

Mediation Update

Volume III



ETHICAL CONSIDERATIONS IN MEDIATION

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Abstract

There are ethical dimensions to every mediation. No matter what your mediation style or orientation is—evaluative, facilitative or transformative—choices need to be made concerning how you as mediator treat the parties at the table (and perhaps those not at the table). This is an overview of different ways of thinking about those choices and offers practical approaches to common ethical dilemmas arising in mediation.

I. OVERVIEW OF MEDIATION

The Model Standards of Conduct for Mediators were prepared in 1994 and revised in 2005 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution (hereinafter referred to as the “Model Standards”). The Model Standards are widely viewed in the United States as establishing a standard of care for mediators in the United States (Model Standards, 2005, pp. 1-2). Other codes of conduct that govern the conduct of mediators are derived from the Model Standards.

The Model Standards serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes (Model Standards, 2005, p. 1). The Model Standards provide the following definition of mediation: “Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.” (Model Standards, 2005, p. 1) Mediation relates to other conflict resolution processes along a continuum that reflects the degree of coercion of the parties to reach a resolution of their dispute, and the participation of a third party.

II. MEDIATION AS FACILITATED NEGOTIATION

On the continuum of conflict resolution processes, both negotiation and mediation are types of private decision making by the parties. On this continuum, mediation is an extension of the negotiation process that involves the intervention of a third party who has limited or no authoritative decision making power (Moore, 2003, p. 8). The mediator’s view or theory of what conflict is will significantly influence the process of mediation, how directive the mediator will be, and the types of intervention that the mediator will initiate.

Continued

Conflict can be defined under several theories:

- Power theory: conflict is a struggle for domination
 - Rights theory: conflict is a contest between competing claims of “rights”
 - Needs and interests theory: conflict is a problem in how to meet incompatible needs with limited resources
 - Transformative theory: conflict is a crisis in human interaction
- (Bush and Pope, 2002, p. 2)

Each theory suggests that a different type of intervention on the part of the mediator is needed:

- Under the power theory, parties need help in organizing and mobilizing
 - Under the rights theory, parties need help in argumentation and advocacy
 - Under the needs/interests theory, parties need help in problem solving
 - Under the transformative theory, parties need help in overcoming their crisis in interaction and restoring constructive interaction
- (Bush and Pope, 2002, p. 2)

In the United States, mediation is based predominantly on the needs/interests and transformative theories of conflict. Consequently, for purposes of this presentation, the types of intervention that will be considered are those that are designed to either help the parties in problem-solving or change the quality of their conflict interaction.

Thus, whether the mediator is task-oriented and focused on problem-solving or takes a more socio-emotional approach and is focused on restoring constructive interaction will determine the participation orientation or directiveness of the mediator and the specific interventions that he/she might take. Interventions refer to tactics by which the mediator deals directly with the conflict (Kressel, 2006, pp. 533-534). All mediators deal with the issues presented in the conflict in some way, although some mediator styles deemphasize a substantive problem solving focus in favor of relational objectives, such as increased understanding of self and other (Bush and Folger, 1994).

Depending on his/her participation orientation, the mediator will engage in different interventions and apply different skills during a mediation. The degree of participation will often give rise to ethical dilemmas. The next section will address ethical dilemmas and the role that values play in such situations.

III. ROLE OF VALUES IN ETHICAL DILEMMAS

A dilemma can be defined as a situation in which no one choice is clearly superior to any other choice. From this definition, then, an ethical dilemma can be defined as one in which all the various alternatives to some degree violate one or more ethical standards (Rahim, 2001, p. 181).

What is ethics?

- Difference between right and wrong
- Often expressed in terms of fairness
- Values determine our view of what’s right and wrong
- Values may be based on law, religion and culture

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“I like to listen. I
have learned a great
deal from listening
carefully. Most
people never listen.”

Ernest Hemingway

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Can there be ethical dilemmas without values?

Ethical dilemmas are principally conflicts over values:

- Values are freely chosen internal standards that people use to judge whether issues, behaviors or events are good/bad, right/wrong, moral/immoral, fair/unfair
 - Development of values is the result of complex socialization process
 - The end result, the value system of an individual, is an elaborate set of beliefs that have developed over a long period of time
- (Moore, 2003, p. 401)

Most people have a hierarchy of values with some beliefs or standards being more important than others. In general, people have three levels of values:

A. Identity or Moral Values

- Deepest and most basic form of belief
- Define how a person or group believes that they really are
- Values about integrity, honesty and truthfulness, candor, fairness and equality fall into this category

B. Terminal Values

- Deep beliefs that guide behavior in most areas of life

C. Operational Values

- Standards and norms that people use to guide everyday life
- (Moore, 2003, pp. 401-404)

Mediators may have values that conflict with values that are associated with or underpin mediation. This conflict is the source of many of the ethical dilemmas that arise in mediation. In the next section, we will examine some of those core values in mediation.

IV. MODEL STANDARDS OF CONDUCT

The Model Standards provide standards by which mediators are to conduct themselves in conducting mediations. They include mandates to:

- Conduct a mediation based on the principle of party “self-determination” which is defined as the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome (Model Standards, Standard I. A)
 - Conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality, maintaining “freedom from favoritism, bias or prejudice” (Model Standards, Standards II. A and B)
 - Avoid conflicts of interest or the appearance of conflicts of interest during and after a mediation (Model Standards, Standard III. i)
 - Maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law (Model Standards, Standard V. A)
- (Model Standards, 2005, pp. 2-6)

What core values are reflected in these Model Standards?

- Self-Determination
- Mediator Impartiality
- Mediator Neutrality
- Confidentiality

Interesting Mediation Books

Conflict Resolution

by Daniel Dana (*McGraw-Hill*). This book covers everything from start to finish and it serves as an excellent introduction to the field as well as being well suited to self-help. This is extremely easy to use.

The Mediator Handbook

by Jennifer E. Beer with Eileen Stief
This is the classic source for mediators and dispute resolution professionals. The first half sets out the classic transactional model in its most tested form and the second half is filled with information on skills, tools and material useful to any mediator. The book is extremely useful.

The Art of Mediation

by Mark D. Bennett and Michele S. G. Hermann (*NITA*). This book is the script for a forty hour mediation class, with some additional material as well. If you wanted to teach a class you could easily use this book.

Basic Skills for the New Mediator

by Alan H. Goodman (*Solomon Press*). This covers everything in mediation from start to finish. Each of the books I recommend has its own perspectives and approaches and each has a different style. Goodman rounds out the basic texts that you need in order to have a good foundation as a practitioner.

These core values embedded in the Model Standards may conflict with an identity or moral value of the mediator: what the mediator may consider to be fair. This ethical dilemma transcends culture; even if we do not all agree on what is fair due to cultural differences, whatever is fair in our view may be incompatible with the values reflected in the Model Standards. In the next section, we will identify the kinds of ethical dilemmas that arise from that incompatibility.

V. FAIRNESS IN MEDIATION

Some ethical dilemmas arise from the conflict between the mediator's values or sense of fairness and the outcome of the mediation process. Other ethical dilemmas arise from the mediator's values or sense of fairness and the mediation process itself.

Outcome- based Fairness versus Model Standard I

- Self-Determination Dilemma

Process-based Fairness versus Model Standards II, III and V

- Impartiality Dilemma
- Neutrality/Conflict of Interest Dilemma
- Confidentiality Dilemma

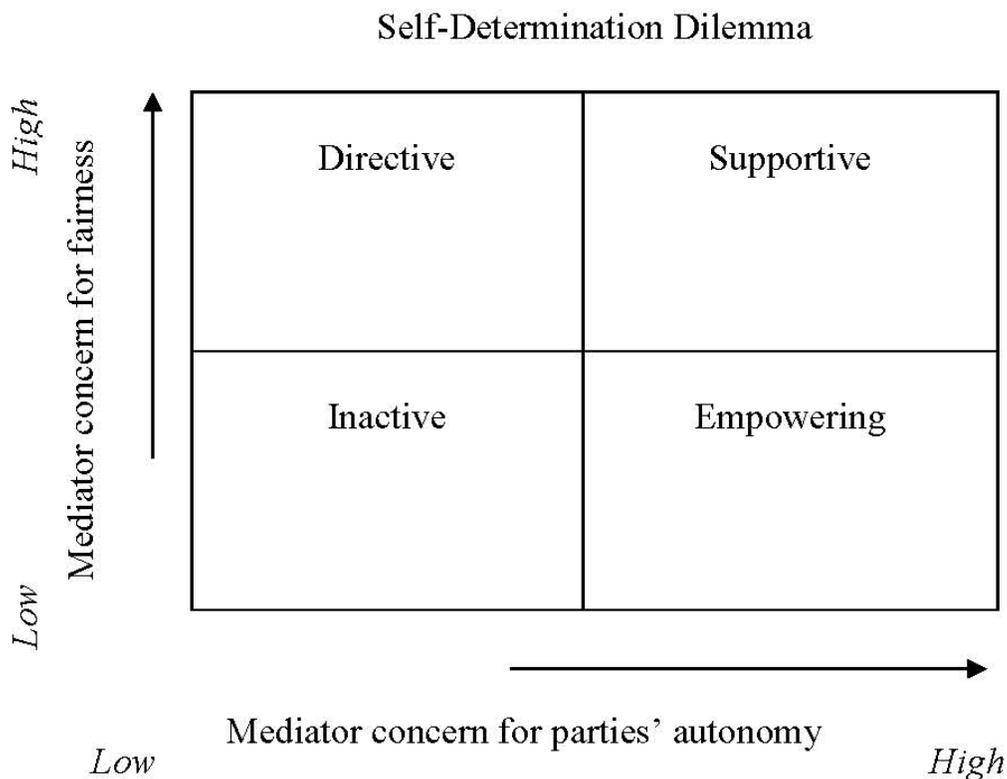
In the next four sections, we will examine the contours of each of the foregoing dilemmas.

VI. SELF-DETERMINATION DILEMMAS (OUTCOME-BASED FAIRNESS)

As we have seen, Standard I of the Model Standards requires that the mediator conduct a mediation based on the principle of party self-determination (Model Standards, 2005, p. 2). This obligation is qualified in two respects: first, a mediator may need to balance such party self-determination with his or her duty to conduct a quality process in accordance with the Model Standards (Model Standard I. A. 1). Secondly, the Model Standards recognize that a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions (Model Standard I. A. 2).

The ethical dilemma that may arise, then, is what happens when the mediator's sense of fairness conflicts with the obligation to respect the parties' autonomy or right to self-determination? The degree to which the mediator respects the parties' autonomy or right to self-determination will determine his/her participation orientation and affect his/her desire to maintain nondirectiveness.

This tension between the mediator's concern for fairness and the mediator's concern for the parties' autonomy can be conceptualized as follows:



The first dimension explains the degree (high or low) to which a mediator wishes to satisfy his values of fairness. The second dimension explains the degree (high or low) to which the mediator wishes to preserve the parties' autonomy or right of self-determination. Combination of the two dimensions results in four specific participation orientations: directive, inactive, empowering and supportive. The participation orientations are described as follows:

A. Directive Orientation

This orientation indicates high concern for the mediator's own sense of fairness and low concern for the parties' autonomy or right to self-determination. Mediators who have this orientation may behave forcefully and be highly directive. Examples of such directive behavior include evaluation of the merits of the dispute, offering substantive recommendations on how the dispute should be resolved, and pressure tactics to accept particular agreements.

B. Inactive Orientation

This orientation shows a low concern for both the mediator's sense of fairness and low concern for the parties' autonomy. Few, if any, mediators have this orientation. In their view, the mere presence of a mediator in the mediation room, without more, would likely be the only manifestation of this orientation.

C. Empowering Orientation

This orientation indicates a low concern for the mediator's sense of fairness but a high concern for the parties' right to decide the outcome of their negotiation. This orientation is one of the hallmarks of the transformative approach to conflict (Bush and Folger, 1994). The transformative mediator's allegiance is to the interdependent concepts of empowerment and recognition. Empowerment refers to strengthening each party's ability to analyze its respective needs in the conflict and to make effective decisions. Recognition refers to improving the capacity of the disputants to become responsive to the needs and perspectives of the other. This orientation is critical of mediator interventions to produce settlement, direct problem-solving, or substitute mediator judgment or analysis for that of the parties. All of these activities are felt to diminish party autonomy (Kressel, 2006, p. 536).

D. Supportive Orientation

This orientation represents the middle range on the spectrum of satisfying the mediator's sense of fairness and preserving the parties' autonomy or right to self-determination. Mediators in this quadrant seek to balance the competing values of fairness and party autonomy and, as a result, most likely feel torn between these competing values.

This dilemma can manifest itself in the following situations:

A. Offering the parties a solution

- At the parties' request
- On the mediator's own initiative

B. Opposing a resolution formulated by the parties because

- the resolution is unfair to a weaker party
- the resolution is illegal
- the resolution is unfair or not "just"
- the resolution is unfair to a nonparty

Compromise?

"Compromise: An agreement between two men to do what both agree is wrong. "

Lord Edward Cecil

"Compromise is the best and cheapest lawyer. "

Robert Louis Stevenson

"Compromise, n. Such an adjustment of conflicting interests as gives each

adversary the satisfaction of thinking he has got what he

ought not to have, and is

deprived of nothing except what was justly his due. "

Ambrose Bierce

"We all agree on the necessity of compromise. We just can't agree on when it's necessary to compromise. "

Larry Wall

"You have to compromise all the way. The only thing that counts is the result."

Richard Widmark

"Compromise, if not the spice of life, is its solidity. It is what makes nations great and marriages happy."

Unknown

"Learn the wisdom of compromise, for it is better to bend a little than to break."

Jane Wells

Fairness to a Non-Party

- Most mediations have consequences for others outside the mediation
- How absent parties are treated is an important factor in evaluating the fairness of any mediation process (examples: children in divorce mediations, future generations in environmental disputes)
- To the extent that negotiations are being facilitated by mediators, are mediators accountable to outsiders?

Reasons for Holding Mediators Accountable

- Precedential effects of even privately mediated matters
- Special role of ethics of leadership implicated in actions of mediators
- Educational effects of showing that better quality solutions can be obtained by processes (such as mediation) that are conducted with the goal of benefiting as much as possible all relevant stakeholders (Susskind, 2004, pp. 514-516)

VII. IMPARTIALITY DILEMMAS (PROCESS-BASED FAIRNESS)

Standard II of the Model Standards requires that the mediator conduct a mediation in an impartial manner and “not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason” (Model Standards, 2005, p. 3).

These dilemmas typically arise when the mediator is an independent mediator

- A North American model of mediation
- This model is widely accepted in those countries with an independent judiciary, which is a model for impartial third parties as decision makers (Moore, 2003, pp. 52-55)

An independent mediator

- Is neutral/impartial regarding relationships and specific outcomes
- Serves at the pleasure of the parties
- May be a professional mediator
- Seeks a jointly acceptable, voluntary, and noncoerced solution developed by the parties
- May or may not be involved in monitoring implementation
- Has no authority to enforce agreement (Moore, 2003, pp. 44-45)

Neutrality vs. Impartiality

- Impartiality refers to the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions they are advocating
- Neutrality refers to the relationship or behavior between mediator and disputants
- Neither concept means that the mediator may not have a personal opinion about a desirable outcome or feel closer to one party than another
- Ultimate test lies in the judgment of the parties (Moore, 2003, pp. 53-54)

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The ethical dilemma that is implied from Model Standard II is what happens when the mediator's sense of fairness conflicts with the obligation to remain impartial?

This dilemma can manifest itself in the following situations:

- A. in view of a personal reaction to a party in the mediation
 - antipathy toward a party
 - sympathy toward a party
- B. in view of personal experience with a similar conflict

VIII. NEUTRALITY/CONFLICT OF INTEREST DILEMMAS (PROCESS-BASED FAIRNESS)

Standard III of the Model Standards requires that the mediator avoid conflicts of interest or the appearance of a conflict of interest during or after a mediation (Model Standards, 2005, p. 4).

The ethical dilemma that may arise from compliance with the obligation to avoid a conflict of interest is that it may be incompatible with the mediator's sense of fairness to himself or herself. Unlike the other ethical dilemmas involving fairness to the parties or third parties, this type of ethical dilemma brings to the surface what the mediator believes is fair to him or her. Avoiding conflicts or the appearance of conflict is often at the expense of the mediator.

So this ethical dilemma can be framed in terms of relationships with parties

- prior to mediation
- when relationships arise during or after mediation
- when class or group "relationships" exist

IX. CONFIDENTIALITY DILEMMAS (PROCESS-BASED FAIRNESS)

Standard V of the Model Standards requires that a mediator maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law (Model Standards, 2005, p. 5).

Confidentiality dilemmas often arise when the mediator caucuses, that is, meets privately with a party. The mediator may call for a caucus for various procedural reasons:

- to allow intense emotions to be vented without escalating differences between the parties
- to clarify perceptions or misperceptions
- to change unproductive or repetitive negative behavior
- to diminish and limit unhelpful communications

(Moore, 2003, p.369)

The mediator may also call for a caucus for various substantive reasons:

- to clarify positions
- to explore interests and needs
- to formulate new proposals and conduct reality testing of those proposals
- to weigh the other party's proposals

(Moore, 2003, pp. 369-370)

A party will often reveal information to the mediator that he does not want to have disclosed to the other party. Standard V. B. provides that a mediator who meets with any persons in private session during a mediation "shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person (Model Standards, 2005, p. 6). Hence, mediators can often find themselves in an ethical bind: Should confidentiality be the mediator's highest value, or should full disclosure of information relative to a settlement that is fair in the eyes of the mediator have primacy?

Such ethical dilemmas can be categorized as follows:

- A. *Vis a vis* outsiders
 - Reporting allegations of violence or crime
 - Communicating to a court
 - Communicating to a party's lawyer
- B. Between the parties
 - When disclosure would prevent uninformed settlement
 - When disclosure would break impasse

X. CONCLUSION

Mediators can face many different ethical dilemmas caused by the conflict between the core values embodied in the Model Standards and many other codes of conduct that govern the conduct of mediators, on the one hand, and their own identity or moral values, on the other hand. One such identity or moral value that is held by all mediators is that of fairness. It may be useful for mediators to analyze any ethical dilemma that comes his or her way by first identifying the core value of mediation at stake and then examining how it competes with or is incompatible with his or her own values of fairness.

REFERENCES

- Bush, R. A. B. and Folger, J. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.
- Bush, R. A. B. and Pope, S. G. "Mediation: The Transformative Framework," a presentation for the City Bar of New York ADR Committee, March 7, 2005.
- Kressel, K. "Mediation Revisited." In Deutsch, M., Coleman, P., and Marcus, E. (eds.), *The Handbook of Conflict Resolution*. San Francisco: Jossey-Bass, 2006.
- Moore, C. W. *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed.). San Francisco: Jossey-Bass, 2003.
- Rahim, M. A. *Managing Conflict in Organizations*. Westport: Quorum Books, 2001.
- Susskind, L. "Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties not at the Table." In Menkel-Meadow, C. and Wheeler, M. (eds.), *What's Fair: Ethics for Negotiators*. San Francisco: Jossey-Bass, 2004.

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