

Conflicts Between the Ethical Principles That Are Critical to Preserving Trust in the Mediation Process—A Need for Increased Understanding and Concern

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The parties' trust in the mediation process is vital to the success of most, if not all, mediations and adherence to the guiding ethical principles that govern mediations is essential to the preservation of that trust. To maintain the parties' confidence the ethical principles that guide mediators are not secondary or collateral to the mediation process. They are central to it and define it.¹

The guiding principles are that the parties should have full "self-determination" and any agreement reached should be based on "informed consent."² The mediator is to be "impartial,"³ free of conflicts of interest⁴ and, subject to limited exceptions,⁵ the process is to be "confidential," with the preservation of confidentiality of matters discussed in private caucus especially important.⁶ The mediator is to promote "good faith" and "honesty" among the parties,⁷ with the quality of the process to be maintained.⁸ To the extent that the mediator can embrace and adhere to those ideals the parties' trust will be preserved; but if those guiding principles do not control, the parties' trust may be eroded or lost.

Given the importance of those ethical ideals that are central to the process, it is a particularly troubling reality that as many mediations unfold the mediator will need to confront and grapple with direct conflicts in the application of those principles. Such conflicts can very often present challenges for the mediator that are of material importance to the course of the mediation and to maintenance of the parties' trust. Addressing those challenges, while accommodating the needs of the parties and maintaining an effective mediation process, can require the very highest form of the mediator's art.

It is especially troubling that due to such conflicts mediations may not always be conducted in full compliance with the ethical ideals. When conflicts between the guiding principles result in their not always being followed it is not because the mediator is "unethical" or unwilling to pursue the ideals diligently. It is very often because the nature of the conflicts is such that they cannot be readily overcome.

Typical of such conflicts is the dilemma that arises when the mediator learns that a party or counsel for a party are not fully "informed." A party or counsel may be unaware of a key legal principle or a key procedural matter, such as the waiver of a defense, that would make all the difference. Critical facts may be known to one side and not the other. Such shortfalls can arise because a party is not well represented or not represented at all or,

more serious, because one party has hidden facts from another. The mediator may know of such shortfalls from his or her own experience or from what a party has told the mediator in private caucus, with those statements cloaked by confidentiality.

In such situations the ideals of party self-determination and informed consent on the one hand and impartiality and confidentiality on the other are in conflict. If the mediator acts to inform the ignorant party or that party's counsel he or she will be favoring one side and abandoning his or her need to be impartial. If to bring the party the missing information the mediator shares facts learned only in private caucus he or she will also be departing from the pledge of confidentiality. If he or she were to do so the important trust that the parties have as they deal with a purportedly impartial mediator in confidential sessions could well be lost. Yet if the ignorant party proceeds without the missing information, an agreement reached as a result may not meet the ideal of informed consent, and, depending on the materiality of the missing information, could be challenged later by the party who is not fully informed.

The challenge can become greater if the mediator discovers that the key information has not been shared between or among the parties because one of the parties intends to deceive another or if attorney misconduct is involved. Possessed of such information, the mediator faces further conflicts between the critical promise of confidentiality on the one hand and his or her responsibility to promote honesty and fairness among the parties on the other. If the mediator is a lawyer in New York and many other states, there may be a further conflict with his or her professional duty under the Code of Professional Responsibility to report attorney wrongdoing.⁹

To layer on another problem, the mediator needs to be cautious in trying to move ahead not to be driven by ego or personal considerations. If, for example, he or she leaves a party ignorant on a key matter it may actually be easier to reach an agreement than if the party is well informed. If such an agreement is reached and it improves or sustains the mediator's settlement record, but the mediator has acted in a way which is questionable in pursuit of a better record, he or she will be in direct conflict with the clear ethical principle that mandates against such motivations.¹⁰ Given that prompting a settlement is seen by many to be the mediator's mission it can often be difficult to tell whether the mediator is pursuing that worthy goal or a better record or both. The not infrequent desire of a

mediator to promote fairness, which the ethical guidelines do not make a part of the mediator's mission,¹¹ may also make the analysis of motives difficult.

Still more complexity arises if the information of which one side is ignorant is significant but not vital or possibly only of interest. As the importance of the information is lessened the need to consider acting is lessened. That may lead to increased difficulty in deciding whether any action is necessary.

Of course, because mediation is often undertaken before there has been a full exchange of information, the parties will in practice have often accepted the risk that they have not considered everything, preferring cost saving and avoidance of risk to full knowledge. That being the case there will often be an informational asymmetry that the mediator, and the parties, will need to accept. In such cases the parties' consent is informed by the awareness that they may be missing information.

Unfortunately, it is a reality that some of the more thoughtful suggestions, code provisions and legislative enactments which have been provided to assist the mediator in navigating through such troubled waters will not always bring wholly satisfying answers either for the parties or the mediator. For example, where a party has factual information that the party knows his or her adversary lacks one proposal is for the mediator privately to suggest that the knowledgeable party share the information with the uninformed adversary. The party possessed of the information may recognize (or counsel may recognize) the potential for overturning an agreement later and want to avoid that risk. If the information is then conveyed with the consent of the knowledgeable party it may be said that the result will be beneficial to both sides. A lasting agreement may then be reached based on truly informed consent.

But what if the knowledgeable party prefers to take his or her chances with an agreement while taking advantage of the fact that some information has not been disclosed to the adversary? The mediator is not free to breach confidentiality and will know that the ignorant party may enter into an agreement while being misled by the party's adversary. The mediator must skillfully deal with that challenge knowing that the ideal requires that a mediator encourage honesty and candor among the parties. Maintaining confidentiality and impartiality are vital in maintaining trust, but other important principles will not have been fully respected.

Another path for the mediator that has been suggested, especially where a principle of law or a procedural problem is the point as to which a party is ignorant, is to urge the ignorant party to be sure that all legal doctrines or concepts have been checked or procedural points reviewed. That may include telling a party who is not represented that he or she should seek counsel. Such an approach seems attractive because it does not actually

call for the mediator to tell the ignorant party outright what that party does not know. It, therefore, does not seem as much of a departure from impartiality or a breach of confidence. But, since the mediator's effort, presumably undertaken in good faith pursuit of "informed consent," is to try to, in effect, lead the horse to water, is that not just another way of helping one side to the detriment of the other, effectively becoming an advocate for one side? And even though a breach of confidentiality may not have occurred "in so many words," is leading a party to a missing fact previously shared with the mediator in confidence not arguably a breach of confidentiality, albeit subtle?

If lawyer misconduct is involved it has been suggested that the right answer is to report counsel, if, as required by the Code of Professional Responsibility, the misconduct indicates the lawyer is dishonest. That argument is based on the premise that the Code of Professional Responsibility in most states is court mandated, whereas mediation codes of conduct often are not and, therefore, may be trumped by the court rule.¹² That can arguably solve the problem for the mediator but what will it do to the mediation process if confidentiality is breached? It may well destroy trust, and what if the mediation or the ethical principles for mediators are court mandated?

To address the conflict the ABA has suggested what has been called an "exit door" for the lawyer.¹³ The idea is that he or she can avoid the dilemma by advising the parties at the outset of the mediation that he or she does not represent them as an attorney, thereby freeing the mediator from professional duties as an attorney, including the need to report attorney wrongdoing. Unfortunately, while arguably freeing the mediator-lawyer from responsibility, such remedies still leave the process flawed.

As other ways of freeing lawyers of the dilemma, six states have changed their ethical guidelines for mediators to either free the lawyer of the duty to report attorney misconduct or to expressly allow a mediator-lawyer to report misconduct.¹⁴ While they too provide an escape for the mediator-lawyer they also leave the process flawed.

Yet another solution is for the mediator to withdraw, as he or she might if criminal conduct, domestic abuse or violence were involved.¹⁵ The mediator may thereby avoid association with an agreement based on something short of informed consent and he or she will not have favored one side or breached confidentiality. But, if that is the preferred solution, a good many more mediations will fail, and the parties may just move ahead to settle either alone or with a different mediator as the result of a deficient process.

The mediator-lawyer might also decide simply to risk being sanctioned in order to preserve confidentiality. While lawyers are rarely sanctioned for failing to report other lawyers, it can happen, and again the process will

fall short of what is promised by the guiding ethical principles.¹⁶

In addition to existing legislation and ethical pronouncements that may free mediator-lawyers of some of the burdens resulting from the clash of ethical ideals, other bright line rules could be adopted that would effectively take the mediator off the hook. But such bright line qualifications of ethical principles could seriously erode the public confidence in the mediation process that is promoted by allowing each of the ideals to stand as inviolate. If a party thinks that mediator impartiality, confidentiality, informed consent or party self-determination are subject to too many exceptions, the trust that comes from a belief that each principle will be respected cannot be sustained. Also, where the code of Professional Responsibility is applicable, failure to apply its requirements may bring discredit to the legal profession.

Conclusion

Especially because conflicts in ethical principles go to the heart of the mediation process and confidence in it, there should be increased emphasis on the singular importance of ethical ideals in mediation and the need to grapple sensitively and successfully with the inevitable conflicts between the defining ethical ideals. Mediators should actively seek answers and focus on strategies for addressing such dilemmas as they seek to preserve trust in the process and guide the parties toward resolution.

Encountering ethical dilemmas can activate heightened awareness in the mediator, building deeper understanding and requiring greater subtlety, flexibility and sensitivity. These are the very qualities that mediators bring to the mediation process. As trust is at the heart of ethics and is the ingredient missing from conflict that the mediator seeks to replace, so too, the efforts of a mediator to handle conflicts sensitively and seek creative solutions are themselves efforts to build trust, repair relationships and work towards resolution.

It is important that the mediation community seek a broader consensus on what to do with such serious problems. Such a consensus would put mediators in better position to deal artfully with ethical dilemmas.

Endnotes

1. The Preamble to the Model Standards of Conduct identifies promotion of “public confidence in mediation as a process for resolving disputes” as a primary goal. See also Ellen Waldman, *Mediation Ethics Cases and Commentaries* 119–124, 149 (2011).

2. The Model Standards of Conduct for Mediators Standard I.
3. The Model Standards of Conduct for Mediators Standard II.
4. The Model Standards of Conduct for Mediators Standard III.
5. Disclosure may be mandated in some cases of attorney wrongdoing or child abuse. Ellen Waldman, *Mediation Ethics Cases and Commentaries* 255–275 (2011).
6. The Model Standards of Conduct for Mediators Standard V.
7. The Model Standards of Conduct for Mediators Standard VI.4.
8. The Model Standards of Conduct Standard VI.
9. New York Rules of Professional Conduct Section 8.3; altogether 36 states including New York have codes of professional responsibility for lawyers that conflict with their ethical requirements for mediators, 34 *Campbell L. Rev.* 205 4 (2011).
10. The Model Standards of Mediator Conduct Section I.B.
11. The Model Standards of Conduct do not contain any principle requiring that fairness be assured. There has been much scholarly debate on the point but the standards have generally not been set to promote fairness. Ellen Waldman, *Mediation Ethics Cases and Commentaries* 5-6, 118-119, 124 (2011).
12. Ellen Waldman, *Mediation Ethics Cases and Commentaries* 257 (2011).
13. 34 *Campbell L. Rev.* 205 2-3 (2011).
14. 34 *Campbell L. Rev.* 205 5-6 (2011).
15. In some jurisdictions elder abuse and threats to property may permit mediators to withdraw. The Model Standards of Conduct Sections VI.B. and C.; see also 34 *Campbell L. Rev.* 205 8 (2011).
16. 34 *Campbell L. Rev.* 205 3-6 (2011).

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