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Neutrality in Irish mediation, one concept, different meanings

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Abstract

The Mediation Act 2017 places mediation at the heart of the civil justice system in Ireland and protects some of the key principles of mediation. This article discusses neutrality, one of these principles. The article shows how neutrality is discussed by two sets of mediation stakeholders (clients and mediators). Using two data sets, the article demonstrates that both groups recognize the influence of neutrality on the mediation process. At the same time, the article shows that the manner in which both groups discuss neutrality is different.

1 | INTRODUCTION

In the past 50 years, mediation has become an important part of civil disputing in many jurisdictions. In a range of settings, governments, judges, and other stakeholders have viewed mediation as a mechanism to increase the efficiency of court proceedings. In Ireland, the importance of mediation as a viable and effective alternative to court was underlined by the Mediation Act, 2017. The effectiveness of mediation, however, is only one part of its appeal. Mediation is often discussed as a voluntary, confidential, and neutral process where clients, rather than a judge or other third-party, can resolve their dispute on their own terms. These procedural elements also allow mediation to attend to procedural justice concerns (van den Bos, van der Velden, & Lind, 2014). In Ireland, the meaning of these mediation principles has been developed by mediation stakeholders including government, judges, lawyers, and mediation organizations. What has been missing from this discussion, however, is an understanding of how clients view mediation and the principles underpinning the process.

This article tries to fill this gap. By examining mediation from a procedural justice and a theoretical viewpoint and through an analysis of evaluations collected by the Family Mediation Service (FMS) and a survey of Irish mediators, the article explores how neutrality, an important procedural justice idea and a mediation principle, is discussed by mediators and clients.

The analysis shows that although both groups recognize the influence of neutrality, they use the concept in different ways.

The article is divided into three sections. Section 1 addresses neutrality. Often identified as a mediation principle and an important procedural justice concept, neutrality raises theoretical debate. This section discusses this debate. Section 2 discusses the Irish mediation landscape, with particular attention to the Mediation Act, 2017. Section 3 analyzes client and mediator evaluations of neutrality and its place in mediation. This shows that although both groups highlight neutrality, they emphasize the concept differently.

2 | NEUTRALITY IN MEDIATION

2.1 | Neutrality as a concept

Although often recognized as a component of mediation (Law Reform Commission, 2010), defining neutrality has been problematic. Wolski refers to neutrality and impartiality as, “imprecise and multidimensional” terms (Wolski, 2002, p. 8). Neutrality meant the mediator does influence the outcome of the dispute, with impartiality ensuring that the mediator does not favor either party. Astor (2007) viewed neutrality as including both concepts as mediators do not take sides or impose their resolution on the parties. She also outlined two further elements of the concept regarding conflicts of interest and freedom from governmental interference. Wing (2008) noted that neutrality was influenced by ideas of symmetry (in procedural terms) and impartiality.

Cobb and Rifkin (1991) discussed neutrality’s meaning emerging, “from a set of interrelated, interdependent, terms: justice, power, and ideology” (Cobb & Rifkin, 1991, p. 37). In a review of training materials, mediation texts, and mediator interviews, the same authors identified two conceptualizations of neutrality operating in the mediation field: neutrality as impartiality and neutrality as equidistance. Neutrality as equidistance sees the mediator maintain equilibrium between the parties, at times favoring one party and on other occasions, the other. Neutrality as impartiality acts as, “a weapon against ideology in mediation” (Cobb & Rifkin, 1991, pp. 41–42). This also causes practical difficulties as guarding against biases and ideology means monitoring unconscious processes outside the mediator’s control. A mediator who fails to control these processes, though, could, “harm the process” (Cobb & Rifkin, 1991, p. 43).

For Mayer, neutrality comprised different elements, “structure, behaviour, emotion, perception, and intention” (Mayer, 2011, pp. 860–861). Structural neutrality concerns mediator connections and conflicts of interest. Behavior neutrality looks at what a mediator does within the mediation. How do they manage the process and what actions do they take that might favor one party? Emotional neutrality concerns impartiality and a lack of bias, something that perception also deals with, by considering how the mediator’s actions are viewed. Intention is what a mediator tries to do, namely being, “fair ... evenhanded, and to act in a neutral manner without bias” (Mayer, 2011, p. 863).

Mayer also recognized that mediators necessarily affect the mediation process. For this reason, the idea that a mediator’s values or knowledge will not influence the process is naïve. Instead of thinking of neutrality in idealized terms, as a standard that needed to be reached, he argued that mediators should think about the role they are performing and their, “social responsibility” (Mayer, 2012, p. 812). Stulberg (2012) went some way to endorsing this idea, arguing that mediators needed to ensure outcome neutrality, with mediators structuring

the process as a justice event where parties could discuss issues and resolve the dispute on their own terms. Process neutrality, on the other hand, was not required, a distinction that Douglas (2008) also endorsed.

Susskind argued that mediators needed to, “ensure a fair outcome” (Mayer, 2012, p. 819). In this, the other stakeholder interests, not only the people attending mediation, needed to be represented in the dispute outcome, with these unrepresented groups being allowed to review and assess the agreement before settlement. To aid this process, a mediator, “can take responsibility for the quality of an outcome without speaking for a missing group” (Mayer, 2012, p. 819). Taking responsibility affects neutrality. Instead, as Susskind notes, they might, “ask leading questions, suggest ideas and options, or offer to carry a draft of an agreement to others who are not present and try to incorporate their reactions into a final version of the agreement” (Mayer, 2012, p. 819).

Cobb and Rifkin (1991) identified a similar requirement in the ethical code a mediator organization (SPIDR), which required neutrals to pay attention to any interests not represented in the process. When they identified such an interest, and the parties’ needs required it, the neutral needed to ensure the parties considered the interests were considered. This obliges mediators to be biased to represent all the interests affected by the mediation, affecting mediator neutrality. When outlining how this might work in a divorce mediation, in which a child of the couple refused to participate, Susskind (Mayer, 2012) raised some mediator approaches including suggesting that a *Guardian Ad Litem* be appointed to represent the child’s interests or suggesting that the child’s view be represented by a third party. In either case, the mediator plays a role in fashioning an outcome that accounts for the needs of all three parties (parents and child) instead of only concentrating on the parties in the mediation (the parents).

2.2 | The importance of neutrality

Although commonly accepted as an important idea, neutrality is also, “a highly debated and contested term” (Astor, 2007, p. 223). A further difficulty is that neutrality can operate as a, “folk concept,” viewed in terms developed through a “tacit understanding contained in (and by) a rhetoric about power and conflict” (Cobb & Rifkin, 1991, p. 37). Neutrality, then, may have one meaning for mediators who share this tacit understanding, but a different meaning for clients who do not. This is not simply a theoretical concern. The practical effects of neutrality, on mediation, stem from some distinct, but connected, ideas: neutrality’s effect on some disputants, the mediator’s effect on the process, and the procedural effects of neutrality.

A criticism levelled at mediation is that the process can place some disputants at a disadvantage. Grillo (1991) claimed that mediation places female disputants at a disadvantage by replicating existing power structures with inbuilt power imbalances. Other authors identified how mediation could impact other groups (Delgado, Brown, Lee & Hubbert, Delgado, Brown, Dunn, Lee, & Hubbert, 1985; LaFree & Rack, 1996; Baruch Bush & Folger, 2012; Delgado, 2017). Effectively dealing with these differences, so that neither party is placed at a disadvantage, could impact the mediator’s neutrality (Astor, 2007; Cobb & Rifkin, 1991).

Wing (2008) addressed the same concern from a different angle. She discussed how neutrality could privilege some parties in mediation. A reliance on neutrality, on the part of a mediator, could mean that those parties whose stories more closely aligned with a societies’ master narrative could win out. Parties with greater narrative power, then, perhaps based on language ability, class, race, or gender were better served by a mediation in which neutrality was viewed

as providing impartiality and equidistance. An overreliance on neutrality could disadvantage a party within the process. In either case, whether a mediator works to protect a party within the process, or affects a party by relying on their neutral role, the result is the same. Through their actions, the mediator influences the process and the outcome of the mediation.

This is the second issue with neutrality, mediators affect the mediation process (Cobb & Rifkin, 1991; Mayer, 2012). Although neutrality is required, mediators are not immune from prejudice or bias. Unlike other people, however, a biased mediator could place a disputant at a disadvantage. This concern is heightened, perhaps, because mediators do not always practice consistently. Mulcahy (2001) showed that what community mediators said and did sometimes differed. At times, mediators stepped into the process assuming, “their everyday personality” often because they were frustrated with a disputant and felt that assuming that personality was the best way to ensure that a resolution could be reached (Mulcahy, 2001, pp. 516–517).

Greatbatch and Dingwall (1999) also identified mediators who stepped into the dispute and affected the process. They examined the handling of domestic violence claims in divorce mediation. Although such claims were made in 15% of the cases studied, mediators tried to stop them being discussed by suggesting, “they lay beyond the scope of the sessions and/or shifting to different topics” (Greatbatch & Dingwall, 1999, p. 176). They also found (Greatbatch & Dingwall, 1989) that family mediators sometimes made suggestions to help disputants resolve their dispute, suggestions that were informed by the mediator’s view of what a worthwhile outcome would look like.

Astor’s (2007) claim that mediation neutrality is more important than neutrality in adjudication was based on the confidentiality of the process, and the lack of legal norms and rules underpinning its legitimacy. Mediations legitimacy, instead, rests on voluntarism and neutrality. This leads to another explanation for neutrality’s importance, namely, its procedural effects. Voluntarism and self-determination, often identified as a core principle of mediation (Green, 2010; Hanks, 2012; Hedeem, 2005; Quek, 2009; Sander, 2007) would be impacted if a mediator did not act neutrally (Izumi, 2010). The same principles enhance procedural control that can increase fairness judgments (Thibaut & Walker, 1978). Litigants exercise dispute control by choosing to use mediation and by developing settlement terms, which helps them experience a fairer process.

If a mediator allows one party to tell their story, without providing a similar opportunity to the other party, voice would also be affected. This requires a mediator to, “actively engag[e] in a process of facilitating the parties’ chosen outcomes” (Douglas, 2008, p. 151). Voice is an important procedural justice concept, which helps parties to feel that their views are respected (Welsh, 2001). When their opinion is heard, this feeling is enhanced, with the disputant feeling that their opinion is worthwhile and that they might influence the outcome of the process. This attends to instrumental and relational concerns that can influence procedural evaluations (Tyler, Huo, & Lind, 1999).

Instrumental concerns are practical. The disputant believes their input can affect the resolution process and the process outcome. Relational concerns, look at a disputant’s treatment, are their views heard and respected? Attending to instrumental and relational concerns helps people to experience a fairer process, especially as the ideas attend to different aspects of resolution procedures. Tyler et al. (1999) underlined this fact when they showed how litigant evaluations shifted during a dispute. When a process began, people focused on instrumental concerns. When a process ended, on the other hand, relational concerns were paramount.

Mediator neutrality can affect both sets of concerns. Neutrality ensures that the parties’ needs influence a resolution, rather than a third-party imposing a resolution. This attends to a

disputant's instrumental concerns. Neutrality also shows a disputant that they are being treated fairly, attending to relational concerns. If the mediator is not neutral, on the other hand, the process appears less fair, as well as making it more difficult for a mediator to build a rapport with the parties, a foundational activity of mediation (Kressel, 2006). In addition, disputant engagement in the process is unlikely if they understand that they are not being treated equally.

The link between mediation and justice also underlines neutrality's importance. If, as Stulberg (2012) claims, mediation is a justice event, should a mediator not ensure that justice is done? More generally, if mediation takes place in a court system, should justice be a concern of the mediator? A failure to reach a "justice" standard (however defined) could disadvantage a disputant. Reaching that standard, though, risks imposing a mediator's solution on the parties. This is a fine line to walk. Cobb and Rifkin's (1991) pointed to the difficulties that could arise when mediators attempt to maintain equidistance between the parties, by supporting a party on occasion. In a later analysis of community mediators, respondents walked this line by stressing the importance of disputant self-determination meaning they incorporated, "an understanding of the limitations of their role, and ... the primacy of ... the parties' self-determination" when dealing with neutrality in their practice (Douglas, 2008, p. 149).

For mediation to operate effectively, neutrality seems necessary. Nevertheless, neutrality raises issues that can impact mediation. Assessing these issues means that neutrality becomes an increasingly complicated concept. The client comments discussed later in the article show how family mediation clients identified this complicated concept. The discussion also outlines mediator views. Comparing both sets of responses, each group viewed neutrality in different ways. Before that discussion, however, the next part will discuss mediation's development in Ireland. In particular, the discussion shows how the ideas underpinning mediation, including neutrality, have been widely shared among professional stakeholders.

3 | MEDIATION IN IRELAND, AN EMERGING COURT ARCHITECTURE

3.1 | The legal framework

Before the Mediation Act (2017), mediation's use in Irish civil proceedings was ad hoc, a situation reflecting civil procedure reform more broadly. Unlike other common law jurisdictions (England & Wales being a good example) no widespread review of Irish civil disputing has taken place. Instead, reforms have proceeded on an ad hoc basis, often in response to actual, or perceived problems. Reflecting this ad hoc nature, mediation has been used in a range of settings all governed by different legislative rules (The Residential Tenancies Act, 2004, s 90; The Central Bank Act, 1942, s 57CA; the Workplace Relations Commission Act, 2015, s 39).

In family disputes, the FMS has provided mediation services to separating and divorcing couples since 1986. The work of the FMS was influenced by two pieces of legislation—the Judicial Separation and Family Law Reform Act, 1989 and the Family Law (Divorce) Act, 1996—which contained provisions concerning mediation. In the wider court system, too, mediation has become increasingly important. As a European Union member, Ireland legislated for Directive, 2008/52/EC governing dispute resolution in certain cross-border disputes (S.I. No. 209/2011). Order 69A of the Rules of Superior Courts (RSC), governing the Commercial Court, allowed mediation and other alternatives to be used in commercial disputes. Lastly, in

both the Superior and Lower Courts rule changes allowed ADR processes to be used to settle disputes (RSC, Order 99; RSC, Order 56A; RDC, Order 49A; RCC Order 19A).

In the Mediation Act, 2017, Ireland has developed a firmer idea of how mediation can be used. This new approach should make mediation a more effective part of the litigation process, thereby increasing its appeal for litigants. Another factor that could add to the mediation's appeal, are the principles underpinning the process. These principles have influenced Irish and international mediation for some time. Even as mediation was used in an ad hoc fashion, a few key principles supported the process in Ireland: voluntarism, confidentiality, and neutrality.

3.2 | A theoretical framework

The development of the Mediation Act, 2017 took several years and involved government, civil society, and industry stakeholders. The Law Reform Commission (LRC) examined how mediation could be used in 2010. In its final report, the Commission identified a number of what they termed, "General Principles of Mediation & Conciliation" (Law Reform Commission, 2010). These included voluntarism, confidentiality, neutrality & impartiality, self-determination, efficiency, and flexibility.

The commission (2010) recommended that participation in mediation should be voluntary. This view of mediation has continued. Section 8(3) of the Mediation Act states that, "the outcome of mediation shall be determined by the mutual agreement of the parties." Mediation stakeholders also stress voluntarism's importance. The Mediators' Institute of Ireland (MII) Code of Conduct and Practice (2009), for example, contains provisions governing self-determination and voluntarism.

In courts, voluntarism has remained important. Although courts *can* impose a costs penalty for a litigant's unreasonable refusal to attempt or use mediation, following a court invitation, no such penalty has been imposed (RSC Order 56A; RSC Order 99). Courts, instead, have focused on the voluntary nature of mediation. In *Atlantic Shellfish v Cork County Council*, Gilligan J specifically stated that mediation was designed, "to bring together the willing participants" who want to resolve their dispute ([2015] IEHC 570, at 18). On appeal, Irvine J, in the Court of Appeal, reiterated this fact.

Although these decisions, and the views expressed in legislation and stakeholder rules, do not show that Ireland is different from other jurisdictions, they do show that Irish mediation has been influenced by a shared understanding of how mediation should operate and work. Unlike other jurisdictions, where the bounds of mediation practice and the ideas underpinning that practice have been debated, Irish mediation has been marked by a general unanimity of ideas. This is shown, not only, by the treatment of voluntarism but also by the treatment of confidentiality and neutrality. The LRC (2010) emphasized the importance of confidentiality when they recommended that a mediation privilege be developed. In the Mediation Act, section 10 protects communications, notes, and records relating to mediation. Even before the enactment of the legislation, the stakeholder rules required mediators to protect confidentiality, with rule 37 to 47 of the MII's Code of Practice and Ethics protecting confidentiality.

Mediation is also viewed as a neutral process. Section 8(1) of the Mediation Act obliges mediators to identify, "any actual or potential conflict of interest" that could limit their ability to act as mediator. If they identify a conflict, they cannot serve as mediator. Section 8 (2) imposes an additional mediator obligation to, "act with impartiality and integrity and treat the parties fairly." The LRC (2010) described neutrality and impartiality as, "fundamental to the success of ADR processes" (LRC, 2010, p. 60). They concluded that both concepts

should be protected in any statutory framework governing mediation and that mediators should be required to disclose conflicts of interest to strengthen this protection.

As before, a mediator's professional obligations require them to act neutrally. Rule 56 of the MII Code (2009) requires mediators to act impartially, and defines impartiality as being free, "from bias or prejudice." Rule 57 imposes an additional obligation to, "remain neutral as to the content of the outcome of the mediation." Interestingly, both the MII and the LRC see neutrality and impartiality as distinct, yet related, concepts. The Mediation Act, on the other hand, frames the requirement for impartiality as a professional obligation. Not only must the mediation act impartially, they must also act with integrity.

Despite this, an understanding of the principles underpinning Irish mediation—voluntarism, confidentiality, and neutrality—has been shared by the various stakeholders in the mediation community and have been reinforced through a process of discussion. This has seen the Law Reform Commission, Government, and mediation stakeholders (such as the MII) focus on the importance that attaches to voluntarism, confidentiality, and neutrality and the effect of these concepts on mediation. The treatment of voluntarism by Irish courts and the understanding of confidentiality should the results of this process in action (Cheevers, 2018a, 2018b). Although the rules governing court-connected mediation are similar to rules in England & Wales, the approach of the Irish courts to their UK counterparts has been markedly different. There, similar rules have resulted in costs being imposed. What has been missing from this shared conversation and shared understanding is any discussion of how clients understand these principles and their influence on mediation, something this article tries to address.

4 | METHODOLOGY

4.1 | FMS evaluations

The first data source was client data from two evaluations collected by the FMS between 2006 and 2015: a short evaluation, with seven questions, and a long evaluation with 16 questions. A total of 1,147 evaluations were collected and analyzed (1,092 short, 55 long). Despite two separate evaluations being collected, they shared the same questions, shown in Table 1.

Respondents were self-selected and all the evaluations were anonymous. Copied into an excel spreadsheet, and checked for accuracy, by the researcher throughout 2017, the evaluations were transferred to NVivo and SPSS for qualitative and quantitative analysis. This article concentrates on the results of the qualitative analysis. Although the respondents were not asked if they reached an agreement, they were asked why they felt they were unable to reach an agreement. Two hundred and fifty seven respondents, out of a total of 1,147 respondents, completed an answer that explained why the process has not ended in agreement. On these figures, 890 (77%) clients who completed a short form reached an agreement and 47 (85%) clients who completed a long evaluation reached agreement. However, on these latter forms, another question asked respondents if they thought their agreement would last, with some respondents doubting the effectiveness of their resolution.

4.2 | Professional and client survey

Professional and client data were collected by a survey conducted in 2017. This examined respondent attitudes regarding the role of procedural justice concepts in Irish mediation.

TABLE 1 Family mediation service evaluation questions

Short evaluation questions	Long evaluation questions
1. Was information on mediation easily available to you? (Yes/No)	1. Was information on mediation easily available to you? (Yes/No)
2. What made you decide to go to Mediation?	2. What made you decide to go to Mediation?
3. Did you find the administrative staff of the Family Mediation Service helpful? (Yes/ No)	3. Did you find the administrative staff of the Family Mediation Service helpful? (Yes/ No)
4. Did you find the Mediation Process useful to you? (Yes) In what way(s) did you find it useful? Did you find the Mediation Process useful to you? (No) How do you think it could have been made more useful?	4. Did you find the Mediation Process useful to you? (Yes) In what way(s) did you find it useful? Did you find the Mediation Process useful to you? (No) How do you think it could have been made more useful?
5. Did you agree some issues or all issues between you?	5. Did you agree some issues or all issues between you?
6. Has the Mediation experience improved your way of communicating with your partner? (Yes/ No) In what way(s) has it improved communication?	6. Has the Mediation experience improved your way of communicating with your partner? (Yes/ No) In what way(s) has it improved communication? 7. Did Mediation help you to better understand the needs of your children at this time? (Yes/ No) 8. Was there a Direct Consultation Session held between your child/children and the Mediator? (Yes/No) Did your child/children express any views about the Direction Consultation Session? 9. Was there a Family Session held? (Yes/No) If yes, in what way did you find the Family Session useful? If No, in what way could the Family Mediation Service be made more useful? If agreement was not reached
7. If Agreement was not reached. Why do you think you and your partner were unable to reach agreement at Mediation?	10. Why do you think you and your partner were unable to reach agreement at Mediation? Reasons or Comment 11. Do you believe the process of mediation saved you money? (Yes/No) 12. Was mediation a better solution for you than going to court? 13. Do you believe the mediation agreement will last? (Yes/No) 14. Will you be happy to return to mediation if there are changes required? (Yes/No) 15. Do you think Mediation should be made compulsory in family law matters? (Yes/No) 16. Would you recommend the Family Mediation Service to a friend? (Yes/No)

The survey collected biographical information (gender, age group, reason for encountering mediation etc.), responses to a Likert scale assessing the respondents’ attitudes to procedural justice ideas in mediation, and a series of qualitative questions, on which the current analysis is based.

- How do you explain mediation to clients?
- Does mediation offer people anything else, not included in Question 9 (Likert statements)?
- Why did you choose this answer? (After the clients had answered whether they felt mediation was useful)

Respondents were self-selected. Mediators on the Commercial Mediator and Family Mediator lists of the MII were contacted as well as members of the Irish Commercial Mediators Association (ICMA). Surveys were also distributed at the MII Annual Conference and the ICMA Annual Conference. The final sample population contained 172 responses, shown in Table 2. The data reported here come from the mediator and mediator/other categories.

4.3 | Qualitative analysis

Both sources were analyzed using thematic analysis. This approach allows a researcher to use both preexisting coding schemes and to develop deductive codes based on the material analyzed (Braun & Clarke, 2006). In the analysis “neutral/neutrality,” “impartiality,” “balanced,” and “fair” were initially coded separately. Also included in the “neutral” code were references that showed a mediator acting in a way that concerned neutrality. An example was the following comment, “The mediator allowed my ex to insult me and for 6 sessions allowed him to drag up the past + old ground” (Lky-407, 2012, Female). As it became clear that clients were using the terms interchangeably all the ideas were placed into an overall “neutral-fair-impartial” code.

5 | NEUTRALITY—CLIENT AND MEDIATOR OPINIONS

5.1 | Client opinions

Clients discussed neutrality in different ways. The word “neutral” was used not only to describe mediators, but also the process, the forum, and the environment. A good example was provided

TABLE 2 Professional and clients survey response numbers

Respondent identity	Number of respondents
Client	4
Mediator	74
Lawyer (solicitor or barrister)	33
Mediator/ other (lawyer, client etc.)	39
Other	6
Missing	16

by a male client who identified mediation as a useful process because, “it provided a neutral environment to discuss and agree various issues” (Gal-13032, Male, 2015). Some clients also referred to mediators as neutral parties, neutral voices, neutral people, or simply neutrals. Impartiality was also used to refer to mediators. This term was used on one occasion (out of a total of 37 comments) to describe the mediation environment. A total of 59 people used fair to describe the process. Like neutral and impartial, this term was used to describe the process itself and the actions of the mediators within the process.

Despite the use of different terms and the importance of those terms in the theoretical discussion outlined earlier, it was not clear that clients focused on neutrality or impartiality as different concepts. In addition, it appeared that both concepts were important in how they influenced the effectiveness of the mediation process. Given this, the subsequent discussion will use the term neutrality throughout. An overall theme was developed to describe how clients understood neutrality.

Mediation is a process in which neutrality acts as an aid to resolution, where neutral mediators can play a supportive role, provided neutrality can be seen.

5.1.1 | Neutrality as “an aid to resolution”

Neutrality was discussed as an “aid to resolution” that played an instrumental role in the mediation process. Here, instrumentality meant not only the procedural justice idea discussed earlier (Shapiro & Brett, 1993), but also that the process was effective. A male client stated that mediation, “Made negotiations a lot easier & quicker on a level playing field, & under calmer conditions” (Ath-11772, 2014, Female). A second client said that mediation, “gave us an objective and impartial forum in which to sort out our differences and come to a mutually acceptable agreement” (Ath-11482, 2012, Male). For both clients, neutrality helped the parties to reach an agreement. A final respondent stressed this fact, “I would say that having a third party that is neutral was very helpful in reaching agreement & I may not have reached one otherwise” (Bla-1411, 2012, Female).

Client communication also made the process effective. For one client, mediation was useful because it, “[h]elped in ironing out the various problems.” The rest of the comment showed neutrality’s influence in this process, as mediation, “[h]elped to see both sides of the discussions” (Ath-11006, 2010). In a similar comment, a respondent highlighted how the parties, “[f]ound it much easier to discuss the issues involved with the help of a person who was totally neutral in the process” (Tal-12647, 2013, Female). A final client stated that mediation, “provided a neutral forum, where we could discuss the separation in a reasonable and casual manner” (Dub-17233, 2011). In these and other comments, neutrality influenced communications between the parties, enhancing the effectiveness of the process.

A second factor influencing the parties’ communication and the processes’ effectiveness was the mediator’s relationship with their clients, which was influenced by neutrality. Neutral mediators built a rapport with the parties and helped the parties to trust the mediator. A process identified by a female respondent who described her mediator as, “extremely helpful + patient. She was very understanding + didn’t put any pressure on either of us but let things develop at their own pace” (11670Wx, 2014). Later in the comment, she highlighted the effect of the mediator’s actions, “With [mediator’s name] help we found a safe space to come to an agreement. we both trusted her + she helped us greatly with good advice + guidance.” A second respondent

addressed similar issues, describing her mediator as, “extremely helpful, mindful of our circumstances and we were both listened to” (Cas-11,203, 2013, Female). A final client praised their mediator for, “remaining neutral and kept us on track. She dealt sensitively with our issues but was direct as well when necessary. Very good. Thank you” (11486Wx, 2013, Female).

Throughout the comments, neutrality was identified as an influential part of the process. Whether building a rapport with clients, providing an impartial forum in which communication could occur, or simply helping to make the process effective, mediator neutrality influenced the client's mediation experience. In another group of comments, the client's mediation experience was affected in another manner. In these comments, clients discussed mediators who supported them through the process, while still being neutral.

5.1.2 | Neutrality—“a neutral and supportive role”

Clients described mediators who assumed three distinct roles: calmer, educator, and neutral, a description mirroring some previous research. De Girolamo (2013) identified mediation as a negotiation setting where mediators assumed identities and changed, “the distance between themselves and parties,” with these actions helping to make the process effective (De Girolamo, 2013, p. 204). In the current analysis, the assumption of different roles aided effectiveness. “Calmer mediators” defused emotions and refocused on the issues that needed to be resolved. “Educator mediators” helped clients to think about the wider effects of their dispute (most notably on children) and sometimes provided options that could be used to resolve the dispute.

“Neutral mediators” were discussed in different ways. First, as described in the last section, mediators made the process effective. Another group of clients described mediators who rebalanced power dynamics (regardless of how they came about) that made the process effective. In this role, the mediator supported one client while remaining neutral. How best to rebalance power in mediation, has been questioned (Astor, 2007; Mayer, 2012). Although the present analysis cannot answer that question, it does show that clients recognized when mediators tried to do it. A female client was very explicit in outlining how mediator support helped her strengthen her claims and communicate her needs.

From the moment we separated until we started mediation I felt under a lot of pressure from my husband to agree to his terms of separation. But during the sessions he didn't get away with talking over me and making derogatory comments about me. Then he tried to be charming with the mediator and convince her that I was being unreasonable and difficult, but she stuck to the rules of mediation. Her impartial attitude made me feel safe again and I gained more confidence to stand up to him (Bla-1805, 2014).

Although the client identifies a mediator with an, “impartial attitude” the comment also shows a mediator supporting the client. For this client, acting impartially meant the mediator did not side with the other person in the dispute. This reassured the respondent that they were in a safe process. The last sentence, in particular, shows how the mediator's support affected the client, as she, “gained the confidence to stand up to him.”

A second respondent expressed similar ideas. She started by stressing that mediation was a neutral process, in that it, “Offered a neutral venue where we could talk” (Bla-1265, 2012). She followed, however, by discussing a mediator who supported her. She noted how she had,

“Always had difficulty pinning [Party name] down if needed to discuss something. Also he was more respectful with a third party present” (Bla-1265, 2012). Another person stressed that the mediator had helped the parties to settle their issues, with the support the client received allowing them to address issues with the other party.

I got to sit down with my ex in a safe/neutral location and discuss future arrangements regarding our son. I got the opportunity to talk without being shut dow [sic] by my ex and we were reminded and shown that our son is and should always be our main focus and not peronal [sic] differences between us (Cas-11471, 2015, Female).

Throughout these comments, although identified as neutral, mediators, especially for female clients, appeared to provide the support and encouragement that clients needed to discuss issues with their partner/ex-partner. Cobb and Rifkin's (1991) pointed to such mediator actions being a feature of neutrality as equidistance, where community mediators spoke of rebalancing power among the parties. For Astor (2007) these actions risked the mediator's neutrality, while Wing (2008) stressed that mediators needed to be more aware of how they acted in mediation, rather than simply relying on claims of neutrality as a protection for the parties.

In the evaluations, clients were aware when mediators acted for one party or the other. Although neutral, the comments show mediators who acted *for* one client and *against* the other. Nevertheless, the clients making these comments did not appear to be unduly worried by the mediator's behavior. If anything, the fact that the comments came in response to a question that asked the clients why mediation was useful, would tend to show that the effectiveness of the process was most important. Neutrality and the other actions of the mediator became important if they aided or hindered the process. Unfortunately, whether the other party saw things the same way is unclear as they did not complete evaluations.

In this way, mediators are walking the line between remaining neutral and supporting the parties, discussed earlier (Douglas, 2008). This is a fine line to walk, and some other comments show that not every client experienced neutrality like this. For these clients, support was the furthest thing from their mind. They identified a mediation process lacking support and neutrality.

5.1.3 | Neutrality—“what neutrality?”

Neutrality was not always identified or experienced by clients. A male client stated that he and his partner were unable to agree on a solution because the mediator placed, “... too much emphasis on one particular issue + was not neutral” (Rah-10714, 2014, Male). The same client continued their comment by noting that the, “Mediator was not strong enough in encouraging compromise on both sides.” A second respondent noted that she had not been able to reach an agreement with her partner because that party, “... didn't agree two [sic] a lot of things. He thought the mediator was on my side” (Sli-10730, 2014). Unlike the earlier comments, where clients stressed that the actions of their mediator helped make the process effective, the mediators in these comments appear to hinder the resolution of the dispute. Because one party felt that the mediator had taken sides, they were less inclined to compromise.

Some other clients identified mediators who hindered the process by failing to control it. When faced with opposing parties who were unwilling to listen, to discuss, or compromise, the mediator failed to make them listen, discuss, or compromise. These clients also felt that the

mediator should have encouraged the parties to settle. A client described this feeling, stressing that her husband, “was too bitter” (Bla-1557, 2013). This bitterness impacted the process, as, “he would not be honest about his redundancy or pension.” The lack of honesty, coupled with an unwillingness to, “answer direct questions” meant that the mediation process was unsuccessful. The blame for the ineffectiveness of the process, though, was not limited to her ex-husband.

The mediator should have been tougher on him to be truthful especially when he was caught out on some of the lies. I really though [sic] mediation would work for us but it requires two people to want it to work (Bla-1557, 2013).

Here, neutrality is unhelpful. Because of their neutral stance, the mediator was unable to help the disputants to settle their dispute. Even when the other party was lying, the mediator refused to force them to be truthful. In a second comment, another person identified a mediator who was *too* neutral, who hindered the process, and ensured that power imbalances continued.

As my husband (ex) has a strong personality, I expected the mediator [Mediation service employee name omitted], to help sort our situation out. He did not know how best to handle the issues that arose due to the separation + my husband took charge from day 1 (Bla-1306, 2012, Unclear).

It should be noted that although the number of clients criticizing mediators in this way was low (16 comments on the short evaluations and 2 comments on the long evaluation) the comments are still informative. Once again, effectiveness is important. Because mediators were neutral and refused to make a party engage in the process, the process was ineffective. Like the early comments, neutrality was a consideration in as much as it influenced effectiveness.

The evaluations show that clients, much like mediators, see neutrality as operating in different ways. The evaluations also show how theory becomes real. As they used mediation, neutrality stopped being a theoretical idea for these clients and instead became an idea with practical effects, whether good or bad. In the earlier theoretical discussion, mediators also viewed neutrality as encompassing various ideas. The next section of the article examines how mediators discussed neutrality in a survey that examined mediator attitudes toward procedural justice concepts in mediation.

5.2 | Neutrality and mediators—“principle, principle, principle”

Neutrality is neither an easy concept to describe nor a value-free idea and is imbued with particular cultural, social, and practical meanings (Mayer, 2004). A mediator or client's view of neutrality, then, is affected by a range of issues including their training, experience, and education. This certainly appeared to be the case for the FMS clients. Although they were aware of their neutrality, it was important as it influenced the effectiveness of the mediation process. Neutrality was assessed by how it impacted effectiveness. Mediators discussed and identified neutrality differently. Although they discussed mediation as an effective process, mediators also strongly identified as neutrals. Neutrality was discussed alongside voluntarism and confidentiality as important elements of mediation. This made *being* neutral and *doing* neutrality important, although neutrality could also help the parties to reach an agreement.

This was underlined by a male mediator who stated that he described mediation, “as a voluntary process where an independent, neutral third party helps people in conflict to have a constructive conversation about the issues that divide them and to make decisions on those issues” (04/04/2017, 56–70). Mediator views appeared to be informed by their training and professional background. This meant that they did not take sides, did not impose their solution on clients, and treated both sides equally. A mediator, who was also a client, stated that they described the process to clients as, “a voluntary process It’s confidential we don’t take sides nor judge, we manage the process and the clients determine the outcome” (05/10/2017, Female, 56–70). A male mediator/solicitor, similarly noted that, “It is a neutral independent third party, who’s there to facilitate the settlement of a dispute” (April 28, 2017, 25–40).

Here, neutrality is strengthened by stressing independence. Independence was reinforced in comments that emphasized the mediator’s facilitator role, with facilitation proving the mediator’s independence. These two concepts inhabited a reinforcing loop. Facilitation helped to prove the mediator’s independence and an independent mediator could act as a facilitator, free of any conflicts of interest or other pressures. Independence also made neutrality a practical reality. An independent mediator could not be influenced by either side or by a third party. As noted by a respondent, “You will not be forced into agreement and I will be independent and neutral. You must be willing to try and you must be willing to settle. I need your agreement on this before we start” (03/05/2017, Male, 41–55, Mediator).

Facilitation also proved that mediators were trustworthy. If the mediator facilitated the process, they would not try to influence their clients or impose a solution that the clients had not agreed.

This is a process to help you. In the course of the mediation process you will solve your problems your self [sic]. I as mediator will act as referee, you will adhere to the rules as laid down. When we come to an agreement that both sides are happy with, it will be but [sic] into writing and both sides will sign the agreed document (11/04/2017, Male, 56-70, Mediator).

Section 8(3) of the Mediation Act, 2017 requires this empowering process. Unless specifically asked, mediators cannot make suggestions to help parties resolve the dispute. The reasoning behind such rules protecting and encouraging voluntary participation, and neutrality, is that clients can agree a settlement that they design themselves. Theoretically, this should make a settlement more acceptable and more stable. This was stressed by a description of mediation as:

a confidential and voluntary process in which I as mediator facilitate a dialogue between you to help you to reach an agreement based on your own mutual needs and interests, if you wish to do so... I am entirely neutral to the outcome. It is up to you to choose what kind of agreement you want and you are free to be as creative as works for you in coming up with options to help you reach agreement (03/05/2017, Female, 25-40, Mediator).

This comment is a good example of how mediators discussed mediation. In addition to noting that mediation can be effective (“to help you to reach an agreement”), mediation’s principles are highlighted throughout (“Mediation is a confidential and voluntary process... I am entirely neutral to the outcome”). Neutrality is reinforced by stressing that the mediator, “facilitates a dialogue.” Finally, the mediator stresses that the clients will decide the outcome of the dispute (“It is up to you to choose what kind of agreement you want”).

Besides reinforcing the mediator's trustworthiness, references to neutrality and facilitation pointed to the importance of neutrality and the other principles underpinning mediation for mediators. These principles, regularly mentioned, were not simply important because they helped disputants to resolve their disputes. The focus of many comments, pointed to mediation being a process that was voluntary, confidential, and neutral. Although the comments discussed effectiveness, the focus of mediators was different from clients. Whereas clients focused on effectiveness first, mediators generally focused on the principles of the process and then effectiveness.

Whether the descriptions reflect how mediation is practiced is unclear. Mulcahy (2001) showed that mediator statements regarding neutrality were not always replicated in practice. The survey, unfortunately, cannot show if this is also true for Irish mediators. Some responses in a series of semi-structured interviews, though, suggest that Irish mediators are not radically different from their UK counterparts. One respondent discussed the mediator's role in the following terms.

Preparation is key... you need to ensure as the mediator... that you talk to both sides... You need to ensure that if you can't get a face to face, that you're talking to the client, as well as the lawyer. Cause you need to know what are the obstacles to settlement and you need to get, you need to buy some... what's the word, trust... successful mediation is all about trust. Interestingly, people sometimes overegg the whole empathy point, empathy can be important but it's by no means the only thing. Sometimes people need to be encouraged, sometimes they need to be cajoled, sometimes they need to be given a hug, and you need to know the difference. And sometimes, you need to stand up to people and say, "In all my years of experience... you will be in difficulties if you proceed along this line." They have to hear it from somebody, and if they don't hear it, big deal, that's what they're paying you for... (Robert, Profession and location omitted for Confidentiality Purposes).

Here the mediator stresses their neutral role ("you talk to both sides") while recognizing that trust needs to be established ("successful mediation is all about trust"). Nevertheless, they also stress that making the process effective means approaching clients in different ways, sometimes confronting them with hard facts. This would appear to show a mediator veering from a neutral role into one like De Girolamo (2013) identified, where the mediators increase or decrease the distance between themselves and a client. Even in this situation, though, the clients still control the process, thereby protecting voluntarism and, arguably, neutrality ("if they don't hear it, big deal"). A second mediator also discussed how neutrality could affect mediation.

[T]here has to be an empathy by the mediators, albeit, that we remain neutral... and then the other thing that comes through with the mediation process if they're... having regard to the ground rules, which they sign up to, a respect comes through... And there's not this tension of the courtroom. Cause we're not... we're... we're all there, in this room that and they realize that the mediators are neutral ... I mean the neutrality is a huge aspect of things. There's no, you know, coming down on one side or the other, and I think that brings a calmness... cause they realize, you know, that they can say... well within reason, I mean only the other day after six sessions, words were being used and my co-mediator and I said, "Hold on a second, have a look at these ground rules that we... you cannot be you know, if you wish to use that sort of language, sorry we have to discontinue" (Laura, Profession and location omitted for Confidentiality Purposes).

Here, neutrality is an important part of a rule-based process where the ground-rules (agreed by the parties) allow the mediators to confront a party. Some of the client comments, discussed earlier, identified mediators doing something similar by questioning one party and supporting the other. In both interview comments, neutrality is more nuanced than in the survey responses. In each case, the mediator responds to the situation before them, rather than their theoretical understanding of what neutrality means and how it should operate.

6 | CONCLUSION

Nonetheless, neither interview comment reflects how mediators reported describing mediation to clients. Those descriptions often discussed mediation in terms of the principles underpinning the process, including neutrality. Although mediators recognized that mediation can help to resolve disputes, the process itself and any resolution that resulted were framed by voluntarism, confidentiality, and neutrality. This raises two connected questions. First, does it matter if mediators describe mediation one way and do mediation another? Second, if mediators are attempting to encourage engagement in mediation, is this the most effective description?

6.1 | Does it matter?

As the earlier theoretical discussion showed, neutrality is difficult to define and is imbued with social, cultural, and theoretical meanings that clients might not understand. Even if we use a common theoretical understanding and say that neutrality is underpinned by ideas of impartiality and equidistance, what does this mean? For the FMS clients, it seemed that neutrality was a concept that equated with ideas of fairness. Although different terms were used, it was not clear that clients were distinguishing between the theoretical concepts underpinning neutrality. Instead, it appeared that clients viewed neutrality as fairness between the parties (i.e., that no party was allowed to hog the limelight) and the mediators did not take sides.

In what Cobb and Rifkin (1991) termed the, “paradox of neutrality” mediators engage in a neutral process—implying detachment—which also requires the mediator’s active input. The need to balance neutrality and involvement sees the mediator shift their place within the process. By relying on impartiality and equidistance, mediators start by describing themselves as, “two neutral people” and people who were, “not about to judge or take sides or anything like that” (Rifkin, Millen, & Cobb, 1991, p. 157). As the case progresses and the parties’ stories are discussed, the mediators’ actions provide support to the parties within the process. De Girolamo (2013) identified a similar process, with the mediator reducing or increasing the distance between themselves and the parties. In both studies, the mediators’ actions were designed to support or challenge clients, to make mediation effective.

Wing (2008), on the other hand, criticized a reliance on neutrality, founded on notions of impartiality and equidistance, as a basis for fairness in mediation. If the privilege of certain disputants was not recognized, neutrality could mean that other disputants could be placed at a disadvantage. In cases where one party tells a story conforming to a “master narrative,” while the other party tells a story based in a counter-narrative, neutrality could lead to the master narrative influencing the mediation discussions and the process outcome. Greatbatch and Dingwall (1999) showed how such narratives could influence family mediation where mediators suggested that domestic violence claims remained outside the scope of the mediation. Smithson,

Barlow, Hunter, and Ewing (2017) also discussed family mediations where clients tried to assert, “the demonstrable moral order” informing a relationship (p. 189). Mediators, in this case, referred to the common mediation narratives around turn-taking, respect, and so forth.

In all these cases, although mediators speak of neutrality (with the attendant ideas that term implies) the effect of their actions mean that some clients do not experience a neutral process. The current analysis shows that at least some FMS clients saw this paradox and recognized when their mediators deviated from a neutral script. This was particularly clear in two sets of responses. Those of clients who pointed to mediators that were, “... not neutral” (Rah-10714, 2014, Male) and those clients who discussed mediator support. For the first set of respondents, the mediator’s actions were not effective. For the second group, the mediator’s actions helped to make the process more effective. Although the results of the mediator’s actions were different, the fundamental point remains, clients were told one thing (that they were taking part in a neutral process), but experienced something else.

6.2 | Is this the most effective approach?

Stokoe (2013) showed that neutrality played an important role in how mediators described and sold mediation. When mediation was described as a neutral and impartial process, with mediators exhibiting impartiality in their discussions of a client’s case, the client was less likely to use mediation. If the mediator explained the process differently, by emphasizing with the client, the client was more likely to use mediation. In short, “the impartial ethos of mediation was found to be in conflict with what the callers want: someone to be on their side” (Sikveland & Stokoe, 2016, p. 252).

The problem was that mediators focused on what they found important. Mediators focused on neutrality because they identified neutrality as being important. This was not the same for the people using the process. The most successful calls were those where the mediator explained, “the process of mediation rather than its philosophy” (Sikveland & Stokoe, 2016, p. 252). In these interactions, mediators described the process and showed how it could help clients, rather than describing mediation in philosophical terms. This helped to overcome an initial reluctance to use mediation. The survey descriptions share something with some of Stokoe’s discussions (2013). Mediation was described in terms of the philosophical ideas and the principles underpinning the process—voluntarism, confidentiality, and neutrality. These concepts made mediation different. The frequent references to the principles and their place within mediation showed that they were important because they said something about mediation, how the process worked, and, by extension, the mediators themselves.

This article also offers another view of this engagement process. Although based on post-mediation evaluations, evaluating family, rather than community mediation, the analysis tends to support the earlier findings. Clients used effectiveness to evaluate mediation. The important question was whether mediation helped clients to resolve the dispute. The philosophical ideas underpinning the process came into play after this analysis was made. This finding is probably not unexpected. The majority of clients using mediation are unlikely to be mediators and probably have no philosophical attraction to mediation, one way or another. Instead, they are using the process to resolve a dispute. If mediation can help to resolve the dispute, then it is useful. If it cannot, it is no better or worse than any other resolution process. Unlike mediators, the principles underpinning mediation were important for clients as they related to effectiveness. If a settlement was reached, clients identified neutrality as aiding this agreement. If an agreement

was not reached, neutrality had not worked as intended. In either case, effectiveness came first. Only after this assessment, was neutrality relevant.

The research presented in this article tends to support the idea that discussing mediation in philosophical terms is not the most effective way to enhance mediation rates. The results suggest that first and foremost the effectiveness of mediation should be stressed. When discussing mediation with their clients, as required under the Mediation Act, 2017, lawyers should stress the effectiveness of the process. Effectiveness should also be stressed in publications highlighting mediation, while recognizing, of course, that mediation is not a panacea.

To aid effectiveness, more attention should also be paid to preparing disputants to take part in mediation. This work, making sure that people have their needs identified, are ready to communicate with the other party, and ready to compromise, is a key part of the mediation process. Lawyers and mediators should ensure that their clients understand that mediation needs these things to be in place. Discussing mediation in these terms, highlighting effectiveness, while using the principles underpinning the process to bolster these effectiveness claims, may help to provide clients with a fuller picture of what mediation is, what it can do, and how it can be used.

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