

# EMPATHY, NEUTRALITY AND EMOTIONAL INTELLIGENCE: A BALANCING ACT FOR THE EMOTIONAL EINSTEIN

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*Emotions play a central role in mediation as they help to define the scope and direction of a conflict. When a party to mediation expresses (and hence entrusts) their emotions to those present in a mediation, a mediator must do more than simply listen - they must attend to these emotions. Mediator empathy is an essential skill for communicating to a party that their feelings have been heard and understood, but it can lead mediators into trouble. Whilst there might exist a theoretical divide between the notions of empathy and sympathy, the very best characteristics of mediators (caring and compassionate nature) may see empathy and sympathy merge - resulting in challenges to mediator neutrality. This article first outlines the semantic difference between empathy and sympathy and the role that intrapsychic conflict can play in the convergence of these behavioural phenomena. It then defines emotional intelligence in the context of a mediation, suggesting that only the most emotionally intelligent mediators are able to emotionally connect with the parties, but maintain an impression of impartiality – the quality of remaining ‘attached yet detached’<sup>1</sup> to the process. It is argued that these emotionally intelligent mediators have the common qualities of strong self-awareness and emotional self-regulation.*

## I INTRODUCTION

One of the challenges every mediator faces is how best to address the role of emotion in a mediation.<sup>2</sup> It takes a great deal of courage for a party to mediation to express their emotions (be they anger, fear, doubt, insecurity), and the way a mediator addresses these emotions can play an enormous role in the successful resolution of a conflict. It is suggested in this article that as emotions underpin so many aspects of conflict, a mediator is derelict in their role if they ignore the emotions and feelings of the parties. The extent to which a mediator deals with these emotions is circumstantial, and much depends on the mediator’s ability to read the emotional needs of the participants. If a

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<sup>1</sup> T Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 3<sup>rd</sup> ed, 2008) 60.

<sup>2</sup> For a discussion of the role of emotions in negotiation, see D Foong, ‘Emotions in Negotiation’ (2007) 18(3) *Australasian Dispute Resolution Journal* 186.

mediator over-empathises with the emotional concerns of one party, they leave themselves open to allegations of bias and partiality. If they under-identify with the emotions being expressed by a party, that party may feel that they have not been heard or understood, and this lack of catharsis may hinder productive negotiation.

This article posits that genuine mediator empathy is an essential tool for helping people through tough periods when they are involved in conflict with another. Many mediators are able to harness the power of emotion to guide individuals (and groups) through a conflict. They are able to access their own emotional intelligence to assess what a party to conflict needs to see, hear, or do at any given point in time during the mediation. The emotional intelligence of mediators varies significantly and as a result, there is danger in a mediator dealing with emotions and empathising when they may not possess the emotional intelligence to effectively do so. Emotional intelligence in this context is seen as a 'competency' that engenders mediators with the 'ability' to deal with the range of emotions presented to them.

This article will examine the effect of emotions and empathy upon the neutrality of a mediator. It will be suggested that the very qualities that make good mediators so effective (their ability to establish emotional connections and their ability to empathise) are the same qualities that can jeopardise the neutrality of the mediator and the neutrality of the mediation process that they must administer. The experience of and the susceptibility towards emotion is part and parcel of what it means to be human, and mediators are no different in this regard. For a mediator to establish an emotional connection with the parties, but to remain perfectly neutral in person and process, is a difficult undertaking. To walk a day in someone's shoes, and not be touched by their plight and circumstances, is arguably a task for the emotional Einstein.

## II MEDIATION, EMOTION AND EMPATHY

*Most simply, emotions matter because if we did not have them nothing else would matter. Creatures without emotion would have no reason for living nor, for that matter, for committing suicide ... Emotions are the stuff of life. Emotions are the most important bond or glue that links us together.*

-John Elster<sup>3</sup>

Emotion is important in mediation because it drives conflict. To this end, a mediator needs to address the emotions that arise during a mediation to help facilitate a resolution of the dispute. Whether we conceive emotion simply as one dimension of conflict,<sup>4</sup> or central to the idea of conflict,<sup>5</sup> its role in shaping a mediation is often pronounced. Mediators will often allow a conflict to manifest itself, which allows parties to release unexpressed emotions and to communicate unmet needs. Barsky notes that emotional needs can act as a block to mediation and that 'making feelings an explicit focus of discussion helps the negotiations to be less reactive and more proactive: "Freed from the burden of unexpressed emotions, people will become more likely to work on the

<sup>3</sup> J Elster, *Alchemies of the Mind* (Cambridge University Press, 1999) 403.

<sup>4</sup> B Mayer, *The Dynamics of Conflict Resolution – A Practitioner's Guide* (Jossey-Bass, 2000) 4-8.

<sup>5</sup> T Jones and A Bodtger, 'Mediating with Heart in Mind: Addressing Emotion in Mediation Practice' (2001) 17(3) *Negotiation Journal* 217.

problem.”<sup>6</sup> Pent up emotion can be a roadblock to successful negotiation and if a party feels that a mediator and the other party understand their concerns (and the emotions that attach to them), they will be more likely to negotiate their interests and abandon their positions.<sup>7</sup> It is suggested here that where a party insists on adopting a position, as opposed to focussing on interests, that position is strongly underpinned by self-justifying emotion. If you explicitly deal with the emotions of that party, you take the ‘sting’ out of their position, and with far greater ease can encourage them to mediate upon their interests.<sup>8</sup>

Boulle suggests that the mediator’s role in improving the emotional environment of a mediation is a key element in settling conflicts.<sup>9</sup> ‘In broad terms, mediators can contribute to an emotional environment for the parties by contributing a trustworthy person and process, and by otherwise providing a setting that is hospitable and non-threatening.’<sup>10</sup> To improve the emotional environment of a mediation, the mediator must develop and inspire the confidence and trust of the parties involved.<sup>11</sup> Whilst a neutral and well-communicated structural framework to the mediation can increase the parties’ confidence in the process, an emotional connection between the mediator and each party can instil faith and trust in the mediator as a person. The way a mediator manages this emotional connection is one of the most important drivers of a successful mediation. When skilfully managed, the establishment of an emotional connection with the parties can lead to a productive empathic bond that fosters trust and openness. When mismanaged, a mediator can emotionally under or over-commit to a party, leading to impressions of partiality and potential compromise of process (that is, non-neutral language, uneven speaking time for parties, biased intervention strategies). A mediator with high emotional intelligence is less likely to mismanage this emotional connection, and as a result is far more likely to help parties achieve their mediation goals.

For the purposes of this article, mediator empathy refers to the ability of the mediator to put themselves ‘in the shoes of another, to understand things from their perspective.’<sup>12</sup> If a mediator is able to understand the needs of a party that underlie their dispute, they can then accurately communicate back to the party that their feelings have been heard and understood.<sup>13</sup> They can successfully attend to their emotional needs. When a mediator establishes an empathic bond with a party, it does not mean however that the mediator consequently supports or favours that party. Boulle correctly notes: ‘[e]mpathy

<sup>6</sup> M Barsky, ‘Emotional Needs and Dysfunctional Communication as Blocks to Mediation’ (1983) 1(2) *Mediation Quarterly* 55, 57 citing in part R Fisher and W Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 2<sup>nd</sup> ed, 1991) 31-2.

<sup>7</sup> Fisher and Ury, above n 6, 31-2.

<sup>8</sup> Ibid.

<sup>9</sup> L Boulle, *Mediation: Principles, Process, Practice* (Lexis Nexis Butterworths, 2<sup>nd</sup> ed, 2005) 214-17.

<sup>10</sup> Ibid 216.

<sup>11</sup> Ibid.

<sup>12</sup> L Boulle, *Mediation – Skills and Techniques* (Lexis Nexis, 2001) 136.

<sup>13</sup> Astor suggests that ‘[s]eeing things simultaneously yet differently is already a core skill for mediators. Mediation requires the mediator to sit with conflicting accounts of the same events presented by the parties and recognise the validity of both perspectives while at the same time working towards an agreement.’ H Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221, 231. Astor labels this openness to other perspectives ‘seeing the colour purple’ (a reference to an anecdote contained in Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991) 149-150. This ability to see things simultaneously yet differently is therefore a competency that allows a mediator to genuinely empathise with both parties to a dispute.

does not signify agreement, nor does it amount to sympathy with, or compassion for, another. It involves convincing a person that the listener has entered their world of perceptions, if only temporarily'.<sup>14</sup>

Mediator partiality and bias can be the subtle and unfortunate consequences of a mediator who remains unaware of the personal impact that a party's story may have upon them. When a mediator attempts to identify with the emotional needs and wants that underpin a dispute, there is a level of interaction with clients that is different from ordinary conversation.<sup>15</sup> deMayo suggests that 'encouraging the parties to go beyond objectively stated positions to identify and address their private interests can result in the creation of an emotionally intimate atmosphere that includes the mediator as a participant-observer.'<sup>16</sup> If a mediator employs an empathic approach in such an environment, 'the participants' words are more likely to touch a responsive chord [with the mediator], particularly when a client describes an emotion that resonates with the mediator's personal experience.'<sup>17</sup> Empathy can easily become sympathy when the personal values, feelings and sensitivities of a mediator are triggered by the plight of a party in mediation. There is a real danger that the mediator may lose the separateness of his or her own identity in the empathic process<sup>18</sup> in an emotional environment that heightens the potential for emotional reaction.

It is one thing to suggest that mediator empathy, when unchecked, can lead to partiality and bias. It is another to examine the psychological processes that explain how this phenomenon can occur. There is a large body of psychoanalytic literature that has studied intrapsychic conflict,<sup>19</sup> and mediators are beginning to understand the importance of this literature to their own professional practice.

#### A Countertransference

Many commentators have noted that just as the mediator's personal qualities can impact upon the parties, so too can the personal qualities of the parties influence the mediator.<sup>20</sup> Countertransference has been identified as 'the term used to describe feelings evoked in

<sup>14</sup> Boule, above n 12, 136. Alexander and Howieson also draw a clear distinction between the concepts of empathy and sympathy. They describe empathy as 'the ability to put [ones] self in the other negotiator's shoes and to understand where that person is coming from in terms of feelings.' Sympathy is described as 'involv[ing] compassion and implies agreement with the other person.' N Alexander and J Howieson, *Negotiation: Strategy, Style, Skills* (Lexis Nexis Butterworths, 2<sup>nd</sup> ed, 2010) 146.

<sup>15</sup> R deMayo, 'Practical and Ethical Concerns in Divorce Mediation: Attending to Emotional Factors Affecting Mediator Judgment' (1996) 13(3) *Mediation Quarterly* 217, 220.

<sup>16</sup> Ibid. deMayo defines a participant observer as 'one who actively participates in an event while making professional observations of those at the centre of the action.'

<sup>17</sup> Ibid 219.

<sup>18</sup> C R Rogers and B Stevens, *Person to Person: The Problem of Being Human; A New Trend in Psychology* (Real People Press, 1967) 93.

<sup>19</sup> 'Intrapsychic or internal conflict is conflict that resides within the individual. Psychodynamic psychiatry, derived from psychoanalytic theory and technique, is the branch of psychiatry that studies the individual's internal states, particularly those dealing with conflict.' S Fukushima, 'What You Bring to the Table: Transference and Countertransference in the Negotiation Process' (1999) 15(2) *Negotiation Journal* 169, 170.

<sup>20</sup> See particularly deMayo, above n 15, 217; and D Bowling and D Hoffman, 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation' (2000) 16(1) *Negotiation Journal* 5.

the therapist by the client.’<sup>21</sup> Whilst this understanding of countertransference is arguably correct, it is too broad. A more widely accepted definition of countertransference involves a counsellor’s ‘reactions to the client that stem from the counselor’s unresolved personal issues.’<sup>22</sup> According to Burwell-Pender and Halinski, countertransference arises ‘when a counselor’s past or present experiences are realised in his or her client’s present situation.’<sup>23</sup> Whilst these descriptions are couched in terms of a doctor-patient relationship (or counsellor-client relationship), countertransference is a ubiquitous phenomenon with obvious relevance to the mediation environment. The danger that countertransference poses to mediator impartiality is clearly apparent. If a mediator experiences positive countertransference, they may over-identify with one of the parties to mediation. The mediator’s own emotional, behavioural and cognitive experiences may see a mediator positively identify with the predicament of one party, leading to a ‘loss of neutrality or objectivity, blurring boundaries, over-praising, [and] excessive care taking’.<sup>24</sup> It is important to note at this stage that countertransference can be managed by an experienced mediator, and a distinction can be drawn between countertransference feelings and countertransference behaviours (that is, the internal and external reactions to countertransference).<sup>25</sup> Whilst countertransference feelings may be an unavoidable by-product of the mediator-client dyad,<sup>26</sup> an emotionally intelligent mediator will rely upon their *emotional self-awareness* to detect signs of countertransference, and *emotional self-regulation* to prevent any countertransference behaviour that may compromise impartiality.

## B *Emotional Contagion*

*A wise man associating with the vicious becomes an idiot;  
A dog travelling with good men becomes a rational being.*  
-Arabic Proverb

Emotional contagion is another psychological phenomenon that has the potential to impact upon mediator impartiality. Emotional contagion ‘refers to the tendency to catch another person’s emotions.’<sup>27</sup> Formally defined, it represents ‘a tendency to automatically mimic and synchronize expressions, vocalizations, postures, and movements with those of another person’s and, consequently, to converge emotionally.’<sup>28</sup> Emotional contagion represents a threat to mediator impartiality because a mediator can be affected by the mood and emotions of the parties.<sup>29</sup> When a mediator engages in empathy, they seek to *understand* a conflict from the perspective of a party. If emotional contagion is present but undetected during the empathic process, a mediator may begin to *feel* the same way as a party about the conflict. This emotional

<sup>21</sup> Bowling and Hoffman, above n 20, 11.

<sup>22</sup> L Burwell-Pender and K H Halinski, ‘Enhanced Awareness of Countertransference’ (2008) 36(2) *Journal of Professional Counselling: Practice Theory and Research* 38, 41.

<sup>23</sup> Ibid 41-2.

<sup>24</sup> Ibid 42.

<sup>25</sup> Ibid 43.

<sup>26</sup> Ibid.

<sup>27</sup> E Hatfield, J T Cacioppo and R L Rapson, *Emotional Contagion* (Cambridge University Press, 1994) 7 as cited in M Kimura and I Daibo, ‘The Study of Emotional Contagion From the Perspective of Interpersonal Relationships’ (2008) 36(1) *Social Behaviour and Personality* 27, 27.

<sup>28</sup> Hatfield, Cacioppo and Rapson, above n 27, 5.

<sup>29</sup> It is worth noting that the issue of emotional contagion in mediation should not always carry negative connotations. Skilful mediators frequently take advantage of this phenomenon, in the hope that the positive and optimistic mood they bring to a mediation will ‘rub off’ on the parties.

convergence may physically manifest itself in vocal, postural and expressional imitation of a party. If a mediator remains unaware of the emotional contagion, their own physical reciprocity of affective expression is bound to lead to perceptions of partiality.<sup>30</sup>

It is suggested in this article that mediator empathy is not the sole cause (or even the driving force) behind countertransference and emotional contagion in a mediation. This argument is supported by literature<sup>31</sup> that draws a sharp distinction between the ‘sophisticated cognitive forms of empathy and the primitive, basic process of emotional contagion’.<sup>32</sup> It is however argued that mediators who genuinely care about their clients, who seek to identify the emotional drivers of conflict, and who possess the ability to decode emotional expression are vulnerable to emotional transfer and affect. Mediators as (generally) caring people, who engage in empathic activity, are perfect conduits for countertransference and emotional contagion. Empathy is not the cause of these phenomena, but it can act as the accelerant that helps the flames of countertransference and emotional contagion burn brighter still.

### III MEDIATOR NEUTRALITY

*The hottest places in hell are reserved for those who in times of great moral crises maintain their neutrality.*

-Dante<sup>33</sup>

Academics and practitioners alike continue to debate what mediator neutrality actually means and what its defining characteristics should be.<sup>34</sup> In many senses, the notion of mediator neutrality is still being coloured by the idea of judicial neutrality, where judges are required to act impartially, remain indifferent to the result reached (simply apply the law) and avoid conflicts of interest arising out of previous exposure or relationships with the parties. This is not particularly surprising; relative to litigation and the adversarial machinations of the common law, mediation is still a *comparatively* fresh conflict resolution tool. As an alternative form of dispute resolution, the advantages of mediation have been espoused to the greater public. The promotion of the principles underlying mediation is important in legitimising its practice as an ethical and accountable means of resolving conflict. Astor notes with contrast to the formal justice system that ‘mediation is not public, nor is it necessary for mediated agreements to accord with the law. Mediation must therefore derive its legitimacy from other sources, most notably consensuality and neutrality.’<sup>35</sup> That is why the idea of mediator neutrality is so important – it is a theoretical cornerstone that underpins and legitimises the practice of mediation.<sup>36</sup>

<sup>30</sup> Jones and Bodtke, above n 5, 226.

<sup>31</sup> Hatfield, Cacioppo and Rapson, above n 27, 5.

<sup>32</sup> R W Doherty, ‘The Emotional Contagion Scale: A Measure of Individual Differences’ (1997) 21(2) *Journal of Nonverbal Behaviour* 131, 132.

<sup>33</sup> D Alighieri, *La Divina Commedia* (1302-1321) Inferno, canto 3.

<sup>34</sup> See for example H Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part 1’ (2000) 11 *Australasian Dispute Resolution Journal* 73; H Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part II’ (2000) 11 *Australasian Dispute Resolution Journal* 145; S Douglas, ‘Neutrality in Mediation: A Study of Mediator Perceptions’ (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 139; T Bogdanoski, ‘The Neutral Mediator’s Perennial Dilemma: To Intervene or Not to Intervene’ (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 26.

<sup>35</sup> H Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part 1’, above n 34, 73.

<sup>36</sup> *Ibid* 74.

It is not the purpose of this article to *extensively* critique different meanings (or definitions) attributed to mediator neutrality. Instead, this article will explore whether a mediator who cultivates strong empathic bonds with each party to the mediation can realistically claim to be mediating in a ‘neutral’ fashion. Important to this question is acknowledging which definitions/aspects of neutrality (if any) can sensibly co-exist with strong emotion and empathy in a mediation.

### A *Neutrality in Mediation Codes and Guidelines*

From the outset, it is important to acknowledge that neutrality is an ‘umbrella’ term that embraces a number of different concepts.<sup>37</sup> The difficulty of defining neutrality is highlighted by Boule when he argues that neutrality has several shades of meaning that relate to both the mediator’s status and the mediator’s role.<sup>38</sup> Given that mediator neutrality is such a loaded concept, it is not surprising that the word ‘neutrality’ has been abandoned in some mediator codes and guidelines in favour of ‘impartiality’.<sup>39</sup> The following references to mediator standards and guidelines are prefaced by one of the core arguments of this article: that a mediator who engages in empathy and emotional attending to the parties cannot be neutral and cannot be impartial unless we relax our understanding of mediator impartiality.

Practice Standard 5 of the *National Mediation Accreditation Standards* (NMAS) entitled ‘Impartial and ethical practice’, states that ‘[a] mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.’ Impartiality is further defined as meaning ‘freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias.’<sup>40</sup> If the mediator believes that they are experiencing bias towards one of the parties that may impair their impartiality, the Practice Standards mandate that they withdraw from the mediation.<sup>41</sup> Mention of mediator *neutrality* is not made in these standards.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has also provided a framework<sup>42</sup> for the development of standards and guidelines in alternative dispute resolution. This framework promotes impartiality as a ‘skill’ that a mediator should possess and an ‘ethic’ that a mediator should abide by. Section 17 of the framework refers to the *skill* of impartiality as being ‘necessary to balance the relationships with and between the parties, to create trust in the process and the

<sup>37</sup> O Cohen, N Dattner and A Luxenburg, ‘The Limits of the Mediator’s Neutrality’ (1999) 16(4) *Mediation Quarterly* 341, 341.

<sup>38</sup> Boule, *Mediation: Principles, Process, Practice*, above n 9, 31-2. Boule suggests that the term ‘neutrality’ can mean that the ‘mediator has no personal views about or opinions on the dispute; that the mediator is disinterested, that is he or she has no interest of their own in the outcome of the dispute; that the mediator has no prior knowledge of the particular dispute; 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 decision making; and that the mediator will conduct the process even-handedly, fairly and without bias towards either side.’

<sup>39</sup> Sourdin, above n 1, 62. See specifically the *National Mediation Accreditation Standards*.

<sup>40</sup> Definition contained in *National Mediation Accreditation Standards*, Practice Standard 5.1.

<sup>41</sup> *National Mediation Accreditation Standards*, Practice Standard 5.1.

<sup>42</sup> This framework is contained in National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Attorney-General’s Department, Canberra, 2001) 100-14.

practitioner, and to ensure fairness for all the parties involved.’ A mediator is able to demonstrate impartiality by (amongst other things):

- conducting an even handed process;
- identifying the existence of any actual or potential bias or conflict of interest;
- avoiding any appearance of partiality or bias through word or conduct;
- displaying sincerity and integrity, and building and maintaining trust.<sup>43</sup>

Sections 24 (Exhibiting lack of bias) and 25 (Maintaining impartiality) of the NADRAC framework raise *ethical* requirements of Alternative Dispute Resolution (ADR) practitioners that should be addressed in the development of standards. These sections warrant attention, firstly because they draw a distinction between an exhibited lack of bias and impartiality (a distinction that on first glance is not obvious) and secondly, because an exhibited lack of bias is linked to the concept of neutrality. Section 24 provides that ADR practitioners exhibit a lack of bias when they ‘demonstrate independence and lack of personal interest in the outcome so that they approach the subject matter of the dispute with an open mind, free of preconceptions or predispositions towards either of the parties.’<sup>44</sup> An ADR practitioner’s lack of bias is mentioned in section 24 as being a requirement of neutrality. Neutrality in turn requires an ADR practitioner to disclose:

- any existing or prior relationship or contact between the ADR practitioner and any party;
- any interest in the outcome of the particular dispute;
- personal values, experience or knowledge of the ADR practitioner which might substantially affect their capacity to act impartially, given the nature of the subject matter and the characteristics of the parties.<sup>45</sup>

Section 25 of the NADRAC framework attempts to draw a distinction between neutrality and impartiality. In the context of mediation, section 25 suggests that neutrality is a question of mediator interest in the conflict, whereas impartiality is more a matter of mediator behaviour.<sup>46</sup> This distinction assumes relevance in assessing whether a mediator who emotionally engages and empathises with the parties to a mediation can be said to be acting in a neutral fashion. Indeed, if we conceive neutrality as equating to a mediator’s interest in the conflict (that is, prior relationships, interest in the outcome, personal values), a strict adherence to this notion of neutrality would be impossible for an empathising mediator to achieve, and in some circumstances would be extremely undesirable.<sup>47</sup> The neutrality/impartiality distinction is further complicated because the terms are often used interchangeably in guidelines and in academic

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<sup>43</sup> These practical examples of impartiality are listed in s 17 of the *NADRAC Framework for ADR Standards*.

<sup>44</sup> Section 24 of the *NADRAC Framework for ADR Standards*.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* s 25.

<sup>47</sup> Schreier notes that the suppression and stifling of emotions in a mediator ‘can impair thinking, hamper intellectual performance, and interfere with smooth social interactions’. It can also lead to ‘physical symptoms, illness, and memory and decision-making impairment’. See L S Schreier, ‘Emotional Intelligence and Mediation Training’ (2002) 20(1) *Conflict Resolution Quarterly* 99, 103.

discourse. The terms are imprecise and multi-dimensional<sup>48</sup> and that causes problems for practitioners and academics alike when considering the primacy that neutrality and/or impartiality should hold in the practice of mediation. Accepting that the NADRAC framework creates the distinction between mediator interest and mediator behaviour (neutrality v impartiality), section 25 lists some behavioural requirements that are deemed essential to maintaining impartiality:

- conducting the process in a fair and even-handed way;
- treating the parties equally (that is, spending approximately the same time hearing each party's statement or approximately the same time in separate sessions);
- ensuring the practitioner does not communicate noticeably different degrees of warmth, friendliness or acceptance when dealing with individual parties;
- ...
- organise the venue, times and seating in a way which suits all parties.<sup>49</sup>

Finally, the codes of conduct for solicitor-mediators in New South Wales and Queensland both impose a duty on mediators to maintain *impartiality* in conducting the mediation process. Section 5.1 of the New South Wales guidelines states:

The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action. The mediator shall not play an adversarial role and shall maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.<sup>50</sup>

Both codes also address mediator *neutrality* as a separate concept to impartiality. Section 5.2 of the New South Wales guidelines states:

If the mediator believes, or any one of the participants states, that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed after full disclosure of all relevant facts relating to the issue of neutrality.<sup>51</sup>

Reproducing excerpts from these codes serves to highlight several broader themes discussed in mediator neutrality literature:

1. Impartiality, rather than neutrality as a primary requirement of mediators; and
2. Impartiality as a behavioural phenomenon.

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<sup>48</sup> B Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248, 249.

<sup>49</sup> Section 24 of the *NADRAC Framework for ADR Standards*.

<sup>50</sup> Section 5.1 of the *NSW Law Society Guidelines for Solicitors who Act as Mediators*. Note that the Queensland requirement for impartiality in s 4 of the *Queensland Law Society Standards of Conduct for Solicitor Mediators* is couched in similar terms: 'A mediator must maintain impartiality towards all parties. Impartiality means freedom from any favouritism or bias in appearance word or action, and a commitment to assist all parties to a dispute as opposed to a single party, but without a commitment to a particular outcome.'

<sup>51</sup> Section 5.2 of the *NSW Law Society Guidelines for Solicitors who Act as Mediators*.

These guidelines also reinforce the challenges that confront a mediator who seeks to deal in emotion and empathy during a mediation. Empathising with a party's conflict narrative and the emotions that underpin the dispute is such a powerful way to build up trust and confidence in the mediator. Likewise, a mediator who behaves in an impartial manner and presents an image of neutrality (whether perceived or actual) will also command the trust and confidence of the parties. The problem for a mediator is that it is so difficult to authentically do both. All too often, the very best characteristics of mediators (benevolence and compassionate nature) shape empathy towards sympathy, and sympathy towards bias – resulting in challenges to mediator neutrality and impartiality. This article argues that a mediator's commitment towards empathy and emotional connection is one of the most subtle yet pervasive challenges to mediator neutrality. The appropriate balance between these two ideals can only be struck by an emotionally intelligent mediator.

### B *Mediator Impartiality or Mediator Neutrality?*

Firstly, impartiality as opposed to neutrality is the predominant *requirement* of mediators. This is not to suggest that mediator neutrality is unimportant, but that impartiality is put forward as an absolute requirement, whereas mediator neutrality is not proffered as a strict or immutable requisite. This distinction is important for this article – it means that an empathising mediator can temper certain aspects of neutrality in order to strengthen their emotional attendance to the parties and their dispute.<sup>52</sup> The codes explicitly envisage a situation where the mediator is not completely neutral, but the mediation can still proceed.<sup>53</sup> In contrast, where mediator impartiality is in question, the strong and mandatory language of the codes dictates that a mediator must withdraw from the mediation.<sup>54</sup> This is consistent with Boule's analysis that impartiality is a core and defining characteristic of mediation, whereas other aspects of neutrality 'are less absolute requirements and their existence will always be a matter of degree, depending on context and circumstances.'<sup>55</sup>

Rather than being viewed as separate concepts, many practitioners and academics view impartiality as *one* element of neutrality. It is suggested here that a mediator who engages in empathy and emotional connection, but who does not possess a strong emotional intelligence, will compromise all aspects of neutrality, including impartiality. The simplest way to show this is to explain how empathy and emotional intelligence affect the three senses or conceptions of neutrality identified separately by Boule<sup>56</sup> and Wolski.<sup>57</sup> According to these authors, mediator neutrality can be conceived along three dimensions:

<sup>52</sup> For example a mediators personal history and values may allow a stronger empathic bond to grow between themselves and one or both of the parties.

<sup>53</sup> See especially, *NSW Law Society Guidelines for Solicitors who Act as Mediators*, above n 51.

<sup>54</sup> See s 5.1 of the *NSW Law Society Guidelines for Solicitors who Act as Mediators*, '[t]he mediator shall maintain impartiality towards all participants at all times during the mediation process.' See also the *National Mediation Accreditation Standards*, Practice Standard 5.1, 'if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express consent of the parties.' (emphasis added).

<sup>55</sup> Boule, *Mediation: Principles, Process, Practice*, above n 9, 33.

<sup>56</sup> Ibid 32.

<sup>57</sup> Wolski, above n 48, 249.

1. Disinterestedness – no interest in the outcome of the mediation.
2. Independence – no prior relationship with the disputants.
3. Impartiality – a mediator conducts the process fairly, even-handedly and without bias to either party.

Whilst judicial officers in the court hierarchy must be neutral in all three of these dimensions, it has been suggested that this is not, and should not, be the case for mediators.<sup>58</sup> They should only be impartial. The attraction of mediation, as opposed to litigation, is that it allows a skilled mediator to define a conflict in all its dimensions and complexity – regardless of strict legal rights or entitlements.<sup>59</sup> In this fashion, a mediator can both ‘legitimate the common reality of conflict and validate the emotional experiences accompanying it.’<sup>60</sup>

A mediator who does not possess strong emotional intelligence is in danger of breaching each of these facets of neutrality. In terms of disinterestedness, a mediator who over-connects emotionally with a party will have an interest in seeing the mediation resolve in a particular way. A stronger empathic link with one party may see the mediator strive for a resolution that they believe is fair for that party. In addition, a mediator’s *own* ideas and interests can see them promote certain outcomes over others. ‘Mediators bring their own values and interests to the mediation ... they choose behavioural tactics based on the kind of outcome they wish to achieve, that is, an outcome that is consistent with their own values and interests.’<sup>61</sup> Disinterestedness is also affected by practical considerations. Given that ‘mediators have their own interests in achieving settlements, success rates, professional reputation, return custom and personal satisfaction,’<sup>62</sup> neutrality in this regard is almost impossible to achieve.

Mediator independence requires that the mediator does not have a previous relationship with the parties. This is a difficult and often undesirable aspect of neutrality, with repeat business and mediator specialisation militating against this obligation. It is not disingenuous to suggest that mediators without strong emotional self-awareness may subconsciously (or even consciously) favour a repeat customer that provides remuneration, stability and future business.

Mediator impartiality is the most important dimension of neutrality. The challenge for mediators is to remain emotionally unbiased in a mediation. Mediators have their own set of views, backgrounds and personal experiences that colour the way they interact with the world and the people within it, which can make it incredibly demanding to remain emotionally detached to the plights of two different parties in conflict. It is unrealistic that a mediator will emotionally identify with each party to the same extent and degree. If a mediator emotionally over-identifies with one party, or emotionally under-identifies with another, then the potential for biased dealings and tainted mediation processes greatly increases. Research by Greatbatch and Dingwall suggests:

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<sup>58</sup> Boule, *Mediation: Principles, Process, Practice*, above n 9, 32.

<sup>59</sup> *Ibid* 87.

<sup>60</sup> *Ibid* 88.

<sup>61</sup> Wolski, above n 48, 249, with reference to P H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, 1979) 211, 213-17.

<sup>62</sup> Boule, *Mediation: Principles, Process, Practice*, above n 9, 33.

mediators affect the moral assessment and legitimization of claims during the mediation process by the ways they structure the interchange between the parties, in terms of the sequencing of storytelling, and the framing of responses and what needs to be responded to.<sup>63</sup>

If we accept (consistently with the NADRAC standards) that impartiality is predominantly a behavioural phenomena, then an emotionally intelligent mediator is obliged to ‘conduct the mediation process in a way which is fair, even-handed, objective and unbiased as between the parties.’<sup>64</sup> It is argued that impartiality is a difficult quality to objectively assess. Wolski notes that the real requirement emphasised in mediation literature is perhaps ‘the need to be perceived to be impartial.’<sup>65</sup> This is consistent with the writings of Boule, who argues that ‘partiality is as much a matter of party perception as it is of objective behaviour, a factor which makes it more difficult for the mediator to manage and control.’<sup>66</sup>

Noting this difficulty, serves to highlight the ‘impartiality traps’<sup>67</sup> that empathy and emotional over-identification can create for a mediator. The danger with establishing an empathic bond with a party to mediation is that the mediator becomes unduly influenced by the plight of that party. Emotionally intelligent mediators possess high levels of self-awareness, which allows them to diagnose when they are over-committing to a particular party. Without this emotional intelligence, a mediator may not be aware of his or her own cognitive and behavioural cues that are suggestive of mediator bias. When a mediator is unable to access these internal cues, empathy with a party can so easily become sympathy. Often, the empathy/sympathy divide can be quite fine to draw and the potential for overlap is pronounced.

If empathy evolves into undetected sympathy, the processes that a mediator must administer are in jeopardy. The mediation may not be conducted in an even-handed way, and sympathy with one party may lead to uneven levels of attention and distorted caucusing and story-telling times. Reframing a party’s issues may be done in such a way that the mediator is acting as an advocate for one of the parties and effectively representing their argument to the other party.<sup>68</sup> Sympathy may lead the mediator to communicate noticeably different degrees of warmth, friendliness or acceptance to one of the parties based on their perceived emotional needs.<sup>69</sup> Finally, sympathy may lead to unfair option generation and reality testing that heavily favours one party. A mediator may appear dismissive of options that do not favour a particular party. As a result, the reality testing of these options may turn into an interrogation or cross-examination of the party that a mediator feels little sympathy towards.<sup>70</sup>

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<sup>63</sup> S Silbey, ‘Mediation Mythology’ (1993) 9(4) *Negotiation Journal* 349, 351, referring to D Greatbatch and R Dingwall, ‘Selective Facilitation: Some Observations on a Strategy Used by Divorce Mediators’ (1989) 23 *Law and Society Review* 613.

<sup>64</sup> Boule, *Mediation: Principles, Process, Practice*, above n 9, 35.

<sup>65</sup> Wolski, above n 48, 249.

<sup>66</sup> Boule, *Mediation – Skills and Techniques*, above n 12, 258.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> This would be in contravention of s 25 of the *NADRAC Framework for ADR Standards*.

<sup>70</sup> Boule, *Mediation – Skills and Techniques*, above n 12, 258.

### C *Impartiality as Behaviour*

Secondly, the NADRAC guidelines draw a distinction between neutrality as interests and impartiality as behaviour. This distinction is supported by some authors, but has not been widely canvassed in the literature or indeed other mediator guidelines. The semantic separation of these concepts is of benefit – and is supported in this article – when considering the effect of emotions in mediation. Whilst it is almost impossible for a mediator not to have some interest in a dispute (due to their personal background and the emotional bonds formed during empathy), they might be able to regulate their behaviour in such a way so as to be seen as impartial.

It is suggested and is consistent with the writings of Cohen, Dattner and Luxenburg that ‘equidistance, empathy and attentiveness are tools that can be used during the mediation process to create impartiality.’<sup>71</sup> Equidistance has been described as ‘the ability of the mediator to assist the disputants in expressing their side of the case’.<sup>72</sup> To assist the parties in telling their story and expressing their emotions, the mediator may temporarily align themselves with each party as they elaborate their positions.<sup>73</sup> At first blush, this suggestion appears counter-intuitive. If anything, the appearance of an empathic and attentive bond between the mediator and one party would leave the other party with impressions of mediator partiality and bias. Equidistance as a component of neutrality however works to the extent that the mediator can assist each party evenly.<sup>74</sup> By concentrating on the evenness of their interactions with the parties, the mediator can be perceived as *behaving* impartially. Cobb and Rifkin suggest that ‘mediators may, at a given moment, favour one side or the other, but unbiased settlement is the “summative outcome” of this process; [equidistance] is the active process by which partiality is used to create symmetry.’<sup>75</sup>

If impartiality ‘implies a commitment to aid all the parties as opposed to a single party, in reaching a mutually satisfactory agreement’,<sup>76</sup> there is no overt requirement that every step of the mediation process is completely impartial. This is simply not possible in the majority of mediations, and is outright impossible when emotion plays a strong role in the mediation. Kurien’s critique of neutrality and impartiality lends weight to this argument when he reasons:

<sup>71</sup> Cohen, Dattner and Luxenburg, above n 37, 343.

<sup>72</sup> E Odom, ‘The Mediation Hearing: A Primer’ in J E Palenski and H M Launer (eds), *Mediation: Contexts and Challenges* (1986) as cited in J Rifkin, J Millen and S Cobb, ‘Toward a New Discourse for Mediation: A Critique of Neutrality’ (1991) 9(2) *Mediation Quarterly* 151, 153.

<sup>73</sup> Rifkin, Millen and Cobb, above n 72, 153.

<sup>74</sup> Ibid.

<sup>75</sup> S Cobb and J Rifkin, ‘Practice and Paradox: Deconstructing Neutrality in Mediation’ (1991) 16 *Law and Social Inquiry* 35, 44. Hilary Astor suggests that a semantic differentiation between the terms neutrality and impartiality has been prompted by mediators who ‘desire to reconcile an honest admission of their own perspectivity with the need to retain the legitimising effect of neutrality in some form.’ Hilary Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221, 227. This author completely agrees. The difficulty however of completely abandoning principles of neutrality or impartiality (if the view is that both are impossible to achieve in practice), in favour of party self determination, is that mediators would technically be in breach of mediator codes of conduct by doing so. In essence, these codes of conduct would be setting mediators up to fail.

<sup>76</sup> L M Cooks and C L Hale, ‘The Construction of Ethics in Mediation’ (1994) 12(1) *Mediation Quarterly* 55, 63-4.

[t]he intrinsic unconscious world and the make-up of the individual make true neutrality an unattainable goal. What is possible is the development of an apparent neutrality at a conscious level whereby the individual is conscious of the potential for biases through self-reflection, and takes active steps to produce a behaviour which is, so far as possible, impartial.<sup>77</sup>

Rather than requiring mediator impartiality to involve a strict and continuous series of unbiased words, actions and processes, impartiality could be conceived as a final outcome or end product achievable through equidistant practise. This would necessitate a relaxation of mediation guidelines that makes mediator impartiality achievable. Guidelines such as the *NSW Law Society Guidelines for Solicitors who Act as Mediators* set impossible targets for mediators when they require a mediator to maintain impartiality towards *all* participants at *all* times during the mediation process.<sup>78</sup>

Such an approach would sit more comfortably with the role that emotions play in a mediation and the effects that those emotions can have on a mediator. Under the guise of impartiality, it is unrealistic to expect a mediator to suspend their judgement and feelings with respect to one or both of the parties. A more realistic approach is to acknowledge that equidistance achieves impartiality by allowing an ‘active process through which partiality is used to create symmetry.’<sup>79</sup> If both parties feel that the mediator has understood their side of the story, and that the mediator has assisted them to express their views, feelings and interests, then it is likely they will view the mediator’s position as impartial (regardless of partial or biased steps taken along the process).

#### IV EMOTIONAL INTELLIGENCE – EMPATHY AND IMPARTIALITY MADE POSSIBLE

If:

1. we accept that emotion is an important and ever-present aspect of mediation; and
2. we acknowledge the intersubjective nature<sup>80</sup> of mediation where the mediator and the parties are in a relationship of mutual influence,

then it follows that a mediator must intelligently attend to his or her *own* emotions in order to facilitate a successful mediation outcome. Simply put, emotional intelligence is the intelligent use of emotions<sup>81</sup> – an individual develops awareness of their emotions and uses them to beneficially aid their thinking and behaviour. Mayer, Caruso and Salovey suggest that:

<sup>77</sup> G Kurien, ‘Critique of Myths of Mediation’ (1995) 6 *Australian Dispute Resolution Journal* 43, 52.

<sup>78</sup> Section 5.1 of the *NSW Law Society Guidelines for Solicitors who Act as Mediators*.

<sup>79</sup> D Kolb, ‘To be a Mediator: Expressive Tactics in Mediation’ (1985) 41(2) *Journal of Social Issues* 11.

<sup>80</sup> See J M Natterson, *Beyond Countertransference: The Therapist’s Subjectivity in the Therapeutic Process* (Jason Aronson Inc, 1991) 29, where the author notes that ‘In all human dyadic impingements, each person influences the other, no matter how obscure the process may be. Both parties are coequal contributors. Their respective fantasies and desires, values and goals, are engaged in continuous struggle, through which both persons are continually changing. This intersubjective experience should be regarded as the basic precondition for any theoretical understanding of psychotherapeutic process’.

<sup>81</sup> H Weisinger, *Emotional Intelligence at Work* (Jossey-Bass, 1998) xvi.

[e]motional intelligence refers to an ability to recognise the meanings of emotion and their relationships, and to reason and problem solve on the basis of them. Emotional intelligence is involved in the capacity to perceive emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them.<sup>82</sup>

### A *Emotional Self-Awareness*

The qualities of emotional self-awareness and emotional self-regulation are the cornerstones of emotional intelligence theory, and are essential to good mediator practice. It has been suggested above that mediator empathy can quickly blur into sympathy and emotional over-identification when the personal emotions of a mediator are aroused by the circumstances of a mediation. Mediator self-awareness and self-regulation can stop these emotional triggers from being acted upon in a way that is detrimental to the mediation. Emotional self-awareness involves a mediator being aware of both their mood and their feelings about that mood.<sup>83</sup> If a mediator is unable to identify their emotions with respect to the subject of the mediation, the parties to the mediation and the progress of the mediation, the emotional candour of the mediator may inadvertently manifest itself in biased words, interventions and behaviours. If a mediator is unaware of their own feelings, and the impact of the parties upon their own feelings, they are not in a position to self-assess the impartiality of their processes.<sup>84</sup> Goleman lends support to the importance of mediator self-awareness when he contends that the ‘personal emotional competency of self-awareness contributes to self-regulation, which in turn undergirds the development of social skills (such as conflict management)’.<sup>85</sup>

As an element of self-awareness, an understanding of meta-emotions (the way we feel about having certain emotions – emotions about emotions) is incredibly important for a mediator. If a mediator cannot identify how they feel about their current emotional state, there will be no inquiry as to whether those feelings or emotions are appropriate for the particular context. Take for example a mediator who has emotionally over-identified with a party as a result of empathic processes. If a mediator is feeling sadness and sympathy for one party, an inquiry into their meta-emotions should signal that these feelings may be inappropriate in the context of the mediation and may lead to party perceptions of favouritism and bias. If a mediator is unaware of their meta-emotions, they will see no need for cognitive or behavioural *self-regulation*, which can seriously jeopardise mediator impartiality.

An understanding of meta-emotions will also affect the mediator’s empathic efforts. Jones and Bodtger note that differences in meta-emotions can form the basis of

<sup>82</sup> J D Mayer, D Caruso and P Salovey, ‘Emotional Intelligence Meets Traditional Standards for an Intelligence’ (1999) 27 *Intelligence* 267, 267.

<sup>83</sup> D Goleman, *Emotional Intelligence* (Bantam Books, 1995) 47.

<sup>84</sup> Lang and Taylor refer to the concept of ‘artistry’ to explain a mediator’s ability to read the signals of the participants in a mediation as well as their own personal signals. A mediator who is self-aware can bring their knowledge and experience to bear in determining the frequency and timing of their interventions. These interactions/interventions can greatly aid the *flow* of the mediation with an emotionally intelligent mediator operating in a way that seems automatic, yet being fully aware of and responsive to the shifting interactions between themselves and the disputing parties. M D Lang and A Taylor, *The Making of a Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000) 3-7.

<sup>85</sup> D Goleman, *Working with Emotional Intelligence* (Bantam Books, 1998) chs 1-3, as referred to in K Krone and D Dougherty, ‘Book Review: Working with Emotional Intelligence’ (1999) 13(2) *Management Communication Quarterly* 337, 338.

misunderstanding and conflict.<sup>86</sup> A mediator will hinder their ability to empathise if they assume that their own meta-emotions are shared by the party with which they are attempting to connect.<sup>87</sup> This can lead to frustration on behalf of the party and a loss of trust in the mediator. Whilst a party may feel that their side of the dispute has been heard, mediator misinterpretation of their meta-emotions may leave a party feeling that they have not been understood. Conversely, a mediator's appreciation of a party's meta-emotion leads to powerful and authentic empathy – 'an important step toward emotional perspective taking, which is strongly linked to the use of more socially competent, collaborative conflict management.'<sup>88</sup>

Finally, mediator self-awareness plays a vital role in circumventing the affects of countertransference and emotional contagion. In terms of countertransference, a mediator's emotional state may be altered by a party who triggers the recall of previous experiences and arouses the personal values and beliefs of the mediator. Self-awareness of emotion would allow a mediator to detect when the affects of countertransference have caused a shift in mood. Self-awareness of meta-emotion or meta-cognition will allow a mediator to understand that these shifts in mood have been brought about because they are associating their own personal issues and experiences with the stories told by their clients. It is only through emotional self-awareness that countertransference feelings can be detected and countertransference behaviours can be avoided.

Similarly, emotional self-awareness can ensure that mediator impartiality is not unduly influenced by emotional contagion. An awareness of a sudden change in mood can suggest to a mediator that they are being influenced by the parties. Meta-cognition and meta-emotion can lead a mediator to realise that their emotional reaction is not proactive – it is a reactive response that has been 'caught' from another party. Ultimately, because of the speed at which emotional contagion occurs,<sup>89</sup> self-awareness will need to be coupled with ongoing self-assessment throughout the mediation. Emotional contagion is not a dualistic concept; it exists in context and degree and a mediator with strong self-awareness will ensure that if possible, it is detected and its physical manifestations regulated. Goleman's assertion that self-awareness is a necessary pre-cursor to self-regulation rings true with respect to both countertransference and emotional contagion.

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<sup>86</sup> Jones and Bodtker, above n 5, 240.

<sup>87</sup> Ibid. Jones and Bodtker highlight this problem with an example, 'I would be ashamed about being angry, so I assume that you would/should also be ashamed about being angry.' They suggest that this form of 'egocentric attribution bias' may mean that when we discover another party does not share our meta-emotions, 'we are likely to make negative judgments and attributions about the other which lead to or exacerbate conflict.'

<sup>88</sup> C Saarni, *The Development of Emotional Competence* (The Guilford Press, 1999) as cited in Jones and Bodtker, above n 5, 241.

<sup>89</sup> Doherty, above n 32, 131. Hatfield, Cacioppo and Robson argue that 'the process of emotional contagion is much too automatic, fast and fleeting, and too ubiquitous to be accounted for by [overly] cognitive, associative, or self-perception processes.' It is therefore cautiously suggested that a mediator may become aware of the affects of emotional contagion, by coupling strong emotional self-awareness with continuous emotional self-assessment. Whilst emotional contagion can occur extremely quickly, automatically and often unconsciously, the fact that it physically manifests itself through the mimicking and synchronisation of expressions, vocalisations, postures and movements suggests that it can be independently diagnosed.

## B *Emotional Self-Regulation*

Whilst emotional self-awareness can alert a mediator to feelings that may threaten impartiality, emotional *self-regulation* can stop those feelings from being expressed and acted upon in a way that undermines the mediation. Emotional self-regulation allows a mediator to maintain professional boundaries and the perception of impartiality whilst still striving to be emotionally honest and present with the parties.<sup>90</sup> This involves a mediator identifying the emotions they are experiencing and *consciously* acting or not acting upon them. The importance of emotional self-awareness is again emphasised because a mediator cannot consciously act, or refrain from acting, upon emotions to which they are oblivious. Schrier argues, '[t]he most salient aspect of emotional regulation competence is that one exercises conscious choice, to the extent possible, as to how, whether, and when to express (in contrast to feel) an emotion.'<sup>91</sup> If mediator impartiality is viewed as a perceivable (observable) quality, then emotional self-regulation can prevent biased expressions and behaviour that challenge mediator impartiality. This management of emotional expression has been referred to as 'political competence'<sup>92</sup> and involves the mediator curtailing their own power to influence the mediation, in furtherance of party self-determination. A mediator's ability to empathise 'could be described as an attribute which is "operationalised" into a political skill.'<sup>93</sup> It is this political skill which can be used to foster a tighter rapport with parties, without exerting a power or influence that is viewed to be partial. There is nothing wrong with empathic bonds that produce feelings and emotions in a mediator. That is a natural by-product of a mediator who cares about the parties in a mediation. It is only when a mediator's empathy becomes sympathy, *and that sympathy is acted upon* that a mediator has fallen into error. When viewed as a learnable competency (as opposed to an inherent characteristic), a mediator's ability to emotionally self-regulate involves the 'skill [of] realising that inner emotional states need not correspond to outer expression, both in oneself and in others'.<sup>94</sup> Practically, there must be recognition that a mediator will experience emotions and biased thoughts throughout the course of a mediation. These internal biases may consistently favour one party, or fluctuate between the parties. Through self-awareness, a mediator can identify these biased emotions and through the competency of self-regulation, ensure that these biased emotions do not physically manifest themselves as partial behaviours.

## V CONCLUSION

In conclusion, this article has sought to highlight the tension between mediator empathy and mediator impartiality when emotion is addressed in a mediation. The developing sophistication of emotional intelligence literature will continue to inform the practice of mediation, and temper mediator behaviour with practical, emotional reality. It is only through strong emotional self-awareness and self-regulation that mediator empathy can possibly co-exist with party perceptions of impartiality. Arnold Bennett, the British

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<sup>90</sup> Schreier, above n 47, 101.

<sup>91</sup> Ibid 103.

<sup>92</sup> See P Marshall, 'Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress' (2008) 8(1) *QUT Law and Justice Journal* 176.

<sup>93</sup> Ibid 191.

<sup>94</sup> C Saarni, 'Emotional Competence: A Developmental Perspective' in R Bar-On and J D A Parker (eds), *Handbook of Emotional Intelligence: Theory, Development, Assessment and Application at Home, School, and in the Workplace* (2000) 68, 77-8.

novelist and playwright once stated, ‘There can be no knowledge without emotion. We may be aware of a truth, yet until we have felt its force, it is not ours. To the cognition of the brain must be added the experience of the soul.’<sup>95</sup> To mediate in the absence of emotion is to fall afoul of this advice. If a mediation settlement or agreement is going to ‘stick’, a mediator needs to have addressed the emotional concerns that underpinned the dispute. Parties to a mediation must be happy in heart and mind that they have been heard and understood. Ultimately, a dispute belongs to the parties of a mediation and ‘the choice of ending it belongs to them too.’<sup>96</sup> Whilst the intersubjective nature of any mediation will see the mediator and parties mutually influence each other, a mediator must rely upon their own emotional self-awareness and emotional self-regulation to maximise the contribution of the parties to their own solutions.

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<sup>95</sup> A Bennett (1867-1931), British novelist, *The Journals of Arnold Bennett: Entry for 18 March 1897* (1932).

<sup>96</sup> L Parkinson, ‘Mediating with High-Conflict Couples’ (2000) 38(1) *Family and Conciliation Courts Review* 69, 75.