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**A Case Study of Mediators
Maintaining Impartiality within Practice**

by

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the degree of MSc by Research**

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- **Abstract**

The aim of this research was to obtain qualitative information from local practitioners' relating to their practice of mediation, with a focus on maintaining impartiality within the mediation environment, as impartiality is a key principle associated with the mediation process and is discussed by mediators regularly. Following a literature review, in which existing research into impartiality and neutrality as aspects of mediation was identified and described, an initial small-scale case study was conducted with mediation practitioners in Canterbury making use of qualitative questionnaires. The qualitative data obtained from six participants who completed questionnaires was then analysed inferentially to identify everyday meanings of terminology and establish whether there are common strategies for maintaining impartiality in the practice of mediation. Canterbury Christ Church University has operated the Mediation Clinic for ten years and has established relationships with practicing mediators based in Canterbury primarily and from other areas of East Kent. The Mediation Clinic has three strategic aims: to enhance the student experience; to provide mediation services to the local and wider community of Kent; and to encourage research into attitudes held about mediation from legal practitioners, mediators and clients. This research project is being sponsored by the Mediation Clinic. There is future scope for this initial study to be conducted in other locations within the United Kingdom to establish validity of local findings across a wider geographical area or its scope widened in order to look at differences between the different types of mediation and varying backgrounds of mediation practitioners.

- **Introduction and Theoretical Background**

As this research is being conducted as a Masters in Law this novice researcher begins by providing an overview of how alternate dispute resolution processes, including mediation, work alongside traditional law. She then highlights key theoretical concepts relating to the process of mediation, with these being: explanation of different types of mediation; terminology used to define impartiality within mediation; how different models of mediation and mediator styles have a potential impact on impartiality; where impartiality occurs within other parts of the criminal justice system and how mediators are trained in impartiality.

2.1 Purpose of this Research

The purpose of this research was to find out how mediators apply the theoretical concept of impartiality within the practice of mediation and strategies they use to maintain impartiality, seeking to increase the existing knowledge base around the concept of mediator impartiality. Hence the following research question was proposed:

- To what extent do mediators in Canterbury maintain impartiality within practice?

This overall question can then be sub-divided into several more specifically defined questions:

- What does impartiality or neutrality mean to mediators?
- What common strategies, if any, do mediators employ to maintain impartiality?

- How do mediators ensure that they are remaining impartial?
- Are mediators able to always maintain impartiality?
- Why are mediators sometimes unable to maintain impartiality?

Collecting data to answer these questions became the scope for this single, small-scale project. In addition, the mediators were also asked to share any other thoughts or ideas relating to impartiality.

Following a review of existing research to gain a deeper understanding of the theoretical process of mediation, a qualitative questionnaire was designed and tested. A finalised questionnaire was then distributed to mediators associated with the Mediation Clinic to provide information to answer the research question posed. The researcher wanted to understand how impartiality is maintained within the practice of mediation, specifically focusing on: what impartiality means to mediators; identifying common strategies utilised to maintain impartiality; and methods mediators use to monitor their own impartiality. The information collected is presented within this report, with some analysis having been done. Finally, conclusions and recommendations have been proposed including suggestions for further research which might include repeating this study in other geographical locations to increase reliability and validity of results obtained locally.

Little existing research focuses on the mediation *process*, and where it does it either focuses on a single case example or occurrence, or employs the use of role plays, rather than observing real practice. Several former studies on impartiality within the

mediation process have been identified, involving research methods including observation, interviews and an online questionnaire, and these studies will be discussed further in the literature review. Relevant theoretical information on current mediation practice is outlined in the introductory section, in order to provide an overview of the practice of mediation, highlighting how impartiality is a key component of the mediation process and therefore why investigation of this concept is important. Ongoing professional development for mediators suggests that they reflect on all aspects of mediations that they have undertaken in order to ensure that they are practising to the highest standards. It is, therefore, surprising that existing research has not involved gathering the views of mediators about the mediation process more extensively.

Research into mediation initially commenced in both private and public sectors to evaluate the claims that mediation is less costly and less time consuming than litigation. Early research into mediation focused primarily on simple questions including: settlement rates, client satisfaction, time and cost efficiencies, compliance and outcomes. Kelly, in her review of existing research into mediation, also, suggests that research into the mediation process itself could be an area of future research identifying that analysis of mediator behaviours and interventions, as well as participant characteristics and behaviours would advance this area of legal practice. Saposnek, commenting in response to Kelly, also concluded that little is known about what actually happens in mediation or whether there is any consistency within a given mediator's style or across mediators and their methods.

The literature review section of this report provides details of several existing studies by Mulcahy, Douglas and Becker, amongst others, into neutrality, a term commonly associated with impartiality, within the practice of mediation that have influenced this research project, with neutrality being investigated, a term commonly associated with impartiality. Unfortunately, there appears to be sparse information as to why the terminology has also now evolved to encompass impartiality as well as neutrality.

Other aspects relating to impartiality that could have been explored are: is there a difference in approach to impartiality within different types of mediation? or, is there a difference in approach to impartiality between solicitor mediators and non-solicitor mediators? However, to answer these further questions, larger numbers of mediators would have had to be involved, with equal numbers practicing in the various types of mediation and from a wider diversity of backgrounds, than this locally based study allowed. Therefore, these aspects are outside the scope of this research. To obtain the greater depth required for generating informed conclusions to these latter two sub-questions, it would be anticipated that an additional methodology of interviewing would elicit richer data produced by narrative enquiry, than that obtained by questionnaire alone.

2.2 Theoretical Background

As this research is being conducted as a Masters in Law this novice researcher now seeks to provide an overview of how Law and Alternate Dispute Resolution (ADR) work alongside each other. She then highlights key concepts relating to the process of mediation, with these being: types of mediation within practice; the use of

terminology within mediation; the effect on impartiality from different models of practice; impartiality within the wider criminal justice system, including a comparison of key legal professional roles; how mediators are trained to be impartial and, finally, she highlights weaknesses of the mediation process, as it may not always be the most effective or appropriate route for resolving specific disputes. She then explains the context that this study occurred within.

2.2.1 Law and Alternate Dispute Resolution (ADR)

Law is often described in terms of rules, which define the types of behaviour that are forbidden and if engaged in can result in official (police and court) sanctions. A rule can be defined as “a general norm mandating or guiding conduct in a given type of situation”. Viewing law as a ‘system of rules’ is an inadequate description, as it provides no difference between legal rules and moral rules or indeed how these are each distinguished. Law involves the “acceptance that the established rules are both legitimate and authoritative”, so, therefore, should be obeyed. Law, therefore, is applied across a breadth of topics, for example, jurisprudence, criminal, race, intellectual property, international, employment, family, property and inheritance, amongst others, each with a focus on a discrete topic area. The English legal system is highly regarded, with courts providing fair hearings, for a judge to make a decision, known as the process of litigation.

However, it is also now recognised that for some circumstances options other than litigation are equally appropriate and alternate dispute resolution (ADR) has received increasing support from the Civil Procedure Rules 1998, with a new European

Directive on Mediation having been established in 2008 and further supported by a Family Justice Review in 2011, with reforms for these processes still ongoing.

Therefore, litigation and mediation as alternate processes can be compared thus:

Litigation	Mediation
Parties are regarded as adversaries	Seeks to identify mutual interests
Issues defined in legal terms, often by legal practitioners	Participants raise matters for discussions in their own terminology
Legal practitioners act on behalf of their client/or individual acts as litigant in person representing themselves	Participants speak for themselves and have to listen to each other
Viewpoints can become polarised and opposite	Attempts to narrow differences and build bridges
Formal legal rules govern the court process	Informal, private and flexible
Usually a lengthy process, involving delays	Agreements can be achieved more quickly
Parties follow legal advice	Participants make their own decisions
Focuses on what has gone wrong in the past	Focuses on present and future arrangements
Can prolong conflict and cause additional stress	Attempts to reduce conflict and stress
Often only two possible outcomes are explored	Explores a range of possible outcomes
Has higher costs	Has lower costs
Decision imposed by judicial authority	Participants are involved in all decisions
Imposed decisions are not always adhered to	Consensual decisions more likely to be adhered to

Table 1: Comparison of Litigation and Mediation Processes

Mediation, the focus of this study, is currently governed by a Code of Practice, rather than any formal legal act, and is designed to work alongside existing legal structures. Several legal acts, defined by Parliament are highly applicable to the practice of mediation, as any settlements reached within mediation must also be in line with English Law more generally. Statutes relevant to mediation include, but are not limited to:

Children and Families Act 2014

Child Support Act 1991

Civil Jurisdiction and Judgements Act 1991

Consumer Rights Act 2015

Employment Act 2002

Equality Act 2010

Family Law Act 1996

Matrimonial Causes Act 1973

It should be noted that the term 'alternate dispute resolution (ADR)' is used to cover a range of alternatives to litigation available to resolve disputes, so the reader is aware that mediation is not the only alternate process. However, as this study does not focus on these processes, they will simply be named here, as salutation to the range of options available for resolving disputes. Alternates to litigation for civil and commercial legal matters if a decision is required from an independent third party; include: arbitration, adjudication and expert determination; or where the participants retain control of the process and outcome: negotiation either directly or via solicitors,

mediation, early expert evaluation, and complaint or grievance procedures. An additional route available within family law is collaborative law, where again the disputants remain the deciders of any outcome. For employment matters conciliation is also recognised as an alternate to a tribunal and must now be attempted before any tribunal application is submitted, with workplace mediation available for resolving difficulties in ongoing working relationships.

2.2.2 Overview of Mediation Processes

Now to the focus of this study that of Mediation, which is a relatively new field within Law, emerging about twenty-five years ago. Mediation can be utilised across many areas of legal practice, including:

- employment issues, such as severance negotiations or for improving difficult working relationships;
- civil and commercial matters, such as boundary or consumer disputes;
- family legal matters, including financial and childcare arrangements;
- community problems, such as conflicts between neighbours.

Mediation has four core principles:

- Voluntary – participants must want to be involved;
- Confidential – except where there is risk of harm or possible criminal activities;
- Impartial – mediators have no vested interest in the outcome, and remain free from bias and prejudice;
- Empowering - the participants make their own informed decisions.

These four key principles are underpinned by other fundamental ethics: mediator competence and training; suitability and safety; respect for cultural diversity; no conflict of interest with any participants (direct and indirect) of the dispute; fairness and being child focused. These ethical considerations are linked to how mediators maintain impartiality or otherwise and whether clients perceive the mediator as being impartial too.

There are two predominant, established processes or types of mediation: civil and commercial mediation, which also encompasses community mediation (historically including workplace mediation for employment matters) and family mediation. Although, workplace mediation is now emerging as a discrete process of mediation and can often be a hybrid of both the established forms, particularly where working relationships are involved.

Civil and Commercial Mediation can be defined as :

- Facilitated discussions between the participants in dispute, with a neutral third party (mediator);
- Who acts fairly between the parties;
- Within a relatively structured but flexible process;
- During a defined period of time;
- All of which creates impetus for a fair settlement.

The Family Mediation Council (FMC) Code of Practice defines family mediation as:

- A process for those involved in family breakdown;
- Where an impartial third party is appointed;
- To assist them in communicating more effectively with each other;
- For them to reach their own agreed and informed decisions by negotiation;
- Concerning matters relating to separation, divorce, children, finance or property.

2.2.3 Defining Impartiality and other related Terminology

From the definitions of the two main types of mediation provided thus far, it can be noted that terminology between them differs, particularly in the describing of the unbiased approach a mediator is expected to maintain, with neutral being used in the civil and commercial mediation definition and impartial utilised within family mediation. In this study the term impartiality is being used predominantly, although a backdrop of the terms neutral and impartial has been identified within existing literature. Impartial can be defined as: *“not prejudiced towards or against any particular side or party; fair; unbiased”* and this definition was used by the researcher to inform the suggested possible options for the meaning of impartiality and the strategies used. As the researcher is a family mediation practitioner she has selected this term, rather than neutral for the purpose of this study. Parkinson, in her recent book, argues that “mediators are stated to be impartial and/or neutral, but impartiality is not the same as neutrality”. She then explains that impartiality relates to the mediator: not having any stake in the outcome of mediation; being and remaining non-directive; and not taking sides with either participant. She believes that the term neutrality, however, implies an absence of values which is not true of the mediation process or of mediators as people

in her opinion. Other mediators prefer the term “multi-partial” instead of either impartial or neutral.

As can be seen from the definition of civil and commercial mediation, a mediator is expected to *act fairly*, as part of their role as a neutral third-party and this researcher has assumed that acting fairly is the same as impartiality for the purposes of this research, as within civil and commercial mediation impartiality is actually viewed as an ethical consideration with a requirement for mediators to act impartially throughout and be seen to be doing so. Acting fairly involves ensuring that all participants in a mediation have opportunity to be involved in the process and the process should be conducted as fair to both participants. However, the concept of fairness also encompasses other aspects of mediation including that participants are involved voluntarily, rather than through any coercion, and are making their own decisions.

A further term related to impartiality, identified within the existing literature, that is also used to describe the concept of impartiality with mediation is that of *bias* and is commonly used to reflect the opposite of impartiality, rather than the term partiality. Bias is defined as a predisposition or prejudice or influencing, usually unfairly. Kydd suggests, from his review of existing studies into impartiality within mediation, that bias does not prevent mediators from being successful and may therefore at times be acceptable and beneficial to reaching an agreed outcome.

2.2.4 Effect of Mediation Model on Impartiality

In addition to the two different types of mediation, there are, also, assorted models of mediation practice that can be utilised as described below. The operational

differences of these models of practice may, therefore, impact on how impartiality is managed by the mediator (s). Each model has a specific focus, which may potentially affect how mediators manage impartiality within them. Some models assist mediators with impartiality, whilst other models could hinder mediators remaining impartial.

- ***Sole practitioner*** - A mediator who works alone with both participants of the mediation, who would, therefore, have to monitor their impartiality either themselves or from client comments only.
- ***Co-mediation*** - Two mediators working as a team, alongside each other, with both participants together, where each can help the other remain impartial, as well as each individual ensuring this themselves.
- ***Shuttle mediation (caucusing)*** - The mediator (s) goes between the participants, who are based separately, with a level of confidentiality agreed upon in advance, so not all information is shared, which could possibly mean that remaining impartial is more difficult.
- ***Face-to-face mediation*** – The clients are in the same room, with the mediator at all times, so everyone has heard all that has been disclosed. This model is the preferred option within family mediation, where communication is expected to be transparent between the participants.
- ***Involving lawyers in process*** - Direct lawyer involvement in the mediation, as opposed to providing legal advice outside of the mediation process. Mediators would, therefore, have to be careful not to be influenced by the merits of the viewpoints proposed by the lawyers.

Civil and commercial mediation often involves operating a 'shuttle' process, where the mediator meets with each participant separately, in different rooms, and relays what they each want to the other. In family mediation the participants are more commonly in the same room at the same time, with all information being shared in a transparent manner. Unlike the family model, within the shuttle model not all of the information shared by each client is shared with the other, so what is and isn't shared is used by the mediator to influence the progress of the mediation towards settlement, so it could be argued that this model has a higher potential for mediators to become impartial. However, there is an additional focus in family mediation, which it is not only the viewpoints and outcomes that those involved are seeking, it should also be focused on what is best for the children of the family too. So similarly to the civil and commercial process this may cause a mediator to feel they have deviated from being impartial when raising questions relating to the needs of children involved as these needs may not be what the clients are seeking, so again the mediator can influence the outcome.

Whichever the type of mediation, one of the key parts of the process is for the mediator to understand the perspectives of all involved in the dispute situation. Atticus Finch, a fictional lawyer, defending a case involving aspects of race says: "You never really understand a person until you consider things from their point of view – until you climb into their skin and walk around in it", which could also be a strategy a mediator could employ to maintain their impartiality. By putting oneself in the 'shoes' of another and considering the situation from their perspective, as opposed to your own view, a deeper understanding of their perspective is likely to be gained, rather than remaining an observer only. By considering the perspective of each participant within mediation, a mediator gains this understanding of each of them, hopefully enabling them to see both perspectives as fully as possible.

2.2.5 Effect of Mediator Personal Attributes on Impartiality

The professional values, experience and personality of the mediator will also influence how they manage the mediation process, along a recognised scale between passive facilitation and active intervention styles, referred to as facilitative-broad or evaluative-narrow mediators respectively. Riskindescribes an evaluative-narrow mediator as one who relies on their own legal background and having awareness of the likely outcome of litigation, and uses these attributes to help mediation clients understand the merits and weaknesses of their respective positions. Facilitative-broad mediators aim to assist participants to define the subject matter of the mediation in terms of underlying interests, in order for them to develop and decide upon their own outcomes. It could, therefore, be argued that an evaluative or intervention style could impact on mediator impartiality, whereas a facilitative approach involves less influence from the mediator.

2.2.6 Impartiality and Bias within the Criminal Justice System

Returning to the wider practice of law again in this section, as this study is based in the academic discipline of law, although focusing on a particular process within this, the reader needs to be aware that mediation is not the only area of law that impartiality is applicable to. Within the criminal justice legal system, judges, as well as mediators, are also expected to remain impartial when hearing and deciding on cases presented in court, as are inspectors and panel members in tribunals and grievance hearings. However, the roles differ in that a judge makes a decision regarding the outcome for the parties, while a mediator enables those involved in a mediation to decide upon their own outcomes and makes no such decision as to outcome. The role of a lawyer is also different to that of either a judge or mediator, so a comparison of these legal roles is now provided.

Judges	Lawyers	Mediators
Make a decision or ruling on the outcome of the dispute between two sides, by applying the law to the situation.	Provide advice to a specific individual, interpreting the law to enable that person to protect their rights.	Enable participants to decide a mutually acceptable outcome, working alongside the requirements of relevant legal processes.
Appointed by government commission.	Appointed by an individual or company.	Appointed by both participants of the dispute.
Preside on disputes involving criminal matters, family matters, children or tribunals.	Usually practice in one area of law, as expert.	Facilitate assorted dispute types, depending on training completed
Act impartially, considering the views of both sides.	Represent one individual or side, focusing on merits of the case for that person.	Act impartially, considering the views of both participants.
Apply a sentence or court order.	Provide evidence of the merits to the other side or via court.	Provide non legally binding mediation summary documents.

Table 2: Comparison of Legal Roles with Mediator Role

It would seem from court cases that have occurred that this decision making role of the judges raises issues of possible partiality within the justice system. Two such examples of how a judge's decision may be perceived to be biased include:

- 'Halsey v Milton Keynes General NHS Trust', in which the judge awarded payment of costs for both sides to the party who had been unwilling to

participate in mediation when offered the opportunity, whereas in mediation both participants share the costs equally;

- 'Norris v Norris' where a lump sum was awarded to one party based on trust and inheritance amounts received.

Other court cases are focused on an evaluation as to whether those involved in dispute resolution processes have remained impartial throughout the process.

Examples of this type include:

- 'Turner v Secretary of State for Communities and Local Government and Others', which involved the evaluation of inspector objectivity and demonstration of fair inquiry management during a Court of Appeal judgement;
- 'Watson v University of Strathclyde', where the effect on employer's grievance hearings of possibly biased panel members were considered.

As has been noted, part of a judge or inspectors role is to make a decision based on arguments and facts provided by both sides, whereas a mediator makes no such decision on the outcome of a mediation. With the decision made by the judge, parties may perceive that the judge has become biased, particularly if one participant did not obtain the outcome they were seeking. Therefore, it could be argued that the mediator not deciding the outcome assists them in remaining impartial, particularly in being seen to be impartial.

2.2.7 Training Mediators to be Impartial

As has been explained earlier in this chapter, impartiality is viewed as one of the main principles of the mediation process and is one of nine skills a mediator utilises,

so having recently completed mediator training, this researcher was somewhat surprised to find that impartiality forms only a small part of the theory of mediation covered in any foundation mediator training course. For example, in the Alternate Dispute Resolution Group (ADRg) Family Mediator Training Programme impartiality is mentioned on three pages (two occurrences being an outline of the key principles and the third being a definition) out of two hundred and forty three pages and is part of a two hour skills discussion session as part of a forty-five hour course. The Centre for Effective Dispute Resolution (CEDR), in their Mediator Training Course Handbook mention neutrality and impartiality on five pages out of one hundred and sixty two, and use the terms interchangeably. In the main, impartiality is, therefore, being primarily learnt through experience and practice, beginning with role-play simulations during the foundation course and then practiced on-the-job. In addition to a foundation training course, family mediators must now also complete a professional portfolio, based on three completed mediations, in order to achieve accredited status. There is also a requirement for family mediators to have their practice of mediation overseen by a Professional Practice Consultant (PPC), who must be an accredited and experienced family mediator, providing professional support and guidance to a mediator throughout their career. The professional values, experience and personality of the mediator may have an impact on how they manage the mediation process along a scale between passive facilitation and active intervention, also referred to as facilitative or evaluative mediation respectively.

2.2.8 Weaknesses of Mediation

So as to ensure that any reader who may hold the impression that this researcher only extols the virtues of mediation, the weaknesses of the mediation process will now be detailed, with these having been identified as being:

- a judgement or independent decision is not provided, which we have seen may increase the perception of bias occurring;
- clients may try and misuse the process by attempting to influence the mediator to be on their side or maintain any power imbalances that exist;
- outcomes cannot be enforced as they are not legally binding; and are often in the form of a Memorandum of Understanding (a confidential summary of mediation), as opposed to the legal equivalent of a consent order;
- no fully defined statutory framework exists so there is no regulation of civil and commercial mediator practice;
- costs for resolving the dispute can increase if the process does not succeed.

Parkinson, a recognised family mediator with extensive practice experience, outlines several additional shortcomings of the mediation process in her book including:

- mediators bringing different professional backgrounds and styles of working;
- lack of clarity as to whether the aim of mediation is to settle a dispute or resolve the underlying conflict;
- it cannot be used in certain circumstances, for example, where domestic abuse or impaired capacity exist;
- clients do not always have a good understanding of what mediation involves;

- clients often bringing unrealistic expectations of what mediation can achieve;
- it is not intended to address the psychological impacts of relationship breakdown.

2.2.9 The Mediation Clinic

This research was conducted through the Mediation Clinic, at Canterbury Christ Church University, which was established ten years ago, with the aim of providing a mediation service to the local community. The idea was that the practice of mediation would then in turn inform the undergraduate curriculum, bringing this newer area of practice into the law programmes for undergraduate students. The Mediation Clinic aims to offer a quality professional mediation service, providing family, workplace and civil & commercial mediation to the local community, providing opportunities for law programme students to have practical opportunities relating to their taught degree modules. The Mediation Clinic partners with local mediation practitioners, who have undertaken recognised mediator training courses and practice in accordance with the Family Mediation Council Code of Practice for family disputes or the European Code of Conduct for Mediators for civil, commercial and workplace disputes. The role of the researcher for this study is that of Mediation Clinic Development Officer and family mediator, hence the curiosity into understanding impartiality within the practice of mediation more fully.

- **Literature Review**

Any research commences with reading what has already been written about the topic of interest to gather information in order enable the formulation of arguments and inform the research being conducted. Existing findings can assist the defining of the most appropriate method for the study and allow comparisons with other research to be made. A review of literature was, therefore, conducted to identify existing knowledge available relating to the topic of impartiality, and its opposite of bias, within mediation. In addition existing research relating to the terms neutrality and fairness, which for the purposes of this research have been linked to impartiality, has also been included. Previous studies have been identified, which are now summarised, ordered by date of publication.

3.1 Dworkin and London (1989) What is a Fair Agreement?

Joan Dworkin, an assistant professor in medical social work, and William London, conducted a theoretical analysis of components of fairness in a hypothetical dispute, hoping to more fully understand the concept of fairness. As we have seen, *fairness* is a term used to describe how a mediator should act within civil and commercial mediation, and for the purpose of this current research project it has been assumed that this term or concept is aligned to impartiality. They identified two general categories for fairness, as being:

- Procedural – dealing with the process by which an agreement is reached;
- Substantive – includes the contents of any agreement and the general outcome of the dispute.

They evaluated procedural fairness based on factors of: the impartiality of the mediator; voluntary, informed decisions by participants; participant understanding of

decisions and information presented; non coercion and any power balances. They identified that each type of fairness is composed of both internal and external factors, with all of these being the mediator's responsibility. Overall, they concluded that although acting fairly or impartially is a key requirement of a mediator, there had not been "an extensive examination of this fundamental consideration". The factors used for the evaluation were assumed by the researchers as being the relevant framework and they could be criticised for not providing a fuller rationale for how this framework was derived. Their key finding was identifying that fairness was composed of two different types, rather than an evaluation of how fairness or impartiality work within practice. As previous research had focused primarily on the substantive component the idea of fairness, also, having a procedural or process component is the reason for this existing paper being included, as it is an aspect of the mediation process under investigation.

3.2 Menzel (1991) *Judging the Fairness of Mediation*

Building on the work of Dworkin and London, Kent Menzel, a graduate teaching fellow in the US, proposed that a more comprehensive critical framework be developed for judging the *fairness* of mediation agreements and the mediation process. He examined his own practices theoretically, looking at specifically identified external and internal factors of fairness, as the framework. External factors were defined as: success at reaching an agreement; compliance with the agreement; cost of the agreement; efficiency through which the agreement is reached and stability of the agreement over time. Internal factors are recognised as being: other's needs; relational development; satisfaction with mediation outcome (agreement) and the psychological effects of the mediation. He concluded that this suggested framework

provided a multidimensional perspective to review mediator fairness and the fairness of mediation agreements. He, also, suggested that it could be used to guide future research. However, it should be noted that only one factor in the framework looks at the mediation process itself, being the efficiency of how any agreement is achieved, which is where impartial would be applied in practice. This study has been included as an example of an earlier research study conducted into mediation, as described by Kelly's overview of existing literature.

3.3 Cobb and Rifkin (1991) Practice and Paradox: Deconstructing Neutrality in Mediation

Sara Cobb and Janet Rifkin, associate professors of communication and legal studies respectively, based in the USA, undertook research into the practice of mediator neutrality and interviewed 15 mediators. From their analysis of transcripts they identified two components of *neutrality* as being *impartiality* and *equidistance*. They proposed that impartiality is similar to an absence of bias, with a mediator refraining from siding with either client, which involves the mediator separating themselves from their conscious and unconscious feelings and reactions, and all of these ideas were used to inform suggested responses for the questionnaire closed questions. At the same time they suggested that equidistance is about the mediator conserving the balance of power between the mediation clients. Managing power imbalances is one of the other skills a mediator uses and was not a focus of this study, although if power imbalances are handled poorly then impartiality could be impacted, particularly from a client perspective, so this aspect of the mediation process warrants further exploration. They concluded that the two components are embedded within the concept of *bias*, with each component viewing bias from a different perspective and therefore the two

components are mutually exclusive. It would therefore seem that they conclude that impartiality is a part of neutrality, as opposed to impartiality being a discrete concept. At least one author argues that they have over analysed the phenomena and created a paradox within practice. This existing study, also, demonstrates the confusion surrounding the use of terminology to describe impartiality, which has been addressed for the purposes of this current study earlier in this report, and is a theme that arises in a further existing study included later in this literature review.

3.4 Fuller, Kimsey and McKinney (1992) Mediator Neutrality and Storytelling Order

Rex Fuller, a professor of human communication in the USA, and others conducted a study to investigate the perception of mediation participants (disputants) to mediator neutrality based on *storytelling sequence*. They conducted twelve role-play sessions with volunteer undergraduate students, who had no previous experience of mediation prior to participating as disputants. For each role-play the disputants were briefed ahead on their roles and the same scenario was used for each role-play, with the same two mediators facilitating all the role plays. They varied the sequence of storytelling order using three research conditions: disputant A asked to share first; disputant B asked to share first; and concurrent disclosure, with each disputant videotaping their story ahead of the session. Following the role-plays the disputants were then asked to complete an established questionnaire. Fuller concluded that storytelling order does significantly influence the perception of mediator impartiality. They emphasised that it is the person who tells their story first that produces the primary narrative, to which the other mediation participant then responds, thus the second person is sometimes limited by the constructions and language of the initial

storyteller. Being mindful of story-telling order was included as a suggested response to a closed question in the research questionnaire, to see whether mediator perceptions about this are similar or different to that of disputants. Although the validity of confirming the previously suggested importance of story-telling order using role-play scenarios only could be questioned.

3.5 Beer (1994) *The Mediator's Handbook*

Jennifer Beer, in her book, provides four methods for setting aside own reactions, beliefs and values in order to maintain impartiality within mediation. These proposed methods are:

- cultivating awareness of own beliefs and principles;
- being centred, so as to separate own life from that of participants;
- having a clear purpose;
- providing empathy by identifying something in the participant or situation that you find encouraging to focus on.

These ideas were used to inform the suggestions for responses to a question on the questionnaire utilised in this current research, with being aware of own reactions and feelings included as a possible strategy for maintaining impartiality.

3.6 McCorkle (1995) *The Murky World of Mediation Ethics*

Suzanne McCorkle, an US associate professor of communication studies, used discourse analysis to analyse US state and professional mediation association codes of conduct for common and disparate themes within the principles and ethics of

mediation. She identified that key terms such as *neutrality*, *impartiality*, *conflict of interest* and *dual role* are used to mean different things across the various state codes of practice. In addition she identified that these terms were often not described within each code either. She, also, noted that one state separated fairness as being separate to neutral and impartiality, thus identifying this further term for describing the unbiased approach of a mediator. Her findings support the argument that the terms being used to describe the mediator role within mediation, neutral and impartial, are being used sometimes interchangeably and sometimes not in the literature that exists for mediation. This confirms the confusion regarding terminology that was outlined in the introductory section of this report.

3.7 Mulcahy (2001) *The Possibilities and Desirability of Neutrality*

Linda Mulcahy, a now Professor of Law in the UK, interviewed community mediators working (seven paid staff and twenty volunteers) for Southwark Mediation Centre and observed forty three mediations conducted by them too, with data collection occurring over an eighteen month period. The mediations observed employed predominantly the shuttle model with only five face-to-face mediations being observed. This is one of the earliest studies to seek views directly from mediators about concepts within mediation, as opposed to being focused on settlementscollecting data direct from mediators, which is why it has been included. This type of study has since been applied subsequently by other researchers and these studies have also been reviewed. Mulcahy aimed to answer four questions overall with one of these being aspects of the focus for this study exploring whether neutrality is always possible. One of the other questions she was attempting to answer was whether neutrality is always desirable and this theme was subsequently explored more recently by others,

with these studies incorporated later in this section. Mulcahy identified that mediators reacted emotionally to disputants, with them explaining that these reactions created practical difficulties of ignoring personal bias but, unfortunately, her report did not include any practical examples from the sessions observed and this lack of explanation prompted the research question for this current project about how mediators apply the concept of impartiality within practice.

3.8 Garcia, Vise and Whitaker (2002) Disputing Neutrality

Garcia, an associate professor of sociology in the US, and others videotaped thirty mediation sessions with an initial plan to provide an interactional analysis of how an impression of bias may be created. They then analysed these sessions, following transcription of the recordings. They identified only one example of a disputant having made an accusation that the mediator had become biased. From their analysis, the researchers, concluded that participants in mediation rarely communicate perceptions of bias during the mediation. Although without the availability of all the transcripts it could be argued that all the other mediators did maintain impartiality which was why no other comments relating to mediator bias were recorded from other participants. They described potential triggers for the perception of the complaint regarding bias as, one being interruption of a participants contribution by the mediator and another an interruption from the other person. They reviewed the skills that mediators used to maintain impartiality and concluded that being able to share the 'story' equal numbers of times, storytelling order, managing power imbalances and a clear explanation of the process are all helpful strategies to maintain impartiality. These findings informed some of the suggestions within the questionnaire used to conduct the current research, with being mindful of story-telling order and minimising interruptions included

as suggested options for strategies used by mediators to ensure impartiality (question four of the questionnaire). As only one example had been identified in this original study, there was also a curiosity to explore whether occurrences of bias occurred more frequently. Managing power imbalances is another aspect of the mediation process and a separate skill to that of impartiality so was not included as a possible option, although on reflection how a power imbalance is addressed may impact on how the mediation participants perceive a mediator's impartiality.

3.9 Exon (2008) The Effects of Mediator Styles on Impartiality

Susan Exon , a professor of law in the USA, provides a clear and concise summary of previous research which defines the main mediator styles referred to within the background theory. She acknowledges that there are different definitions of mediation, with one definition of the mediator's role explained 'as to be seen to not be taking sides', which supports the information regarding current practice outlined in the introductory section of this report. She highlights that a criticism of the facilitative style is that it can be passive and may allow power imbalances that exist between mediation participants to continue. However, she postulates that this style readily conforms to the requirements of impartiality. She highlights that researchers have criticised the evaluative style as they think it crosses the impartial threshold, however, it does assist with a settlement being achieved. She suggests that mediators often swap between styles in a single mediation session.

3.10 Douglas (2012) Neutrality in Mediation

Susan Douglas, a barrister and lecturer in business law, based in Australia, conducted interviews with ten mediators working for the Department of Justice Dispute

Resolution Service, in Brisbane, to extend the work previously undertaken by Cobb and Rifkin, explained earlier. She initially proposed that neutrality is a binary construction, in that mediators are either neutral or not. The purpose of her study was to investigate whether alternate constructions of neutrality exist, to contribute to mediation theory generation. The results of her analysis revealed that mediators' perceptions of neutrality were based on two key themes: *impartiality* and *even-handedness*. Douglas noted that mediators also aligned two further themes to neutrality, being a distinction between the process and outcome of mediation and the mediators' views of participant autonomy. The report of her study would appear to corroborate the findings of the earlier study conducted by Cobb and Rifkin, with them all concluding that impartiality is contained within the concept of neutrality. She acknowledged amongst her conclusions that it can be difficult to transfer these concepts into practice. Although, unfortunately, she provides no specific examples of the difficulties experienced to support this acknowledgement. It was the lack of this information that informed the request for examples from mediation practice within the questionnaire used in this current research, particularly as the focus was seeking to explore how mediator impartiality was applied within practice.

3.11 Becker (2013) *The Controversy over Mediator Neutrality*

Daniel Becker, as a Master's student in New Zealand, continued the research of Mulcahy and Douglas, distributing a mixed method, both quantitative and qualitative, online questionnaire to four hundred and fifty registered mediators. He received eighty six responses, which he analysed with some basic statistics and informally qualitatively (his description) to support the statistical findings. He, also, incorporated a section of questions relating to the regulation of mediation, as his

focus was to seek views from mediators not only on the concept of impartiality, (similar to this study) but also the recent implementation for the requirement of mediators in New Zealand to be legally registered, a different topic entirely. He identified that mediators in New Zealand defined neutrality as 'providing a process that enables party autonomy', closely followed by neutrality meaning impartiality supporting the findings of the earlier studies mentioned upon which his study was based. Although this use of different terminology may hinder and invalidate any comparisons. He identified that the majority of respondents considered adherence to neutrality as being very important to the mediation process. He explained that mediators had expressed difficulties with applying the concept of neutrality in practice but gave no details of their responses for this claim. He asked mediators to suggest theoretical reasons that may cause a departure from impartiality, an idea that has been used to obtain factors affecting impartiality that mediators have experienced within practice within this research. The paper he produced from his study was used to inform the questionnaire used in the current study, with some of his questions being used, whilst some questions were amended to focus on actual practice of impartiality.

3.12 Frenkel and Stark (2015) Improving Lawyers' Judgement.

Douglas Frenkel and James Stark, professors of law at American universities, argue that having an understanding of the different types of cognitive bias, which have been extensively defined by psychologists, enables a mediator to see different perspectives that could be taken and better understand what hinders impartiality. They began by identifying the assorted psychological biases that are relevant to the practice of law, followed by a review of how mediators are trained differently to the

more traditional legal role of solicitors. They suggest that this theoretical knowledge of bias types could potentially be incorporated into legal training programmes, for both mediators and solicitors, to raise awareness of how and why bias sometimes occurs. This research paper, also, supports the observation that impartiality is covered only briefly within mediator training programmes, despite it being one of the core principles of the mediation process. They have identified existing knowledge from an academic discipline outside of law that could be incorporated into mediator training to enable mediators to understand impartiality and what hinders it occurring more fully. However, it may be prudent for professionals with a background in psychology to deliver this subject matter, as the descriptions of the bias types within this paper were not always completely clear.

3.13 Chalkey and Green (2016) Is Safeguarding Mediator Neutrality More Important Than Ensuring a Fair Settlement?

Katherine Chalkey and Martin Green, from the School of the Built Environment and Engineering, Leeds, UK, raised the question as to whether “safeguarding mediator neutrality and party autonomy are more important than ensuring a fair settlement” and following a review of existing journal articles and theories, concluded that neutrality ought not to be more important than achieving a fair settlement. They identified difficulties with the idea of mediator neutrality, with these being: mediator influence; non-bias and impartiality; even-handedness and fairness and equidistance. They, also, highlighted that mediators have to intervene at times, also known as being directive, for any outcome to be achieved and ponder whether these interventions have the potential for the mediator departing from remaining impartial. They, also, highlighted a need for the concept of mediator neutrality to be reviewed in context,

commenting that aspects of the mediator role can cause conflict within the mediator at times. Mulcahy wondered whether neutrality was something that a mediator should always maintain and Chalkey and Green are extending this idea that any intervention by the mediator may cause a mediator to deviate from being impartial, although they note that without interventions from the mediator a settlement may not be achieved. As a consequence of this earlier research, remaining non-directive was a suggested answer within the questionnaire used in this current research to obtain the views mediators have about interventions within the process.

3.14 Maclean and Eekelaar (2016) The Brave New World

Mavis Maclean and John Eekelaar aimed to look at the practical effects of recent policy changes in relation to the management of divorce and separation within the family justice system, with the accompanying reduction in legal aid provision in 2013. Their overall focus sought to establish whether there is a need to choose between traditional legal services or whether the new processes of private ordering should be more fully adopted, rather than focusing on specific aspects of the mediation process. They observed and/or interviewed twenty family mediators in a variety of settings. Participants were categorised by professional background, namely lawyer mediators (eight participants) and non-lawyer mediators (twelve participants), with these categories then being divided into four sub-groups: non-lawyer mediators working in non-legal settings, such as mediation service or outreach premises; non-lawyer mediators working within legal settings; mediators who were qualified solicitors but no longer practising law; and lawyer mediators practising law and mediation within a legal setting. They produced a general summary of observations for the non-lawyer mediators but not for the other categories of mediator. Whilst they collected

respectable data, in the form of transcribed mediation sessions or interviews, they analysed the data from the different groups of mediators differently. Leaving this researcher wondering whether they are exhibiting bias against non-lawyer mediators, as their analysis of this group appeared to be more critical than for the other groups. In a review of this book, Paulson commented that “the boundaries of roles are less clear now that lawyers and mediators are increasingly occupying the same space”. Although exploring the differences between the different backgrounds of mediation practitioners, is out of this researchers project scope, this book, nevertheless, contains some credible suggestions as to how legal practice may evolve in future, with one proposal being that mediation becomes a recognised legal role. The research outlined in this book sought to obtain perspectives from mediators about their practice of mediation, similarly to this study, however, it focused on the aspect of mediator background, as opposed to impartiality, although the difference in mediator background was initially considered as a sub-question to answer the research question being investigated by this study and subsequently rejected. This book has been used to inform the recommendations suggested within the conclusion, particularly in relation to mediator training, which the book, also, commented on.

3.15 Carol Izumi (2017) Implicit Bias and Prejudice in Mediation

Similarly to Frenkel and Stark, Carol Izumi, a US Professor of Law, writes theoretically about how implicit bias, which is having unconscious prejudices and stereotypes, may affect mediator ability to remain non-judgemental. She suggests, in her paper accompanying a symposium presentation, strategies for overcoming implicit bias include: having an awareness of personal prejudices and adopting co-mediation to provide a mix of gender or ethnicity for clients. Her thoughts confirmed the inclusion of

being aware of own reactions and feelings as a strategy suggested for selection in Question 4 of the questionnaire. Her comments about co-mediation were echoed by participants of this research, as highlighted in later sections.

- **Methodology**

Research can be defined as the 'systematic study of a topic' and involves the ability to access and critically analyse any findings. The research methodology is the approach taken to undertake the research project. Therefore, how the research is conducted should be appropriate to answer the research question posed, providing reliability, 'the extent a procedure produces similar results under constant conditions, and validity, 'whether an item describes what it is supposed to'.

The aim of the project was to collect information from currently practicing mediators, about one aspect of the mediator role that of managing impartiality in practice, as part of my current role as Mediation Clinic Development Officer.

4.1 Research Paradigm

The two predominant paradigms for conducting research are known as quantitative and qualitative and can be defined as:

- Quantitative research, or positivism, is based on measuring the effect of a specified event or intervention by defining an experimental hypothesis which predicts the effect that may, or more commonly may not appear, known as the null hypothesis.
- Qualitative research, or constructivism, is, according to Parker:
 - "i) an attempt to capture the sense that lies within, which structures what is said about what is done;
 - ii) an exploration, elaboration and systemization of the significance of an identified phenomenon;

- iii) the illuminative representation of the meaning of a delimited issue or problem.”

Each of the paradigms has a different focus, which can be compared thus:

Quantitative	Qualitative
Experimental hypothesis	Defined research question for a specified phenomenon
Defined intervention, with dependent and independent variables, with controls	Justified methodology, which could be of assorted types, to understand layers of meaning
Measured results or deductive (either empirical or rational)	Inductive process
Statistical tests applied to analyse data to determine significance of findings	Coding conventions need to be defined for the analysis of the data collected
Is based on objectivity	Involves reflexivity
Originally established to seek truth	Seeking meaning, not fixed truth
Involves a scientific discourse derived from the epistemologies of positivism and realism	Knowledge is created by social and contextual understanding and is about how we come to understand an individual’s worldview
Predominant in natural sciences	Predominant in social sciences

Table 3: Comparison of Quantitative and Qualitative Research Paradigms

Studies can either utilise one of the above only, or take a mixed methods approach, utilising both paradigms simultaneously. It should be noted that each type of

research is not better than another and academics are becoming more accepting of the idea that the distinctive types of research are both valid and reliable when applied in the appropriate way.

This research adopted a predominantly qualitative approach, as this research is seeking to understand a particular aspect of the mediator role that of being impartial and the researcher was seeking to obtain the thoughts and experiences relating to impartiality from the participants involved in the study. An attempt at assigning quantitative values to the proposed meanings of impartiality was incorporated too. Collection of statistical data, such as the number of occasion's mediators felt that they had or had not remained impartial, was not the focus of this study.

4.2 Research Ethics

Prior to conducting this study a research proposal was submitted for Supervisor Panel approval and Ethics Board approval was, also, obtained via existing University procedures. In accordance with the ethical considerations of conducting research, practicing mediators in Canterbury were invited to participate in this study on a voluntary, consensual basis (Appendix 1), and provided their responses anonymously, which mitigated this being intrinsic research, with any of their client names also being anonymised, as per confidentiality requirements of the mediation process itself. As the mediators are professionals and not regarded as vulnerable and the research is unlikely to cause either physical or emotional harm there were few other ethical considerations for this research, particularly as no children were involved.

4.3 Research Approaches

Yin defines a *case study* as “an empirical inquiry that investigates a contemporary phenomenon, within its real-life context, especially when the boundaries between phenomenon and context may not be clearly evident”. Stake’s viewpoint is that the unit of analysis, or case, is key, with the focus being “an aim to understand one thing well”. Based on both Yin’s real-life context and Stake’s description that the aim is to understand one thing well this study can therefore be declared a case-study. Stake also incorporates a requirement that the “in-depth description and analysis occur within a bounded system”. This study is bounded in two ways, with participants needing to be of a particular profession, that of practicing as a mediator, and based within a specific geographical area, being Canterbury, Kent.

A researcher conducting research within their own organisation or profession is defined as an Inside Insider by Brown, whilst Merriam and Tisdell describe this as an intrinsic approach to research. An advantage of this approach is that it provides ‘living’ knowledge relating to the topic under investigation. However, the researcher must take particular care not to be influenced by knowing the participants of the study. In this case, it was hoped that due to existing relationships the data gathered would be more exposing than that provided to a more general survey method.

A *comparative* approach to research “involves asking whether different legal systems and legal cultures have addressed problems in a different ways”, and whether solutions adopted are perceived as successful or otherwise. It can be used to highlight any discrepancy between how a topic is portrayed in literature and how it actually operates in practice, thus making this approach relevant as this study is seeking to explore how mediators apply the theoretical concept of being impartial

within their practice of mediation. As well as being conducted purely for academic purposes, this approach can also include a policy aspect and can provide information to inform reforms in practice or considering the desirability of introducing forms of legal regulation. As identified in the literature review this study has similarities with an existing study and some comparisons of the two sets of findings will be made in the analysis section of this report. One potential problem with this approach is related to whether actual like for like are being compared.

A mixture of convenience and purposive *sampling* occurred. Convenience sampling is based on accessibility of participants to the researcher and is appropriate for this particular case study as the mediators selected for participation are all associated with the Mediation Clinic and practicing in Canterbury. Purposive sampling aims to generate in-depth understanding on the subject of interest, so the sample was therefore taken from practising mediators, who have knowledge of the mediation process and have applied the principles in practice with their clients. The mediators selected for possible participation are from a variety of professional backgrounds (lawyers, barristers, academics and business professionals), of different genders, practising different types of mediation and have been practising for differing lengths of time.

15 mediators based in Canterbury were selected as the sample, with 13 of them being the members of the Mediation Clinic mediator panels, thus narrowing the case study approach further. Overall, there were 7 male and 8 female research participants selected, with ages ranging from 42 to 64 years, with 7 having a legal background and 8 having non-legal backgrounds. Several of the selected

participants practice more than one type of mediation with overall numbers being 6 civil and commercial mediators, 6 family mediators and 8 workplace mediators. To balance numbers of family and civil and commercial mediation practitioners an additional family mediation practitioner, known by the researcher, who is not a member of the Clinic family mediator panel was invited to participate. A community mediator from a local community mediation practice, that was formerly associated with the Clinic, was also included, as this is not a type of mediation that the Clinic is involved in, but had been the type of practice for the first similar study conducted. The researcher, therefore, did not want to omit this type of mediation from the study so as to enable a more valid comparison. Also, three members of the Clinic mediator panels are community mediators, in addition to undertaking other types of mediation, and would therefore be drawing on experiences from several types of mediation, making a total of 4 community mediators.

Qualitative questionnaires (Appendix 2) were distributed to the selected sample, following a pilot to test the initial draft of the questionnaire, and were employed to provide a consistency to the data collected from each participant, with participants still being able to provide limited answers in their own way to share experiences of impartiality relevant and personal to them, to add some richness of data. Questions within questionnaires can be of assorted types, with the key types being: closed and open. Closed - ended questions provide a list of possible answers for the respondent to select from, whilst in open-ended questions the respondents answer in their own words, which can make analysis of responses more difficult.

The more structured a question the easier the responses are to analyse, with six types of structure identified as list, category, ranking, scale, quantity and grid, which are described below:

<i>Question Structure Type</i>	<i>Description</i>
List	A list of possible answers is provided, with any of them being chosen.
Category	Each respondent can only fit into a single category. For example, if age categories might be 18 – 24, 25 – 34, 35 – 41, 42 – 47 etc.
Ranking	The respondent is asked to place responses in rank order from highest to lowest.
Scale	Scaling devices (nominal, ordinal, interval, ratio) can be used, and can involve statistical analysis.
Quantity	This is a number providing the total amount of any response.
Grid	A table can be used to record answers to two or more questions concurrently.

Table 4: Question Structure Types

The questionnaire in this instance used, both closed, list type questions, with suggested possible answers provided in order to identify possible themes of impartiality, and open questions asking mediators to share their personal experiences relating to their impartiality in order to obtain specific examples of occurrences of when it became difficult to maintain impartiality.

One drawback of questionnaires is that of question wording, which can be ambiguous, imprecise and assumptive. Therefore, a pilot questionnaire had previously been distributed to two non-Canterbury based associates of the Mediation Clinic to test an initial questionnaire, following review by the academic supervisor of this project. Feedback received from the pilot questionnaire was then incorporated

into a final questionnaire that was then distributed, meaning that as well as selecting meanings that resonated with them, participants were also asked to rank these meanings of impartiality they selected in order of importance to them.

Parker explains that *discourse analysis* focuses on how language becomes structured to produce sets of meanings that are independent of the intentions of speakers or writers. It could be argued that the predominant approach for research within law, that of black letter analysis, is also a type of discourse analysis, based on the language and application of judicial doctrine. A very basic discourse analysis was used to review the responses received to the open-ended questions included in the questionnaire to identify common themes used to describe the mediator views on impartiality.

Therefore, in summary, this research was a mixed methods study, conducted using an intrinsic, purposive, comparative, case-study approach, involving interpretative, qualitative data collection and analysis techniques, in order to explore the extent that mediators in Canterbury maintain impartiality within practice.

- **Analysis**

6 completed questionnaires were received, giving a 40% return rate, which is above average response rate for questionnaire return. All of the responses were from members of the Mediation Clinic mediator panels, which raises a question about the inclusion of the two additional mediators not on the panels being included. 3 responses were from mediators with a background of either still practising as a lawyer (x 1) or having done so previously (x 2), while the other 3 responses were from mediators with a non-legal, business background. 4 participants are male, with the other 2 being female, all aged between 42 and 55 years. 1 participant is of Asian ethnicity and the others are all white-British in origin. All participants are educated to at least degree level, have additional professional qualifications and are engaged in full-time work, either employed or self-employed.

One participant practiced family mediation only. A second participant practiced in civil and commercial and workplace mediations. Two further participants practiced workplace and community mediation, with one of them also mediating for health-related disputes in addition. A fifth participant practices workplace, family and community mediation, whilst the remaining participant practices civil and commercial, family and workplace mediation. This data was collected to see whether there were differences in responses from the different types of mediation practiced, to see whether there was support or otherwise for the work of Maclean and Eekelaar, although this aspect of study was technically out of scope for this project, due to the small sample size. It has, therefore, been assumed that impartiality or acting fairly work similarly within the different types of mediation. Some basic support for this

assumption in this case-study is that five of the respondents practice more than one type of mediation, so their comments are likely to be related to their overall experiences, as none of the questions asked anything specifically about the different processes of practice. In fact, it was the respondents themselves who commented on the different processes and models of mediation, as will be seen later.

The responses from all the completed questionnaires have been collated for each question, providing an overall summary of responses received. The responses for each question are then analysed in separate sections. The initial questions on the questionnaire were about the individual mediator in order to gain data about the types of mediation practiced in case comparisons between the types of practice exposed any differences between the types of practice. There was also potentially scope for comparing the findings of this study with those of Maclean and Eekelaar with knowing the professional background of the respondents, either from a legal background or a non-legal one. These were then followed by further questions which have been used to answer the overall research question. Statistical tests of significance cannot be applied due to the limited sample size, meaning any inferences cannot be identified as being significant or otherwise. However, the inferential (or inductive) data collected from a small sample, to collect data related to answering a particular research question, can be used to generalise about larger groups. Therefore, this small qualitative exercise provides indicative rather than significantly influential results.

The collated responses for each of the questions will now be reviewed according to their question number from the questionnaire (Appendix 2).

5.1 Question 3 Responses

The responses received to the question 'What does impartial/neutral mean to you?' are provided in the table below, accompanied by the ranks of importance given by each individual to each of their selected suggestions (with 1 being the highest importance):

Suggestion	Selected	Rank
Not taking sides	Yes x 6	1, 1, 1, 2, 2, 7
Remaining unbiased	Yes x 6	2, 2, 2, 3, 3, 3
Working alongside both participants equally	Yes x 6	1, 1, 5, 5, 5, 6
Being fair	Yes x 5 No x 1	3, 4, 6, 7, 8
Being non-judgemental	Yes x 4 No x 2	1, 1, 6, 7
Having no vested interest in the outcome	Yes x 4 No x 2	1, 3, 5, 6
Having no prejudices	Yes x 4 No x 2	4, 4, 6, 7
Remaining non-directive	Yes x 3 No x 3	4, 8, 8
Others provided by participants:	Yes x 2 No x 1	
Communicating effectively with both parties		4
Treating both participants equally (different to working alongside, which might indicate time allocation)		2
Disclosing any possible/apparent conflicts of interest before accepting appointment		Unranked, as given in Pilot

Table 5: Questionnaire Question 3 Summarised Responses

Three suggested meanings selected by all six participants were:

- not taking sides
- remaining unbiased
- working alongside both participants equally

Not taking sides received the highest rankings overall, with ranks of predominantly 1 (x 3) and 2 (x 2) with one lower ranking from the mediator practising family mediation only.

Remaining unbiased received the next highest and most consistent rankings, with ranks of 2 (x 3) and 3 (x 3).

The meanings of working alongside both participants equally and being non-judgemental received ranks that were bi-polar. The difference in these rankings for being non-judgemental and working alongside both participants equally does not appear to be based on gender, type of mediation practised or professional background of the mediator.

Being fair, having no vested interest in the outcome and having no prejudices meanings received a range of ranks. Izumi would argue that each individual has implicit bias and so, therefore, cannot be totally avoided by mediators, but can be managed, which may account for the range of scores, as some participants may have more awareness than others of their own internal prejudices.

Four participants selected being non-judgemental, having no vested interest in the outcome and having no prejudices as a meaningful description. Interestingly, for being non-judgemental and having no vested interest in the outcome the four participants who selected both were the same (participant numbers 2, 3, 4 and 5). The two participants that had discounted both were also the same (numbers 6 and 7). Three of the four participants (numbers 2, 4, 5) who selected being non-judgemental and having no vested interest had also selected having no prejudices, whilst the other had discounted this meaning.

The remaining non-directive meaning divided the opinion of the participants, with three participants selecting that this meaning was important and the other three participants discounting it as a meaning entirely. The ranks provided by the three affirmative responses were bi-polar. The difference in affirmative and negative responses and the bi-polarity of the rankings does not appear to be related to either the type of mediation practiced or the background of the mediator.

Overall, 2 participants selected all 8 suggested meanings, with neither adding any suggestions of their own. 2 participants selected 7 of the suggested meanings, with each of them discounting a different suggestion, with these being remaining non-directive and having no prejudices. One of them included a suggestion of their own. 1 participant selected 5 of the suggested meanings and discounted the other three, whilst including a suggestion of their own and the final participant selected only 3 of the suggested meanings and discounted all the others.

Three further meanings were suggested by participants, both in the study and during the pilot of the questionnaire.

So it would, therefore, seem that impartiality has many different meanings. However, three suggested meanings selected by all participants, which could mean that these have greater importance, are:

- not taking sides
- remaining unbiased
- working alongside both participants equally

Not taking sides and remaining unbiased were also given higher rankings than other suggested meanings by these respondents so these could be valued more highly than other meanings. Therefore, this could indicate possible definitions of impartiality, from the suggestions provided for selection, as primarily being not taking sides and remaining unbiased, which were two different answers provided for selection, although now seem very similar. The earlier studies by Mulcahy and Douglas used interviews and the details of the questions asked were not provided in their reports, but from their studies they identified impartiality as an aspect of neutrality as opposed to seeking the meaning of impartiality in itself. Exon's discourse on mediator styles did suggest a possible definition of the role of the mediator being defined as not taking sides and these indicative findings would support this. Becker, in his study did ask a question relating to the meaning of neutrality, providing two answers, remaining non-directive and having no vested

interest in outcome common to my suggestions and two different suggestions of impartiality and even-handedness. A higher percentage of mediators in New Zealand selected neutrality as predominantly meaning impartiality and even-handedness, which supports this investigation into mediator impartiality. The responses common to both questionnaires were selected less frequently by mediators in this study and assigned primarily lower rankings than other suggestions, although it would not be valid to calculate a percentage figure as Becker has done, due to the small sample size.

5.2 Question 4 Responses

Strategies used to ensure impartiality/neutrality (both terms were used in this question, as the questionnaire was distributed to mediators conducting different types of mediation, which links this study more clearly with the study conducted by Becker, although he did not ask mediators about strategies for ensuring impartiality, so a comparison to his results cannot be made for this question) when working with clients were selected by the participants from suggestions provided as below:

Strategy	Selected	Rank
Seeing both perspectives	Yes x 6	1, 1, 2, 2, 2, 6
Building rapport	Yes x 6	3, 3, 3, 3, 4, 6
Being aware of own reactions and feelings	Yes x 5	1, 2, 3, 3, 4
Remaining non-judgemental	Yes x 4 No x 1	3, 3, 4, 6
Maintaining transparent communication	Yes x 4 No x 1	1, 2, 4, 5
Using problem solving to identify	Yes x 4 No x 2	2, 5, 6, 7

outcome		
Being mindful of story-telling order	Yes x 3 No x 2	5, 5, 8
Remaining non-directive	Yes x 3 No x 2	5, 7, 9
Minimising interruptions	Yes x 2 No x 3	7, 7
Others suggested by participants:	Yes x 2 No x 1	
Active listening		4
Co-mediating		1
Explaining 'reality testing' in initial joint meeting		Unranked, as given in Pilot

Table 6: Questionnaire Question 4 Summarised Responses

Strategies for maintaining impartiality when working with clients selected by all six participants are:

- building rapport
- seeing both perspectives

With seeing both perspectives being given higher rankings than building rapport, with both strategies being given one lower ranking.

Five further strategies were given a range of ranks by the participants:

- being aware of own reactions and feelings
- remaining non-judgemental
- maintaining transparent communication
- using problem solving to identify outcomes

- remaining non-directive.

Although, only being selected by 5 participants, being aware of own reactions and feelings received higher rankings than building rapport.

Minimising interruptions received consistent ranking, but was only selected by two participants being discounted by three participants. Being mindful of storytelling order was given two different rank scores, with neither score being the highest rankings.

Three other strategies were suggested by participants and during the pilot of the questionnaire, with these being: active listening; co-mediation; and explaining 'reality testing' in first joint session.

These findings indicate that key strategies utilised for maintaining impartiality, based on the number of times selected and rankings allocated, are: seeing both perspectives; being aware of own reactions and feelings and building rapport. This focus on ways a mediator ensures they are being impartial in practice was not a focus of the earlier similar studies identified so comparisons are, therefore, unable to be made. The identification of being aware of own feelings and reactions supports the theory proposed by Izumi's that being aware of personal implicit bias assists with maintaining impartiality. The responses to this question have, however, added to the existing knowledge base relating to impartiality within mediation. The being mindful of story-telling order, included from information from Fuller, who concluded that mediation clients perceived this as a key indicator of mediator impartiality, was only selected by 3 respondents and not ranked highly by the mediators who selected this

strategy, which may indicate that this is a less important aspect of impartiality to mediators than their mediation clients.

Some of the suggested meanings of impartiality (Question 3) have corresponding strategies (Question 4), so a comparison of these is:

Meanings	Ranks	Strategies	Ranks
Not taking sides	1,1,1,2,2,7	Seeing both perspectives	1,1,2,2,2,6
Being non-judgemental	1,1,6,7	Remaining non-judgemental	3,3,4,6
Remaining non-directive	4,8,8	Remaining non-directive	5,7,9
Having no prejudices	4,4,6,7	Being aware of own reactions and feelings	1,2,3,3,4

Table 7: Comparison of Meanings and Strategies for Impartiality

The meaning of not taking sides and the associated strategy of seeing both perspectives received responses from all participants, with almost identical rankings being given, which would indicate that this is the strategy most commonly employed to ensure not taking sides. The strategy of being aware of own reactions and feelings was ranked more highly than the corresponding meaning of impartiality, indicating that this strategy for maintaining impartiality is of more importance to mediators, rather than it being a key understanding of meaning for them.

The strategy of being aware of own reactions and feelings received higher rankings than its associated meaning of impartiality of having no prejudices.

The participants made further comments relating to the suggested meanings and strategies in subsequent questions and these will be explored in later sections.

5.3 Question 5 Responses

Participants then described how they personally monitor their impartiality, with responses received categorised into themes below:

- Personal awareness such as appreciation of one's own prejudices, which is very different to "having no prejudices"
- By being aware of my personal prejudices and potential for being judgemental I take 'stock' on a regular basis throughout the exercise
- Monitoring own feelings and responses

- When working with parties, self-reflection "in action"
- Reflecting upon mediation undertaken
- Filling in a reflective statement after each meeting to monitor my performance and aid any improvements

- Active listening includes monitoring the parties' body language which may provide non-verbal messages as well as listening carefully to verbal responses
- I also tend to check back with both parties that they feel they are getting a fair hearing
- Ask clients for feedback

- If co-mediating liaising with your colleague
- Co-mediating helps

- Co-mediating is the most important check and balance, by being able rely on another mediator to help maintain impartiality, to redirect where necessary and to discuss with you if they feel there is partiality and offer an alternate perspective or approach
- By speaking with my Professional Practice Consultant and mediation colleagues
- Professional Practice Consultant monitoring of my practice
- Watching time allocations
- I also seek to make sure both parties are fully understanding, hence my answer to not necessarily provide equal time to each side , as one may require more 'working alongside' than the other
- Ongoing training

These responses indicate that mediators monitor their impartiality using predominantly four methods:

- Being aware of own prejudices and feelings;
- Reflecting upon own practice;
- Obtaining feedback from clients;
- Participating in co-mediation.

With a fifth method being identified by family mediators of working with their Professional Practice Consultant (PPC).

It would, therefore, seem that mediators in Canterbury agree with both Beer's and Izumi's suggestion, that having awareness of own feelings is beneficial for maintaining impartiality, as they have identified this as a key method they use to monitor their own impartiality.

5.4 Question 6 Responses

Four participants identified that they found understanding both viewpoints throughout mediation mostly easy, whilst two participants identified that they sometimes found it difficult, with none of them selecting always easy. With the two different responses being received it is difficult to infer anything particularly definite, other than some mediators sometimes do find it difficult to understand both viewpoints. On reflection this question could have been posed in a better way or even omitted, as subsequent question responses give clearer views about struggles with impartiality.

Therefore, as two mediators identified that they sometimes found it difficult to understand both viewpoints, this might indicate that mediators are not always able to see both perspectives at all times. This would corroborate with mediators elsewhere acknowledging they struggle at times to be impartial identified in earlier studies conducted by Mulcahy and Becker, although they do think impartiality is a very important concept to adhere to, according to Becker.

5.5 Question 7 Responses

Four participants do sometimes wonder whether they have NOT remained impartial, whilst two participants felt they always remained impartial.

Examples of when the participants wondered about their impartiality remaining in place were provided by three of these respondents (two workplace and community practitioners and one family practitioner) thus:

- A mediation was cancelled at the last minute, due to an incident at the office and one client complained bitterly. Given the nature of the incident I felt their response was unreasonable and I worried thereafter I would not remain impartial and was acutely aware of mannerisms and body language as the mediation continued.
- I feel it is important to 'self-check' so regularly wonder if I have lost my impartiality. This is particularly relevant between the individual meetings and the joint meeting. Until all the individual caucus meetings have taken place there can be a danger of being drawn to a party and going beyond an understanding of their situation. There is a fine line between empathy and over identification with one party. I do my best to deal with this by reminding myself that I will not have a complete picture until I have seen everyone. Case example – when a female patient was complaining about her dentist. Initially a rapport was established but when I asked a challenging question I was met with an angry response accusing me of siding with the health professional. Afterwards I realised that my question was clumsy and that internally I was thinking “no wonder the dentist finds you a difficult patient”. Also through supervision I began to appreciate that there were counter-transference issues.
- On the occasional time I am mildly directive to seek to achieve an agreement that is very likely the best that can be achieved given certain intransience on one side or another.

These results and examples provide further indication that mediators certainly question their ability to remain impartial. The examples demonstrate factors that affect mediator impartiality which can be categorised as: an outside event; taking

care with empathy and over-identification with clients; self-reflection; natural judgement being triggered and when being directive. Two of the above examples are based on the mediator's reaction to a client, whilst the third indicates that being directive may be perceived by the client as not remaining impartial.

Possible reasons for a departure from impartiality suggested theoretically by mediators in Becker's study include: the process is often emotional; you can be 'sucked in'; the content of discussions triggers natural judgement; having a formal legal background; focusing on a child's best interest and during the reality testing of potential outcomes phase of the mediation process. Unlike this study, mediators in Becker's study were not asked to provide personal examples of incidences of deviating from impartiality. The factors of being 'sucked' in or over-identifying with a particular client and the triggering of natural judgement suggested in theory have been confirmed by personal examples from within mediation practice provided by mediators in this study.

5.6 Question 8 Responses

All participating mediators identified a wide variety of attitudes or behaviours from clients that affect their ability to maintain impartiality, despite two respondents feeling that they always remained impartial:

- using mediation to bully or manipulate the other client
- when a client is openly manipulative of the other party or attempts to manipulate me
- refusal to engage properly in mediation

- overbearing males (from a male participant)
- when a party holds to an obviously impossible position (given what the other party has also stated) more out of a (stated) point of 'principal' where they could potentially achieve a settlement – albeit maybe not the full 100% of what they would like – and thereby, in reality, failing to mediate
- displays of unreasonable behaviour
- when clients reveal hurtful things that have also happened to me
- when I suspect a client is not being truthful
- when they put their own desires selfishly above the other, for example in the treatment of children, or in positioning for financial settlement based on overt greed

All of the respondents identified at least one attitude from clients that has the potential to affect impartiality within practice. Reactions triggered by the content of the mediation, identified here, as clients revealing things that have happened to me, supports this suggestion proposed theoretically by mediators from Becker's study. The responses received in this study begin to explore the 'real' reasons that cause hindrances to impartiality, with several different ideas to those suggested previously

being revealed, thus the knowledge base of application within practice for impartiality has begun to be extended. These responses would further indicate that mediators do not always maintain impartiality, but with noticing own reactions and taking action, as proposed by Izumi the clients may remain unaware that a mediator has had a lapse of impartiality.

Actions that have been taken when a mediator feels that they haven't remained impartial have been grouped into themes below:

- taking time out during a session, to clear my head, bring my feelings into check
- give myself a good 'inner talking to' as soon as I can to enable me to continue to remain impartial
- reflection "in action"
- filling in a reflective statement after each meeting to monitor my performance and aid any improvements
- being extra vigilant as to what I say verbally and through body language
- to try to understand what is motivating a party to act in the way they are
- look beyond the behaviour in a bid to understand what is going on for the party
- ask clients for feedback

- talk to other mediators/ask advice
- being clear to both parties that the intransience is going to stall any agreement and at this point I may offer some direction, including the point that the direction is my opinion (only)
- ask the party concerned to reflect on their behaviour and ask them how this might be perceived by a neutral third party
- PPC monitoring of my practice
- ongoing training

All of the mediators identified actions they have taken when they feel they have deviated from being impartial. The themes have been categorised as: self-reflection; attempting to understand the behaviour; seeking feedback; explanation and ongoing supervision and training. Some of the actions taken to regain impartiality are similar to the responses for monitoring impartiality, which would make sense. Although a further strategy for remaining impartial has emerged of finding an understanding for why a client is behaving a certain way. As the mediators have all provided actions they have taken when they feel they have deviated from impartiality this would further indicate that mediators do not always maintain impartiality, as proposed by, but with the mediators noticing own reactions and taking appropriate action, the clients may remain unaware of this. Exploration of ways that mediators regain their impartiality in practice further develops the theoretical suggestions highlighted by

Becker, providing a deeper understanding of how mediators practice the concept of impartiality.

5.7 Question 9 Responses

Four participants have had clients say that they've been biased, with bias being used as the opposite to impartiality for the purpose of this question, with three participants not having been told they've become biased. Three examples shared (with limited details), unfortunately one respondent was unable to recall details, are:

- A health complaint case where although resolution was achieved the GP felt I had shown slight bias towards the patient.
- Thankfully, this has only ever happened once before. The minute the client accused me of bias, I volunteered (politely) to end mediation with the couple concerned following which, the accuser apologised to me and requested I continue to mediate. Following this, I sought advice from my Professional Practice Consultant, who said I should do what made me feel comfortable. I chose to stop mediation with the couple concerned as I felt my position could be compromised going forward.
- I have had 1 client (party 1) ask in a joint family mediation session if we (co-mediating), were favouring the other client (party 2) on the basis of not refuting party 2's asking for more money in a financial discussion as party 2 were looking after their children. This comment was dropped fairly quickly after it was questioned.

Four participants have heard of incidences where clients have expressed that the mediator has not remained impartial, with one of them unable to recall specific details, whilst two participants hadn't. Examples provided are (no additional details provided by participants):

- I have had a number of clients, as a solicitor, where they have tried mediation and have become disillusioned with the process, as the mediator has stated their view as to the outcome and they therefore felt this empowered the other client not to engage properly or mediate with an open mind.
- In community mediation in neighbour disputes from time to time a mediator has been 'accused' of being impartial. This would be addressed in supervision, to establish whether it perhaps was a defensive reaction from the neighbour, or maybe identify an area that the mediator has to work on.
- I have heard of several occasions mentioned by clients that have come to me/us from other family mediation providers, where they felt it was biased. In 6 of 7 cases, this was the man suggesting that the mediator, a woman, favoured the party that was a woman.

Overall, three respondents have had both clients say they have been biased and heard about other incidences of bias. One participant had not had clients express that they had become biased or heard about any other incidences. With four respondents receiving direct feedback from clients about being biased, this indicates that clients of mediation certainly perceive a breakdown in impartiality, which based on comments may not actually be the case, such as the GP possibly aggrieved at the outcome of the mediation; defensive reaction from one neighbour and when issue of bias raised and discussed, the accusation appeared then to be dropped.

With five respondents indicating that they had heard of incidences of bias or been involved in possible complaints in this study, it would initially seem that a higher occurrence rate of incidences of bias has been identified locally, than the Garcia study would indicate. Garcia only identified one such accusation from a client in her earlier study, although only thirty hours of mediation were analysed and the mediators responding to this study would have been providing examples from many more hours of practice than this. As a greater number of practice hours is being drawn upon, it may therefore not be a valid inference that the incident rate of bias occurrences is higher locally. A further reason why Garcia only found one example of a client complaining about mediator impartiality may be that mediators monitor their own impartiality and have developed strategies to maintain this, so although as we have seen they acknowledge they sometimes struggle to remain impartial clients may not be aware of this.

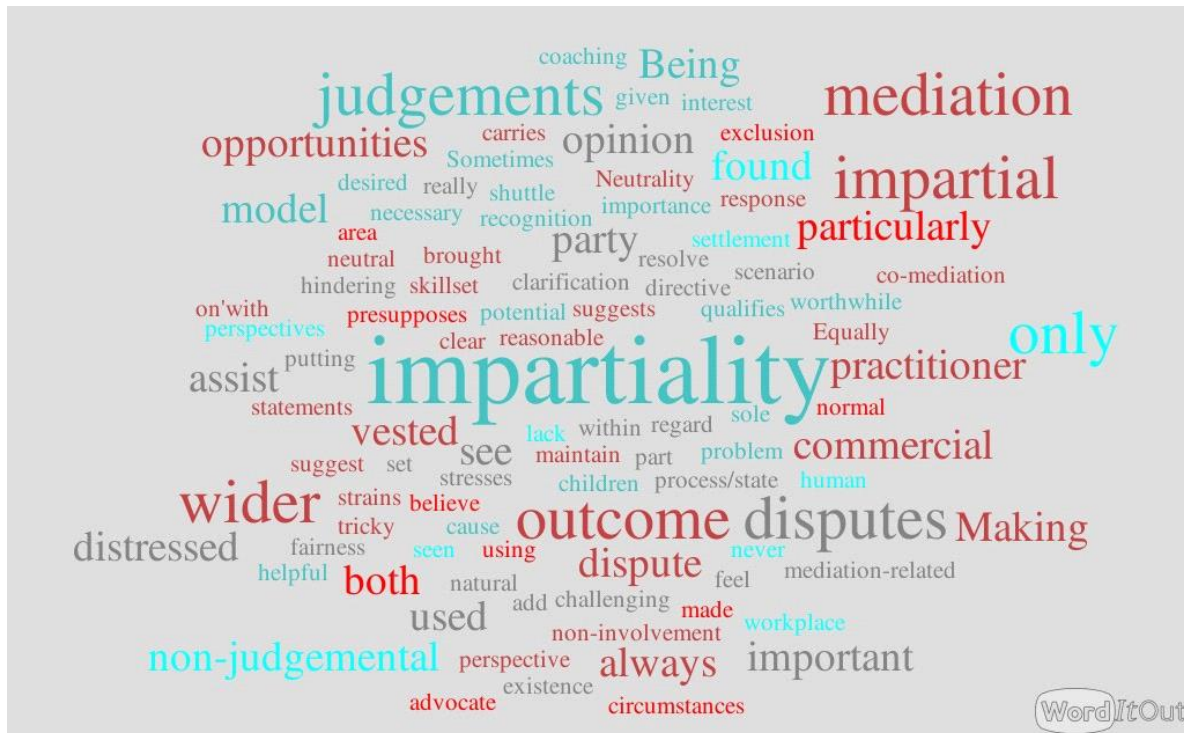
5.8 Other Thoughts from Participants (Question 10 Responses)

Other thoughts and ideas relating to impartiality within mediation provided by three of the study participants, in response to the final questionnaire question, have been analysed using basic, manual discourse analysis, looking for themes within all the sentences, and by use of an online word cloud application for an electronic analysis to identify common themes. One of the three participants had obviously given the topic considerable thought and provided several insightful comments. The original raw data used for the analysis can be seen in Appendix 3.

Basic discourse analysis of the data provided by the responding mediators revealed the following themes:

- All three responses highlighted the importance of impartiality within mediation, including the idea of being seen to be impartial from one of them.
- Two participants, both workplace mediators, felt that it is sometimes beneficial to be directive, as it can assist with achieving a settlement, as long as any suggestions are accompanied by reminders of process. One of these participants acknowledged that being directive has associated risk too.
- One participant advocates the use of co-mediation, particularly in family scenarios, as a key strategy for maintaining impartiality, advocated by Izumi as a strategy for overcoming implicit bias.
- Another participant commented on the use of terminology within mediation explaining that the terms neutral and impartial are not always used appropriately.
- Another comment was related to the idea that impartiality means being non-judgemental as they felt that this was not completely possible, because making judgements is a normal human response. They felt that judgements can play an important part in problem-solving, another skill of a mediator.
- A final comment to be highlighted is regarding the meaning of having no vested interest in the outcome also being difficult to always achieve, particularly in family mediations where the focus is about putting the needs of the children first. They felt that this focus could affect the idea of fairness too.

Word Cloud



The size of the text within the word cloud indicates how often the words occur, with the largest size text identifying the words occurring most frequently. The colours have no meaning and are an aid to visualisation only. In a study of impartiality it was no surprise to see this word being the largest. The next text size down applied to several words listed in no particular order: mediation; disputes; impartial; wider; outcome and judgements. The majority of the words are of the smallest text size indicating they occur infrequently, which would be expected for the amount of text being analysed here. One drawback of this electronic analysis is that it is difficult sometimes to differentiate between the different text sizes as they decrease, although, admittedly the less frequently occurring words are unlikely to identify themes. Another drawback is that it separates linked words distorting the themes somewhat, for example wider being a more commonly used word than perspectives, when the phrase used by the mediators was wider perspectives, with them having

also having used the words opinion, options and viewpoints in conjunction with the word wider. This distortion, however, may be due to the researcher's limited familiarity with the application.

Themes identified by both methods of analysis are impartiality and judgements, with several comments regarding being non-judgemental provided by mediators. Additional themes affecting mediator impartiality identified from the manual analysis are: terminology, which has been discussed in the background section and will be commented on further in the conclusion section; being directive and the co-mediation model assisting impartiality.

- **Conclusions & Recommendations**

Research involves defining a specific research question, then selecting the relevant paradigm in which to find the answer, involving a comprehensive evaluation of existing research on the topic in question. Research to date into mediation is predominantly based within the qualitative paradigm and often appears to be a pulling together of existing data, rather than focusing on collecting new data. A predominant focus for the existing research has been on outcomes and duration of the process, with a few studies seeking to understand the mediation process more fully.

The research question posed for this study was:

- To what extent do mediators in Canterbury maintain impartiality within practice?

This overall question was then defined into five more specifically defined sub-questions to breakdown the topic into smaller discrete areas, to enhance this investigation, rather than using a single, high-level question:

- What does impartiality mean to mediators?
- What common strategies, if any, do mediators employ to maintain impartiality?
- How do mediators ensure that they are remaining impartial?
- Are mediators able to always maintain impartiality?
- Why are mediators sometimes unable to maintain impartiality?

This study focused on the concept of mediator impartiality, as this is a key part of the mediation process, with an overall aim of exploring how this concept is applied by mediators within the practice of mediation, to explore how mediators choose to be and remain impartial and whether it is feasible for impartiality to be always maintained.

An overall summary of the indicative findings of this case-study, conducted in Canterbury, UK, sponsored by the Mediation Clinic will now be provided.

6.1 Conclusions

It would seem that impartiality has many different meanings potentially, although this study could infer that not taking sides or remaining unbiased could be the key meaning of impartiality within mediation, as higher rankings were assigned by all respondents, which is supported by Exon's discourse on mediator styles, which

suggested not taking sides as being a possible definition for mediator impartiality. However, Izumi theorised that being unaware of personal implicit bias may affect mediator impartiality, so might argue that remaining unbiased is unfeasible, so should not be a key definition of impartiality.

Terminology used within mediation to describe impartiality is confusing, with key terms sometimes being used interchangeably and sometimes not. Continuing with the theme of terminology, similarly to the finding from McCorkle in The US there is ambiguity within the UK Codes of Practice definitions of mediation with the terms impartial being used by the FMC and neutral by the CMC, accompanied by acting fairly. One of the respondents commented that 'fairness also needs to be considered' and this may be a further term requiring clarification of meaning within mediation and is another concept that may benefit from further research. Menzel attempted to define a theoretical critical framework for assessing mediation, which focused primarily on the fairness of the outcome of the mediation, rather than fairness within the process, when facilitating negotiations between clients, but his idea of a framework could be further developed to assist understanding of how theoretical concepts within mediation are applied within practice.

There was little knowledge found in the existing literature relating to how mediators apply the concept of impartiality within practice and this researcher hoped to add to the existing knowledge base. Mediators were, therefore, asked to comment on strategies they use to maintain their impartiality. Key strategies utilised for maintaining impartiality are identified as: seeing both perspectives; being aware of own reactions and feelings; and building rapport, based on the number of times selected and rankings allocated. Mediator perceptions of the importance of the

strategy of story-telling order differ to the perceptions of importance to mediation clients.

Methods mediators use to monitor their impartiality are predominantly:

- Being aware of own prejudices and feelings;
- Reflecting upon own practice;
- Obtaining feedback from clients;
- Participating in co-mediation.

With a fifth method being identified by family mediators of working with their Professional Practice Consultant (PPC).

In her book, Beer suggests that having awareness of own feelings would be a beneficial way to ensure a mediator remains impartial, and Izumi proposed that being aware of personal implicit bias is the first step in overcoming bias, and it seems that local mediators agree with them as this is a method they utilise within practice.

With two respondents identifying that sometimes they found it difficult to understand both viewpoints, three respondents sharing narratives of times they had questioned their impartiality and two respondents providing examples of hearing about incidences of bias, this might indicate that mediators are not always able to maintain impartiality at all times, which would corroborate earlier studies conducted by Mulcahy and Becker. Garcia's study identified a single occurrence of bias, but only

thirty hours of mediation had been analysed, while all the mediators, from Canterbury, who participated in this study identified examples of occurrences of bias indicating a higher occurrence rate. Although Garcia only analysed thirty hours of mediation and it is likely that the mediators in Canterbury have conducted at least thirty hours of mediation individually, hence the higher numbers of occurrences relating to bias.

Mediators acknowledge that it can sometimes be difficult to remain impartial, although they do think it is a very important concept to adhere to, according to Becker. The factors of being 'sucked' in or over-identifying with a particular client and the triggering of natural judgement suggested in theory have been confirmed by personal examples from within mediation practice provided by mediators in this research.

All of the respondents identified at least one attitude from their clients that personally has the potential to affect their impartiality, rather than the possible hindrances that were suggested theoretically by mediators in Becker's earlier research, extending the theory into actual practice. Reactions triggered by content were identified by both this and the earlier research as something that causes a deviation from impartiality. But as has been seen within the analysis, manipulation was something that local mediators struggled with when being impartial. They all identified actions they have taken when they have felt they haven't remained impartial. These responses would further indicate that mediators do not always maintain impartiality, but with noticing own reactions and taking action, the clients may remain unaware of this. This may be another reason why Garcia only found one example of a client

complaining about mediator impartiality during her research project. Some of the actions taken to regain impartiality are similar to the responses for monitoring impartiality, which would make sense, although might indicate that suggested responses to an earlier question have influenced response to later, open questions. A further strategy for remaining impartial emerged from this research with one participant sharing that finding an understanding for why a client is behaving a certain way assisted with maintaining impartiality. The exploration of ways that mediators regain their impartiality in practice further develops the theoretical suggestions highlighted by Becker, providing a deeper understanding of how mediators actually practice the concept of impartiality.

Further themes identified by both methods of discourse analysis are impartiality and judgements, with several comments regarding being non-judgemental provided by mediators. Additional themes affecting mediator impartiality identified from the manual analysis are: terminology, which has been discussed in the background section and will be commented on further in the conclusion section; being directive and the co-mediation model assisting impartiality.

As explained earlier mediator styles and models of mediation can also have potential impact on impartiality. Exon suggests that a more evaluative style may cause a mediator to cross the boundaries of impartiality, when they become directive to achieve a settlement, particularly within the shuttle mediation model. Several of the respondents to this study commented that they found the co-mediation model beneficial for maintaining impartiality, because another mediator is also involved and the team can therefore monitor each other's impartiality and may provide a balance

for gender and ethnicity, in addition to remaining aware of own personal reactions and feelings. Mediators in Becker's study identified achieving a fair outcome as a justifiable circumstance for a mediator departing from impartiality and several mediators in this study also commented about being directive, indicating that an evaluative style does assist in achieving an outcome, with this approach raising concerns regarding their impartiality. Use of the co-mediation model was indicated by several respondents as being of benefit for ensuring impartiality and was not an idea I had considered or included within the questionnaire and is an area that would warrant further investigation.

6.2 Recommendations

Terminology within mediation is clearly a confusing issue with previous studies seeking to understand the concept of neutrality, with suggested conclusions that neutrality encompassed the idea of impartiality. Further work into all the terms to clarify their meaning AND application would, therefore, be beneficial. A professional Working Party could be established to review the terminology used within mediation and define shared definitions of terms and process for application within the mediation profession, which would have an additional benefit of improving clients understanding of the process.

An earlier study suggested that mediator training is linked to the practice of mediation and from comments raised by the mediators who responded it would seem that training is something some of them suggest could assist them further with being impartial. The findings from other academic disciplines, for example psychology, relating to types of bias could be incorporated into mediator training

programmes, because having a greater understanding of cognitive bias types would likely assist mediator self-awareness, a strategy indicated as key by respondents of this study. In addition, Maclean and Eekelaar proposed that training should become more standardised.

History shows that alternate dispute resolution began outside of the discipline of law in its earliest forms. However, more recently it has become aligned to legal processes, in particular within family mediation. A current sector consultation by the Family Mediation Council (FMC) is considering whether a family mediator should be able to provide a consent order for divorcing clients, instead of the Memorandum of Understanding that is the current outcome document. Having achieved a Memorandum from mediation, clients currently have to engage a solicitor to produce the consent order to be submitted to court or can alternatively make an application as an applicant in person on standard court forms, as an additional step, to make the outcome legally binding, a weakness of the process identified. Civil and commercial mediators are already enabled to produce Tomlin orders for mediation clients. One, therefore, wonders, as do others, whether the future of mediation practice will become the domain of the legal profession, rather than continue to work concurrently alongside existing legal processes. It will be interesting to see how the development of the mediation process and the role and responsibility of the mediator role evolve in future.

6.4 Methodology Review

On conducting this study again it would be helpful to include a definition of impartiality being used, with an explanation of why this term has been adopted, in the Participant Information Sheet, so as to remove confusion relating to terminology.

A larger sample size would enable statistical analysis of results to establish any findings of significance, and would be able to utilise the rankings assigned more fully than has been done in this study.

The questionnaire could have been sent via an electronic survey application to ensure greater anonymity of participants, although this adds a technological dynamic that may be off-putting to some potential respondents, particularly within the practice of law that is only just moving away from paper-based systems.

Question 6 in the current questionnaire should either be re-phrased or omitted, as the results obtained did not add particularly value to the findings. It could have been worded in a similar way to a question posed by Becker.

Two further research methods of interviews and ethnography were, also, considered initially, but subsequently rejected. Semi-structured *interviews* are a technique to capture the variety and multiplicity of participants' responses, in their own words, thus giving a fuller meaning to the answers provided. This may have made this method a suitable approach as they are ideal for experience-type research studies or for exploring understanding and perceptions. They are usually conducted face-to-face, as the interaction between participant and research is an additional dynamic in this method. This technique was originally considered by the researcher for this study, as obtaining responses in the words of the mediators themselves relating to the concept of impartiality would have provided a greater richness of data. However, the researcher felt that potential participants would be unlikely to allocate the additional time needed for an interview, as they commonly work to billable hours. Also, being a practitioner the researcher felt that she may become too involved in discussions arising, and therefore, influence data collected by this method. Even

within the study of research itself bias is discussed frequently, both in terms of the researcher having a bias towards anticipated outcomes and bias existing within research procedures, such as transcription of interviews.

The other approach that was rejected is *ethnography*, which Maye Taylor describes as a multimethod approach, with participant observation being the base method, combined with interviewing and document analysis occurring. She explains that it has four key characteristics:

- studying experience as it is lived;
- collecting data from a variety of sources;
- unstructured data collection initially allowing significant concepts to emerge through analysis;
- involves in-depth study of one or two situations.

As it involves several research methods, it reduces the reliance on a single type of data and therefore potentially makes any findings more valid. The researcher, or ethnographer, takes an active role within the research environment, participating in people's lives, but imposes no structure on it, which was part of the reason for the rejection of this method. "Ethnography is the study of people in their natural setting, typically involving the researcher being present for extended periods of time in order to collect data systematically about their daily activities and the meanings they attach to them". Ethnography was, also, not felt a suitable approach in this instance, as the mediation process is confidential and clients of mediators, as well as mediators, would have needed to consent to a researcher being present during actual mediations. Based on cases for the Mediation Clinic family clients, in particular, are often unwilling to have additional observers involved due to the personal nature of

the discussions. Mediators would understandably, also, not want the process affected for their clients either and being observed includes an additional dynamic not normally present within the mediation environment, making it, therefore, seem a less valid approach for this study into mediator impartiality. Knowing they are being observed may, also, have impacted how mediators managed their impartiality, as they would be aware that this was the topic under study.

6.5 Further Ideas for Future Research

This study could be repeated more widely in other geographical locations to provide validity and reliability to methodology, with a comparative analysis of how applicable local findings are to findings from other geographical locations, both within UK and internationally, building on the studies that have already occurred.

This study could be repeated with a larger sample size, in collaboration with the Civil Mediation and Family Mediation Councils, including possible financial sponsorship, to establish a fuller meaning and understanding for impartiality within mediation, involving a larger data set being collected so a multi-variate cluster statistical analysis could be conducted to add significance to results obtained.

Further research could be done on the terminology used to define mediator impartiality to clarify whether the terms impartiality and/or neutrality are used interchangeably or are different. In addition research as to why the different types of mediation have adopted different terms for impartiality, with an aim to identify which term is the most appropriate to be used within mediation could occur.

Further study to explore idea of equidistance within fairness proposed by Cobb and Rifkin could be conducted, particularly relating to how equidistance can be used to

manage power imbalances, another skill of a mediator, identifying possible impacts that managing power imbalances may have on mediator impartiality.

Another area would be further exploration about circumstances that justify a departure from impartiality, developing the work initiated by Becker.

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- **Appendices**

8.1 Appendix 1 - Participant Information and Consent Form

CONSENT FORM

Title of Project: An Investigation Exploring How Mediators Maintain Impartiality Within Mediation.

Name of Researcher: Yvonne Rosamund

Contact details:

Address:	Canterbury Christ Church University
	St. Martin's Priory
	North Holmes Road
	Canterbury
	Kent
	CT1 1QU
Tel:	
Email:	

Please initial box

1.	I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions.		
2.	I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.		
3.	I understand that any personal information that I provide to the researchers will be kept strictly confidential		
4.	I agree to take part in the above study.		

Name of Participant

Date

Signature

Name of Person taking consent
(if different from researcher)

Date

Signature

Yvonne Rosamund
Researcher

Date

Signature

Copies: 1 for participant
1 for researcher

PARTICIPANT INFORMATION SHEET

Yvonne Rosamund, as part of her MSc studies, is conducting a research study at Canterbury Christ Church University (CCCU), sponsored by the Mediation Clinic and School of Law.

Background

The aim is to obtain information from local practitioners' relating to their practice of mediation, with a focus on how they maintain impartiality within the mediation environment. Impartiality is a key principle associated with the mediation process and this research seeks to collect and analyse data from local mediation practitioners on this aspect of the mediation process.

What will you be required to do?

Participants in this study will be required to complete a questionnaire that will take no longer than 30 minutes (tbc following pilot). Your participation in this research project is voluntary. Your details will remain confidential and anonymous and will not be published or disclosed in any form. Your participation and the results will be limited to statistical data and analysis of the responses.

To participate in this research you must:

- Be a practicing mediator and be based within the Canterbury area

Feedback

Receipt of your completed questionnaire will be acknowledged if your questionnaire is returned via email.

Confidentiality

All data and personal information will be stored securely within CCCU premises in accordance with the Data Protection Act 1998 and the University's own data protection requirements. Data can only be accessed by Yvonne Rosamund. After completion of the study, all data will be made anonymous (i.e. all personal information associated with the data will be removed).

Dissemination of Results

If you would like to see the results of this survey or are willing to be contacted directly to answer further questions about your responses, you will have an opportunity to indicate so during the survey.

Deciding whether to participate

If you have any questions or concerns about the nature, procedures or requirements for participation do not hesitate to contact me. Should you decide to participate, you will be free to withdraw at any time without having to give a reason.

Any questions?

Please contact Yvonne Rosamund or Tom Mortimer, Academic Supervisor for this research project.

8.2 Appendix 2 – Questionnaire Used in this Research

Questionnaire to Investigate Mediator Impartiality Within Practice

Participant ID: (I'll allocate a code on receipt of completed questionnaire).

You can either complete electronically by typing into this word document or print the questionnaire and complete.

- What type of mediation do you practice? ***Please highlight all that apply or delete those that don't.***

Civil & Commercial Workplace Community Family Other

- Are you a solicitor with a current Practice Certificate? Yes/No

- What does impartial/neutral mean to you? ***Please select any options from the list below and feel free to add any of your own.***

Please also rank any options you have selected in order of importance, with 1 being the highest.

	Option	Select	Rank
a)	Not taking sides	Yes/No	
b)	Working alongside both participants equally	Yes/No	
c)	Being non-judgemental	Yes/No	
d)	Having no vested interest in the outcome	Yes/No	
e)	Being fair	Yes/No	

f)	Remaining unbiased	Yes/No	
g)	Having no prejudices	Yes/No	
h)	Remaining non-directive	Yes/No	
i)	Other: Please add own	Yes/No	

- ***Please select any strategies you use to ensure impartiality/neutrality when working with your clients from the list below.***

Please also rank any options you have selected in order of importance, with 1 being the highest.

	Option	Select	Rank
a)	Being mindful of story-telling order	Yes/No	
b)	Minimising interruptions	Yes/No	
c)	Building rapport	Yes/No	
d)	Being aware of own reactions and feelings	Yes/No	
e)	Remaining non-judgemental	Yes/No	
f)	Seeing both perspectives	Yes/No	
g)	Using problem solving to identify outcome	Yes/No	
h)	Maintaining transparent communication	Yes/No	
i)	Remaining non-directive	Yes/No	
j)	Other: Please add in any of your own	Yes/No	

- How do you personally monitor your impartiality? ***Please describe.***

- How easy do you find it to be understanding of both viewpoints throughout a mediation?
Please highlight your response below or delete those not applicable.

Always Easy	Mostly Easy	Sometimes Easy	Sometimes Difficult
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- Do you sometimes wonder whether you have NOT remained impartial? Yes/No
If yes, please provide examples if you have any.

- a) Are there particular attitudes or behaviours from clients that affect your ability to maintain impartiality? Yes/ No
If yes, please describe.

b) What actions have you then taken if you feel you haven't remained impartial?
Please describe.

- a) Have you had clients say that you've been biased? Yes/No
If yes, please describe.

b) Or have you heard of incidences where clients have expressed that the mediator has not remained impartial? Yes/No
Please describe.

- Please add any other thoughts or ideas relating to impartiality that have not been covered:

Please see next page if you would be interested in seeing the results of this survey.

Supplemental Information (which will not be included in any analysis):

- Would you like to see the results of this survey? Yes/No

- Please let me know if you would be willing to be contacted further about your responses by providing relevant contact details. These will be removed from the completed questionnaire once all data collection has occurred.

Contact: _____

- **Appendix 3 – Raw Data Responses to Question 10**

Other thoughts regarding Impartiality provided by participants (Question 10 raw data responses) were:

- Regularly in mediation-related writings the words neutral and impartial are used - not always appropriately. As a practitioner, I understand the importance of impartiality and without its maintenance it will impact detrimentally on the work. Neutrality is different and suggests non-involvement.
- Impartiality is vital, including to be seen to be impartial. In the event your experience indicates that the process/state of mind of one party may be hindering them recognising potential opportunities to resolve their dispute and potentially relieve the wider stresses and strains that have brought them to the exercise. I feel it is reasonable to add direction, or opinion perhaps, provided the mediator is very clear that this is their opinion only and offered only by way of seeking to assist the distressed party to see a wider perspective. It carries risk, however, I believe these can be worthwhile in circumstances that may assist emotionally distressed people to see wider perspectives and opportunities to 'get on' with life with the dispute behind them.
- I think that sometimes, especially in commercial mediation, that it is helpful to be directive, and particularly for settlement using a shuttle mediation approach, when 'coaching' a client is a taught skill set by mediation trainers.
- The model used is important to maintain impartiality and is why I advocate a co-mediation model particularly for family disputes and possibly workplace

disputes. For commercial disputes, I have never really found a problem with mediating as a sole practitioner.

- Being non-judgemental and having no vested interest in the outcome, presupposes the necessary existence of both for impartiality. I disagree. Being non-judgemental seems to me to suggest that it is always possible to be non-judgemental. I have not found this to be true. Making judgements is a natural and human response, which is normal. It is only the lack of recognition of such and the expressing and acting on judgements that are made, that can cause a break in impartiality. Equally, making judgements is also an important part of the problem-solving skill set.
- As for having no vested interest in the outcome, I am not sure that if based on a stated desired value or outcome by both parties, for example putting the children first in a given scenario, that challenging statements or decisions that do produce this vested outcome qualifies for exclusion as not being impartial. The issue of fairness in this regard is also a tricky issue.