THE CONTRADICTION OF MEDIATOR NEUTRALITY AND FAIRNESS: A POSSIBLE SOLUTION

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Mediators and commentators see a contradiction of expectations that a mediator be both fair and neutral. (Astor, 2007, p. 236). Some see this contradiction as an inherent one because neutrality “cannot stand side by side” with fairness. (Exon, 2006, p. 43) And many commentators have proposed various ways to resolve this apparent contradiction. Herein, the existence of such a contradiction is questioned and, assuming such existence, a possible solution is proposed from a practical view rather than a scholarly view.

To provide a foundation for the proposed solution here, an examination is first made into what “neutrality” and “fairness” might mean in the specific context of mediation. The meanings are examined from different viewpoints because those terms can have different meanings for different stakeholders – the mediation parties, the mediator, and governing bodies. Then, an analysis is made of whether there is a contradiction in achieving neutrality and fairness, and whether this contradiction creates problems for the stakeholder groups. The potential problems relate to whether a mediator can achieve both neutrality and fairness, and at the same time, whether the parties can find satisfactory levels of neutrality and fairness.

Next, the question of - whether “neutrality” and “fairness” are or should be goals rather than standards of conduct - is addressed. That leads to the proposed solution here – allow the marketplace and parties participating in mediation to determine the meaning and extent to which “fairness” and “neutrality” should exist in mediation, particularly litigated cases.

WHAT IS “NEUTRALITY”?  

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To determine what neutrality means for the mediation parties (not their counsel), one may look at dictionary meanings of “neutrality.” Counsel is omitted here, not because their perspective is irrelevant, but rather because they can have a perspective distinct from the parties they represent. Princeton’s WordNet defines neutrality as a “nonparticipant in a dispute;” and “tolerance attributable to lack of involvement.” Webster’s Dictionary defines it as “the condition of being unengaged in contests between others;” “state of taking no part on either side;” and “indifference.”

Those definitions suggest a lack of participation by a mediator – which seems contrary to the expectations of the mediation parties. The parties expect the mediator to resolve the dispute, and this seems implausible in the absence of mediator participation. Therefore, these “ordinary person” definitions provide little help to the mediation parties (and mediator) in determining whether their mediator is being neutral.

In contrast, Answers.com defines neutrality as “not invested in the success or failure of a particular national/political agenda, party or interest;” “not taking sides;” and “balanced.” Wikipedia defines it as the “absence of declared or intentional bias.” Perhaps some of these definitions provide potential guidance to the mediation parties deciding whether their mediator is neutral. For example, if “not invested” means that the mediator has no financial interest in a party or outcome, a mediation party can objectively determine that absence. “Declared or intentional bias” may be another standard which a party can measure against outward behavior. “Declared” may mean the mediator makes an explicit statement, and “intentional” may mean the mediator consciously acts to prejudice a party.

Other definitions fail to provide objective guidance to a mediation party of what is neutral. For example, do most mediation parties have the same idea of what it means to “not taking sides”? Do most mediation parties have the same idea of what it means to be “balanced”? These definitions leave much room for a difference in opinion. And if there is a large difference in opinion, then mediators and
governing bodies should avoid using those definitions to set the expectations of the mediation parties concerning neutrality.

BusinessDirectory.com defines neutral as an “impartial third party that has no financial, official, or personal interest in a controversy, dispute or issue.” Of all of the above “ordinary meaning” definitions, this one seems to provide the most objective standards that mediation parties can use to determine whether a mediator is neutral. However, this definition appears incomplete. Mediation parties seem to expect that an impartial mediator is more than an absence of financial, official, or personal interest.

From the governing body perspective, in California for court-ordered mediation, the rules discuss neutrality but do not define it. California Rules of Court, Rule 3.852(1) defines mediation as a “process in which “a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” Rule 3.852(2) defines a mediator as a “neutral person.” Neither definition objectively assists the mediator in determining what conduct or lack thereof achieves neutrality. The same applies to mediation parties – the definitions provide no objective criteria by which the parties can measure mediator neutrality.

The California Rules of Court discuss “impartiality” but do not state whether or how “impartiality” relates to “neutrality.” According to some commentators discussed below, “impartiality” seems to be related to “neutrality” but there is a distinction. (Douglas, 2006, page 187). In fact, “impartiality” and “neutrality” are used interchangeably, though they have different meanings. (Van Gramberg, 2006, 201).

California Rules of Court, Rule 3.855(a) states that a “mediator must maintain impartiality toward all participants”. But “impartiality” is not defined. Nevertheless, Rule 3.855(d) assumes that the mediator knows the definition of impartiality and provides that “[s]ubject to the principles of impartiality . . ., a mediator may provide information or opinions. . . .” And the Advisory Committee
Comment to subsection (d) says “[s]ubject to the principles of impartiality . . . , a mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation . . . “

The California Rules of Court provide no real guidance to either the mediation parties or mediator on what is or is not neutral behavior. At best, a mediator and the parties can assume that being neutral and being impartial are equivalent or similar. For “impartiality”, a list of actions identifies acceptable conduct. But since the “principles of impartiality” are exceptions to the list and the principles are not defined, the mediator and the parties are still left in the dark about what is neutral behavior.

On a national basis, the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution jointly prepared the Model Standards of Conduct for Mediators. The Standards state that they do not have the “force of law.”

Interestingly, the Model Standards do not require “neutrality”; instead, they require “impartiality.” Standard IIA requires that the mediation be conducted in an “impartial manner.” “Impartiality means freedom from favoritism, bias, or prejudice.” Standard IIB provides that the mediator “should not act with partiality or prejudice.” Perhaps “impartiality” is supposed to be equivalent to “neutrality” under the Model Standards, but the Standards do not so state. These definitions of “impartiality,” like the California Rules of Court, provide little, if any, objective guidance on what constitutes acceptable “neutral” or “impartial” behavior.

In turning to how mediators define “neutrality,” one might surmise that mediators consider a combination of “ordinary meaning” definitions, such as the above, as well as governing body
definitions. If this is an accurate assumption, then it also seems true that mediators sit in a greater haze of uncertainty than do the parties when it comes to determining neutrality.

**WHAT IS “FAIRNESS”?**

Returning back to “ordinary person” meanings, AudioEnglish.net says that fairness includes “conformity with rules or standards” and “ability to make judgments free from discrimination or dishonesty.” It further includes the definition of “free from favoritism or self-interest or bias or deception.” The Random House Webster’s College Dictionary provides a definition of “being free from bias, dishonesty, or injustice.” The Princeton WordNet defines it as the “ability to make judgments free from discrimination or dishonesty. Wikipedia defines it as the “principle allowing for the use of discretion and fairness when applying justice.” It also defines it as the “perceived appropriateness of rules or procedures used to allocate goods, benefits, and other outcomes” and the “absence of bias.”

Do these definitions objectively help the parties and mediator determine whether the mediator is being fair? It does not seem so. While they give the parties and mediator some sense of what is expected for fairness, the definitions lack objective criteria.

The guidance from governing bodies is better but still lacking. California Rules of Court, Rule 3.857(b) states that a “mediator must conduct the mediation proceedings in a procedurally fair manner. ‘Procedural fairness’ means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.” In contrast to the ordinary meanings, the Rules provide greater clarity to the meaning of fairness because of the Rules’ distinction between procedural versus substantive fairness. In other words, a mediator is only obligated to ensure a fair process. However, the Rules still allow a mediator to ensure substantive fairness, though the mediator is not obligated to do. But if a mediator ensures substantive fairness, is not the mediator being biased or prejudiced in favor of the party who seems to be getting “the short end of the deal”? And, worse yet, would not a party see
mediator action that ensures substantive fairness to be a lack of fairness in the process? Therefore, while the Rules provide some objective criteria for being fair, following the criteria may actually lead to unfairness.

In the Model Standards, Standard VI requires a mediator to conduct the mediation in a “manner that promotes . . . procedural fairness. . . .” Standard VI lists expected actions and non-actions by mediators, but the Model Standards do not define procedural fairness. As such, the Model Standards provide less objective guidance to parties and the mediator of what is fair when compared to the California Rules of Court.

Again, for the mediator looking to ordinary definitions and governing body rules, there are no useable, objective criteria by which a mediator can be fair.

THE INTERSECTION OF “NEUTRALITY” AND “FAIRNESS”?

The following scenarios provide examples of how issues of neutrality and fairness arise, and how they intersect, in the mediation of litigated disputes.

In one example, a dispute involves a polluted river. The defendant is a chemical factory located upstream of the plaintiff which is fish farm. The plaintiff uses the river water to supply water to its farm. The mediator is a board of director member of the National Resource Defense Council (“NRDC”). The NRDC website describes itself as: “the nation's most effective environmental action group, combining the grassroots power of 1.3 million members and online activists with the courtroom clout and expertise of more than 350 lawyers, scientists and other professionals. The New York Times calls us ‘One of the nation's most powerful environmental groups.’ The National Journal says we're ‘A credible and forceful advocate for stringent environmental protection.’”

Highly experienced counsel represents both parties. The mediator conducts the mediation in a manner that allows both parties to fully participate and articulate their interests. The mediator also gives each party the opportunity to make uncoerced decisions. The mediator provides his legal evaluation to
both parties of what a court or jury might decide. The parties reach a resolution with the chemical factory paying millions of dollars to the fish farm and pleading guilty to a pending criminal charge. At no time does the mediator disclose to the parties his affiliation with the NRDC.

Was the mediator neutral? Was the mediation conducted in a neutral manner? A fictitious mediation party observing all of the facts would likely view the mediator as not being neutral. The mediator was “invested in the success or failure of a particular national/political agenda, party or interest”? This was so, under the definition of Answers.com, since the dispute concerned an environmental issue and the mediator was a board of director member of a well-known environmental group; and this group likely had an interest in favor of the fish farm.

But under the Wikipedia definition, the fictitious mediation party might deem the mediator as neutral - the mediator arguably had an “absence of declared or intentional bias.” In other words, the mediator did not declare or state that he/she was biased. And the mediator did not intentionally act in a biased manner against one party, though perhaps unintentionally.

A fictitious mediator observing all of the facts of the example might look to the California Rules of Court to decide whether the actual mediator was neutral. But the fictitious mediator may find no help, since the Rules give no definition of neutrality. Rule 3.855(a) gives some guidance to the fictitious mediator observer in that a mediator “must maintain impartiality toward all participants”. Since “impartiality” is not defined, the fictitious mediator may feel justified in believing the actual mediator was neutral since both parties were treated in the same fashion. On the other hand, if the fictitious mediator looks to Model Standard IIA, he/she may find that the actual mediator was not impartial since that requires “freedom from favoritism, bias, or prejudice.” The fictitious mediator could find it difficult to objectively conclude that the parties were free from the actual mediator’s favoritism for an environmentally harmed party and bias against an environmental wrongdoer.
Turning to fairness from the parties’ perspective, and under the Random House definition above for neutrality, a fictitious mediation party would probably see that the mediator was not “free from bias, dishonesty, or injustice.” Not only would the fictitious mediation party see bias by the mediator, but perhaps more importantly, the fictitious mediation party would see dishonesty in the mediator for not disclosing his/her affiliation with the NRDC.

But when the fictitious mediator looks at the question of fairness, a contrary conclusion could likely be reached. In the context of fairness under the California Rules of Court, the mediator is only required to conduct the proceeding in a “procedurally fair manner. ‘Procedural fairness’ means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions.” On the other hand, the mediator is “not obligated to ensure the substantive fairness of an agreement reached by the parties.”

In this example, the mediator gave each party an opportunity to participate and make uncoerced decisions with the assistance of highly experienced counsel. Also, while the mediator provided a legal evaluation of the dispute, and that such evaluation could have likely been biased, highly experienced counsel represented both parties. Presumably such counsel gave their respective clients their evaluation of the dispute. While the chemical factory eventually agreed to pay millions of dollars, and plead guilty to a crime, again, highly experienced counsel presumably provided the chemical factory with an evaluation of the likely outcome at trial. And the mediator was not obligated to ensure that the resolution was substantively fair to both parties.

The fictitious mediator observer could likely reach the same conclusion of fairness under the Model Standards.

So, was the mediator neutral and fair in the above example? From the mediation party perspective, the mediator was neither neutral nor fair. From the mediator perspective, the mediator might not have been neutral, but was fair.
In another example of the intersection between neutrality and fairness in mediation, the plaintiff was injured at work while using equipment made by the defendant. The plaintiff is a quadriplegic, unrepresented by counsel, and has difficulty in speaking English. The mediator spends almost 90% of the entire mediation time in private caucus with the plaintiff. The mediator explains to the plaintiff the trial process, the need for experts at trial, the cost of hiring experts, the potential bias against the plaintiff because of his lack of English skills, the plaintiff’s legal burdens of proof, the plaintiff’s handicap of proceeding to trial without an attorney, and the likely outcome at trial which the mediator believes to be an award to the plaintiff of at least $5M. The plaintiff tells the mediator that the plaintiff fully understands what the mediator explained. The mediator does not address the foregoing issues with the defendant, including the likely outcome at trial. The plaintiff agrees to a settlement of $1,000.

In this second example, was the mediator neutral? A fictitious mediation party knowing all of the facts might likely answer “no.” Using the definitions of Answers.com, the fictitious mediation party might likely say that the mediator was “taking sides” and not “balanced.” The mediation party might see that spending 90% of the entire mediation time with the plaintiff was not a balanced split of time. And since the mediator discussed the trial-related issues with only the plaintiff, the fictitious mediation party might see that the mediator was taking the side of the plaintiff.

In responding to the question of whether the mediator was neutral, a fictitious mediator knowing all of the facts of the mediation might answer “yes. Consistent with the Advisory Committee Comment to Rule 3.855(a), the mediator was impartial since the mediator discussed trial issues with the plaintiff party and provided a legal evaluation, which is allowed under the Rule.

However, using Model Standard IIA, the fictitious mediator could likely see the actual mediator as having been impartial since there could be a perceived favoritism for the injured party. This could be based on the amount of time spent with the injured party and willingness to discuss various issues with only the injured party.
Was the mediator fair in the second example? If the fictitious mediation party looks at the Random House definition for a definition, the fictitious party may see the mediator as biased for the same reasons the fictitious party sees the mediator as non-neutral.

From the perspective of the fictitious mediator, there is more uncertainty to whether the mediator was fair. At first glance, the fictitious mediation might conclude there was procedural fairness. Since the injured party was not represented by counsel, the actual mediator took the needed steps to ensure that the injured party had sufficient information to make informed decisions.

Still, the fictitious mediator might question whether there was procedural fairness based on the fact that the actual mediator valued the case at $5M and but allowed the injured party to accept $1,000 in settlement. Presumably, the actual mediator accounted for the “problems” with the case when evaluating the case at $5M. If true, and the mediation process was fair, then the fictitious mediator might likely believe that the injured party would have only settled at an amount much closer to $5M. Since the injured party accepted an amount far from $5M, then the fictitious mediation might find one explanation for the low settlement as the mediation process being unfair.

The foregoing examples suggest that substantive fairness cannot be separated from procedural fairness. The examples also indicate that different stakeholders in the mediation process can perceive neutrality and fairness differently. But that alone does not address the question of whether neutrality and fairness can be achieved at the same time.

IS THERE A CONTRADICTION IN ACHIEVING BOTH “NEUTRALITY” AND “FAIRNESS”?

As demonstrated above, there are inconsistent definitions of both neutrality and fairness – whether viewed from the parties, mediator, or governing bodies. If there is no consistency in definition, must one conclude that there is an inherent contradiction in achieving both neutrality and fairness in mediation?
On a cerebral level, one might think so. If there is no consistent definition of neutrality and fairness, then a mediator cannot determine what to do and what not to do in order to achieve neutrality and fairness. But a lack of consistency in definitions might only mean that there is a lack of clarity of what to do and what to avoid if one is the mediator. For a mediation party, perhaps there is a lack of clarity of what to expect by a mediator in terms of neutrality and fairness. However, a lack of consistency in the definition, or lack of clarity of expectation, does not necessarily mean that there is an inherent conflict in concepts – that is, one concept exists to the exclusion of the other.

An absence of an inherent conflict between neutrality and fairness seems to be borne out by anecdotal evidence. Look at the number of private mediation companies, and the number of mediations they conduct. The same observation can be made of court-ordered mediations. Given the large numbers of mediation sessions, and continuing interest in mediation, there must be more than just a few mediation parties who find mediation to be neutral and fair.

Yet, those parties have no consistent definition of neutrality and fairness, though it is probable that those parties have some commonality in their perception of what is neutral and fair. Likely, the perception of neutrality and fairness is a general feeling, and not a specific feeling based on an analysis of objective criteria. So, for mediation parties, there appears to be no problem resulting from an absence of consistent definitions of neutrality and fairness.

Nevertheless, most commentators seem to be of the opinion that notions of neutrality and fairness conflict. For example, Exon claims that “[u]nder the current structure . . . , rarely can a mediator truly act as a neutral and impartial outsider, especially when she attempts to attain a fair result, achieve other concepts of fairness, balance power struggles and promote informed decisions. (p. 46). Douglas explains that the “recent literature on the concept of neutrality in mediation acknowledges that whilst it is a core concept to the mediation process, it is also ironically a controversially flawed
theoretical notion. Much of the academic critique asserts that neutrality is an unattainable aspiration...” (p. 178).

Why is there a divergence between the opinions of commentators and the apparent view of mediation parties? One explanation is that commentator opinion is based on scholarly analysis, which may differ from anecdotal analysis. Another explanation is that mediation parties care little about neutrality and fairness – but that seems implausible in Western culture. (Van Gramberg, 2006, p. 199).

A still further explanation is that mediation parties care little about specific definitions of neutrality and fairness, while commentators care more about specific definitions. And in the commentators’ view, there is an unstated assumption that the defined characteristics of neutrality and fairness must be absolutely followed; and if not absolutely followed, those characteristics cannot exist. In other words, for example, neutrality has a characteristic of self-determination by the parties, while fairness has a characteristic of balancing the power of the parties. (Van Gramberg, 2006, p. 201-202).

When so viewed by commentators, if the parties should be in control of their respective destinies (i.e., self-determination), then the mediator must leave the parties to their own devices, even though there is an imbalance of power (i.e., negotiation abilities).

But the absolute, either/or view above ignores the possibility that there can be varying shades of neutrality and fairness. When there is more neutrality, there may be less fairness, and vice versa. Thus, if one acknowledges the possibility of a balancing of the two concepts, then both concepts can co-exist. If they can co-exist, there is no inherent contradiction between achieving both neutrality and fairness.

**DOES A CONTRADICTION CREATE AN UNSOLVABLE PROBLEM?**

For some, the above analysis may seem too theoretical; for others, not so. If there is a contradiction in a mediator achieving both neutrality and fairness – whether inherent or not - the next question is whether this creates a problem for either the mediator, the parties or both? And, if there is a problem, what is it?
To determine whether the contradiction creates a problem, one can start with an examination of the objectives of a mediator, apart from what may be required by law. One objective is simply to reach a resolution – irrespective of whether the outcome is fair to all parties and irrespective of the process used to reach the resolution. This objective stems from the realities of working as a mediator. If a mediator cannot achieve a record of resolutions, parties may have less interest in using that mediator. If the mediator is not being used, the mediator cannot make a living.

Yet, in the process of getting to any resolution, the mediator may pressure one or even both parties into agreeing to options that may not be of real interest to the parties. The pressured party would likely see that as unfair. If not seeking to pressure one or both parties, the mediator may allow one party to bully another party, thereby perpetuating an imbalance in bargaining power. If a party views itself as having less bargaining power in comparison to the other parties, the former party may see the process (and ultimately the mediator) as being unfair. If a party views the process (or mediator) as being unfair, then there is loss of confidence in the process. In turn, there is reluctance by other potential parties to use the process. In turn, mediators cannot make a living.

Another objective of the mediator may be to achieve a resolution that is fair to all parties, i.e., substantive fairness. (Exon, 2006, p. 19). A fair resolution to all parties may take into account matters over how things are distributed to the parties. (Van Gramberg, 2006, p. 200). But it seems that ensuring fairness in the resolution automatically puts doubt in at least one party’s mind of the mediator’s neutrality. By taking a step of ensuring substantive fairness, there is necessarily an underlying assumption by the mediator that, in the absence of process intervention, the resolution will (or at least could) be unfair to at least one party. But if a party sees process intervention by the mediator to that party’s detriment, then that party may see the mediator as unfair, even if the resolution is fair.
What these scenarios show is that the attempt to ensure both neutrality and fairness can result in a mediation party questioning the neutrality and/or fairness of the mediator. That is a problem, but is it an unsolvable problem?

**A PROPOSED SOLUTION**

There is an obvious lack of clarity on what is neutrality and fairness. But these concepts may be similar to ones where “you know it if you see it.” In other words, perhaps these concepts do not need to be specifically defined because parties know what they mean, even though parties cannot articulate the meaning. Thus, the concepts can be left undefined. So undefined, the concepts do not have to be governing body standards of mediator conduct, but instead undefined mediator goals.

The reason neutrality and fairness can be left undefined by people or governing bodies is that the market for mediators will “define” those concepts. Mediation parties will know if and when a particular mediator has been neutral and fair. In turn, and assuming that the market will drive itself towards neutrality and fairness in Western culture, parties will continue to use mediators that are neutral and fair. For those mediators who are not neutral and fair, the market will discontinue using those mediators.

What is achieved is a market definition of mediator neutrality and fairness, while not requiring a governing body to define those terms. A market definition is desirable, rather than a governing body standard, because the market definition will be consistent with what the market needs and wants. And isn’t that what governing bodies seek to achieve by their regulation?

**REFERENCES**

