

THE 'NEUTRAL' MEDIATOR'S PERENNIAL DILEMMA: TO INTERVENE OR NOT TO INTERVENE?

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This article explores the vexed question of whether or not a mediator's intervention in the power relations of the disputants should be considered a sign of the mediator's departure from their neutral role in the process. It argues that such intervention should not be seen as automatically breaching the mediator's 'neutral' role because neutrality and power can only be appreciated as situated rather than fixed terms. By thinking of neutrality and power in this more nuanced manner, their meaning shifts from being understood in an absolute or universal sense to being dependent upon the individual parties and circumstances of the dispute. Such a conceptualisation of neutrality, influenced by postmodernism, would also give rise to the possibility of multiple meanings and truths being ascribed to the state of being 'neutral'. The result of this is to open up a space for the mediator to legitimately intervene in the process to avert or subvert what the mediator sees as a potentially unfair process for one or more of the parties without the mediator necessarily relinquishing their neutral status.

[W]hatever form power takes, dealing with power while maintaining neutrality places mediators in a double bind. Dealing with power relationships in order to ensure that mediation is fair, and being neutral, conflict with each other.¹

[M]ost mediators continue to claim that they are neutral, even though some also claim that they are able to do things that fly in the face of an asserted neutral persona. One of these is that mediators can redress power imbalances between the parties.²

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¹ H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221, 236.

² R Field, 'Neutrality and Power: Myths and Reality' (2000) 3(1) *ADR Bulletin* 16, 16.

I INTRODUCTION

The aim of this article is to explore the mediator's perennial dilemma of intervening in the power relationships of the disputants while remaining a neutral third party facilitator throughout the negotiation process. Facilitative mediators who intentionally seek to redistribute power cannot be said to be 'acting in a *strictly* neutral fashion'.³ This has led to the assertion that the mediator's neutral role places them in a 'double bind'⁴ whereby they 'must *choose* between claiming neutrality and using non-neutral interventions'⁵ to redress the parties' problematic power relations. The implication of such a suggestion is that a 'neutral' mediator cannot intervene in the process to deal with issues of power. It therefore places an ultimatum on mediators to either relinquish their neutrality by intervening, or retain their neutrality by not intervening.⁶ This article disagrees with this dualistic ultimatum and contests the notion that intervening to deal with the parties' power relations is inimical to the mediator's neutral role in the process. It recognises from the outset that concepts of 'power' and 'neutrality' cannot be universally defined because they must be viewed and understood as highly contextual phenomena.⁷ As such, it discourages all-encompassing conceptions and absolute formulations of neutrality and power that can be applied in every dispute the mediator is called upon to mediate, in accordance with postmodern approaches to mediation practice.⁸ Intervening in the process will only be regarded as a breach of the mediator's neutrality by those who seek to retain absolute concepts of neutrality and power.⁹ Such an absolutism acts to relegate the mediator's role to a passive facilitator of the negotiations.¹⁰ Mediators should not refrain from intervening in the process due to a misplaced fear that to do so would constitute a breach of their neutrality. Instead of being regarded as an automatic breach of their neutral facilitative role, the mediator's intervention in the power relations of the parties, within the framework of a postmodern understanding of neutrality, would open up a space for mediators to legitimately

³ A Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215, 221. See also: S Cobb and J Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16(1) *Law and Social Inquiry* 35, 45.

⁴ Taylor, above n 3, 232; Astor, 'Mediator Neutrality', above n 1.

⁵ R Field, 'Addressing the Neutrality Dilemma Through Ethics for a Mediation 'Profession'' (Paper presented at the National ADR Research Forum, NADRAC, Melbourne, 13-14 July 2007 (Emphasis added).

⁶ H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed, 2002) 152, 155; H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 1' (2000) 11(1) *Australasian Dispute Resolution Journal* 73, 79-80; Taylor, above n 3, 232; Cobb and Rifkin, 'Practice and Paradox', above n 3.

⁷ Taylor, above n 3, 220.

⁸ D Bagshaw, 'The Three M's – Mediation, Postmodernism, and the New Millennium' (2001) 18(3) *Conflict Resolution Quarterly* 205; D Bagshaw, 'Language, Power and Mediation' (2003) 14 *Australasian Dispute Resolution Journal* 130; B Gray, 'Mediation as a Post-Modern Practice: A Challenge to the Cornerstones of Mediation's Legitimacy' (2006) 17(4) *Australasian Dispute Resolution Journal* 208.

⁹ The traditional assertions of the mediator as a neutral third party come from the seminal works of J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass, 1984); and C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 1986).

¹⁰ See: D Dyck, 'The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Neutrality' (2000) 18(2) *Mediation Quarterly* 129; R Thirgood, 'Mediator Intervention to Ensure Fair and Just Outcomes' (1999) 10(2) *Australian Dispute Resolution Journal* 142.

intervene where the intention is to subvert an exploitative outcome. As a result, this would allow mediators to retain their 'neutrality', even if it means having to paradoxically treat the parties unequally so as to ensure just outcomes between them.¹¹

II RECOGNISING THE FLUCTUATING NATURE OF THE POWER RELATIONS BETWEEN THE PARTIES DURING THE MEDIATION

Mediators have found it considerably difficult and challenging to identify and recognise the operation of power between the parties during the mediation process.¹² Before exploring the contested concept of mediator neutrality as it applies to the situation where a mediator may be called upon to intervene in the process to avoid the process becoming inequitable or exploitative, it is first necessary to acknowledge the different forms of power which exist. This is because mediators 'need to understand power when [they] make decisions about which disputes are suitable for mediation, how a mediation is conducted and when it should be terminated'.¹³ Without an adequate theory of power to guide them in facilitating the process, mediators may fail to identify the complex and constantly fluctuating power dynamics that operate between the parties in practice as the parties negotiate a resolution of their dispute. In the absence of a sufficiently nuanced theory of power, mediators may fall into the trap of commodifying power as a force which one of the parties maintains throughout the entirety of the mediation. This view of power is commonly formulated in structuralist theories of power, in contrast to the postmodern and post-structural view of power as an elusive entity which ebbs and flows between the parties according to the subject matter being discussed by them.¹⁴ In contrast to the rigid classification of opposing forces of good/bad and right/wrong in positivist and modernist epistemologies, postmodernism rejects the existence of hegemonic explanations and understandings of knowledge and truth.¹⁵ Rather, postmodernism favours and argues for the existence of multiple truths or meanings of particular concepts derived from their local or situational contexts.¹⁶ Dualistic thinking is eschewed by postmodernism because it 'fails to recognise that reality consists of intermediate degrees, flexible borders, and ever-changing vistas'.¹⁷ Similarly, structuralist explanations of power as emanating from and oscillating around only one institution or person are challenged by post-structuralist rejections of any institution having the essence of being inherently all-powerful or all-powerless. Thus, a postmodernist and post-structuralist approach to power critiques the positivist and modernist claims of power inequalities or power imbalances between parties as simplistic because power is highly complex as it can manifest in many different and even contradictory ways.

¹¹ Astor, 'Rethinking Neutrality', above n 6, 73; Cobb and Rifkin, 'Practice and Paradox', above n 3.

¹² Astor and Chinkin, above n 6, 23.

¹³ H Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16(1) *Australasian Journal of Dispute Resolution* 30, 30.

¹⁴ Ibid 32. See also: J Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13(2) *Mediation Quarterly* 85.

¹⁵ Bagshaw, 'The Three M's', above n 8, 217-18, Bagshaw, 'Language, Power and Mediation', above n 8, 130-1; Gray, above n 8, 210-11.

¹⁶ Bagshaw, 'The Three M's', above n 8, 217-18, Bagshaw, 'Language, Power and Mediation', above n 8, 130-1; Gray, above n 8, 210-11.

¹⁷ M Del Collins, 'Transcending Dualistic Thinking in Conflict Resolution' (2005) 21(2) *Negotiation Journal* 263, 264.

Although Mayer's typology of power¹⁸ is not claimed as a postmodern account and is arguably structuralist¹⁹ in perspective, Mayer's description of the types of power dynamics can initially assist the dispute resolution practitioner to identify power as it plays out between parties negotiating the resolution of their dispute. Without going into detail about each of them here, Mayer comprehensively recognises 13 forms of power that a party in conflict with another may or may not possess to their advantage or disadvantage: formal authority, legal prerogative, information power, association power, resources, rewards and sanctions, nuisance, procedural power, habitual power, moral power, personal characteristics, perception of power and definitional power. Mayer's typology of power is instructive because it urges the mediator to focus on 'less obvious forms of power such as those derived from personal attributes such as self-assurance, being articulate, communication skills [and] endurance'.²⁰ Mayer's articulation of the varying forms of power may help practitioners to contextually identify the many different manifestations and sources of power between the parties during the mediation. However, Mayer's structuralist approach to power can be critiqued as being rigid because it 'seems to describe power as something durable, quantifiable, easy to identify and access'.²¹ A post-structuralist and postmodern account of power looks to the manifestation of power in the relationship of one party to another, rather than viewing power as a fixed entity which the parties either do or do not possess.²² For example, a party may appear to have many of Mayer's indices of power, as in the case of a wealthy corporate executive. Although such a person may be capable of exercising their power in respect of commercial and employment related matters, they may nevertheless find it impossible to exercise their power or negotiate in the context of an interpersonal relationship with a parent, child, spouse or sibling.²³

A postmodern and post-structural exposition of power, following Foucault, therefore moves us away from the oversimplified view of power as an inherently oppressive force that one party uses to dominate the other.²⁴ Post-structural and postmodern models of power urge us to see power as a fluid entity,²⁵ within these frameworks, it is possible to conceive of power being used positively in the sense of a party choosing not to exercise the power they might otherwise have in relation to the other party.²⁶ The challenge then falls upon the mediator 'to observe how and when parties choose to access power to

¹⁸ B Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass, 2000) 50-70. See also: B Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75.

¹⁹ Astor and Chinkin, above n 6, 148.

²⁰ Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 33.

²¹ Astor and Chinkin, above n 6, 148.

²² Astor, 'Some Contemporary Theories of Power in Mediation' above n 13, 34; Bagshaw, above n 8.

²³ For further examples of the situated nature of power in mediation, see Astor and Chinkin, above n 6, 162; Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 31-2; J Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 8(1) *Australian Journal of Family Law* 40.

²⁴ Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 34; Bagshaw, above n 8. See also: H Astor and H Marks, 'Power in Theory and Practice – The Example of the Australian Defence Organisation' (2003) 6(2) *ADR Bulletin* 23.

²⁵ Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 34; S Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139, 155.

²⁶ Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 34; Astor and Chinkin, above n 6, 149, 162; E Grosz, 'Contemporary Theories of Power and Subjectivity' in S Gunew (ed), *Feminist Knowledge: Critique and Construct* (1990) 59, 85.

assist the negotiations'.²⁷ While preferable to modernist and structuralist models, the adoption of postmodernist and post-structuralist theories of power does not excuse the reality that mediation will not always be a preferred method of dispute resolution.²⁸ For example, it may not be possible to transcend the breakdown in communication between some disputing parties, as in the classic example of a family mediation where the female party has been subjected to domestic violence by the male party.²⁹ It could be argued that in a situation such as this, it is not the parties who are the problem because they are either too powerful or too powerless. Rather, it is the mediation forum itself which is problematic because it does not adequately reflect the power relationships of the parties and can instead be used by the perpetrator as a tool for the further abuse of the woman by her ex-partner.³⁰ As Astor and Chinkin state, 'perpetrators of domestic violence may see mediation as another opportunity to exert control than as a venue for resolving a dispute'.³¹

III THE CONCEPT OF MEDIATOR NEUTRALITY

A *The 'Neutral' Facilitative Mediator in Theory*

Facilitative mediation provides disputing parties with a forum and a framework through which to resolve their dispute with one another with the assistance of a 'neutral' mediator.³² As facilitative mediation is underpinned by the interest-based bargaining style of principled negotiation,³³ parties are encouraged by the mediator to negotiate with one another not on the basis of their positions, but their underlying 'needs, desires, concerns, and fears'.³⁴ The role of the facilitative mediator is to 'oil the process of discussion between individuals in conflict'.³⁵ This process involves the mediator assisting the parties in their attempt to identify the disputed issues, develop options and consider alternatives,³⁶ without the mediator actually coming up with any options themselves for the parties. The facilitative mediator is said to only control the process of the mediation and not the content or outcome of the parties' dispute.³⁷ Indeed, mediation agreements will normally include a clause to the effect that the mediator is a 'neutral intervener'³⁸ and the mediator themselves will remind the parties that their role is to be neutral when the mediator makes their opening statement at the beginning of the mediation.³⁹ However, the peak Alternative Dispute Resolution (ADR) advisory body to

²⁷ Gray, above n 8, 214-15.

²⁸ Astor, 'Some Contemporary Theories of Power in Mediation', above n 13, 30; Astor and Chinkin, above n 6, 158-60.

²⁹ See: R Alexander, 'Mediation, Violence and the Family' (1992) 17(6) *Alternative Law Journal* 271; R Alexander, 'Family Mediation: Friend or Foe for Women?' (1997) 8(4) *Australian Dispute Resolution Journal* 255.

³⁰ S Gribben, 'Violence and Family Mediation Practice' (1994) 8(1) *Australian Journal of Family Law* 22; R Field, 'Mediation and the Art of Power (Im)balancing' (1998) 12 *QUT Law Journal* 264.

³¹ Astor and Chinkin, above n 6, 159.

³² Ibid 146; Astor, 'Mediator Neutrality', above n 1, 223.

³³ R Fisher and W Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Penguin Books, 1981); Folberg and Taylor, above n 9; Moore, above n 9.

³⁴ Fisher and Ury, above n 33, 40.

³⁵ J Wade, 'Strategic Interventions Used by Mediators, Facilitators and Conciliators' (1994) 5(4) *Australasian Dispute Resolution Journal* 292, 292.

³⁶ National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (Attorney-General's Department, 2003) 9.

³⁷ Astor and Chinkin, above n 6, 146; Astor, 'Mediator Neutrality', above n 1, 223.

³⁸ L Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 2nd ed, 2005) 30.

³⁹ R Charlton and M Dewdney, *The Mediator's Handbook* (Lawbook Co, 2nd ed, 2004) 293.

government in Australia, the National Alternative Dispute Resolution Advisory Council, avoids describing mediators as 'neutrals' or 'interveners' and instead emphasises the 'impartial' role of mediators.⁴⁰ Although the concept of impartiality is often seen as being synonymous with neutrality,⁴¹ it is sometimes distinguished from neutrality on the basis that it specifically relates to the need for mediators to guard against being biased against or in favour of either of the parties or in relation to a particular outcome.⁴² Importantly, the concept of impartiality reinforces the notion that is not the role of the mediator to be partisan or an advocate for either side and that mediators should therefore remain neutral as to both content and outcome.⁴³ The concept of impartiality also reinforces the mediator's neutrality and integrity by requiring the mediator to disclose to the parties any conflicts of interests they may have in relation to the resolution of the dispute.⁴⁴ Even the appearance of bias,⁴⁵ through the mediator's social, personal or financial connections with either of the disputants⁴⁶ would offend this principle.

Neutrality is a central defining feature of the classical method of facilitative mediation, which does not envision any advisory⁴⁷ or quasi-counselling⁴⁸ role for the mediator in relation to the content of the parties' dispute. Thus, the dilemma of theoretically reconciling neutrality with mediator intervention in the parties' power relations relates almost exclusively to problem-solving facilitative mediation. Evaluative mediators are sometimes viewed as being neither neutral nor impartial in the classical sense because they explicitly give the parties legal advice about the respective merits of their cases and the probable judicial outcome if litigation were commenced.⁴⁹ However, evaluative mediators are still regarded as being neutral and impartial since they do not theoretically display a preference for either party, or a particular outcome, but are instead guided by their interpretation of how a court would resolve the parties' dispute.⁵⁰ In contrast, there is no controversy regarding the lack of mediator neutrality in the recently-developed mediation models influenced by social constructionism and postmodernism,⁵¹ narrative and transformative mediation.⁵² These mediation models reject the need to have a

⁴⁰ NADRAC, above n 36, 3.

⁴¹ Astor, 'Mediator Neutrality', above n 1, 223.

⁴² Astor and Chinkin, above n 6, 150; Cobb and Rifkin, 'Practice and Paradox', above n 3, 41-2. Similarly, Boulle describes an 'impartial' mediator as 'fair, even-handed, objective and unbiased as between the parties': Boulle, above n 38, 35. 'Neutrality' has a much wider meaning: see the discussion in Part IV below.

⁴³ Astor, 'Mediator Neutrality', above n 1, 223.

⁴⁴ Ibid.

⁴⁵ Astor and Chinkin, above n 6, 150; Boulle, above n 38, 32, 35.

⁴⁶ Astor, 'Mediator Neutrality', above n 1, 223.

⁴⁷ NADRAC, above n 36, 9.

⁴⁸ For the distinction between mediation and therapy, see: J Kelly, 'Mediation and Psychotherapy: Distinguishing the Differences' (1983) 1(1) *Mediation Quarterly* 33.

⁴⁹ K Kovach and L Love, 'Evaluative' Mediation is an Oxymoron' (1996) 14 *Alternatives to the High Cost of Litigation* 31, 31; J Alfini, 'Evaluative Versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919.

⁵⁰ NADRAC, above n 36, 7.

⁵¹ D Della Noce, R Baruch Bush and J Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3(1) *Pepperdine Dispute Resolution Law Journal* 39, 48; J Winslade, 'Mediation with a Focus on Discursive Positioning' (2006) 23(4) *Conflict Resolution Quarterly* 501.

⁵² R Baruch Bush and J Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 1994); J Winslade and G Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass, 2000).

theory of neutrality or a detached third-party. Unlike problem-solving or solution-oriented facilitative and evaluative mediation, which focus on the parties' individual needs and problems, narrative and transformative mediators are primarily concerned with the parties' relationship with one another.⁵³ Indeed, settlement is not even the focus or goal of transformative mediation and is merely a product of the parties transforming their relationship with one another.⁵⁴

In transformative mediation, the mediator regularly intervenes in the process to encourage the parties to recognise each other's positions.⁵⁵ Where the parties reach an understanding of the other's perspective, an opportunity for empowerment and moral growth arises as well as the potential for a resolution of the conflict.⁵⁶ Intervention in transformative mediation is justified on the basis that entrenched conflict between the parties has led them to become self-absorbed and unable to see the other party's understanding of the dispute.⁵⁷ Mediator intervention is also central to narrative mediation, a model which remodels facilitative mediation as a process of storytelling.⁵⁸ Narrative mediators recognise that '[w]hen they talk, people are not only expressing what lies within but they are also producing their world'.⁵⁹ Conflict is an entirely inevitable by-product of the diversity of meanings we give to our human needs, interests and desires – and those meanings are constructed by the individual's particular socio-cultural positioning in the world.⁶⁰ The narrative mediator's role is to assist the parties in the deconstruction of their conflict stories to reveal (or externalise) those particular meanings or constructions which have contributed towards the development of their conflict.⁶¹ The parties, with the active participation of the mediator, then concentrate on destabilising narratives of mutual blame and accusation which emerge from these stories⁶² and work towards the reconstruction of a mutually preferred joint narrative which moves the parties beyond the 'grip of the conflict story'.⁶³ As the mediator's interests are 'thrown into the problem solving pot with the parties',⁶⁴ transformative and narrative models separate themselves from the theory and practice of conventional facilitative mediation. By adopting an extensively interactionist approach to managing

⁵³ Della Noce, Baruch Bush and Folger, above n 51, 49; Bagshaw, above n 8.

⁵⁴ Della Noce, Baruch Bush and Folger, above n 51, 49; Baruch Bush and Folger, above n 52.

⁵⁵ Baruch Bush and Folger, above n 52.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ S Cobb, 'Empowerment and Mediation: A Narrative Perspective' (1993) 9(3) *Negotiation Journal* 245. See also: J Rifkin, J Millen and S Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Conflict Resolution Quarterly* 151; S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 16(1) *Studies in Law Politics and Society* 69. Cobb's mediation method is not, strictly speaking, narrative mediation; rather it is the discursive practice of 'mediation as storytelling'. However, mediation as storytelling is subsumed in, and forms part of, Winslade and Monk's narrative mediation model: Winslade and Monk, above n 52; J Winslade, G Monk and A Cotter, 'A Narrative Approach to the Practice of Mediation' (1998) 14(1) *Negotiation Journal* 21, 24.

⁵⁹ Winslade and Monk, above n 52, 40.

⁶⁰ Ibid 41.

⁶¹ Cobb, 'Empowerment and Mediation', above n 58, 250.

⁶² Winslade, Monk and Cotter, above n 58, 26-7, 35-6.

⁶³ Ibid 39.

⁶⁴ Astor and Chinkin, above n 6, 152; Astor, 'Rethinking Neutrality', above n 6, 76; Baruch Bush and Folger, above n 52.

the dispute with the parties, 'the mandate to separate content from process dissolves'⁶⁵ for narrative and transformative mediators, as they 'recognise the inevitability of their impact on the content of the dispute'.⁶⁶ However, in contrast to narrative and transformative mediators, facilitative mediators are less likely to acknowledge that they, too, have such an impact on the process,⁶⁷ albeit to a lesser extent.

B *The 'Neutral' Facilitative Mediator in Practice*

Conceptualising the mediator as a 'neutral' facilitator in theory 'assumes that the mediator can act within the process without impacting upon it, whether by the intrusion of cultural, historical or ideological predispositions'.⁶⁸ There is empirical evidence to show that mediators who claim to practice neutrality are not actually doing so in practice.⁶⁹ In reality, the line between controlling process and content is blurred as mediators very often influence outcomes through the way in which they facilitate their mediations, including their use of strategic interventions⁷⁰ throughout the process. Indeed, growing⁷¹ numbers of facilitative mediators are recognising that 'almost every process intervention made by a mediator has an effect on substantive outcome'.⁷² As transformative mediators have pointed out, facilitative mediators cannot be strictly neutral because they are settlement-oriented and their interventions are geared towards solving the parties' problems rather than restoring or repairing their relationship with one another.⁷³ Silbey and Merry have shown that mediators who are more directive, by assisting the parties to define their dispute and generate options for its resolution, are much more likely than less involved mediators to generate settlement.⁷⁴ Furthermore, in addition to intervening, mediators can also control the process in more subtle ways that can have the effect of influencing the parties' settlement. For example, the mediator's selective facilitation of the process through their use of particular body language can have an encouraging or inhibiting impact on the parties' ability to confidently communicate themselves in the mediation.⁷⁵ Hence, mediators can 'covertly steer'⁷⁶ parties towards reaching particular outcomes by 'creating more opportunities to talk through [the mediator's] favoured options,'⁷⁷ thereby giving little recognition or emphasis to alternative options which the mediator may find undesirable. Similarly, mediators can also influence settlement through their use of strategic questioning, in

⁶⁵ S Cobb, 'Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice: Dialogue on the Practice of Law and Spiritual Values' (2001) 28 *Fordham Urban Law Journal* 1017, 1029.

⁶⁶ *Ibid.*

⁶⁷ Field, 'Neutrality and Power: Myths and Reality', above n 2.

⁶⁸ S Douglas, 'Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response' (2009) 20(1) *Australasian Dispute Resolution Journal* 56, 59.

⁶⁹ For example, see: L Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10(4) *Social and Legal Studies* 505; R Dingwall and D Greatbatch, 'Who is in Charge? Rhetoric and Evidence in the Study of Mediation' (1993) *Journal of Social Welfare and Family Law* 367.

⁷⁰ Wade, above n 35.

⁷¹ Boulle, above n 38, 40; Douglas, 'Neutrality in Mediation', above n 25.

⁷² B Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12(4) *Australasian Dispute Resolution Journal* 248, 249.

⁷³ Baruch Bush and Folger, above n 52.

⁷⁴ S Silbey and S Merry, 'Mediator Settlement Strategies' (1986) 8(1) *Law and Policy* 7.

⁷⁵ D Greatbatch and R Dingwall, 'Selective Facilitation: Some Observations on a Strategy Used by Divorce Mediators' (1989) 23 *Law and Society Review* 613.

⁷⁶ Astor and Chinkin, above n 6, 151.

⁷⁷ *Ibid.*; Astor, 'Rethinking Neutrality', above n 6, 74; Greatbatch and Dingwall, above n 75.

particular through their use of ‘leading and suggestive questions’,⁷⁸ to direct the parties towards solutions and answers for which the mediator has a preference.⁷⁹

Boulle has noticed an overall trend in the past decade of Australian mediators ‘becoming more interventionist’ and ‘less inclined to practice the minimalist intervention implied by the process/content distinction’.⁸⁰ This is especially so if the mediator is prone to taking a more activist role in the process because of the mediator’s interest in social justice,⁸¹ as opposed to the mediator who prefers a more passive and non-interventionist role and is willing to cede greater control of the process to the parties. North American commentators have noticed that mediators with a social science background, in contrast to those with legal backgrounds, ‘tend to be less facilitative during the bargaining stages’ of the mediation.⁸² It also appears that many mediators are prone to intervening in the process, regardless of professional background, because they have ‘a natural inclination towards improving the world through changing how people handle conflict and how they interact with each other’.⁸³

The need for mediators to ensure that their process ensures a fair outcome for both parties has been described as a ‘key skill’⁸⁴ which mediators must learn to progressively develop. Unfortunately, the theory and practice of neutrality does not currently provide for mediators to ensure fair outcomes for the parties because mediator intervention in the content of the negotiations is a breach of the facilitative mediator’s neutral role in the process. Facilitative mediators currently need a reworked theory of neutrality so that they can legitimately treat the parties unequally in order to paradoxically bring about a fair outcome between them. Cobb and Rifkin’s construction of neutrality as ‘equidistance’⁸⁵ can assist in this endeavour as neutrality reconceptualised in this way perceives ‘bias’ in positive terms as ‘the active process by which bias is [paradoxically] used to create symmetry!’⁸⁶ The result of not practising an active neutrality, by maintaining a strictly neutral and non-interventionist stance in the process is to give the party with a greater ability to negotiate for their own needs and interests an opportunity to obtain greater concessions from the other party.⁸⁷ However, ensuring a fair outcome for parties through intervening in the process can only come with experience and requires considerable practice because being able to adequately identify complex power relations between parties can be very challenging and may not always be apparent to even the most experienced mediator.

Mediators can also learn to be more perceptive about the fluctuating power relations between the parties by becoming aware of the different ‘stories’ and narratives being

⁷⁸ Wolski, ‘Mediator Settlement Strategies’, above n 72, 256.

⁷⁹ Boulle, above n 38, 133-6; J Haynes and S Charlesworth, *The Fundamentals of Family Mediation* (Federation Press, 1996) 206-7.

⁸⁰ Boulle, above n 38, 40.

⁸¹ M McCormick, ‘Confronting Social Injustice as a Mediator’ (1997) 14(4) *Mediation Quarterly* 293; I Gunning, ‘Diversity Issues in Mediation: Controlling Negative Cultural Myths’ (1995) 1 *Journal of Dispute Resolution* 55.

⁸² Taylor, above n 3, 220, 226-7; Dyck, above n 10.

⁸³ Gray, above n 8, 209. See also B Mayer, *Beyond Neutrality* (Jossey-Bass, 2004) 82-3.

⁸⁴ Astor, ‘Some Contemporary Theories of Power in Mediation’, above n 13, 30.

⁸⁵ Cobb and Rifkin, ‘Practice and Paradox’, above n 3, 43-5.

⁸⁶ *Ibid.*

⁸⁷ H Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part 2’ (2000) 11(3) *Australasian Dispute Resolution Journal* 145, 151.

told by the parties, particularly those which do not resonate in the dominant culture.⁸⁸ Again, this is something that will come with practice and will depend to a very great extent on the particular life experiences, values and beliefs of the mediator and the extent to which the mediator is aware of their own biases and prejudices.⁸⁹ A failure on the part of the mediator to understand stories that do not form part of the dominant culture can lead to the mediator failing to understand where a particular party is coming from.⁹⁰ The mediator may therefore fail to give recognition to or understand that party's particular position in relation to the dispute and may also fail to intervene in the parties' negotiations where necessary to avoid an inequitable outcome. The mediator's failure to recognise stories that are hard to tell would have the result of favouring the side whose account resonates with the dominant culture.⁹¹ Thus, when the mediator is unaware of their own prejudices or not open to diverse worldviews, the mediator is likely to reinforce the norms and values of the dominant culture,⁹² in the guise of neutrality, or their own subjective views of how the dispute should be resolved.⁹³

IV RECONCILING MEDIATOR NEUTRALITY WITH THE MEDIATOR'S INTERVENTION IN THE PARTIES' POWER RELATIONSHIPS

A *The Importance of Retaining a Theory of Neutrality for Facilitative Mediation*

The notion that the third parties who facilitate or adjudicate disputes must be neutral from the disputants is intrinsically embedded in western liberal notions of justice.⁹⁴ With the rapid absorption of mediation as an adjunct to the judicial system, participants may come to expect the same checks and balances in mediation in relation to impartial treatment. The growing institutionalisation of mediation⁹⁵ is especially evident with greater instances of court-ordered mediation and mandatory pre-trial mediation of family law disputes.⁹⁶ Mediator neutrality can therefore be seen as a counterbalance to judicial neutrality, with mediation gaining its legitimacy from its links with the formal justice system.⁹⁷ Douglas and Field, drawing from Mayer,⁹⁸ also argue that mediation 'may be less appealing to court administrators, the legal profession and government'⁹⁹ if the concept of mediator neutrality were abandoned. However, the fact remains that mediation continues to have fewer procedural safeguards than litigation and adjudication because mediation takes place in private and the mediation agreements

⁸⁸ Cobb and Rifkin, 'Neutrality as a Discursive Practice', above n 58; Astor, 'Mediator Neutrality', above n 1, 232-4.

⁸⁹ L Fisher, 'Working with Gay and Lesbian Partners – Process and Practice Issues' (2004) 15(4) *Australasian Dispute Resolution Journal* 273, 273.

⁹⁰ Cobb and Rifkin, 'Practice and Paradox', above n 3, 51-3, 61.

⁹¹ Ibid 51-3, 60-1; Astor, 'Mediator Neutrality', above n 1, 233.

⁹² Cobb and Rifkin, 'Practice and Paradox', above n 3, 51-3, 60-1; Astor, 'Mediator Neutrality', above n 1, 233.

⁹³ Bagshaw, above n 8.

⁹⁴ Astor, 'Mediator Neutrality', above n 1, 221, 236-7; R Field, 'The Theory and Practice of Neutrality in Mediation' (2003) 22(1) *The Arbitrator and Mediator* 79, 79.

⁹⁵ Astor and Chinkin, above n 6, 8.

⁹⁶ N Polak, 'No Longer Neutral: Practitioner Power in Compulsory (Family) Dispute Resolution' (2009) 20(2) *Australasian Dispute Resolution Journal* 88.

⁹⁷ Boule, above n 38, 31. See also: Field, 'The Theory and Practice of Neutrality in Mediation', above n 94, 89; K Douglas and R Field, 'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) *Murdoch University Electronic Journal of Law* 177, 182-3.

⁹⁸ Mayer, 'The Dynamics of Power in Mediation and Negotiation', above n 18.

⁹⁹ Douglas and Field, above n 97, 178, 182.

reached between the parties are rarely reviewed by an even-handed outsider to ensure their fairness and legality.¹⁰⁰ Furthermore, the consensuality of mediation, in the sense of the parties making a voluntary choice to participate in the process, is being eroded by those instances of mandatory pre-trial and court-ordered mediation.¹⁰¹ As consensuality and neutrality are the theoretical cornerstones for the legitimation of mediation,¹⁰² the need to strengthen the legitimacy of mediator neutrality in the face of a weakening theory of consensuality will be of continuing importance to the future relevance of mediation as a method of alternative dispute resolution. Reconceptualising mediator neutrality as a situated concept would also strengthen the concept of consensuality¹⁰³ because mediators would legitimately be allowed to modify their neutrality to deal with the parties' problematic power relations. This will be explored in the last two Parts which follow.

The need for facilitative mediators to have, and follow, a theory of neutrality is crucial in practice because the successful resolution of disputes can be said to hinge upon the mediator being seen as neutral by the disputants. The mediator's role in the process can never be equivalent to that of a lawyer representing their client's individual needs because the mediator's role does not allow them to be an advocate for either party, with good reason. A party who feels the mediator is biased would justifiably seek to withdraw from the mediation since that party would feel their interests are not being served or even recognised by the process.¹⁰⁴ This is perhaps the strongest argument against any doctrinal rejection of the concept of neutrality, even if it does not always happen in practice in the conventional absolute sense, because 'ultimately it will be the right of the parties to accept or reject mediator intervention'.¹⁰⁵ Charlton and Dewdney note the psychological value of mediators remaining as neutral as possible because 'achieving neutrality is essential if the trust of each party is to be gained and maintained'.¹⁰⁶ It is further argued that 'no amount of skills or strategies is likely to encourage resolution' of the dispute 'if trust is lost with a party because he or she perceives a lack of neutrality on the part of the mediator'.¹⁰⁷ Ultimately, a party can only withdraw due to a lack of mediator neutrality if they are aware the process is being facilitated in a manner which is adverse to their needs and interests.¹⁰⁸ However, most parties with capacity to negotiate effectively for their own needs and interests would have some sense of whether the mediation process is working effectively for them. If a party feels the mediator is being biased in the way they are conducting the process, that party will simply lose trust in the mediator. As 'mediation is built on trust',¹⁰⁹ a party

¹⁰⁰ Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 146; Astor, 'Rethinking Neutrality', above n 6, 73.

¹⁰¹ B Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213; Polak, above n 96.

¹⁰² Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 146; Astor, 'Rethinking Neutrality', above n 6, 73-4; Astor, 'Mediator Neutrality', above n 1, 222, 224. See also: C Harrington and S Merry, 'Ideological Production: The Making of Community Mediation' (1998) 22(4) *Law and Society Review* 709.

¹⁰³ Astor, 'Mediator Neutrality', above n 1, 224.

¹⁰⁴ B Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75, 78.

¹⁰⁵ Gray, above n 8, 219.

¹⁰⁶ Charlton and Dewdney, above n 39, 294.

¹⁰⁷ *Ibid.*

¹⁰⁸ Astor and Chinkin, above n 6, 147-8.

¹⁰⁹ K Brown, 'Confidentiality in Mediation: Status and Implications' (1991) 2 *Journal of Dispute Resolution* 307, 334.

who feels the mediator is not being even-handed, in the sense of treating the parties equally, 'will not disclose their true needs'¹¹⁰ any further. The mediation will have therefore been unsuccessful and the dispute would then need to either be re-mediated or litigation may need to be commenced.

B *Legitimate Mediator Intervention to Maximise Party Control and to Terminate the Process*

Mediators make assessments at intake as to whether or not disputants should be attending mediation on the basis of the parties' capacity and willingness to negotiate with one another.¹¹¹ Should it become clear to the mediator during the mediation session that a party cannot participate effectively due to a history of being subjected to violence, abuse or intimidation by the other party,¹¹² it will be incumbent upon the mediator to consider terminating the process. Mediators should therefore closely observe the parties' negotiations with one another and intervene to directly question the parties, whether in session or private caucus, to ensure the process is not being used against the interests of a party who is not capable of protecting their interests. The mediator will sometimes have no choice but to terminate the process or refuse to allow a particular settlement to be reached where it is contrary to law or endangers important community interests,¹¹³ as mediators and disputants still operate in the shadow of the law.¹¹⁴ However, the extent of the mediator's intervention in the process will be limited by the mediator's ability to 'read' the parties' spoken and unspoken language.¹¹⁵ A mediator who fails to recognise a party's relative inability to negotiate effectively with the other party can perpetuate an unfair process because this would prevent the mediator terminating the process, thereby endangering the disadvantaged or victimised party. As explored in Part II above, mediators can initially use Mayer's sources of power¹¹⁶ to guide them into recognising the various forms of power which may be at play, in practice, between the parties. The task for the mediator is to then see if the parties deploy this power in a negative or positive sense in relation to one another. The result of not understanding the operation of power leads to mediators conducting the process in such a way that fails to acknowledge the parties' problematic power relations with one another, thereby representing a lost chance to transform the parties' relationship with one another.

Mediators should therefore always be alert to those subtle instances where party power can be deployed in an abusive and exploitative manner. However, in order to be aware of these instances, mediators may need to intervene in the parties' negotiations and directly question the parties. It is for this reason that some commentators have stated that 'neutrality is perhaps better understood as the power that the mediator can access or choose not to access at any given point during the mediation'.¹¹⁷ Thus, a mediator may perpetuate an unfair outcome if they simply assume that both parties have had access to legal advice instead of inquiring into whether or not they actually have received such

¹¹⁰ Ibid.

¹¹¹ Astor and Chinkin, above n 6, 158-60.

¹¹² Taylor, above n 3, 232.

¹¹³ Mayer, 'The Dynamics of Power in Mediation and Negotiation', above n 18, 83.

¹¹⁴ R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

¹¹⁵ See above n 88 – n 93.

¹¹⁶ Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide*, above n 18.

¹¹⁷ Gray, above n 8, 216. See also: Douglas, 'Neutrality in Mediation', above n 25, 150, 157.

advice. The party with access to timely and helpful legal advice would be empowered in the negotiations as a result of having greater knowledge about how the dispute is likely to be resolved in court, thereby giving that party greater capacity to make judgments about their best and worst alternatives to a negotiated agreement in comparison to the party that has not had this opportunity. If the mediator inquires into whether the parties have each sought legal advice, mediators can advise a party that has not sought legal advice to do so, for example, by suggesting they seek advice from a community legal centre before participating in the mediation to maximise their chances of securing a fair resolution of their dispute with the other party. Similarly, where a mediator knows or is led to believe that a party is concealing relevant information from the other side which can lead to the other side agreeing to a settlement that is unfair (for example, the total extent of the marital assets in a divorce mediation),¹¹⁸ the mediator ought to intervene in the process. Such intervention could perhaps be in the form of private sessions, to remind the parties to negotiate in good faith and possibly even threaten to terminate the mediation if one of the parties seeks to use the process to secure an unfair advantage over the other side that a court would not tolerate.¹¹⁹

By failing to intervene on behalf of a party who is being disadvantaged by the mediation process, it can be said that the mediator participates in an unjust and exploitative process as the mediator fails to promote that party's self-determination.¹²⁰ Promoting the self-determination of the parties,¹²¹ through maximising their relative control of the process in relation to one another,¹²² is a legitimate principle of the mediator's role in the process. Where the mediator intervenes to maximise party control, such intervention should not automatically be regarded as compromising the mediator's neutrality. As neutrality can only be given meaning in the context of the relationship between the mediator and the parties,¹²³ the propriety of such an intervention can only be evaluated in that particular context. However, it may be that no amount of mediator intervention will be adequate to facilitate a fair resolution for a vulnerable party who is inarticulate or incapable of asserting their own needs and interests.¹²⁴ As mentioned above, mediation will unlikely be a forum where ongoing violence is a feature of the relationship between the parties because the forum could very well be used by the perpetrator of violence as another opportunity to harass the victim.¹²⁵ As Field has argued, the perpetrator will likely reject attempts by a 'neutral' mediator to intervene in the process to redress the complex power relations:

how realistic is it to expect a perpetrator of violence to accept a claim from mediators that even though they are actively assisting the victim of his violence, it doesn't mean they are taking a position on the outcome? It seems to me more likely that a perpetrator would

¹¹⁸ See: Haynes and Charlesworth, above n 79, 76.

¹¹⁹ S Roberts, 'Mediation in Family Disputes' (1983) 46(5) *Modern Law Review* 537, 540.

¹²⁰ Astor and Chinkin, above n 6, 163; Astor, 'Rethinking Neutrality', above n 6, 81; Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 145-6; Douglas, 'Neutrality in Mediation', above n 25, 139.

¹²¹ Taylor, above n 3, 221.

¹²² Astor, 'Rethinking Neutrality', above n 6, 81; Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 145-6; Douglas, 'Neutrality in Mediation', above n 25, 139.

¹²³ Astor, 'Rethinking Neutrality', above n 6, 81; Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 145-6; Douglas, 'Neutrality in Mediation', above n 25, 151-2; D Bryson and D Winset, 'A New Conciliation Model: Mediating Within the Law' in T Fisher (ed), *Proceedings of the 4th National Mediation Conference* (1998) 275,275.

¹²⁴ Field, 'Neutrality and Power: Myths and Reality', above n 2.

¹²⁵ Astor and Chinkin, above n 6, 159.

question the mediator's neutrality, question the process that he feels is suddenly working against him, and either sabotage the process, become violent or walk out.¹²⁶

Thus, mediators should not only refuse to mediate in such circumstances because of a concern about the ability of abused parties to effectively negotiate for their needs and interests with the other party. Mediators should also acknowledge that they can never legitimately act in an exclusively partisan or adversarial manner, blatantly disregarding their neutral role by constantly intervening for only one of the parties, in the same way that the parties' legal representatives can.

C *Towards a Situated Theory of Neutrality in Mediation to Legitimise the Practice of Mediator Intervention in the Parties' Power Relations*

Discourses on mediator neutrality are often constructed upon an unhelpful binary way of thinking about 'neutrality' as an absolute quality that mediators either do or do not have,¹²⁷ rather than viewing it as a complex and constantly fluctuating attribute similar to the Foucauldian exposition of power:

Thinking about neutrality in the same way that Foucault describes power is helpful in shifting the perimeters of the [neutrality] debate. Just as power cannot be owned, neutrality or impartiality should not be seen as qualities a mediator possesses.¹²⁸

By taking this approach to thinking about neutrality, which draws from post-structuralist thought and postmodernism, not only do we 'set mediators up to fail' and call into question the need to retain or abandon neutrality;¹²⁹ we also get around the problem of seeing mediator intervention in the power relations of the parties as something that is necessarily paradoxical to the mediator's role because this more nuanced approach acknowledges that the concept of neutrality is highly situated:

Neutrality is not an absolute in the sense of something achieved or failed, present or absent. It is complex, contextual and contingent. It has different practical meanings depending on the circumstances of the mediation.¹³⁰

Boulle also recognises that the concept of mediator neutrality is multi-dimensional and has 'several shades of meaning' and covers the following factors:¹³¹

- that the mediator has no personal views about or opinions on the dispute;
- that the mediator is disinterested (in the sense of the mediator having no interest of their own in the outcome of the dispute);
- that the mediator has no prior knowledge of the particular dispute;

¹²⁶ Field, 'Neutrality and Power: Myths and Reality', above n 2, 18.

¹²⁷ Astor and Chinkin, above n 6, 152, 155; Taylor, above n 3, 232; Astor, 'Rethinking Neutrality', above n 6, 79-80; Astor, 'Mediator Neutrality', above n 1, 227. As Cobb and Rifkin have noted, 'mediators talk about neutrality as an internal attribute of self that they either possess or lose': 'Practice and Paradox', above n 3, 45.

¹²⁸ Gray, above n 8, 215; Astor, 'Rethinking Neutrality', above n 6, 79.

¹²⁹ Astor and Chinkin, above n 6, 152, 155; Astor, 'Mediator Neutrality', n 1, 227; Astor, 'Rethinking Neutrality', above n 6, 80. For a critique which argues that mediators should entirely abandon neutrality, see: D Gorrie, 'Mediator Neutrality: High Ideal or Sacred Cow?' in L Fisher (ed), *FAMCON '95: Mediation Throughout the Family Life Cycle: Conference Proceedings* (1995) 30.

¹³⁰ Astor and Chinkin, above n 6, 153.

¹³¹ Boulle, above n 38, 31-2.

- that the mediator does not know the parties, nor has had prior association with them;
- that the mediator will not, directly or indirectly, sit in judgment of the parties;
- that the mediator will not use his or her expertise in the subject-matter of the dispute to influence the parties' decision-making; and
- that the mediator will conduct the process even-handedly, fairly and without bias towards either side.

A postmodern approach to neutrality would accept these multiple meanings, yet would not insist that each and every one of them are always present or consistently satisfied by the facilitative mediator throughout every dispute he or she is called upon to mediate. However, as Field has urged,¹³² in order for mediators to legitimately practice a situated neutrality, mediators must openly explain to the parties that this is their approach and style. The theory and semantics of a situated neutrality, influenced by postmodernism, may legitimise the practice of mediator intervention to address problems raised by the parties' power relations. However, it does little to enlighten the participants, who must ultimately be informed by the particular mediator what to realistically expect from the mediation before embarking on it.¹³³ An inequitable outcome can very well be perpetuated where vulnerable parties, unable to negotiate effectively for their own needs and interests, simply expect or assume the mediator will intervene to assist them in their negotiations with the other side, and the mediator does little to dispel such expectations where the mediator is unwilling to adopt an interventionist approach.

An example of the situated nature of neutrality can be given in relation to human rights conciliators and family mediators. The need to situate conciliators as operating within a specific statutory context allows conciliators to transcend the widely held view that they lack neutrality¹³⁴ since:

An insistence on a decontextualised concept of neutrality means that conciliators, by definition, are not neutral and consequently are not really mediators.¹³⁵

Conciliators working at statutory bodies such as the Australian Human Rights Commission and the various state-based Anti-Discrimination Boards clearly cannot be said to be neutral in the strict sense of being free from government policy because they would not allow outcomes that would contravene the spirit of the legislation they operate under and are charged with administering. Clearly these conciliators would be justified in intervening throughout the process to remind the parties of their statutory duties and obligations so as to avoid an outcome that further perpetuates an abuse by the respondents of the complainants' human rights. However, this does not mean that these 'insider mediators' (as some writers describe conciliators)¹³⁶ relinquish their neutrality since they can still be said to be neutral in other pivotal respects, for example, by giving both parties the opportunity to convey their views.

¹³² Field, 'The Theory and Practice of Neutrality in Mediation', above n 94, 83.

¹³³ Ibid 82-3; Douglas and Field, above n 97, 187.

¹³⁴ See: Bryson and Winset, above n 123.

¹³⁵ Astor, 'Rethinking Neutrality', above n 6, 78.

¹³⁶ D Bryson, "'Insider Mediators" and the ADR Practice of Spitting on the Spear' (2001) 12(2) *Australasian Dispute Resolution Journal* 89.

The same could be said about family mediators and dispute resolution practitioners who are trained, funded and accredited by the Federal Government.¹³⁷ Family dispute resolution practitioners would not allow disputing parents to make decisions that are contrary to established family law principles and decisions about the 'best interests' of children.¹³⁸ However, they would nevertheless attempt to retain their neutrality in relation to procedural issues such as hearing from both of the parties. The complexities of mediating family disputes has led some mediators to argue that they exercise a range of neutrality positions during the process, ranging from strict neutrality to an expanded neutrality depending on the subject of the negotiation.¹³⁹ Divorce mediation often requires mediators to facilitate disputes relating to the parenting of the couple's children as well as the equitable division of their assets and property. Taylor writes that family mediators tend to embrace a stricter neutral stance in relation to the couple's financial or property matters,¹⁴⁰ assuming both parties are equally informed as to the substantive issues involved and are competent to negotiate. In contrast, family mediators are regarded as taking a greater interventionist role on issues relating to post-separation parenting because 'parenting issues often create [greater] intrapersonal conflict for the clients'.¹⁴¹ The fact that mediators are 'more' or 'less' interventionist depending on the subject being negotiated does not mean that the mediators should be regarded as 'more' or 'less' neutral. A postmodern approach to neutrality (and power) does not ask questions such as 'How neutral is neutral?'¹⁴² Rather, it is interested in situating the mediator as well as the power relations of the parties in the context of the particular subject being negotiated in order to find meaning, rejecting the possibility of being able to provide fixed definitions or a universal answer to complex questions.

Another instance of the situated nature of neutrality can be seen in relation to Aboriginal dispute resolution. Many disputes within Aboriginal communities involve the selection of a respected community elder as the mediator who often knows one or both of the disputants involved.¹⁴³ Under western liberal formulations of neutrality, the involvement of the mediator in these circumstances would offend the principle of mediator neutrality because of the mediator's prior involvement with the parties and knowledge of their affairs.¹⁴⁴ Unlike the western model of problem-solving facilitative mediation, which emphasises an individualistic interest-based approach to dispute resolution, community-oriented approaches to Aboriginal dispute resolution often place importance in relationships.¹⁴⁵ The goal of restoring community harmony by repairing

¹³⁷ See: Australian Government, *A New Accreditation System: Family Dispute Resolution Practitioners* (Attorney-General's Department, 2006).

¹³⁸ S Charlesworth, J N Turner and L Foreman, *Disrupted Families: The Law* (Federation Press, 2000) 276-7.

¹³⁹ Taylor, above n 3, 226-7.

¹⁴⁰ Ibid 227.

¹⁴¹ Ibid.

¹⁴² Ibid 215. However, as mentioned above, the mediator's role still requires them to consider and recognise the interests and needs of both sides; mediators, unlike lawyers, are not partisan or advocates.

¹⁴³ L Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995) 79; M Sauve, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 80 *Aboriginal Law Bulletin* 10, 11; L Behrendt and L Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 65.

¹⁴⁴ Dyck, above n 10, 130-1.

¹⁴⁵ D Bagshaw, 'Mediation, Human Rights and Peacebuilding in the Asia-Pacific' in *Activating Human Rights and Peace: Universal Responsibility Conference Proceedings* (Southern Cross University Centre for Peace and Social Justice, 2008) 197. See also Sauve, above n 143, 10; Bagshaw, 'Language, Power and Mediation', above n 8, 132; Astor and Chinkin, above n 6, 171.

the relationship between the parties in Aboriginal dispute resolution processes¹⁴⁶ often requires mediators in this context to know the parties involved and to become actively involved in the process, for example, by suggesting and recommending particular options to resolve the dispute for the parties. Taking into account not only the needs and interests of the participants but also of the wider community has been identified as an important aspect of Aboriginal mediation.¹⁴⁷ Instead of being a rejection of neutrality, this should be seen as a reflection of the situated concept of neutrality since neutrality and impartiality are culturally determined and different cultures have their own varying concepts of neutrality.¹⁴⁸ While the mediator may have preconceptions of the individual parties involved, Behrendt and Kelly argue that they can still reflect their neutrality by allocating equal time for the parties to communicate with one another as well as by avoiding any verbal or non-verbal displays of favouritism towards either party.¹⁴⁹ Behrendt and Kelly also point to the history of Aboriginal conflict resolution in pre-invasion Australia to legitimise the current practice of neutrality in Aboriginal mediation involving a mediator who knows both the parties because:

an Elder from a neighbouring clan was not usually brought in to resolve conflict between members of another clan. Intra-clan conflict was managed *by the clan itself*.¹⁵⁰

It is possible to argue that, because a postmodern reconceptualisation of neutrality denies the concept any essential attributes or meaning, it is therefore unworkable in practice. Douglas and Field claim that ‘the flexibility of meaning and connotation [given to mediator neutrality] can be dangerous’ where ‘no explicit explanation of what is meant by neutrality is considered necessary’.¹⁵¹ Unfortunately for those who seek to understand neutrality in this concrete way, no universal definitions can be given to guide them because neutrality is contextually determined. Perhaps the only guidance that can be given is that neutrality cannot be understood in any absolute sense because its meaning can only emerge from the circumstances of the particular dispute requiring mediation. However, the parties’ power relations can be seen as a touchstone of the extent to which the mediator adopts an interventionist or non-interventionist stance in the process. As mentioned above in Part II, the parties’ power relations will also inform the mediator whether or not mediation is an appropriate forum for the disputants. Bagshaw regards the adoption of a postmodern approach to neutrality and power as liberating for both the mediator and the disputants because ‘essentialism can contribute to mediators’ categorising and labelling clients and their problems in a way that impedes opportunities for client-centred practice’.¹⁵² Astor and Chinkin also respond that a reconceptualisation of neutrality which rejects mediator neutrality in an absolute sense, as in postmodernism, actually makes the concept more complex and capable of responding to the particular needs and interests of the disputants:

¹⁴⁶ Bagshaw, ‘Mediation, Human Rights and Peacebuilding in the Asia-Pacific’, above n 145, 197. See also Sauve, above n 143, 10; Bagshaw, ‘Language, Power and Mediation’, above n 8, 132; Astor and Chinkin, above n 6, 171.

¹⁴⁷ Behrendt and Kelly, above n 143, 64.

¹⁴⁸ Astor and Chinkin, above n 6, 154; Astor, ‘Mediator Neutrality’, above n 1, 228.

¹⁴⁹ Behrendt and Kelly, above n 143, 64.

¹⁵⁰ *Ibid* 65.

¹⁵¹ Douglas and Field, above n 97, 181, citing B Wilson, ‘Mediation and Morality’ (2000) *Family Law* 853, 853.

¹⁵² Bagshaw, ‘The Three M’s’, above n 8, 216; Bagshaw, ‘Language, Power and Mediation’, above n 8, 139.

A nuanced analysis of neutrality does not invite us to wallow in a multiplicity of single instances without reference to any principles. It demands that we examine context and culture, identity and values and their impact on disputes and dispute settlement in order to distinguish appropriate from problematic mediator behaviour.¹⁵³

Thus, a postmodern rejection of the 'grand theory' of mediator neutrality as acceptable only in its absolute sense¹⁵⁴ is desirable because it accepts the situated reality of neutrality. It also simultaneously opens up a space for the legitimisation of mediator intervention to ensure fair outcomes where a party is at risk of being exploited by the other side in the process¹⁵⁵ as it allows the concept of 'neutrality' to have multiple valid meanings.

V CONCLUSION

The mediator's intervention in the parties' power relations should not automatically be considered a sign of the mediator's departure from their 'neutral' role in the process. In accordance with postmodern approaches to mediation practice, neutrality and power should only be understood as situated concepts. As such, they are incapable of universal application because their meaning can only emerge from the particular disputes in which they are located. Understanding neutrality in postmodern terms therefore allows us to regard the mediator's intervention in the process as *not* constituting a breach of their neutrality because the meaning of neutrality will have shifted away from being understood in the strict, dualistic sense of the mediator either being or not being neutral. In its place, neutrality would be recognised as having various shades of meaning, thereby opening up a space for the mediator to legitimately intervene in the process to avert a potentially unfair process on the basis of maximising the parties' relative control of the process.¹⁵⁶ However, the mediator must ultimately respect the parties' autonomy and self-determination¹⁵⁷ regardless of the style or styles of mediation they adopt and must not simply substitute what they would like to see as an outcome and give the parties the room to make decisions that are truly their own. In order to do this, mediators must acknowledge that every time they intervene in the process, or choose not to intervene, they are in effect possibly influencing the outcome of the parties' dispute,¹⁵⁸ which is something the parties must ultimately resolve themselves.

¹⁵³ Astor and Chinkin, above n 6, 156.

¹⁵⁴ Astor, 'Rethinking Neutrality', above n 6, 81.

¹⁵⁵ Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87.

¹⁵⁶ Astor, 'Rethinking Neutrality', above n 6, 73.

¹⁵⁷ Ibid; Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part 2', above n 87, 146; Douglas, 'Neutrality in Mediation', above n 25, 150-7.

¹⁵⁸ Taylor, above n 3.