

Rebooting Mediation by Detaching from the Illusions of Neutrality, Just Outcomes and Balanced Power

Greg Rooney

The Future of Mediation

I submit that the next quantum leap for the theory and practice of mediation is to detach from the concept of neutrality as a core element of mediation practice.

I propose that mediation be rebooted as a stand-alone profession by championing the proposition that mediators are not neutrals. That they bring their own personal history and specialised professional expertise to the process of assisting parties who are in dispute.

That there is a body of professional ethics and principles that exists to enable professional mediators to manage and ameliorate against any negative effects arising from their conscious and unconscious prejudices, biases and preconditioning.

Detaching from Neutrality, Just outcomes and balanced power

Neutrality is physically impossible to attain as a personal attribute for a mediator or a practitioner in any other profession or field, despite the modern Western mediation movement's appropriation of it as a core element in the practice of mediation. The same applies to the concepts of 'just outcomes' and 'balanced power'. They are all theoretical constructs which do not exist outside of theory.

These propositions can only be said to exist if there can be shown a demonstrable example of a pure neutral stance by a mediator, a pure just outcome and pure balanced power.

There is nothing theorists can point to that would indicate to a mediator when these states have been physically achieved. There is no framework for determining a clear and precise benchmark for what constitutes a true state of neutrality, a just outcome and a balanced power differential. The principle is that if you cannot show them in the pure form then they can only exist in theory.

One has only to look at some of the writings on neutrality to see how a form of contorted logic is needed to make a case.

Thus, the goal of any procedural framework in a facilitative mediation is to maintain mediator neutrality while restricting party behaviour in order to maintain relative party equality (Rock.2004-05)

and

The call for mediator manipulation of discourse in the name of neutrality implicitly calls for the mediator's internal assessment of the power dynamics in the dialogue between himself and the parties, and the formulation of language that manipulates a dialogue so as to balance out the power of the parties as much as possible. If neutrality boils down to the skilful manipulation of discourse then" (Rock 2004-05)

The proposition is that mediator manipulation through restricting parties behaviour by the management of a person's position in stories, intervening in the associated interactional patterns between stories and the construction of alternative stories equates to a neutral stance (Cobb and Rifkin, 2011). To get around the obvious inconsistency, the suggestion is that a natural internal bias can be balanced by an unbiased external process (Rock 2004-05). The problem with this analysis is that you cannot be half neutral or unbiased in much the same way as you cannot be half pregnant. You are either neutral or unbiased or you are not.

The same applies to the principles of 'just outcomes' and 'balanced power'. They do not exist in pure form. They are subjective concepts subject to infinite variables especially in the context of the fluid art of compromise. They are at most aspirations the degree of success of which can only be assessed after the event has occurred. Neutrality, just outcomes and balanced power are states that can only be assessed in retrospect.

It must not be forgotten that the things one hears are for the most part things whose meaning is only recognised later on" (Freud, 1912 p. 432).

This leaves mediators with the situation that they cannot predict the true status of their neutrality, issues of justice in the outcome and power differentials. They have to wait until they and the parties have undergone the experience of each moment to judge. Having experienced the experience of each of the cumulative moments there is no formal benchmark with which to judge whether those states were achieved. The only assessment can be whether, in all the circumstances, the results of the process and outcome were good enough.

Modern science has concluded long ago that you cannot eliminate the observer from that which is being observed. The same applies to the mediator. You cannot take the mediator's physical, mental, emotional and spiritual presence in the mediation session out of the relationship equation. The mediator's presence cannot be erased by theoretical constructs such as neutrality.

In addition Quantum physics, the science of the subatomic world, goes further to include the observer as a co creator of that world. Support for this connection can be found in the psychoanalytic psychotherapy literature particularly in the concept of 'intersubjectivity' and the 'analytic third' (Ogden, 1994). They can be understood as the space between the parties or the field which exists whenever the parties and therapist are present together. It is as if a third mind is created made up of a conglomerate of the therapist and the patient. It is created in the conscious and unconscious relationship between them.

"The analytic third is a metaphor for the creation of a mind that has an existence of its own and is capable of thinking in ways that neither contributor to the creation of the third subject is capable of generating on his own" (Ogden,2014)

It mostly dissipates when they cease being together in that setting. It fully exists in the shared moment. In a mediation context it means that the thoughts of the mediator both positive and negative about the parties or the success of the mediation affect this communal mind. It challenges the concept of mediator neutrality. (Rooney & Ross 2012).

While mediation is fundamentally different from therapy, the mediator and the therapist both share a human relationship with the people they assist in their respective professional encounters.

The mediator's presence in the room changes the dynamics in the relationship between the parties. To frame that change in the vague terms of neutrality does a disservice to the significant power and influence of the mediator and the mediation process itself.

Mediator ethics is then reduced to a simple subjective belief in one's own ability to be neutral, a belief not only founded on an illusion but one that can only be viewed after the moment to moment events which are being observed have been completed. Is it any wonder that after all these years mediation still suffers from an identity crisis?

There are good reasons to detach from the concept of mediator neutrality as the basis of mediator behaviour. It is counter-productive because it programs mediators' minds into accepting a state that is unattainable. It distorts how mediators view themselves as practitioners as well as how they see themselves relating to the parties. Paradoxically it installs an internal program in their minds that can unintentionally mask their own hidden prejudices, biases and preconditioning, the very thing it is trying to avoid.

The Challenges for Mediation Theory

Moving the focus from mediating the problem to mediating the moment

Mediation is a venue in which the mediator and the parties experience jointly moment to moment events. The mediator has to mediate each of these moments with the parties. The mediator is not a distant observer having no effect on those moments as the concept of neutrality suggests. Both the mediator and the parties are equal co creators of each moment just by their physical presence.

Neutrality, just outcomes and balanced power have to be assessed within the context of the fluidity of moment to moment events. They are in a continuous state of gestation never reaching a static point until the mediation ends. It is at that point that theory can be used as a communication device to help explain, in established words, what has just happened.

It is relevant to look at the history of the modern Western mediation movement with respect to this issue. The attachment to neutrality, just outcomes and power equality as central mediation theories arose as result of the early pioneers having to fend off attacks by the established professions of the law and social sciences that asserted that only they were qualified to deal with the legal and emotional aspects of resolving conflict.

The judiciary asserted that judges were not only neutral but they could dispense Justice to the community. However these are questionable assertions. Judges, like mediators, bring their own prejudices, biases and preconditioning to their role. They have to be constantly aware of these influences and actively ameliorate against them. The judicial appeal processes is a backup when they step over the line.

The concept that the judiciary dispense Justice is also questionable. The judiciary has traditionally referred to access to the courts as access to Justice. It is as if the

concept of Justice is synonymous with the courts. This raises the question as to whether adjudicating on the facts of a particular case ipso facto amounts to Justice.

The observations of his Honour Mr Justice P. W. Young (retired) of the New South Wales Court of Appeal are particularly relevant:

“Just as judges do not make law, they do not resolve disputes, rather, they adjudicate upon them” (Young 2002)

The early mediator pioneers defence to these challenges was to assert that mediators were also neutrals who simply drew from their neutral toolbox of mediator skills and processes to help facilitate the resolution of a discrete dispute between the parties.

Neutrality and Apathy

The marketing of the mediation as a ‘neutral’ product has led to the perception that mediators bring nothing of themselves to the process.

The term neutral is defined in part as:

“ belonging to a state that thus stands aloof, exempted or excluded from active or passive hostilities ; indifferent; not distinctly marked or coloured, indefinite, vague, indeterminate “ (Oxford, 1964).

In Gestalt Therapy neutrality is linked with the word apathy. J Y S Cheng also links neutrality with apathy in a public service context.

Because of the stress on neutrality, civil servants are expected to obey instructions and orders from their superiors without exercising their own moral judgements..... As such civil servants are compelled to be apathetic and do not feel responsible for the outcomes of their actions. (Cheng, 1992)

This is played out in parallel in the minds of policymakers, lawyers and therapist with vested interests and members of the public that the services provided by mediators are illusionary. Neutrality can imply that a mediator’s personal expertise is vague, indefinite, apathetic and indeterminate and one that is not distinctively marked or coloured. Therefore how we present ourselves is how others see us. This is an example of a parallel process at work.

It is no wonder that some lawyers and social scientists assert that they are in a superior position by their ability to bring personal value to the process by their

ability to directly apply their legal and social science knowledge and expertise to the process.

The consequence of mediators hiding behind a veil of neutrality has led to a low point in the evolution of the modern mediation movement in the abandonment, by some, of mediation as a stand-alone profession to the more vague and indeterminate concept of a field.

An Alternative Approach

There is currently a disconnect between theory and practice in mediation particularly with respect to the terms neutrality, just outcomes and balanced power. The Australian academic Prof Laurence Boulle contends that mediation is a practice in search of a theory. While I agree with Prof Boulle I suspect the opposite is also the case in that many mediation concepts, particularly neutrality, just outcomes and balanced power, are theories in search of a practice.

There are always challenges in marrying theory with practice. Practice is a series of moment to moment fluid and unpredictable events while theory, at its best, seeks to understand with an eye to providing reference points for practitioners. However theory struggles for relevance when it moves from guidance to predictability. It overreaches where it tries to seek certainty in a world where nothing is certain.

There is a proper role for the development of mediation theory with respect to practice. However, paraphrasing Michael Jacobs (Jacobs, 1995 p. 6), theory only serves us well if it serves the parties and it is primarily the interaction of the parties and the mediator in the mediation session that makes theory and not theory that makes mediation.

I am not suggesting that the intent behind the use of the terms neutrality, just outcomes and balanced power is wrong or misguided. Rather I suggest that instead of supporting good intentions they unintentionally undermine them.

The terms neutrality, just outcomes and balanced power are far too precise and ordered goals. They require a capacity for prediction which is impossible to attain. This results in a misalignment between their underlying intent and the outcome they are seeking to achieve.

Replacing Neutrality, Just Outcomes and Balanced Power with the principles of mediator 'Fresh Eyes' and parties 'Free Will'

Mediation, at its heart, is a process of experiment and discovery requiring constant adaptation. The decisions in mediation are reached through the oblique process of negotiation, abduction and compromise

The economist John Kay asserts that the best way to achieve any complex goal is by an indirect way. He suggests that our best goals are achieved obliquely (Kay 2010). Kay distinguishes between direct approaches and indirect approaches. He maintains that direct approaches make a distinction between means and ends that often do not exist in reality. This is the case with neutrality, just outcomes and balanced power. In a mediation context they do not exist in the means only in the ends.

Problem solving is by its nature indirect in that it is iterative and adaptive. This is because mediation takes place in the context of unpredictable consequences of interaction between the parties; *"a world whose potential complexity defies precise analysis or calculation; a world suffused with uncertainty in which the specification of problems is invariably incomplete"* (Kay 2010 p 51).

I would submit that the high level objectives that the terms neutrality, just outcomes and balanced power are trying to achieve are better expressed in a more oblique way. I propose a combination of the following two propositions:

- a. Mediators provide a fresh pair of eyes to the process
- b. Mediators allow the parties free will in coming to their decision.

The amalgam of these two terms is sufficiently oblique to allow a variety of processes and approaches available to mediators from all backgrounds and theories. A fresh pair of eyes has a far broader concept than neutrality.

The concept of free will is far more oblique than the concepts of balanced power and just outcomes. It's not about the strategy of achieving neutrality, just outcomes and balanced power but about a much deeper and profound issue; the nature and inherent value of free will.

"The definition of an objective or goal is not separate from the means by which that objective or goal is achieved, and that is why an oblique approach is not only effective at inevitable"
(Kay 2010 p87)

The Consequences for Mediation Theory and Training

The detaching from neutrality, just outcomes and balanced power will have a number of consequences for mediator theory and training.

- ***Moving the focus from the parties to the mediator:***

This reliance on neutrality to define mediator behaviour effectively eliminates the mediator from the relationship equation. The result in an unbalanced focus on only one side of that equation, that is, the parties. As a result the focus on the mediator's relationship to him or herself has become a second or third order issue.

An early example of this focus on the parties can be seen in Christopher Moore's conflict roadmap called a "*Sphere of Conflict- Causes and Interventions*" (Moore, 1986, p. 27) in which he lists types of conflict and attaches to each type a list of possible interventions.

The focus on the parties is also played out in the analysis of conflict theory as a way of trying to understand parties' motivations. It is as if acquiring an understanding of the discreet elements of conflict and resolution translates into a corresponding understanding of party behaviours. Theorists generally look for patterns and lists of behaviours as, for example, the 15 ways to apologise or the 17 best interventions by experienced mediators.

However for practitioners these patterns or lists of behaviours are "*more honoured in the breach than in the observance*" (Hamlet). Practitioners look instead for aberrant behaviours as they are the more valued ones (more honoured -as per Shakespeare's classic double meaning) because they trigger red flags or warnings for the mediator and are the most fruitful source of mediator guidance and direction for the session.

This focus on the parties has reached its theoretical high point with the arrival of the transformative mediation movement (Baruch Bush and Folger 1994) in which the mediator's role is reduced to that of a supporting actor so as to allow the parties to act with true self-determination. It is suggested that the mission for mediators is to offer a safe haven from the culture of mediation experts so as to foster the benefits of party empowerment and recognition (Baruch Bush and Folger 2014).

Defining the mediator's mission solely from the perspective of the parties, whether the approach is transformative self-determination at one end of the continuum or the

problem-solving expert at the other end, is diminished by the absence of a full examination of the person of the mediator. The mediator's mission has to include an assessment of the mediator as an equal player in the mediation process.

This focus on the parties has led to a demand for mediator skills, techniques and interventions to help influence party behaviours. They are often referred to as the mediators' '*Toolbox of Skills*'. They are drawn from 'expert' mediators revealing their tips and tricks through recounting war stories drawn from their good and bad experiences. This is partly driven by novice mediators' hunger for knowledge and understanding to bring a sense of certainty to what is inherently an uncertain process.

The downside to this approach has been identified by Nassim Taleb through what he calls '*narrative fallacy*' which describes how flawed stories of the past shape our views of the world and our expectations of the future (Kahneman, 2011).

Narrative fallacies arise inevitably from our continuous attempt to make sense of the world. The explanatory stories that people find compelling are simple; concrete rather than abstract; assign a larger role to talent, stupidity and intentions than to luck; and focus on a few striking events that happened rather than on the countless events that failed to happen (Kahneman, 2011 p 199)

This has given rise to a hunger for clear messages from leading mediators and theorists about the determinants of success and failure of mediator techniques. Phil Rozenzweig's refers to the '*halo effect*' in which there is a demand for charismatic speakers who can offer illusory certainty particularly with respect to lessons drawn from successful and less successful individuals. He concludes that stories of success and failure constantly exaggerate the impact of leadership style and management practices on outcomes and thus their message is rarely useful (Kahneman, 2011 p 206).

Bernard Mayer in his book '*Beyond Neutrality*' does advocate moving away from mediator neutrality mainly to add value to the mediation product and for marketing reasons. The focus still remains on how to help the parties in conflict. He suggests that neutrality is an important role for mediators but only one role which he states is often a very limiting one in conflict. He does not comment on the principle of neutrality itself other than:

People often do not trust our neutrality. They are suspicious of the concept and question, often correctly, whether we can generally be as neutral, impartial and unbiased as we say we are (Mayer, 2004 p 17).

The focus on party behaviours as a determinate of mediator interventions has limited value due to the fact that there is no certainty in the practice of mediation. It is a moment to moment exercise involving a partnership between the mediator and the parties. It is built on uncertainty and unpredictability.

Mediators therefore play a leading role in managing that uncertainty and act as a role model for the parties. They are tasked with holding the space for the parties sufficient for them to remain working together in the creative dynamics of the session. The mediator is in there sharing and participating in each moment. They are not supporting actors (Baruch Bush and Folger 2014) or neutral bystanders somehow detached from the interactions that are taking place moment to moment in the session. They are full participants and need to be viewed and assessed as such.

- *Focusing on the mediator's use of self*

Detaching from the concept of mediator neutrality elevates the role of the mediator to a position as a participant in the process equal to that of the parties and opens the door for an in-depth examination of the mediators' use of self.

Some early pioneers recognised the importance of mediator behaviour that went beyond the issues of neutrality. Kenneth Kressel and Dean Pruitt (1989 p. 235) suggested that how mediators make decisions about what to do in mediation is one of the least understood but one of the most important issues in the study of mediation.

John Haynes (1996, p21) suggested that we as humans are shaped by our experiences in life both professionally and privately. He proposed that these experiences form a prism through which we make sense of things. He advocated using a mediation prism, which he suggests would separate out legal and emotional issues and focus on what he calls "mediation issues".

Donald Schön has referred to the personal qualities of an outstanding practitioner noting:

“outstanding practitioners are not said to have more professional knowledge but more ‘wisdom’, ‘talent’, ‘intuition’, or ‘artistry’ – They are used as junk categories, attaching names to phenomena that elude conventional strategies of explanation” (Lang and Taylor, 2000, p. 5).

There is an abundance of material in the arts, philosophy and expertise literature on personal attributes that attached to a person of expertise in their field of endeavour.

The ancient Greek aphorism *‘know thyself’*, one of the Delphic maxims, is an early example. Aristotle (1384 to 1322 BC) used it in stating *‘Knowing yourself is the beginning of all wisdom’*. Also from Lao Tzu *“Mastering others is strength. Mastering yourself is true power”* and the Latin phrase *“Vincit qui se vincit”* translated as *‘He conquers who conquers himself’*. These quotes all imply that the only person we can change is ourselves and that any change we make in ourselves changes those around us.

The poet John Keats sought to describe what qualities went to form a man of achievement and what Shakespeare possessed so enormously. He described it as a state where a man is capable of being in uncertainties, mysteries and doubts without any irritable reaching after fact or reason. He described it as negative capability (Rollins, 1981). Wilfred Bion suggested negative capability is not an immediate mental discipline but rather a way of life (Rooney 2007).

There is a considerable body of research drawn from the Expertise Literature that suggests that experts do not necessarily behave according to the conventions of their field or “by the book”. It suggests that experts are not limited by the prevailing boundaries of current professional wisdom, knowledge and practice. They operate from a deep understanding of the total situation they confront. (Wilson 2011).

The recent interest in meditation (mindfulness) as a tool for professional development and its adoption by the mediation movement (Riskin, 2008-09) is helping shift the focus back onto to the personal power and experience of the mediator. The term 'Mindfulness' has a more professional tone than the word meditation which has been helpful in defending against some of the scepticism of mediators by the law and social sciences as being just enthusiastic new age amateurs

or as better expressed by the following definition of mediation as: *'two people locked in the room with a hippie'* (Reucassel, 2010).

Perhaps it is now time to stand up for mediators and mediation as a legitimate and valued profession and professional practice and not be afraid to challenge directly the inadequacies of both the law and therapy with respect to dealing with conflict.

The law is right to be afraid of the power of a well conducted mediation of a difficult legal and/or emotional issue. A process that can provide a far more nuanced and creative legal solution without having to engage in a brutal adversarial legal process. Therapy is right to be afraid of a process that deals directly with the core issues of interpersonal conflict and abuse that can drive mental illness not only in the parties but those associated with them. A process that if handled well can cut years off the need for therapeutic interventions.

Detaching from mediator neutrality and refocusing away from the parties and on to the mediator will result in a change in how mediators are trained and how they are supervised.

Refocusing Mediator Training on Mediating the Moment

The mediation session like life itself is a series of moments unique in time. As we stand in each moment we can either stay totally present or we can focus back to our memories and forward to our desires. The mediator's only option is to work in the moment, as unfortunately, mediator time travel does not exist as far as we know. The power of change is vested in the moment only. It is only by experiencing an experience in that moment that parties can have a chance of ameliorating the past or creating a new future.

In our complex and fast paced modern life it hard to remain present in the moment particularly if we are anxious about past events or have a fear of the future. It is therefore up to the mediator to remain grounded and present in the moment to role model that state for the parties. This requires that mediators acknowledge and let go of any attachment they have to their own memories, desires and the need to understand (Bion, 1970).

Mediator Training and Assessment

Facilitating this experience of the moment is at the heart of the mediation process. It requires special skills for the mediator. This has implications for mediation training and assessment.

- **The first step is for practising mediators to be conscious of what they are thinking. How you think defines how you act (Rooney and Ross).**

The optimum state of mind is one that is openly receptive to the unknown. Bion (1981) refers to it as a state of reverie which he described as a form of mental void, a formless infinite and the perfect blank. It is also known as zero thinking. It is a space in which the practitioner is unmoved by their own memories and desires and the need to understand prematurely what is happening. It is where there is an overall attentiveness to the present moment. This state of mind also appears in Buddhist and Taoist doctrines. Zen calls it '*The don't know mind*' or the '*No mind*' (wu-shin).

Thomas Ogden (2015) interprets Bion (1981) to be saying that there is a difference between conscious thinking and unconscious thinking. We need conscious thinking, shaped by our memories, desires and the need to understand, so as to conduct the business of our every day waking life.

However intuition has its roots in the unconscious mind which is far richer than conscious thinking. Unconscious thinking generates a rich internal dialogue not possible in waking conscious thinking and involves the viewing of experience from multiple perspectives simultaneously. Ogden (2015) states that the unconscious is free to view experiences simultaneously from multiple vertices which would not work as a way of thinking in trying to carry out the tasks and conduct of interpersonal relationships of our daily waking life.

He also talks about engaging in an act of self renunciation. He defines this as the act of allowing oneself to become less definitively oneself in order to create a space in which the practitioner and party may enter into a shared state of intuiting and being at one with the reality.

“The therapist does not seek reverie any more than he seeks intuition. Reverie and intuition come if they come at all without effort unbidden.” (Ogden, 2015)

This contrasts with the concept that empathy is the connecting bridge between the professional and their client/patient. Empathy is defined (Oxford, 1964) as the power of projecting one’s personality into and so fully comprehending the object of contemplation. Ogden suggests the opposite approach. Rather than projecting outward Ogden suggests to go within allowing a space for the connection to occur unbidden and without effort.

Bion’s concept of reverie is comparable to mindfulness, a major factor in Buddhist meditation. The common denominator between Bion’s view and the Buddhist view of mental development is that in both thought systems mental growth is synonymous with learning from experience (Pelled, 2007). This state of reverie is not something that is to be practised just before the mediation session. It is something you practise over your whole life (Symington and Symington, 1996).

- **Having achieved this state of reverie the mediator must then hold it while the parties begin their interaction.**

Freud wrote only five papers on technique. He suggests the preferred state of mind is one that consists simply in not directing one’s notice to anything in particular and maintaining the same evenly suspended attention in the face of all that one hears. As soon as you deliberately concentrate your attention to a certain degree you begin to select from the material before you. One point will be fixed in your mind with particular clearness and some other will be correspondingly discarded. In making this selection you will start to follow your own expectations and inclinations. Freud warns against this and suggests that if you follow your expectations you are in danger of never finding anything but what you already know.

The objective behind maintaining an evenly suspended attention is to in effect clear a space in the mediator’s mind so as to allow the new to come in - a space in which to be surprised.

Bion (1981) warns against developing an attachment to the need to understand as it can inhibit the professional being attentive and totally present in the here and now of the moment. He suggests that we need to experience something before we

can develop a knowing. Experience, he says, precedes thought. Because the experience is permeated with uncertainty there is a need to understand what is going on and an urge to try to clear up that uncertainty. However these drives impede the connection to the unfolding experience. He exhorts a quality of the mind that is openly receptive to the unknown.

- **Having achieved a state of reverie and an evenly suspended attention in the session how then do mediators build a relationship with the parties.**

The answer lies in the fact that the mediator and the parties share time and space together. Ogden concept of the 'analytic third', referred to above, in which each participant exists in his or her own subjectivity as well as experiencing a collective subjectivity through the relationships between them. Similarly in mediation all three parties jointly create a collective subjectivity experience although not identical for each. Because it is a shared experience all parties including the mediator add to or subtract to it from their conscious and unconscious thoughts and actions. The mediator is not a neutral participant in this interaction.

The suggestion is that the energy in the room is something more than the sum of the individual parts. It is the experience of this 'something' that provides a deep connection with the yet unrealised truth. The connection can also be expressed in the ancient concept of the Dao 道, the ten thousand things and becoming one with the Tao. It is also contained in the Christian concept of the Holy Spirit.

- **Having achieved a state of reverie, maintained an evenly suspended attention and remained present in the collective subjectivity of the experience then what?**

To practise as a mediator one still needs to be trained in mediation processes and to have a general understanding of communication, conflict and negotiation theory. However technical knowledge of a particular profession or field is static knowledge isolated from the here and now of the personal experience. To practise one has to continually overcome that knowledge so as to be able to engage in the here and now the moment.

To paraphrase Ogden - analytic learning is biphasic. First we learn mediation procedures and models. We look at the theory behind human behaviour

including the principle of encouraging parties to defer persuasion so that they can hear each other and achieve a form of attunement (Rapoport, 1960). We examine how to avoid what John Gottman calls flooding and thereby increase cooperation so that non-defensiveness, rapport, empathy and understanding can occur.

We can also study game theory and understand the differences between competition and collaboration as expressed in Adam Smith's dictum that: "*In competition, individual ambitions serves the common good*" as challenged by the Nash Equilibrium.

Nobel Prize winner John Nash used advanced logic and mathematics to examine situations in which parties in competition reject a strategy of co-operation that would benefit everyone and instead act independently in an attempt to maximise their own self interest. They quickly fall into a trap because if one party refuses to compromise it is not worth the other party giving way.

Nash postulated that a point of balance is quickly reached in which either side cannot independently escape without suffering a loss. He called this trap the Nash Equilibrium which he postulated was lying in wait for every situation of competition and conflict in which parties are unwilling or unable to communicate.

"Cooperation would lead to the best overall outcome in all ... cases, but Nash's Trap (which is now called the Nash Equilibrium) draws us by the logic of our own self-interest into a situation in which at least one of the parties fares worse but from which they can't escape without faring worse still. That is why it is such an effective trap. If we are to learn to cooperate more effectively, we need to find ways to avoid or escape from the trap." (Fisher, 2008)

We learn *negotiation* techniques including understanding the difference between positions and interests and the need to separate the people from the problem (Fisher Ury and Patton, 1981). We practise various mediation step-by-step models through simulated role plays.

Secondly, paraphrasing Ogden again, in order to practise as a mediator we have to be able to overcome all that we have learned in order to be free to create mediation anew with each client. These phases are in one sense sequential in that we have to know something before we can forget and overcome. But, in another sense, particularly after we have completed formal training, we are continually in

the process of learning to overcome what we have learned (Rooney and Ross, 2012).

The ancient Indian religious text, The Bhagavad Gita (Feuerstein, 2011), gives some guidance through the concept referred to as “The field”. The Field is drawn from chapter 13 of The Bhagavad Gita in Krishna’s advice to Arjuna when he was driving his chariot out between the two armies. It also appears in the book *The Legend of Bagger Vance* (Pressfield 1995) and the Robert Redford film of the same name.

The author Christopher Isherwood refers to the principle theme of the Gita about the nature of action. He states:

In general, people almost always act with attachment: that is to say with fear and desire. Desire for a certain result, and fear that this result will not be obtained. Attached action binds us to the world of appearance to the continual doing of more action. We live in a delirium of doing and the consequences of our past actions conditions the actions we are about to perform..... But there is another way of performing action; and this is without fear and without desire. The Christians call it ‘Holy Indifference’ and the Hindus ‘Nonattachment’.

There is a similarity between the reference in the Gita of performing action without fear and without desire and Bion’s reference to acting without memory and desire.

This concept can also be illustrated from a passage from the book version of in the *The Legend of Bagger Vance* (Pressfield 1995) in the exchange between Bagger Vance and Junah who was struggling with his golf swing. Junah was already nine strokes behind Walter Hagan and Bobby Jones in a match play golf tournament:

Jones and Hagan had teed off, lashing perfect drives down the fairway.

Junah asked “*what can I do, bagger? Tell me*”

The gallery turned now to Junah who still stood over his bag, his face inches from his caddies.

“*Who are you Junah? Nothing you call yourself can help you now. I have emptied you of all that. This match, this heat, this day has emptied you. All yourselves are exhausted and gone. Now hit the ball with what’s left*”

Junah’s glance was desperate.” *But there’s nothing left.*”

Vance nodded. “*Exactly*”

The Caddy held out the champion's driver.

"Remember the game is simple. The ball doesn't move. It simply sits and waits. Now strike it, Junah. Hold nothing back. Hit it with everything you have" (Pressfield 1995)

In the book and film Bagger Vance's (Krishna) instructions mean that Junah (Arjuna) should experience and identify with the field which underlies all creation, his cosmic Self, the level on which all life is connected, instead of relying on Junah's individual identity as a war hero and southern gentleman

Thirdly, having reached this state, how then do we go about navigating through our professional and personal life? In the Gita, Krishna explains to Arjuna: "You have control over your actions alone, never over its fruits." His advice is to transcend the field of duality such as, for example, black and white, right and wrong left and right, democrat and republican, good guys and bad guys and so on. This duality is an illusion because each is a composite of the same element only in a different arrangement. The boundary between them is an arbitrary line dividing into two what is really just one continuous field. It is proposed that you bring yourself from the field of multiplicity to that of eternal Unity. It exhorts the immense value of non-dualistic vision.

The following dialogue from the Robert Redford film *The Legend of Bagger Vance* actors Will Smith as Bagger Vance and Matt Damon as Junah provide a further description of The Field:

Junah is now 12 strokes behind Jones and Hagan.

As Junah reached for his 3 Wood from his golf bag Vance blocks him *"I think it's time"*

"Time for what?"

"Time for you to see the field".

"The field, I see the field. It's 445 yards long with a little red flag at the end and I am 12 strokes behind".

"That ain't it" Vance replied *"if you see the field you wouldn't be hacking at that ball like you were chopping weeds from under your front porch".*

"All right what is the field?"

"Fix your eyes on Bobby Jones. Look at his practice swing. Almost like he is searching for something. Then he finds it."

Watch how he sets it up right into the middle of it. Feel that focus. He got a lot of shots to choose from, duffs and tops and skulls. But there is only one shot that is his, in perfect harmony with the field. One authentic shot that is his shot. One shot that chooses him.

There is a perfect shot out there trying to find each and every one of us. All we got to do is get ourselves out of its way and let it choose us”.

As Jones stood addressing his ball Vance whispers “look at him, he in the field” Turning to Junah “you can’t see that flag as some dragon you have got to slay. You have got to look at it with soft eyes. See the place where the tides and the seasons and the turning of the earth all come together. Where everything that is, becomes one. You have got to seek that place with your soul Junah. Seek it with your hands, don’t think about it. Feel it. Your hands are wiser than your head ever gonnah be. I can’t take you there. Just hope I can help you find a way. It’s just you, that ball, that flag and all that you are”.

In line with this philosophy the mediator should not see the dispute as some dragon to slay. It should be looked at with soft eyes. The solution is out there trying to find each and every one of us. All we got to do is get ourselves out of the way and let it choose us. In some sense we mediators have to do that first and hope the parties follow our lead.

- **Having incorporated all of the above how then does the mediator make decisions about what to do in the mediation session.**

Decisions to act or not act at a particular point of time arise through the mediator being totally present in the moment sufficient to allow an intuitive thought to gestate. Often something emerges in that intuitive thought that is quite different from what is expected. It is often something that is incapable of being predicted.

These intuitive thoughts can produce a rich source of data which is immediate and specific to the parties at that particular point of time in the session. Like comedy, all mediator interventions rely on getting the timing right. Interventions are less effective if they are the product of mediator speculation, even if that speculation is drawn from a good pre-mediation hypothesis, extensive knowledge of theory and practical experience (Rooney 2008).

The word intuition is used here in its traditional dictionary meaning as an immediate apprehension of the mind without reason. In other words it comes from outside of ourselves and is not derived from our bodily senses or from any deductive rational understanding (Rooney and Ross, 2012).

It needs to be distinguished from Daniel Kahneman's adoption of Herbert Simon's inverted definition of intuition, which Kahneman refers to as '*Systems One Thinking*'. They define intuition to be a response drawn, not from outside the rational mind as with the traditional definition, but from within it as part of our normal mental life (Kahneman, 2011 p 237).

The rational mind is a useful tool to help us navigate through our rationally observed life. But it is only half the story. If we allow our rational mind to block out things that cannot be rationally proven and rely only on what it expects then we are condemned to never finding out anything other than what we already know. Like Kahneman with his fire fighter example, if your expectations are that there has to be a rational answer then if you look hard enough you will find nothing other than a rational answer.

Kahneman and Simon's particular definition of intuition contrasts with Ogden's (2015) assertion that intuition has its roots in the unconscious mind which is far richer than conscious thinking. He maintains that that there is a difference between conscious thinking and unconscious thinking. Conscious thinking is derived through the sense organs and includes gut feeling and instinct that are part of our DNA built up over time deal with woolly mammoths and the challenges of communal living.

Ogden states that practitioners must get away from conscious, sensory based modes of perceiving which draws the practitioners mind to conscious experience. Our memories and desires and the compulsion to understand are part of this conscious thought process. "*The unconscious is not a role of physical sensation. Physical sensation resides in the domain of conscious experience.*"

Unconscious thinking is an antidote to the addiction of over intellectualising problems rather than developing the ability to just sit with them through remaining totally present in the moment. Endless intellectualising drawn from the conscious mind paradoxically leads to a blockage and barrier to the absolute

alterity (the state of being other or different) of the world that lies beyond our knowledge and control.

- **Detaching from mediator neutrality and accepting the significant role the mediator plays in the process requires a re-evaluation of aspects of mediation training.**

I suggest the following:

1. There is a view within the various strands of mediation that its fundamental mission or purpose is to help parties who are in conflict. This applies for both the transformative mediation approach and the advisory or directive mediation approach, although they come at it for the different reasons. The former for self empowerment and the latter for providing a fix for the problem. However there is a real danger inherent in any attachment to the need to help.

Some people in the helping professions such as therapists and mediators can be drawn to these professions by the natural desire to help people. While this desire is admirable, it can have the unintended consequence of distorting our thinking process and thus our behaviour as professionals. Isca Salzberger-Wittenberg addresses some of these issues in her advice to social workers. She warns against this desire to help, and suggests that it must be tempered by what is realistic and beneficial to the patient. She submits that the need to want to help can lead to social workers seeking approval from the patient, in being reassured that they are providing something of value.

The focus thereby moves away from the patient's needs to those of the social worker. This can blur the professional distance that social workers, mediators and other professionals need to maintain when dealing with patients or clients, especially those who are in high conflict and emotionally charged disputes. It can lead to a more directive or parental stance, resulting in a more interventionist style (Rooney 2011).

A good example of how the need to help can lead to a directive and parental style of mediator behaviour can be seen in the "The Case of Willie" role-play by Donald Saposnek recorded for the Association for Conflict Resolution at the Academy of Family Mediators Annual Conference, July 6, 1988. It is instructive to compare Saposnek's parental style to the more intuitive approach by John Haynes

mediating the same role-play. These video tapes demonstrate the principle that how you think affects how you act.

2. There needs to be a reassessment of the appropriateness of reframing. Wilson (2014) likens it to a form of manipulation. She argues that as a result of the consequence of contemporary manoeuvring by the state and the media disputants may see reframing in mediation as a form of spin. She points out that it also cuts across the concept of mediator neutrality.

I can say that after 24 years of mediation practice I have not once used a reframe. I will track a conversation and highlight points by an inquisitive open question but will never consciously reframe it. Any reframe has to come from the parties first rather than from the mediator's desire to help or fulfil the mediator's need to find a solution.

3. There needs to be far more focus in mediation training on the importance of the pre-mediation conference. In my view the pre-mediation meeting with the parties and their attorneys is one of the biggest contributors to the success or otherwise of a mediation. It has far more impact and offers a far greater source of personal connection with the parties than the private meeting or caucus held during the mediation session.

4. There also needs to be a reassessment of the appropriateness of developing a pre-mediation hypothesis to be tested in the mediation. See examples of this approach from Christopher Moore and John Haynes (Rooney 2008).

The purpose of formulating and testing a hypothesis is to try to understand not only the problem but also a possible solution in advance so that it can be tested in the mediation. It is driven by the desire to gain an early understanding of the issues and possible options to help in the formulation of questions particularly in the more inquisitorial mediation approaches like the Milan model. However this need to understand can lead to the mediator asking closed questions in a bid to try to discover what they believe to be an existing truth that has not yet been revealed.

Bion (1970) asserts that there is no existing truth to be revealed, but rather a moving toward a yet unrealised truth. There is a subtle but important difference

between these two modes of thinking. This is because the experience comes first followed by the associated thought. If we reverse that order and direct our thoughts towards seeking out an answer before the experience then that mental approach will impede or reverse understanding as it unfolds in each moment.

However if we accept Bion's proposition that mediation (and life in general) is a movement towards a yet unrealised truth then our prejudices, bias' and preconditioning if unchecked will help co-create that truth or solution.

The pre-mediation hypothesis is an example of allowing our thought to precede the experience. This is an example of a mental attitude based on a presumption that there is an existing answer, truth or solution which the mediator only has to fossick about to uncover. This is at the heart of the evaluating mediation model. It is based on the belief that mediators can do the parties a favour by helping them find this hidden existing truth. It's like searching for some item that has been lost. It's out there somewhere. All we have to do is use our experience in similar matters and knowledge of the law to help the parties find it.

This mental attitude gives legitimacy to many mediators, especially those with a legal background, who see mediation as nothing more than a door of the court head banging exercise aimed at getting a quick and effective deal without all the emotional trauma (especially for the mediator) of a joint session.

The facilitative mediation model is more akin to the belief that the parties are moving towards a yet unrealised truth. That the truth will evolve out of the interaction between the parties. A truth that can be surprising and unpredictable.

The difference between the existing truth and the yet unrealised truth is at the heart of perhaps the biggest debate in mediation. The debate between the respective values of the facilitative and the directive/advisory mediation approaches.

The Challenge of Teaching What it means 'Not to Know'

The final challenge for the profession is how to go about teaching and training novice mediators to detach from their own memories, desires, the need to help and the desire to understand prematurely what is happening. How do you teach and

train mediators to overcome all their knowledge and understanding of mediation so as to be totally fresh and present in the moment.

The challenge is to teach and train mediators to become much lighter, more relaxed and less rigid in their thinking as practitioners. It is based on the paradox of working to overcome all that we have learnt about mediation without intellectualising (therefore relearning) the process. How do you teach someone not to know? Paraphrasing Ogden:

In sum, teaching mediation is a paradoxical affair; someone who is supposed to know teaches someone who wants to know what it means not to know.

Conclusion

I am not advocating that we be prejudiced, biased or immune to our preconditioning. I think we all recognise those dangers in mediators. The issue is how best to deal with them.

Neutrality has as many meanings as there are mediators and this I believe is the problem. I believe we should start with an acknowledgement that we are individuals who are naturally biased because of our upbringing, our life experience, our DNA and a myriad of other influences. Let us start from that position and work forward rather than starting from neutrality and work backwards.

I am not sure that the mediation profession's attachment to the term neutral is that benign. Rather than being an antidote to bias (Cobb and Rifkin) I see neutrality as more of a masking agent that can very easily mask our biases and preconditioning. In my view it impedes rather than assists our awareness (particularly with novice mediators) of these dangers.

Neutrality is a beautiful word that evokes warm feelings and goodness. The same applies to helping. A noble and beautiful word. What could be possibly wrong with wanting to be neutral and to help? Therein lies the hidden danger of these 'feel good' terms.

So my thesis is that the profession formally detach itself from the concept of neutrality as a starting point and instead start from the position that mediators are complex human beings with discrete professional skills and therefore are not neutral. It is from that position we can then really examine ourselves and the part our natural prejudices, biases' and preconditioning have on the mediation process

and outcome. It is a far more solid foundation to our professional practice than the vague theoretical concept of neutrality.

The purpose of this paper is to demonstrate that there is a body of learning derived from research, education and training going back to the earliest religious texts in the eastern and western traditions, ancient Greek philosophers, Shakespeare and the modern poets that attest to the personal power we exert as human beings.

That mediation is an honourable stand-alone profession with distinct ethical standards. That mediators hold themselves out to the public as possessing special knowledge and skills in a recognised body of learning derived from research, education and training and who are prepared to apply that knowledge and exercise those skills in the interests of others (Professions Australia).

The challenge for mediators is to work internally on ourselves for it is through this endeavour that we have the most profound effect on those around us both professionally and privately. We cannot afford to be blind to this power.

For mediation to reclaim itself as a profession it has to take off the mask of neutrality and reveal the power and influence of the person of the mediator in all its glory.

.....

English Citation:

Rooney, Greg, Rebooting Mediation by Detaching from the Illusions of Neutrality, Just Outcomes and Balanced Power (February 12, 2015). Available at SSRN:
<http://ssrn.com/abstract=2564035> or <http://dx.doi.org/10.2139/ssrn.2564035>

Russian Citation:

Greg Rooney. Perezagruzka mediatsii//Mediatsia i Pravo Mediation and Law. Intermediation and Conciliation, Moscow ,1 (39), 2016, pp. 50-69

Greg Rooney has been a practising mediator in Australia for 24 years. His professional background is in the law. He has, since 1995, taught mediation and ADR subjects at a number of Australian universities and private institutions. For the last 12 years he has mediated over 200 apologies and reparation payments for sex abuse claims against religious institutions. He is currently mediating apologies for victims of abuse within the Australian Defence Force under the Defence Abuse Response Taskforce set up by the Australia Government. www.gregrooney.com.au

He together with colleagues Margaret Ross and Barbara Wilson run, annually, a mediation workshop retreat in Tuscany, Italy, based on the theme: *“Moving the Focus from Mediating the Problem to Mediating the Moment”*. <http://tuscanymediation.com.au/>

REFERENCES

- Bion, W.R. (1970) Attention and interpretation. London: Tavistock. In Seven Servants (1977) New York: Jason Aronson 1970
- Bion, W. R.(1981) “Notes on Memory and Desire” (1967). In R. Langs (ed.) Classics in Psycho-Analytic Technique. New York: Jason Aronson, 1981
<http://braungardt.trialectics.com/sciences/psychoanalysis/bion/bion-memory-desire/>
- Baruch Bush RA and Folger JP (1994), The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass Publications, 1994).
- Baruch Bush RA and Folger JP, (2014) Reclaiming Mediation’s Future: Getting Over the Intoxication of Expertise, Re-Focusing on Party Self-Determination. Mediation futures project at mediate.com
<http://www.mediate.com/futures/article.cfm?zfn=BushFolgerFuture.cfm>
- Cheng J,Y,S. (1992) The Other Hong Kong Report 1992 Chinese University Press, 1 Jan 1992
- Cobb, S. and Rifkin, J. (2011) Practice and Paradox: Deconstructing Neutrality in Mediation Law & Social Inquiry, Volume 16, Issue 1, pages 35–62, January 1991
- Feuerstein, G. (2011) The Bhagavad – Gita - A New translation Shambhala, Boston & London 2011
- Fisher, L. (2008) Rock, Paper, Scissors – Game Theory in Everyday Life. Basic Books, New York.
- Fisher, R. Ury, W.L. Patton, B. (1981) Getting to Yes: Negotiating Agreement Without Giving In 1981 Hutchinson

- Freud, S. (1912) "Recommendations to Physicians Practising Psycho-Analysis". (1912). In R. Langs (ed.) Classics in Psycho-Analytic Technique. New York: Jason Aronson, 1981.
- Gottman, J.M. (2011) The Science of Trust New York W.W. Norton & Company 2011
- Haynes, J. and Charlesworth, S. (1996) The Fundamentals of Family Mediation. Sydney: The Federation Press, 1996.
- Isherwood, Christopher. (1944) The Gita and War. Bhagavad Gita: The Song of God. translated by Swami Prabhavananda and Christopher Isherwood. Vendanta Press 1944
- Jacobs, M. The Presenting Past. (1995) Milton Keynes: Open University Press, 1995.
- Kahnmenan, D. (2011) Thinking Fast and Slow. Allen Lane 2011
- Kay, J. (2011) Obliquity: Why our goals are best achieved indirectly Penguin Publishing Group
- Kressel, K. and Pruit, D. and Associates (eds.) (1989) Mediation Research: The Process and Effectiveness of Third Party Intervention. San Francisco: Jossey-Bass Publications, 1989.
- Lang, D. L. and Taylor, A. (200) The Making of a Mediator, Developing Artistry in Practice. San Francisco: Jossey-Bass Publications, 2000.
- Mayer, B.S. (2004) Beyond Neutrality, Confronting the Crisis in Conflict Resolution San Francisco: Jossey-Bass Publications, 2004.
- McTaggart, L (2011). The Bond - Connecting Through the Space Between Us Free Press 2011
- Moore, C. W. (1986) The Mediation Process. San Francisco: Jossey-Bass, 1986.
- Ogden, T. H. (1994) The Analytic Third: Working with Intersubjective Clinical Facts . The International Journal of Psychoanalysis, London, 1994
- Ogden, T. H. (2015) Intuiting the Truth of What's Happening : On Bion's "Notes on Memory and Desire. The Psychoanalytic Quarterly 2015 Volume LXXXIV, Number 2

- Oxford. (1964) The Concise Oxford Dictionary. Oxford: Oxford University Press,
- Pelled, E. (2007) Learning from Experience: Bion's Concept of Reverie and Buddhist Meditation. A Comparative Study. International Journal of psychoanalysis 2007 Dec; 88 (Pt6): 1507-26
- Professions Australia at <http://www.professions.com.au/defineprofession.html>
- Rapoport, A. (1960) Fights, Games and Debates Ann Arbor, MI: University of Michigan Press (1960).
- Riskin, L. L. (2008-2009) South Texas Law Review Vol 50:493 2008-2009
- Rock, E.M. (2004-2005) Mindfulness Mediation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice 6 Cardozo J Conflict Resolution 347 2004-2005
- Rollins, H. E. Keats, J. (1981) Letters of John Keats (Two Volumes). Cambridge: Harvard University Press, 1958 referred to in Grotstein, J. S. Do I Dare Disturb the Universe, London: Karnac Books Ltd, 1981
- Rooney, G. (2008). The Use of Intuition in Mediation. *Conflict Resolution Quarterly*, Volume 25, Issue 2, 239– 253.
- Rooney, G. (2011). Mediation as a Process for Healing. in Conflict Management in the Family Field and in other Close Relationships DJOF publishing 2011
- Rooney, G. and Ross, M. (2012) Shifting the Focus from Mediating the Problem to Mediating the Moment - Using Intuition as a Guide (September 1, 2012). Available at SSRN: <http://ssrn.com/abstract=2140220>
- Spanish Citation: - Rooney, G. and Ross, M. Un cambio de foco: de mediar el problema a mediar el momento. Uso de la intuición como guía”, Revista de Mediación 2014, vol. 7, No. 1, pp. 36-46
- Rosenzweig, P. (2007) "The Halo Effect, and Other Managerial Delusions". *McKinsey Quarterly* McKinsey & Company. 2007
- Reucassel, Craig – (2010) The Chaser Comedy Team. After dinner speech at the 10th Biannual Australian National Mediation Conference, Adelaide, 8 September 2010
- Salzberger-Wittenberg, I, (1970) Psycho-analytic Insight and Relationships (A Kleinian Approach) Routledge and Kegan Paul, London, 1970 p 4.

Symington, J., and Symington, N. (1996) The Clinical thinking of Wilfred Bion. New York: Routledge, 1996.

Taleb, N . N. (2007) The Black Swan: The Impact of the Highly Improbable Random House 2007

The Case of Willie - Three Mediation Approaches / Washington, D.C. : Association for Conflict Resolution, Recorded at the Academy of Family Mediators Annual Conference, July 6, 1988 <http://trove.nla.gov.au/version/33348977>

Wilson, B (2011). “(Naughty) Departures”’: Expertise, Orthodoxy and the Role of Theory in the Practice of Mediation. Conflict Management in the Family Field and in other Close Relationships DJOF publishing 2011

Wilson, B (09/21/2014). Revisiting Reframing: Mediation and the Impact of “Spin” Caribbean Law Online. The ADR blog
<http://www.caribbeanlawdigestonline.com/alternative-dispute-resolution-blog>