so that the party with whom the mediator does not caucus is left to wonder what happened while she was not in the room. The best thing a mediator can do to resolve this problem is to adopt a practice to caucus with both parties regardless of whether the need to do so exists. On a similar note, the amount of time the mediator spends with parties in caucus can impact the perception of neutrality. Parties may become alarmed if the mediator spends an hour with one party but only fifteen minutes with the other. While it might not be practical to instill time restrictions, mediators should be aware of the need to avoid significant time differences when caucusing with clients. These suggestions are meant to advise mediators to control the process in a way that places the appearance of neutrality as a high priority.

Another point to be raised here is the fact that the term “caucus” can be an unfamiliar term to parties new to mediation. Parties that don’t know what a caucus is also don’t know what they should expect from one. Mediators have the opportunity to give opening statements that can explain the mediation process and certain procedures that will take place with which clients may be unfamiliar. By utilizing this opportunity well, mediators can prevent concerns about neutrality.
by clearly explaining to parties what they should expect from the mediator and from the other party during negotiation, caucus, etc. For example, a mediator can explain the benefits that caucuses have to offer and explain that his role as mediator will be to play devil’s advocate and to ask questions intended to test each party’s position. Being aware of this can keep parties from second-guessing the mediator’s commitment to being impartial and neutral.

**The Mediator’s Role in the Substantive Aspects of the Mediation**

Authors such as Moore and Benjamin have included in their definition of mediator neutrality the statement that the mediator is neutral with respect to the substance of the agreement. This is to say that the mediator is in control of the process but not in control of the outcome. However, some empirical investigations of mediator neutrality have shown that “practitioners influence the content and outcomes of mediation despite asserting neutrality and consciously struggling to practice it. Mediators exert pressure in mediation towards outcomes they favor by selectively creating opportunities for the parties to pursue these outcomes.”

There are essentially two reasons why mediator involvement in substantive issues can breach mediator neutrality. The first is that suggestions as to the outcome can appear to benefit only one side, even if the mediator thinks that both sides would find the proposed solution agreeable. This problem can challenge the parties’ belief in the mediator’s ability to be neutral. The second is that, by contributing to the substance of the negotiation, mediators might unintentionally place pressure on parties to settle in the way suggested by the mediator. This is problematic given the importance placed on self-determination because it takes away from the ultimate goal of having parties create a solution that works best for them.

77 Astor, *Supra* note 25.
Although some definitions of mediation do not allow for mediators to provide input as to the substance of the case, there are some that do allow for this role. For example, in Illinois Statute 710 ILCS 20/2 Sect. 2, mediation is defined as “a voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions to those issues.” Permitting mediators to provide assistance with substantive issues is beneficial due to the fact that people in conflict are often times too involved in their own interests to see solutions that could provide for a win-win outcome. Mediators can potentially construct creative solutions to the dispute that parties may overlook. Thus, if mediators are forced to completely ignore substantive issues, disputing parties are robbed of a potentially invaluable service that can advance their ability to experience a win-win outcome to their conflict.

Understanding that there are both advantages and disadvantages associated with mediator input on substantive issues worsens the challenge that mediators face when trying to conduct an ethical and successful process for their clients. This issue again demonstrates that employing an “either/or” approach to handling issues that arise in mediation is not always possible or desirable. In this case, yes, mediators may potentially breach their duty to be neutral if they are allowed to have a role in the substantive issues of a given mediation. Yet, unlike a conflict of interest where neutrality is most certainly compromised, a mediator’s role in substantive issues does not necessarily have to lead to the problems described above. Instead, guidelines need to be

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developed to help mediators understand how they are to navigate substantive issues in a neutral, impartial, and fair manner. Overall, the important thing to understand from this example is that holding mediators to a rigid standard of neutrality can have the undesirable consequence of robbing mediation practice of its ability to be flexible and creative.

**Managing Power Imbalances**

Mediation is often cited as an ADR process that is unique in its ability to give a voice to the parties involved. By allowing both sides the opportunity to speak openly about their position, it is thought that the parties are empowered to come to their own solutions. While this claim may be true in many cases, it is often times the case that this desired benefit is threatened when power imbalances are present between the parties.\(^7^9\) Lewicki, Saunders, and Minton understand power as a party’s “ability to bring about outcomes it desires.”\(^8^0\) Power imbalances occur then when one party has a greater ability to bring about the outcomes they desire which can lead to a potentially unbalanced and unfair agreement.

The problem of power imbalances is the third, final, and, perhaps most complex obstacle mediators face in fulfilling their role as neutrals. The question of how to behave in a situation where power imbalances exist among parties that are mediating remains by and large unanswered, although there are a number of suggested methods. The difficulty with this challenge is the fact that a mediator in this type of situation often faces pressures from competing moral or ethical obligations. How does a mediator uphold his responsibility to be a neutral third

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\(^{79}\) Astor, Supra note 25.

party in situations where one of the parties is clearly exerting an unfair power or advantage over the other? Or when a party is conceding too much too fast? An example of this can often be seen in divorce mediation. For example, in cases of spousal abuse, it is often observed that a significant power imbalance exists in favor of the abuser because the abused spouse is usually not equipped to effectively negotiate against an abuser. When a power imbalance affects a party’s ability to negotiate, it also tends to increase the likelihood that that party will concede too much too quickly by way of agreement. This then raises concerns of fairness and justice. If mediators are not allowed to address power imbalances for the sake of maintaining neutrality, the potential exists for certain parties to exploit the practice of mediation in cases where they may be aware of their ability to negotiate more effectively.

A mediator that is truly “neutral” would be prohibited from counteracting such a power imbalance because doing so would require the mediator to make judgments about the parties that go beyond the scope of a neutral mediator. However, this approach to neutrality places a difficult burden on mediators who feel it is their moral and ethical duty to uphold the values of justice and fairness. Therefore, the field must question whether or not it places absolute neutrality above its desire to facilitate a fair process.81 This is again another example that shows that mediator conduct needs to be more clearly defined and that the term “neutral” needs to be redefined to fit the unique circumstances that can arise in this profession.

Some of the current codes of conduct do speak (at least somewhat) to the issue of power imbalances. The National Standards for Court-Connected Mediation Programs requires

81 McCorkle, Supra note 19 at 171-172.
qualified mediators to be able to “understand power imbalances.”\(^\text{82}\) However, this code does not advise mediators as to what should be done about power imbalances. Is it enough to simply understand them, or should this understanding be used in order to eradicate power imbalances?

The Mediation Council of Illinois has included language in its code of conduct that provides mediators with more guidance. It states that “impartiality is not the same as neutrality in questions of fairness. Although a mediator is the facilitator and not a party to the negotiations, should parties come to an understanding that the mediator finds inherently unfair, the mediator is expected to indicate his or her non-concurrence with the decision in writing.”\(^\text{83}\) This language directly conflicts with the principle of neutrality, and yet it does so without really preventing parties from constructing an agreement that may be unreasonable. Only allowing the mediator to state on record his non-concurrence with the agreement does not really do anything to minimize power imbalances. These examples serve to provide more support to the claim that codes of conduct are deficient in their ability to guide mediators effectively in complex situations.

Although currently it appears as though mediators only have the choice between maintaining their neutrality and minimizing power imbalances, one goal of this paper is to show that mediators have ways that they can conduct their practice so that both objectives can be met. One very effective solution is to require parties to have some form of counsel at their side to assist them with negotiation. By requiring this practice, mediators will no longer feel pulled to protect weaker parties and will be able to instead focus solely on their role as a mediator. This

\(^{82}\) National Standards for Court-Connected Mediation Programs, Supra note 48 at §6.1.

solution is discussed at length in the forthcoming conclusions, but is mentioned here to show that this challenge can be managed creatively.

**Other Challenges**

In addition to the challenges described in the previous sections, there are additional challenges that should be brought to light that do not necessarily fit in a specific category. These challenges pertain more to the professional/administrative aspects of mediation and mediation programs that can directly or indirectly affect mediator neutrality.

*The Pressure to Settle*

Although frustrating, mediators need to realize that not every case they mediate will settle. Even when a mediator conducts an excellent process, there is still the potential that the parties will not be able to reach an agreement. Mediators have a duty, as neutrals, not to pressure disputing parties to settle a case that they do not want to settle. Self-determination is too important to the mediation process, and agreements are much more likely to be executed when the parties enter them wholeheartedly. However, there currently exist two scenarios in which the pressure to settle cases becomes greater. These two situations challenge neutrality because they give mediators a personal stake in the settlement of cases.

The first of these situations occurs sometimes in court-connected mediation programs. Sometimes, these programs will publish a mediator’s settlement rate. This may be done in an effort to suggest to future parties that that particular mediator has demonstrated the ability to be successful. While a high rate of settlement may correlate somewhat to a mediator’s level of quality, it is not an appropriate measure of mediator success because it puts pressure on mediators to prove their proficiency by achieving the highest rate of settlement possible. This
pressure can in turn cause mediators to place pressures on clients to settle even if it’s not in their best interest.

The second scenario occurs when parties offer mediators a monetary bonus if they are able to settle their case. This form of compensation presents a serious problem for neutrality because mediators who are faced with these offers now have a personal motive to see the case settle. This may occur in cases where parties are not educated enough about the mediation process to know what constitutes successful mediation and, therefore, they base their opinion on whether an agreement was achieved. Settlement bonuses essentially suggest that the mediator has control over the outcome of the case. Yet, this goes against a major goal of mediation, and that is to encourage parties to resolve the dispute themselves.

The drafters of the Model Standards, for example, recognized the existence of these types of problems for mediators and included language in the 2005 revised Model Standards that directed mediators to place party self-determination above other concerns such as settlement rates. However, simply instructing mediators that they have the professional duty to prioritize self-determination above the potential pressure put upon them to settle is not sufficient. When personal interests are involved, it may be difficult for mediators to recognize when their behavior is altered. This may be especially true in situations where a mediator believes that it truly is in the parties’ best interests to settle a case.

The pressure imposed on a mediator to settle is not the only kind of pressure to settle that exists. Parties may also feel pressured to settle when they are ordered to undergo court-ordered mediation. Although parties are told that agreement is voluntary, they may feel undue pressure to

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84 Model Standards of Conduct for Mediators, Supra note 39 at Standard I(B).
settle because they were mandated to mediate by a judge. It is critical that the legal system weigh the value of court-ordered mediation with the potential consequences that can occur. Pressuring parties to settle can lead to undesirable consequences such as the forming of agreements that are not well-suited to the needs of the party.\textsuperscript{85} In this case, the legitimate desire of the legal system to lessen the existing caseload may not be achieved if parties have to return to court at a later date due to a settlement agreement that has not been properly executed.

Overall, there is the potential for much harm to be done to mediation practice if mediators, parties, or both feel a pressure to settle cases. Of course, all parties should be expected to mediate in good faith, meaning that they should attend mediation with the intent to settle but they should not feel coerced into settlement. This belief is also being reflected in the case law related to mediation. In \textit{Vitakis-Valchine v. Valchine},\textsuperscript{86} a divorcing couple entered into mediation. A month after the settlement agreement was signed, Kalliope Vitakis-Valchine requested to have the agreement set aside, alleging that her husband, her husband’s attorney, and the mediator had pressured her to settle. The appeals court determined that the alleged mediator misconduct was provided sufficient cause to have the settlement set-aside. This decision is an important one in the development of case law related to mediation because it demonstrates that the courts are acknowledging the importance of self-determination in mediation, and that they are taking steps to ensure that it is preserved.

\textsuperscript{85} Gibson, \textit{Supra} note 24 at 69.

\textsuperscript{86} \textit{Vitakis-Valchine v. Valchine}, 793 So.2d 1094 ( Fla. 4 th DCA 2001).
Who Pays?

The question of who pays could potentially challenge the appearance of neutrality in situations where one party pays for a greater portion of the mediation. The Model Standards of Conduct for Mediators allows mediators to accept unequal fee payments on the condition that this type of fee arrangement does not affect a mediator’s ability to be impartial.\(^8\) However, simply telling a mediator that unequal fee arrangements should not impair impartiality does not actually prevent it from occurring on a subconscious level. Moreover, and perhaps more importantly, accepting an unequal fee arrangement creates a situation where the appearance of neutrality may be jeopardized. While unequal fee arrangements seem reasonable in cases where one party is clearly better equipped to pay for mediation than the other, the consequences of permitting such an arrangement can lead to related problems that may override the value of such an arrangement.

Managing Relationships with Organizations that Frequently use Mediation

Certain types of organizations tend to utilize mediation more frequently than the average party type. For this paper, insurance companies will be utilized as a specific example but other types of companies or organizations may use mediation frequently, especially if labor unions are involved. These types of organizations may approach specific mediators or firms on a regular basis rather than select a new mediator each time the need to mediate arises. This makes sense as a practical matter because it eliminates the need to go through the entire process of mediator selection each time that organization is involved in a conflict; however, the repeated use of the same mediator by one party creates a cause for concern with respect to neutrality.

\(^8\) Model Standards of Conduct for Mediators, Supra note 39 at Standard X (B)(2).
This challenge is closely linked to the concerns brought on by bias and conflicts of interests. If a mediator is receiving a large volume of business from one organization, it is not unreasonable to think that he will want to ensure that client’s satisfaction in order to continue receiving business from that client. For these reasons, whether intentionally or not, it is reasonable to anticipate the possibility that the mediator could form a bias in favor of that particular client. The problem presented here is further exacerbated when mediators enter into contracts that extend volume discounts to these high-volume clients. Such discounts demonstrate that a relationship is established between the mediator and the organization and that each party has an interest in the other. This is very clearly a conflict of interest. Even if a mediator’s behavior is not affected by mediating large volumes of cases for one company, such activity brings to questions the integrity of mediation.

Yet, even with the problem this scenario poses, it is likely that these organizations will still utilize the same group of mediators for practical purposes. What then can be done to ensure that a mediator can still uphold the principle of neutrality? Will it be necessary to revert to an extreme that does not allow for these types of relationships to exist in the name of neutrality, but at the expense of convenience for organizations? One point to consider is that large scale use of mediation by organizations such as insurance companies provides the field with an opportunity for growth. It is clearly in the interest of the field to reevaluate the standard of neutrality and ensure that it is not so restrictive that it limits the ability for mediation practice to grow.

Even with these considerations, there are still certain precautions that can be taken to preserve mediator neutrality in these cases. First, mediators should not enter into any type of contract with any prospective clients that in any way guarantees settlement or that offers a
discount based on volume. Second, each time a new case arises with the same client, the mediator should take extra care to inform the second party of this potential conflict of interest as well as the client’s right to either have the case co-mediated or to request another mediator altogether. This is especially important because, when pitted against an organization, individual clients (especially those who are not properly represented) may be faced with a power imbalance and might not realize that they have a choice as to who mediates.

**Subpoenas for Information Obtained During the Course of Mediation**

The final challenge to be discussed here raises considerable concerns for the practice of mediation, especially as it relates to the legal system. As previously stated, a defining feature of mediation is confidentiality. It is agreed within the field that mediator confidentiality is an important component to a successful process. When parties know that mediation proceedings are confidential they are much more likely to be honest about the facts of the case. Moreover, they can develop trust in the mediator knowing that the information that is disclosed will not be used against them at a later point in time. Confidentiality is present at least to some extent in mediation, but there is still uncertainty as to the boundaries and limitations of confidentiality.

One aspect of confidentiality that is still not completely resolved is whether or not courts can subpoena mediators to testify in cases and under what circumstances. The Uniform Mediation Act attempts to establish a privilege for mediation communication against disclosure, admissibility, and discovery. The UMA also outlines specific exclusions to this privilege. However, the UMA has not yet been adopted in many states, which leaves open the debate

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surrounding the boundaries of mediator privilege. Some believe that granting parties in mediation privilege from testifying in court settings may allow some parties to exploit the mediation process for their benefits.\(^89\) Although the UMA’s outlines specific situations where privilege is not granted, the debate still exists over how much privilege is too much. Moreover, even if the UMA is adopted in all fifty states, federal law can still override the privileges it grants.\(^90\) Thus, there are no guarantees as to the future of mediator confidentiality until precedents are set to either protect it or override it.

This uncertainty is a current and important challenge to mediator neutrality. In situations where a mediator is compelled to testify, that mediator can no longer be neutral because he will have to represent the interests of one side in court. It is important to note that the case law in this area is still developing, and there have been several recent victories that have protected the need to exclude mediators from giving testimony. For example, in Foxgate Homeowners Association v. Bramalea, the California Supreme Court ruled that “there are no exceptions to the confidentiality of mediation communications and that both mediators and mediation participants are barred from subsequently revealing mediation communications under California statutes.”\(^91\) Decisions like these with respect to mediator testimony are vital to maintaining neutrality. Unfortunately, mediators do not have much control over how judges will rule in subsequent

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cases and it will be a matter of time before more cases move through the court system and the appeals process to see how the case law will shape this aspect of mediation.

**Conclusions and Recommendations**

Thus far, the focus of this paper has been to shed light on the complex issues and challenges surrounding the principle of mediator neutrality. It has also been established that the professional guidelines currently in place present mediators with the difficult challenge of navigating conflicting standards and ethical obligations. The remainder of this paper will serve to accomplish two important tasks. The first of these will be to propose a revised operational definition of neutrality that takes into account the issues discussed throughout this paper. This new definition can also double as language that can be incorporated into mediator codes of conduct, thereby fulfilling the need for improved guidance with respect to neutrality. The second task will then be to supplement this new definition with a list of the specific changes that need to be adopted in order to fully resolve the confusion that exists today within the field.

**Mediator Neutrality Redefined**

Redefining the standard of neutrality in mediation in a way that adequately addresses the challenges described herein requires more than just a generic sentence stating that mediators have a duty to be impartial, unbiased, and free from conflicts of interest. While these qualities are crucial elements of mediator neutrality, a much more robust and detailed definition of neutrality will be required to bridge the gap between theory and practice. The modified definition proposed includes Taylor’s definition and is as follows:
Mediator neutrality refers to the mediator’s responsibility to conduct a fair, impartial, and unbiased process. To be neutral, a mediator must take every precaution to eliminate the possibility that he will either advance his own interests or act based on any opinions that may form over the course of a case. A mediator must also determine and reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual neutrality of the profession in the performance of duties. While it is acknowledged that absolute neutrality on the mediator’s part is impossible, mediators can still satisfy the requirement of neutrality by making a good faith effort to construct their process in such a way that parties are able to develop trust in the mediator’s ability to be fair, impartial, and unbiased.

**Recommendations**

The following are ten specific recommendations that can be used to improve the practice of mediation based on the research presented within this paper. These recommendations all serve to promote the new definition of neutrality described above and can be used by mediators to clarify any concerns that they may have with respect to their duty to be neutral.

**Neutrality as a range, not an absolute**

The first and perhaps most important change that needs to occur within the field is to cease the debate as to whether or not absolute neutrality is possible. Simply put, it is not. Every challenge described within the body of this paper demonstrates that mediator neutrality in the strictest sense is a theoretical ideal that is difficult to obtain in practice without sacrificing many
useful techniques and strategies. However, this does not mean that the principle of neutrality should be abandoned all together. Neutrality is still very much a distinguishing feature of this particular alternative dispute resolution model even if it is an imperfect ideal. Instead of being preoccupied with achieving a fixed point of neutrality, mediators should be held responsible to make a good faith effort to uphold the principle to the best of their ability. To practice mediation without at least attempting to do so as a neutral would be a misrepresentation of the mediation process.

Essentially, neutrality is something that is not absolute or either/or. Instead, there is a range from less neutral behavior to more neutral behavior, and the factors that impact where a mediator falls on that range include: impartiality, full disclosure of conflicts of interests, procedural considerations (i.e. caucus, etc.), and involvement in the substantive portion of the mediation. While mediators should have an absolute requirement to fully disclose conflicts of interest, the remaining factors allow for a little more flexibility that does not necessarily equate to mediator failure as a neutral. For example, with respect to impartiality, at times a mediator may not be able to help feeling a bit partial towards one party’s story. Such feelings are difficult to control because they form unintentionally. This situation is an example of an area where the mediator falls closer to the “less neutral” side of the range. However, what helps counteract this common dilemma is if the mediator speaks and acts in a way that makes the parties feel that the mediator is neutral. Essentially, appearing to be neutral is much more important than actually being absolutely neutral with respect to one’s feelings about the case. The remaining two factors,

procedural considerations and involvement in substantive portions of the mediation process are the factors where the mediator ought to have the most discretion. The value added by a sharp mediator prepared with creative alternatives or the potential benefits of a really effective caucus is simply too great to set aside for the sake of absolute neutrality. Overall, mediators should constantly try to move closer to absolute neutrality in an attempt to preserve the integrity of the process.

The need to educate parties about neutrality in the context of mediation

In order to clarify a mediator’s duty to be neutral, more emphasis needs to be placed on the importance of the mediator’s opening statement and pre-mediation pleadings. It is at these points of the process that parties can become fully aware of what is means and what it does not mean to be a neutral mediator. Mediators should point out that at times it might be appropriate for the mediator to engage in information gathering in a way that may appear to compromise the principle of neutrality. By explaining to parties that this is part of the process and is not indicative of partiality, the parties, having been fairly warned, will understand that the mediator’s actions are simply meant to help the parties reach agreement. In addition, mediators should provide ample time for parties to ask questions so that they can clarify any concerns they have about the process. Finally, mediators need to stress that it is in the parties’ best interests to cease mediation if they feel in any way uncomfortable with the actions of the mediator. In court-related

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contexts this is especially important since parties are more likely to feel pressured to mediate in good faith.

The benefits of legal representation

Based on the finding of this paper, another change that needs to be adopted as a standard practice across the board is to, at minimum, strongly recommend to parties that they employ legal counsel to assist them during the mediation. Requiring legal counsel would be ideal but may take away from the cost effectiveness of mediation which is a huge concern for some parties. Doing so will alleviate the mediator’s feelings of moral obligation to counteract any power imbalances that exist among the parties. Once the mediator has fulfilled his duty to make this recommendation, it becomes the responsibility of each individual party to heed this advice. In fact, agreements to mediate should include a section that outlines the benefits of representation. This section should also state that, due to the mediator’s commitment to neutrality, parties that do not seek legal counsel during the course of the mediation process should understand very clearly that it is not the mediator’s job to ensure a “fair” settlement. This change in itself will eliminate the major dilemma that mediators face when trying to balance their commitment to the process and to neutrality with their desire to see mediation yield fair and just outcomes.

The legal representation of parties during mediation also creates an important check on mediators. With legal representation, parties who are generally unfamiliar with the specifics of mediation will have a way to ensure that the mediator is behaving according to professional standards. This can help maintain the principle of neutrality because mediators will likely be
more cautious of the way that they conduct the process in front of another professional who is well aware of what neutrality should look like.

The language and use of codes of conduct need to be adapted in order to adequately describe and enforce mediator neutrality.

The next major change that needs to occur within mediation practice is to change mediator codes of conduct to explicitly reflect the concept of neutrality in mediation. The codes should define neutrality (perhaps by using the definition outlined above) and should be adapted to include references to the recommendations made within this paper. For example, codes of conduct need to include a specific guideline that requires mediators to suggest the use of legal representation by counsel. While it would be impractical to include guidelines that address every possible scenario, it needs to be stated within these codes that mediators have a responsibility to uphold the principle of neutrality and that they are required to do so in good faith. Further, the more specific that codes of conduct can be with respect to the requirement of neutrality, the more likely it is that mediators will be able to fulfill their duty to be neutral. Since unique challenges to neutrality may continue to arise, the codes should instruct mediators on what to do in the event that they are unsure of how to proceed in a neutral manner.

Once codes of conduct are rewritten to clearly discuss mediator neutrality, the next step that needs to occur is to make mediator codes of conduct actually mean something. Since currently, most of these codes are simply optional guidelines that mediators can choose to follow, there is no way to enforce mediator neutrality. There are not many consequences in place for mediators who choose to ignore these guidelines. While there have been legal precedents set
that have voided agreements based on mediator misconduct, there isn’t an effective mechanism within the profession to self-regulate and ensure that ethical guidelines are being followed.

To achieve this goal, it would be imperative to implement a licensure or certification process for mediators. It goes beyond the scope of this paper to outline in detail what this process should look like but, ultimately, something needs to be in place to separate well-trained and highly qualified mediators from those who claim to practice mediation. While right now it may not be possible to stop those who practice varying forms of conflict resolution but call it mediation, certification/licensure at least provides prospective clients with the option to select mediators with demonstrated training and competency in the practice. Another important advantage to mediator certification would be to eliminate the need for some court-connected programs to publish settlement rates of their mediators. Instead of being evaluated on some unreliable statistic, prospective clients will be able to look specifically at the mediator’s proven qualifications. Once a process of mediator certification is established, codes of conduct will by default have more weight than they do currently. Maintaining certification will be dependent on upholding the values and guidelines found in these codes.

To digress for a moment, it is worth mentioning again the sometimes problematic fact that there exist a multitude of codes of conduct for one process. The research presented here does not definitively answer the question as to whether or not it is harmful to have this variety. It does seem that, overall, these various codes tend to reflect one another at the core with only a handful of differences pertaining to issues such as mediators engaging in dual roles and how to proceed in the event of a conflict of interest. Ideally, over time the need for almost all of these different codes will be eliminated for the sake of consistency across states and across organizations.
However, for the purposes of this research, it does not appear to be necessary to push for a national code of conduct for mediators in order to ensure that the debate surrounding mediator neutrality is settled.

**Mediator training needs to be revised**

Currently, mediator training programs vary in their quality, content, and requirements. Some training programs are state-sponsored while others are conducted by private institutions. The Illinois Not-for-Profit Dispute Resolution Center Act defines a mediator as "a person who has received at least thirty hours of training in the areas of negotiation, nonverbal communication, agreement writing, neutrality and ethics." The language found in this statute is helpful in that it describes the areas in which the mediator should develop skills; however, it does not specify where this training should come from. The problem with this is that there currently is not a way to measure the quality of mediators since the training they receive (if they receive training at all) is not well monitored. To further exacerbate this problem, there are no statutes or rules in place that control the way that the mediation process is conducted. In fact, any attempts to regulate the process are controversial because mediators do not want to lose the flexibility that they possess to control the specific way in which they conduct mediation. Therefore, the mediation process can vary from practitioner to practitioner and can certainly vary in quality and appropriateness. The ABA Dispute Resolution Section published a Mediator Credentialing Task Force Report in which they acknowledged the need for accrediting mediator preparation programs to ensure quality. Doing so may also help promote more uniformity in the way that the process is conducted.

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94 Illinois General Assembly, *Supra* note 78
With respect to what should be included in training specifically related to the issue of neutrality, it should be clarified that mediators should not be expected to eliminate or ignore factors of their personal identity that may create biases. Instead, training should be centered on helping mediators recognize those factors and, ultimately, understand how they can impact mediation practice.\textsuperscript{95} Training should also include role-playing activities that present scenarios similar to the challenges described within this paper to help guide mediators on the appropriate way to manage these challenges.

On a related note, some professionals may cite the fact that, generally, there is a lack of expressed consumer complaints about mediation and mediators and that this is demonstrative of the fact that there is nothing wrong with the status quo. While it may be true that overall there are few instances of complaints regarding mediator conduct, it does not mean that there are none. It is entirely possible that there are just inefficient paths to discovering them.\textsuperscript{96} Moreover, disputants might not be able to tell what constitutes a quality process. Improved regulation of mediator training and credentialing will minimize the potential for future problems with consumers and can resolve any that may exist today.

Disclosure is key

Strong disclosure rules are already in place in most settings, but they are imperative to maintaining mediator neutrality and, therefore, are mentioned again here. Based on the findings

\textsuperscript{95} Astor, \textit{Supra} note 25.

of this research, simply disclosing conflicts of interests is not enough. Even when parties agree to have a mediator continue with their case upon discovery of a conflict of interest, it is better for the practice of mediation as a whole if mediators across the board withdraw from cases in which a significant conflict of interest exists. The next question to be answered then is what constitutes a significant conflict of interest? One way to answer this is by distinguishing between those situations that may create a conflict of interest that limits a mediator’s ability to be neutral versus those that will more than likely impact a mediator’s ability to be neutral.

The following examples serve to help explain what is meant by this. Say, for instance, that a prospective mediator is the brother-in-law of one party. It can be reasonably argued that this prior relationship doesn’t necessarily impact the mediator’s ability to do his job. It’s quite possible that the relationship between the mediator and the brother-in-law is distant enough that no biases either positive or negative exist. However, in situations where the mediator is publicly vocal about an issue, which directly pertains to the case being presented, the mediators should be required to withdraw from that case due to the fact that there exists compelling evidence that the mediator is in fact not neutral.

By identifying situations in which mediators will have a duty to withdraw regardless of the preferences of parties, the mediation field will earn more credibility among current and future end-users of the process. When mediators decline a case for the sake of upholding neutrality, they will send a strong signal to the public of their intention to uphold the integrity of the process.
Future questions can be resolved through the use of an ethics committee

The beginning of this paper addressed the fact that professions need to continuously evolve in order to keep up with changing circumstances. At times, questions will arise that may not have been addressed in the past. To assist mediators during situations where codes of conduct do not provide sufficient guidance for a new challenge, the next change that needs to occur within mediation practice is the development of ethics committees where mediators can receive guidance beyond the standards set forth in codes of conduct. The committee’s response to inquiries made by mediators should be made available to anyone practicing under a certain state or organization’s code of conduct. Doing so will lead to the development of a resource outside of the codes of conducts that serves mediators in a similar way that case precedents serve lawyers. Implementing this change to the practice of mediation will allow the field to settle the current debate surrounding mediator neutrality without having to foresee future challenges to neutrality that have not yet been raised. As with any other profession, the practice of mediation needs to have a way to evolve smoothly and to respond accordingly to constantly changing legal, economic, political, and social environments.

A caucus with one means a caucus for all

The next recommendation speaks to the use of caucuses in mediation. As stated earlier in this paper, caucuses can be a very powerful tool for mediators needing to get parties through an impasse. In order to eliminate the challenges that caucuses present to mediator neutrality, all mediators need to adopt a policy that if they caucus with one party, they will caucus with all parties. This suggestion is made based on the understanding that meeting separately with just one of the parties in a caucus really destroys the appearance of neutrality even if the mediator is
successful in conducting the caucus in a neutral manner. By caucusing with both parties, the mediator is able to demonstrate that caucuses are a normal part of mediation. Moreover, since both parties experience what a caucus is like, they will all be able to see firsthand that the mediator is able to conduct himself as a neutral even when meeting separately.

Requiring this change will not be an easy thing to do as many mediators want to retain control of how they conduct the process. This suggestion will further be challenged by the fact that there is no specific regulatory body in place to enforce such a rule. The mere fact that under the current system it would be difficult to institute a rule as simple as this one demonstrates the need for improved mediator training/credentialing and for some type of an ethics committee to form as these changes will make it much easier to implement the proposed caucus rule.

Payment Considerations

In order to eliminate any potential for parties to question a mediator’s neutrality, fees need to be split by parties 50/50. Although it is understandable that some parties may be more capable of payment than others, it doesn’t change the fact that the appearance of neutrality is severely compromised when one party pays the mediator more than the other. In addition to this recommendation, mediators should also eliminate any agreements that offer a mediator any type of bonus if the mediation is successfully settled. Such agreements compromise mediator neutrality significantly because mediators are no longer uninterested third parties. In fact, with a settlement bonus at stake, mediators may potentially push parties to settle in cases where settlement may not be the best outcome.

Related to these two recommendations is another regarding contractual relationships between service providers and parties that attend mediation in high volumes. Any contract that
makes specific promises of future business creates an ethical problem for mediators who have a duty to be neutral. If mediators are overly-concerned with receiving a company’s repeat business, their ability to be neutral is seriously compromised due to their own interests. If a company does choose to use a particular mediator or firm repeatedly, it should be done on a case-by-case basis. The other parties involved need to be alerted to the fact that a high volume relationship exists and should be properly advised that they may select another mediator if so desired.

**When mediation is not appropriate**

One last consideration that should be made is the fact that the mediation process may not be ideal in every situation. There will be cases in which parties are better suited when they employ a neutral who will determine the merits of their case. Much like the belief among ADR practitioners that litigation is not ideal for every conflict, mediators should not be quick to think that their conflict resolution method of preference is one size fits all. The integrity of the process should never be compromised for those parties who say that they are interested in mediation but in reality what they require is something other than mediation. Those involved in ADR should be able to tailor conflict resolution processes to fit their client’s needs, but should be required to refer to the process as what it actually is. Those solely practicing mediation should be expected to decline cases in which it is clear that the parties are actually better served by another ADR method. Adopting this policy will create a positive image for the practice of mediation as a whole and can minimize the potential for parties to exploit the process.
Conclusion

On a final note, it is important to realize that even with all of the confusion surrounding mediator neutrality and even with the lack of nationally enforceable mediator standards, the community of mediators that exists today has been able to achieve the very difficult task of promoting the increased and voluntary use of mediation. The future of mediation in the United States looks bright, even if there are some kinks along the way. It is imperative that those within the field continue to look towards the future of the profession by working hard to swiftly resolve other important debates.
Bibliography


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