

# THE MEDIATOR AND ETHICAL DILEMMAS: A PROPOSED FRAMEWORK FOR REFLECTION

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## **The Mediator and Ethical Dilemmas: A Proposed Framework for Reflection**

Louise Otis and Catherine Rousseau-Saine

### **ABSTRACT**

Mediation frequently gives rise to dilemmas that involve ethics, professional codes of ethics and the Law. Ethical dilemmas arise in the course of judicial mediation as well as in extrajudicial mediation. While codes of professional conduct set forth the regulatory principles intended to guide mediators in their interventions, they cannot foresee all the ethical issues and questions that arise in the course of mediation activities. This article will: (1) examine the basic ethical principles that apply to mediators; (2) consider how some of these principles can come into conflict; (3) identify ethical dilemmas encountered by mediators; and (4) propose a reflexive reasoning process for making ethical choices.

**Keywords:** Ethical dilemma – Mediator – Judge mediator



## INTRODUCTION

Our societies are founded on the rule of law, of which moral values common to subjects of law form an integral part. The hierarchical organization of standards of conduct introduces an order of relationship between manifestations of human activity that are posed and defined by ethics, codes of ethics, morality and the law. These standards of conduct are continually called into question and frequently mixed up.

Morality is the science of doing what is right and good for life in a given society. Morality puts forward absolute or transcendent precepts for *living together*. It represents shared awareness based on customs, times and places in the world, establishing regulatory principles for action and conduct.

Ethics is a reflexive discipline that seeks to evaluate human conduct from the viewpoint of a value system. Applied ethics is embodied in reality and defines the steps we can take to lead to a just action. When the Latin moralists assimilated Greek thought, they retained and Latinized the word *êthika*, the meaning of which was ramified according to the subjective nature of morality.

Ethics is a search for meaning. It has a subjective dimension, referring to values that hold currency in a place and time circumscribed in the present. It is a function of the object, but centred on the subject, attaching itself to relative and immanent values.

Professional codes of ethics are fixed on regulated human activities. They translate just action into rules and duties, notably those governing the exercise of professions. The foundations of professional codes of ethics are thus found in codes of conduct for engineers, architects, physicians, lawyers, etc. Even federally appointed judges in Canada, who are institutionally independent, are governed by "Ethical Principles for Judges."

The law sets out rules for the operation of human society to ensure the well-being and continuity of society. It allows, defends, sanctions and punishes. The law turns morality into action.

Mediation is a consensual or obligatory way of resolving disagreements, based on negotiation and assisted by a neutral third party, the mediator. In North America, mediation is either judicial or extrajudicial.

Extrajudicial mediation intervenes on the fringes of the formal justice system. It results from a simple intention of the opposing parties, the contract that institutes mediation as a means of resolution prior to arbitration, or the law, which imposes mediation first before the conflict becomes judicialized.

Judicial mediation is a consensual or obligatory means of resolving disputes that is based on negotiation and integrated into the formal judicial system. In Quebec, judicial mediation is voluntary and is essentially presided over by judges in all the courts and tribunals, including the Court of Appeal.<sup>1</sup> In the other Canadian provinces, judicial mediation is a hybrid process that sometimes involves judges and sometimes institutional or private mediators, by summary procedure.

Mediation frequently gives rise to dilemmas that involve ethics, professional codes of ethics and the Law. Ethical dilemmas arise in the course of judicial mediation as well as in extrajudicial mediation.

Codes of professional conduct set forth regulatory principles intended to guide mediators in their interventions. While these codes establish the general orientations that should guide mediators, they cannot foresee all the ethical issues and questions that arise in the course of mediation activities.

Many books and feature articles have been written on ethics and mediation.<sup>2</sup> A recent phenomenon is the lively debate in the field of

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1. L. Otis, *La transformation de notre rapport au droit par la médiation judiciaire*, 8 conference, Albert-Mayrand (Montreal: Thémis, 2005); Louis Otis, E.H. Reiter, "Judicial Mediation in Quebec" in Nadja Alexander, ed., *Global Trends in Mediation*, 2nd ed. (Alphen aan den Rijn: Kluwer Law International, 2006). After introducing mediation by judges at the Court of Appeal in 1997, Quebec became in 2002 the first jurisdiction in the world to create a fully hybrid system of mediational and adjudicative justice in all courts and administrative tribunals.
  2. Recently, E. Waldman, with the contributions of many mediators, has dedicated a book on ethics and mediation: E. Waldman, *Mediation Ethics*, San Francisco: Jossey-Bass, 2011.

mediational ethics. An informal corpus of rules of conduct has been developed empirically, in real time, by mediators. In fact, interest groups and national or international associations of mediators, email correspondence and online discussions give mediators opportunities to introduce, discuss and resolve ethical dilemmas they encounter in the course of conducting a mediation.<sup>3</sup> Consensual principles that emerge from these discussions are added to the more general principles on which codes of conduct are founded. The existence of these practical means of intervention, which contribute to resolving ethical questions with the advice of peers, opens a new sphere of analysis and reflection.

This article will: (1) examine the basic ethical principles that apply to mediators; (2) consider how some of these principles can come into conflict; (3) identify ethical dilemmas encountered by mediators; and (4) propose a reflexive reasoning process for making ethical choices.

### **Section 1. Codes of professional conduct**

The ethical rules of mediation, defined in general terms, spell out best practices and establish means of implementing them. The rules of professional conduct applicable to mediators set standards for regulating mediation; these rules are derived from the law in some cases, and from codes of professional conduct in other cases.

Codes of conduct that regulate extrajudicial mediation are becoming increasingly widespread in societies that encourage the use of mediation. The ADR Institute of Canada (alternative dispute resolution) and the affiliated institutes have adopted codes of ethics and codes of conduct to ensure its application.<sup>4</sup> Mediators who seek official recognition from these institutions are required to uphold the rules stated in the codes. Failure to follow ethical rules could lead to suspension or withdrawal of membership and duties within the Institute.

In terms of judicial mediation, the Canadian Judicial Council has drawn up *Ethical Principles for Judges*, which apply to federally

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3. For example, many discussion groups can be found on the following website <<http://linkedin.com>>. The Kluwer Mediation Blog is also another example: <<http://kluwermediationblog.com>>. International Academy of Mediators has also a private website permitting recommendations of activities related to ethics dilemmas for working mediators.

4. ADR Institute of Canada, <<http://www.amic.org/rules/conduct.html>>; The Mediation and Arbitration Institute of Québec has adopted the Ethical Code of Mediators, <<http://www.imaq.org/>> and the Mediation and Arbitration Institute of Ontario has adopted the Ethics Code, <<http://www.adrontario.ca/>>.

appointed judges.<sup>5</sup> Similar publications also exist in Quebec, British Columbia and Ontario for provincially appointed judges. These codes apply mutatis mutandis to judges who act as mediators. In Ontario, where a mandatory judicial mediation program has been imposed on Courts of Justice in major cities, the Ministry of the Attorney General has developed a *CBAO Model Code of Conduct* for selected mediators.<sup>6</sup>

This list, which is far from exhaustive, includes some of the principal codes of conduct for mediators available in Canada. The codes establish usages and standards to guide mediators.

### **Subsection 1. Fundamental codes of conduct in mediation**

The major aspects of codes of professional conduct are attached to ethical considerations regarding mediation.<sup>7</sup> Most of the essential principles are common to the various codes.<sup>8</sup> The most significant converging principles are self-determination, impartiality, independence and conflict of interest, confidentiality and quality of the mediation process. These principles cover both the quality of the means of intervention and the essential attributes of the neutral third party.

The process of judicial mediation takes on an ethical dimension that differs substantially from the ethical dimension that characterizes extrajudicial mediation. Those involved in judicial mediation are expected to play more dynamic roles that take them beyond the comfort zone to which they have traditionally been accustomed.<sup>9</sup>

For judges in particular, mediation brings them closer to the parties in a space of proximity that is conducive to fruitful dialogue. By that very

5. This publication can be accessed at <[http://www.cjc-ccm.gc.ca/french/news\\_fr.asp?selMenu=news\\_pub\\_judicialconduct\\_fr.asp](http://www.cjc-ccm.gc.ca/french/news_fr.asp?selMenu=news_pub_judicialconduct_fr.asp)>.

6. This publication can be accessed on the website of the Attorney General on <<http://www.attorneygeneral.jus.gov.on.ca/french/courts/manmed/codeofconduct.asp>>; See also the following article for a detailed explanation of the obligatory mediation program in Ontario, as well as the other judicial mediation programs around Canada: L. Otis, C. Rousseau-Saine and E. Reiter, "Confidentiality in judicial mediation in Canada" in Tanya Sourdin and Archie Zariski, ed., *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution*, Australia, Thomson Reuters, 2013.

7. For a review of the fundamental principles of mediation and the different codes of ethics, see C. Cyril, *International Commercial Mediation*, Chapter 12 (Informa Law, 2008).

8. D. Hoffman, "Ten Principles of Mediation Ethics" (2000) 18 *Alternatives* 147; P. Renaud, "L'élaboration d'un code de déontologie en médiation: une réflexion" (1996-1997) 27 *R.D.U.S.* 327.

9. L. Otis, "La justice conciliatoire: l'envers du lent droit" (2001) 3 *Éthique Publique: Revue internationale d'éthique sociétale et gouvernementale* 63.

fact, the judge mediator plays a much more active role than the decision-making role, which is, in essence, reactive. By definition, the mediation process brings judges closer to the parties in the dispute and their lawyers than would be the case in the decision-making process. In addition, that link is forged in a contextual environment where rules of conduct and intervention boundaries are not explicitly defined.<sup>10</sup> Caucus meetings, private discussions with only one party, disclosures of confidential information, telephone conversations and emails initiated by parties are likely to lead to ethical dilemmas for both the judge mediator and the lawyers.<sup>11</sup>

On the face of it, the legislatively defined context of the traditional judicial system provides watertight ethical protection. It is interesting to note, however, that it is extremely rare for judge mediators to be questioned regarding judicial conduct. Since 1997, not one judge mediator in Quebec has been sanctioned for failing to adhere to the general principles of the code that governs them. Why is that? The flexibility and vitality characteristic of mediation intervention could not accommodate rigid and immutable ethical rules. That is why judicial mediation was developed at the dawning of a sophisticated policy of ethical vigilance that keeps the process under the tight control of the judge mediator. The judge protects the integrity of the mediation system by making sure that three fundamental ethical principles are respected: confidentiality, self-determination or autonomy of the parties, and the fairness of the process.

In addition, the education and training of judge mediators in Canada involve scenarios of ethical dilemmas. Simulations and demonstrations of ethical impasses are part of the educational content judge mediators receive. And so self-regulation by internal forces interacting during the judicial mediation process has borne fruit. The judicial mediation system in Canada has proven to be dynamic and effective in terms of the ethics of judicial mediation.

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10. See R.A. Baruch Bush, "A Study of Ethical Dilemmas and Policy Implications" (1994) 1 *Disp. Resol.*, art. 4; K.K. Kovach, "The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way" (2008) 49 *S. Tex. L. Rev.* 789-827.
  11. On judges-mediators, see J.C. Crastley, "Judicial Ethics and Judicial Settlement Process: Time for Two Strangers to Meet" (2006) 21 *Ohio St. J. on Disp. Resol.* 569; S.S. Shweder, "Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements" (2007) 20 *Geo. J. Legal Ethics* 51; G.W. Adams, *Mediating Justice: Legal Dispute Negotiations*, Toronto: CCH Canadian, 2003 at pp. 183-184. On the non-judge mediators, see M. Moffitt, "Suing Mediators" (2003) 83 *B.U. L. Rev.* 147; M. Moffitt, "Ten Ways to Get Sued: A Guide for Mediators" (2003) 8 *Harv. Negot. L. Rev.* 81.

### §1. *Self-determination*

The principle of self-determination imposes on the mediator the duty to make sure that the parties give free and informed consent throughout the mediation process. That principle translates into the mediator's duty to: (1) refrain from inducing the parties to accept an agreement; (2) inform the parties that they have the right to accept or reject an agreement; and (3) respect the parties' freedom in decision-making, as long as it is in accordance with fairness and the law.

In extrajudicial mediation, the mediator is committed to respecting the parties' autonomy and not influencing their consent. However, the mediator does not have the same ethical responsibility as the judge mediator when it comes to expressing legal opinions. In judicial mediation, the judge mediator can easily influence the decision of the parties and their lawyers through his moral authority, status and knowledge of the law. This is why judge mediators must refrain from expressing opinions on whether the dispute is well-founded. Their role is to facilitate and promote the autonomy of the parties, not to make a decision on the dispute. Except under special circumstances in which the judge mediator may give his opinion in an incidental manner at the express request of the parties, he does not as a rule influence the consent of the parties.

The mediator, as a neutral facilitator, may – at the appropriate time – present solution options to the parties. It is important to remember that the parties have frequently abandoned their objective perception of the conflict. To take a broader view, the mediator will guide them beyond the narrow framework of their disagreement and explore avenues that are likely to constitute valid options for finding a settlement. However, responsibility for the decision lies wholly with the parties. The judge mediator will encourage them to take the necessary risks to extinguish the conflict that divides them, but will never take away their power to make their own decisions.<sup>12</sup>

Independence of intention presupposes the ability to express free and informed consent. The mediator will watch vigilantly for all signs of conflict, default or manifest inaptitude in a party's capacity to make choices and give consent. The presence of lawyers does not absolve the mediator of the duty to ensure that the parties who sign the agreement are able to express informed and clear-eyed consent.

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12. L. Otis and E. Reiter, "La médiation, Recours et Procédure en Appel" (2011) LexisNexis 153. This article, which mentions the ethical principles of judge-mediators, is adapted *mutatis mutandis* for extra-judicial mediation.

### *§2. Impartiality of the mediator*

The principle of impartiality means that the mediator will behave in a neutral and fair way toward the parties throughout the mediation process, refraining from giving undue preference to either party's position or directing the process in such a way as to favour either party.

However, the mediator frequently needs to balance the obligation of impartiality against the duty to protect the integrity of the mediation process. That duty specifically includes fair treatment of the parties. The mediator must protect the parties from any abuse of influence or power.<sup>13</sup> It is essential to identify the dynamics of domination and control right from the start of the session in order to avoid having to repeat the solution obtained by mediation or reinforcing the problems that initially gave rise to the conflict.<sup>14</sup> In the absence of formal procedural rules, and in a framework where the transaction is final and binding on the parties, it is up to the mediator to make sure that the process is fair.

Among the factors that may impede the fairness of the process are an uneven balance of power that leaves one party with no real bargaining power, and cultural differences that need to be managed with care and respect, as they can affect negotiation style and the expression of intention. These two factors bring us back to the quality of free and informed consent. It is up to the mediator to ensure that the process is not structured in such a way as to cause an unreasonable disadvantage to either one of the parties, especially the party who does not have legal representation. Under these circumstances, the mediator will sometimes have to redress the balance in the mediation room without compromising his own neutrality.

### *§3. Conflict of interest and independence*

The principles of conflict of interest and independence establish that the mediator cannot intervene in a mediation that involves anyone with whom he has personal, professional or economic ties, or has had such ties in the past. The mediator should have no personal interest in the object of the mediation or the outcome. Similarly, he should not have a relationship with any of the parties or anyone who stands to benefit from the result of an agreement.

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13. L. Otis and E. Reiter, "La médiation, Recours et Procédure en Appel" (2011) LexisNexis 183. See also J.M. Hyman, "Swimming in the Deep End: Dealing with Justice in Mediation" (2004) 6 *Cardozo J. Conflict Resol.* 19.

14. R.S. Adler and E.M. Silverstein, "When David Meets Goliath: Dealing with Power Differentials in Negotiations" (2000) 5 *Harv. Negot. L. Rev.* 1.

Independence is not a right proper to every mediator as such, since it is also the foundation of the very institution of mediation, which is based on the intervention of a neutral and disinterested third party. The independence of mediators models both a state of mind that translates into the mediator's objective impartiality and the independence attached to protecting the institution of mediation.

#### §4. Confidentiality

The effectiveness of mediation rests on the confidentiality of spontaneous exchanges of emotions and ideas and on establishing a synergistic communication that enables negotiations to bear fruit.<sup>15</sup> As a general rule, except under exceptional circumstances, everything that is said, written or done during the mediation process comes under the seal of confidentiality and may not be invoked in legal proceedings.<sup>16</sup>

First, let's look at the law. In Quebec, confidentiality under the law is considered a legal obligation that completely defines the mediation process. It can be difficult to delineate the contours of that legal obligation, since Praetorian law draws upon different legal systems. In addition, by codifying the mediation, the legislator has harnessed an instrument that is, by its very essence, protean and without real boundaries. The Quebec Court of Appeal aptly summarized the rules that can be derived from jurisprudence on the rule of confidentiality in judicial mediation:

[TRANSLATION] What is confidential in discussions held in the framework of a settlement conference is the exchanges that lead to a settlement, i.e. elements that are communicated during that conference and which were not known to one party before the conference. If something in the file was known to both parties before the conference, it does not acquire confiden-

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15. L. Otis and E. Reiter, "La médiation, Recours et Procédure en Appel" (2011) LexisNexis 180; G.W. Adams, *Mediating Justice: Legal Dispute Negotiations*, Toronto, CCH Canadian, 2003 at pp. 290-300; J.-P. Bonafé-Schmitt, "La médiation: une alternative à la justice?" in N. Kasirer and P. Noreau, ed., *Sources et instruments de justice en droit privé*, Montréal, Thémis, 2002 at pp. 161-164; C.J. Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 S. Tex. L. Rev. 407, 441-443; A.M. Burr, "Confidentiality in Mediation Communications: A Privilege Worth Protecting" (2002) 57 APR Disp. Resol. 64 at 64 and 66.
  16. D.A. Ruiz, "Asserting a Comprehensive Approach for Defining Mediation Communication" (2000) 15 Ohio St. J. on Disp. Resol. 851; E.E. Deason, "Predictable Mediation Confidentiality in the U.S. Federal System" (2002) 17 Ohio St. J. on Disp. Resol. 239; M.A. Weston, "Confidentiality's Constitutionality: The Incursion of Judicial Powers to Regulate Party Conduct in Court-Connected Mediation" (2003) 8 Harv. Negot. L. Rev. 29.

tial status by being mentioned during the conference. Obviously, I exclude settlement proposals made before the conference that remain privileged based on previously explained principles (codification of the common law rule that defines the scope of the protection conferred on discussions without prejudice to the settlement).

[...]

Does confidentiality extend to the agreement arrived at in the framework of a settlement conference? There has been a great deal of debate on that subject. In Canada, the answer may vary from province to province. I propose to answer that question in the negative, essentially because the legal rules and principles on which the confidentiality of settlement discussions is based are entirely distinct from those relating to the confidentiality of the agreement that arises from those discussions.<sup>17</sup>

In Canada, there are four exceptions central to the principle of confidentiality, all based on protecting the public interest: (1) an attack on the physical and psychological integrity of a child; (2) medical emergency; (3) serious and immediate danger caused to another person; and (4) the exchange of information between professionals from the same institution.

Where there is outright fraud, it is certainly possible to attack the settlement agreed to at the end of the mediation process. Does the same hold true for the lawyer's professional error where it does not constitute fraud? We do not believe it does. As in the decision-making process, the lawyer's incompetence or negligence may leave an opening for a remedy in damages, but it would be prejudicial to the sacramental rule of confidentiality to allow the attenuation of a codified principle when another remedy is open to the injured party.<sup>18</sup>

And now to the matter of ethics. The principle of confidentiality must also be considered in terms of its ethical component. As facilitator of the process, the mediator obtains privileged information and must know how to use it to advance the conclusion of a transaction while respecting the requirements of confidentiality.

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17. A. Rochon, *La règle de confidentialité en médiation judiciaire, son étendue, ses exceptions*, Canadian Judicial Mediation Conference, June 16, 2011 at p. 7, available online at <<http://www.mediationjudiciaire.ca/Page.aspx?idPage=24>> (accessed August 24, 2011). See also *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 R.C.S. 592 at para. 78-79.

18. *Cassel v. Superior Court*, 51 Cal. 4th 113 (Cal. Sup. Ct., 2011), at p. 124.

The necessity of maintaining a fair balance between the parties becomes more apparent during individual meetings that occur during the mediation conference. Concentric circles of confidentiality are created in this way. Confidential information is revealed during these caucuses, frequently accompanied by specific instructions on how to tell the other party. The mediator's skill lies in knowing where to draw the thin line between excessive prudence that immobilizes the negotiation and disproportionate boldness that affects impartiality and creates a breach of confidence.

During a mediation session, the mediator needs to let the parties – under the protection of confidentiality of exchanges – examine the dispute from all angles and define the essential questions and interests underlying a settlement. Briefly put, the moderator must create a safe environment that lets the parties engage spontaneously and sincerely in the negotiation process without altering the balance of power. Confidentiality is the heart and soul of judicial and extrajudicial mediation. Every time a breach is made in that fortification, confidence in the institution of mediation is shaken.

#### *§5. Quality of the mediation process*

The quality of the mediation process is based on the competence of the mediator, who should have appropriate training and possess the knowledge and skills that qualify him to preside over the mediation process.

The mediator is first and foremost an expert in the communication and negotiation process. The mediator is not generally required to be an expert on the topic that is the subject of the dispute. For example, disputes regarding construction or medical liability do not, except in specific cases, require a knowledge of the fine points of civil engineering or the precepts of medical science. Instructed by the parties who submit the pre-mediation presentations, the mediator can easily conduct the mediation and ensure the quality of the process. However, some fields of human endeavour do require expertise on the subject of the dispute. Judicial mediation in criminal law is conducted by jurists who specialize in the field. The same is frequently the case in disputes regarding technical aspects of taxation, international finance or environmental law.

Mediation is structured differently from simple negotiation. Here, communication is triangular, with the parties addressing each other, although in the initial stage, the mediator serves as the intermediary

in communication. The mediator is not the privileged recipient of the communication but rather a channel; the parties hold the discussion via the mediator because they hold decision-making power. That being said, the quality of the process will reflect the mediator's skill in making sure that not only does communication flow smoothly but it is also marked with periodic interventions intended to delimit differences of opinion and advance the negotiation process.

That dynamic applies even when the parties are hostile and do not want to be in the same room during negotiations. In this kind of situation, the mediator's role requires skill and mastery, because he is the one who closes the communication triangle by deciding when and how to transmit relevant information to one of the parties in order to maximize the chances of settling the dispute, without compromising his duty to preserve confidentiality.

#### *§6. Lawyers' ethics in the mediation process*

It is difficult to separate the mediator's ethics from the ethics of the lawyers who represent the parties. Mediation also imposes ethical obligations on lawyers that are distinct from the obligations that apply in the framework of the adversarial process. Unlike the traditional justice system, mediation is designed to let the parties speak; communication is established between the parties (the mediator being a facilitator, not an interlocutor), rather than between the lawyers and the judge.

Thus, the role lawyers are called upon to play in judicial mediation takes them beyond the ethical framework designed for courtroom speeches and representation. To a certain extent, the lawyer needs to give priority to seeking a fair solution negotiated by vigorously defending his client's position, since the objective of mediation is to arrive at a transaction that is fair to the parties, not a one-sided victory. In the context of the ethics of judicial mediation, lawyers need to abandon the adversarial paradigm to approach what Carrie Menkel-Meadow calls "non-adversarial ethics."<sup>19</sup>

In Canada, lawyers' conduct is generally governed by codes of professional ethics that apply the framework or exercise of professional activities with clients to all lawyers. Thus, a lawyer who represents a client in mediation must continue to act like a lawyer and is bound by the

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19. C.J. Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 S. Tex. L. Rev. 407, 414.

provisions of the code of professional ethics. However, the ethical obligations of the lawyer run in two directions.

On the one hand, the lawyer has a duty of loyalty to the client. On the other hand, the lawyer must also serve justice and participate in the sane administration of Justice. In a mediation context, lawyers may face some tension between their duty of loyalty to their client, which is based on an adversarial or competitive conception of the profession, and the interests of justice, which tend on the contrary to foster a cooperative or interrogatory conception.<sup>20</sup>

Finally, when we look at judicial mediation it is interesting to note that the role of the lawyer as an officer of the court includes another duty – the duty of informing the client of the existence of a mediation service or counselling the client on whether the service would be appropriate. The judge may recommend mediation to the parties at the stage of granting leave to appeal or when requests are sent to a judge sitting alone who considers that the file would benefit from mediation. However, sometimes such a recommendation may not be immediately forwarded to the parties.

The Honourable Marie-France Bich, Judge of the Court of Appeal of Quebec, describes the problem as follows:

[TRANSLATION] On quite another train of thought, I was speaking just now of the occasional difficulty of ‘taking the judge out of the mediator’: a similar problem exists for certain lawyers who are unable to step out of their role as a litigant. In fact, this expresses, I think, the fairly common problem of seeing negotiation as a phenomenon that is not part of the law but is opposed to the law or in any case different from it, when it should in fact be seen as an integral part of the law. The reluctance may stem from the fact that mediation makes no pretence at general normativity, which is the opposite of adjudication, while we as jurists are less at ease with this normative vagueness.<sup>21</sup>

To encourage the use of mediation will require education: lawyers and the general public need to be informed that mediation is available and that it is appropriate for most disputes. It is also necessary to raise

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20. A. T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, Cambridge: Belknap Press, Harvard University Press, 1993 at pp. 152-154; J.A. Cohen, “Lawyer Role, Agency Law, and the Characterization ‘Officer of the Court’ ” (2000) 48 *Buff. L. Rev.* 349.

21. Conference given on June 17, 2011 at the Canadian Judicial Mediation Conference in Montreal.

the ethical question that brings into play lawyers' obligation to facilitate the administration of justice and avoid behaviour motivated by personal interests.

### ***Subsection 2. Functional limits of codes of professional conduct***

Codes of professional conduct for mediators list the basic ethical principles that should govern the mediation process. While these principles may seem at first glance to be quite straightforward, they frequently turn out to be imprecise and obscure when we try to apply them to the increasingly complex situations that arise in the mediation process. In the twenty-first century, mediation has evolved from labour conflicts and private disputes to governance conflicts, class action suits, criminal law mediation, major environmental litigation and commercial disputes in the worldwide economy. The advent of cyberjustice has brought to the fore e-mediation,<sup>22</sup> in which the protagonists and the mediator experience the mediation process remotely and never see each other face to face. In short, situations in national and transnational law that frequently involve innumerable players in a framework that often defies definition.

In such circumstances, the general principles spelled out in codes of professional conduct serve as guidelines for mediators seeking solutions to ethical dilemmas, but offer no oracular judgments.<sup>23</sup>

The question then arises: should codes of professional conduct spell out specific rules for facilitating the resolution of ethical questions? The authors are not much inclined to recommend the codification of rules specific to mediation ethics. As Professor MacFarlane explains, codes of conduct serve a specific goal: to establish standards and parameters intended to guide mediators in fulfilling their mandates.<sup>24</sup> We share that view, especially as codification would require amendments from time to time to reflect developments in ethics.

Mediation is a flexible and context-based means of resolving conflicts. The ethical environment is closely linked to the nature of the dispute, the parties involved, and circumstances of time and place, as well as the mediator chosen by the parties or imposed by the Court. Consid-

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22. Online Mediation.

23. J. Macfarlane, "Mediating ethically: the limits of codes of conduct and the potential of a reflective practice model" (2002) 40 Osgoode Hall Law Journal 1; A.-C. Yang, "Ethics codes for mediator conduct: necessary but still insufficient" (2009) 22 Geo. J. Legal Ethics 1229 at 1231, 1235 and following.

24. J. Macfarlane, "Mediating ethically: the limits of codes of conduct and the potential of a reflective practice model" (2002) 40 Osgoode Hall Law Journal 1 at 54.

ering the variability of determining factors, it would seem to be superfluous to develop detailed codes of conduct. Flexibility in interpreting general principles is conducive to contextual adaptability and truly reflects the spirit of mediation.

This approach certainly paves the way for modulated interpretations of ethical principles by mediators. However, this variation in interpreting general principles hardly differs from the interpretation of legislative documents under Praetorian law. The courts can always intervene if the free and informed expression of consent to an agreement is vitiated.

## **Section 2. Practical case studies – ethical dilemmas**

Now let's consider certain ethical dilemmas frequently encountered by mediators.

### ***Subsection 1. Ignorance of changes in the law or of Praetorian law***

We know that the quality of the process presupposes that the mediator has meticulously prepared the case. Generally, the parties send the mediator a list of questions of fact and law before mediation begins. While analyzing the file, the mediator may sometimes discover aspects that are likely to change the position of the parties during mediation, whether they be changes to the law or new jurisprudence that modulates the legal situation.

If a change to the law is a determining factor that could affect the outcome of the mediation, the ethical dilemma should be resolved by immediately disclosing the information. If the change in the law remains purely accessory to seeking the negotiated solution, the mediator should defer disclosing the information so that the parties can first engage in the negotiation process. However, in the case of judicial mediation conducted by a judge, the information – whether it is significant or accessory to resolving the dispute – should be disclosed at the first appropriate opportunity. The judge mediator is not only acting as a neutral facilitator but also ensuring the integrity of the judicial institution. His status as mediator is subordinate to his judicial mission.

The mediator, specifically the jurist, is chosen or appointed first for his skills as a neutral facilitator but also for his knowledge of substantive law, which is implicitly recognized. A mediator's reputation stands on the strength of these premises. The disclosure of a determining judgment or

amended or new legislation is essential to establishing a true balance of power. Mediation that is knowingly conducted on the margins of the law is harmful to the fairness of the process.

The way in which information is disclosed is important, however. If one of the parties has already been informed of the new legal situation but has not disclosed it, the mediator will choose to bring them up to date either in caucus with the lawyers or in caucus with the parties.

Certain mediators opine in favour of non-disclosure of the law, arguing that the parties are represented by their lawyers. Consequently, they say, the code of professional ethics and legal liability will, if need be, indemnify the injured party. In essence, mediation is intended to prevent and extinguish lawsuits, not to give rise to new disputes.

### ***Subsection 2. Unrepresented parties***

There is no more arduous task for a mediator than establishing a balance of power in a mediation session when one party has legal representation and the other party is representing him or herself. The mediator's subjective impartiality is in constant jeopardy. If the mediator opts for perfect neutrality, the fairness and quality of the process could be compromised. If he decides to intervene to explain the options and give an opinion, he embarks on the irreversible path of providing counsel and is exposed to partiality. How can one reconcile ethical principles that seem to be so divergent?

First of all, we need to measure the gulf that separates the parties. Sometimes the unrepresented party is quite knowledgeable about the nature of the dispute and the applicable legislation. In commercial cases, an accountant or financial planner may well decide not to take legal representation without suffering the least inconvenience. In such a case, the mediator acts the same way as with the represented parties until the time comes to hold individual meetings. In judicial mediation, the mediator primarily avoids caucuses with an unrepresented party to protect his impartiality. If it is absolutely necessary to proceed with an individual meeting, the mediator requests the presence of an assistant who signs a confidentiality agreement.

If the unrepresented party does not have sufficient understanding of the issues in mediation, the mediator, in a joint session, should require the consent of the represented party to give specific explanations to the unrepresented party in order to ensure that the mediation proceeds in a

coherent manner. If an agreement is reached, the mediator may suggest a cooling-off period before the transaction is signed.

Mediators, who often encounter this type of dilemma, have developed methods of analysis and reflection to guide them in their interventions. In the subsection below, we reproduce an email discussion in real time between mediator colleagues regarding the dilemma of unrepresented parties. The discussion is reproduced here in full to show how beneficial simultaneous exchanges between mediators can be, as well as peer counselling, a new field of analysis.<sup>25</sup> The opinions that emerge from these discussions are in addition to the more general opinions on which codes of conduct are founded.

*§1. The dilemma of the unrepresented party, as discussed by mediators*

**Subject: Ethical dilemma: unrepresented party**

Question from the mediator: What would you do in this situation?

In a mediation today, I encountered a complex situation. One of the parties was young and had no legal representation, while the other party was a financier and lawyer with 40 years of experience. The unrepresented party had instituted proceedings for the payment of one million dollars, which he alleged was owed to him. The represented party had made many promises of payment over the past few months, but had never kept his promise.

In mediation, the parties finally reached an agreement. The unrepresented party agreed to grant a full release and discharge of all claims, whether known or unknown, in exchange for a payment of one million dollars.

The agreement was in fact a unilateral contract between the two parties. If the unrepresented party received one million dollars, there would be a contract and he would have to withdraw his claims. However, if the represented party failed to pay the promised sum, there would be no agreement and the parties would find themselves back in the situation that prevailed prior to mediation. The chances of the represented party fulfilling his obligation were slim, as he had never kept his promises in the past.

The unrepresented party also agreed to include a provision stipulating that the agreement was confidential, which meant, in terms of our law, that it

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25. In the email exchange we have reviewed, references to parties or identifying facts have been erased to protect mediation confidentiality. These exchanges come from professional associations that have coded sites.

would not be admissible in court. That provision therefore made the agreement non-enforceable to some extent.

I'm trying to stay content and neutral and still let the parties themselves determine the result of the mediation. However, the settlement is clearly disadvantageous to the unrepresented party and I doubt that the unrepresented party really understood the meaning of the provisions in the agreement. "If the money fails to show up today as it has consistently for 10 months before coming to me," the unrepresented party will not be satisfied with the agreement and may tell everyone that mediation is a waste of time. If the money is paid, the unrepresented party will not be able to make any further claims at all to the other party due to the release and discharge of all claims known or unknown.

I did, of course, insist that the unrepresented party consult a lawyer. However, she refused, saying that even if her friend (a lawyer) hadn't called her back, she was satisfied with the agreement and wanted to sign so she could finally get her money back.

I would really like to have your opinion on this situation. Can you think of a creative approach to such a situation? Would you have intervened? Would you have been able to sit there quietly and watch the situation unfold with a polite smile on your face? Please give me your thoughts.

## *§2. Answers to the dilemma of the unrepresented party*

### **Re: Ethical dilemma: unrepresented party**

Reply no. 1: I do think you've met your obligations as a mediator. You've managed to bring the parties to the best possible frame of mind for reaching an agreement. They wouldn't have done that without you, so it's a good result.

It's true that the result may not be as satisfying as a standard bilateral agreement – in which each party promises something to the other – which can be enforced by one of the parties if it is violated and which is not protected by the rules of confidentiality. However, the agreement reached between the parties is still a legitimate way of bringing them to resolve their dispute. You helped them to reach an agreement and it was up to them to decide what should go into the agreement.

If your concern is that the unrepresented party will think that mediation is a waste of time if she doesn't get the money, then your concern is only with the image of mediation. Even if the payment isn't made, the parties have been helped to come to a solution, which is not a waste of time per se.

However, if there's really been a waste of time, the fault lies with the unrepresented party, not you. He should have obtained a bilateral agreement with a provision that would make it enforceable in court. If there was no real balance of power and he wasn't sensible enough to realize that, it's his problem, not yours.

Is your real concern that the unrepresented party couldn't appreciate the meaning of the release he agreed to in exchange for a million dollars?

That concern is still a problem in mediations with parties who have an imbalance of power. In that type of situation, I always sit down with the two parties in joint session and go through each paragraph in the agreement to discuss what each paragraph means and what impact it could have. I do this especially when there's a release. After that, if the weaker party still wants to sign the agreement, so be it.

**Re: Ethical dilemma: unrepresented party**

Reply no. 2: For your information, I never go into mediation without first getting a written statement that spells out the following:

- 1) That I don't give legal opinions and don't act as counsel or as a lawyer;
- 2) That I've advised the parties to have a lawyer present during mediation even if that means giving them a deferment so they can change their minds the day we go into mediation. In cases where the parties choose to ignore that advice, I recommend that the unrepresented party have the agreement examined by a lawyer before signing it;
- 3) That I won't present any options or evaluate any offers.

Despite all of the above, I still feel obliged to give the parties some small extra pieces of advice during mediation or at the very least, warnings about the consequences they can expect if they come to such an agreement.

In your case, I believe you should have had a discussion with the parties (in joint session) about the meaning of releases and discharges of all claims, whether known or unknown, and discussed the impact that kind of provision could have on the parties. You should have done the same for the provision on the confidentiality of the agreement. Those provisions have to do with the enforceability of the agreement, and I believe that's a subject that should be discussed by the mediator.

I know some of my colleagues may think that this is going too far and may infringe on the principle of the mediator's neutrality. I also know that my interventions could be perceived as contradicting the release I ask unrep-

resented parties to sign. My intuition and my experience as a mediator have led me to take this course of action.

If the party who is represented by a lawyer is not inclined to have that kind of conversation, I would explain that it's really to his advantage to make sure that the unrepresented party fully understands the obligations he's committed to in order to make sure the agreement is viable.

I don't think there can be free and informed consent if essential information is missing. It is true that the unrepresented party is free to renounce all forms of protection and warranties, hoping that the money will arrive as promised. However, he should be properly informed if he does so.

I believe that the principle of neutrality sometimes requires the mediator to act to redress some imbalances so that the parties can really be put on an equal footing.

In short, if I'd been in your shoes I wouldn't have sat there smiling politely without saying a word. Instead, I would have made every possible effort to inform the unrepresented party that his desire to get an agreement without having consulted a lawyer reduced the chances that the agreement would be viable and satisfactory for both parties.

Finally, if that's the only kind of agreement the represented party is willing to accept and the unrepresented party is still ready to sign knowing that the agreement could be futile, then the mediator can't do much more, unfortunately.

The parties should know, however, that you as a mediator can't guarantee the fairness of the agreement.

### *§3. Exceptional behaviour*

The mediation process is flexible and gives the parties an opportunity to exchange views on the relationships between them and tell the story of the conflict. In most cases, these exchanges play an important role in helping to structure the mediation from the viewpoint of clarifying positions and interests. It does happen sometimes that the parties, once they are freed from a formal framework, express their resentment in an inappropriate way and step beyond the bounds of decorum and courtesy.

How can we rein in exceptional behaviour by the parties without affecting the quality of the process and going beyond the limits imposed by impartiality?

We must reiterate that mediation is a neutral territory from which moral judgment is generally absent. Except for a few borderline cases, experienced mediators have the ability to face the excessive expression of emotions without running the risk of breaking up the mediation process. A break, followed by an individual meeting with the recalcitrant party, is usually enough to resolve the impasse.

The mediator also serves as the transmission belt for factual information in the conflict. It does happen sometimes that the parties have a distorted relationship with the truth. It is not unusual to find yourself facing exaggeration, half-truths, white lies and pregnant silences in a mediation room. Nor is good faith a prerequisite for going into mediation. The mediator manages the mediation process by taking all these factors into account and making sure that the important facts stated serve as the foundation for resolving the conflict. The mediator is not the guardian of the truth, over which he has very little control in a process of neutral facilitation. However, he does have an ethical duty to withdraw from mediation if he realizes that erroneous decisive information has been knowingly transmitted in his presence.

### **Section 3. Reference framework for ethical reflection**

Mediators' interventions are not always in-depth and based on a thoughtful analysis; most interventions are based on experience, the ability to react promptly, knowledge of the file, etc. In fact, the natural ability to intervene rapidly is among the attributes of a good mediator. However, in unforeseen and complex situations an empirical response based on spontaneous experience is frequently not enough to ensure appropriate intervention.<sup>26</sup>

To help mediators find a scheme for analyzing ethical rules, some authors have suggested frameworks for reflection that go beyond simply consulting codes of professional conduct or intuitive intervention. Professor Georges Legault recommends the applied ethics method, which is designed to arrange ethical principles in order of priority after some deliberation leading to a conscious choice. Legault notes that there are three actions intended to guide the mediator in that reflection: developing skills to discern ethical issues; deliberating on the best choice of action under the specific circumstances; and engaging in dialogue with peers to

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26. Studies lead by Professor Shane Frederick of MIT Sloan School of Management demonstrate that an intuitive answer taken under an impulsion is often not the good one. On this topic, see S. Frederick, "Cognitive Reflection and Decision Making" (Fall 2005) 19 *The Journal of Economic Perspectives* 4 at 25-48.

jointly assume the rationality of the decision.<sup>27</sup> Professor Macfarlane proposes a “reflective practice” approach similar to the model put forward by Legault.<sup>28</sup> These frameworks for reflection underline the importance of mediators being aware of the consequences of their interventions and the motivation that guides them.

We believe that a reflective and deliberate thinking process should lead the mediator to: (1) define the ethical dilemma; (2) identify the legislation, codes or guidelines that are applicable; (3) consult peers to distinguish between various options; (4) analyze the issues related to each option; and (5) make a thoughtful and deliberate decision based on factual input.

In fact, the point is to move from an individual process of ethical questioning to a collective approach that calls upon peers, with the ultimate goal of enriching reflection on ethics and validating the choice of interventions.

## CONCLUSION

Mediation occupies an increasingly vast territory in the field of human activities. It should come as no surprise, then, that ethical reflection now plays a predominant role. Mediation, a privileged means of resolving conflicts, evolves at the same pace as society and needs to keep on adapting to society. Unlike the traditional justice system, which is based on the adversarial model, mediation handles conflicts with no time frame, setting aside moral judgments.

It goes without saying that codes of professional conduct that are binding on mediators cannot settle the vast number of ethical dilemmas that arise in the mediation room. But it would not be desirable either to codify ethical interventions in a narrow and closed-off regulatory model.

The flexibility inherent in mediation mode is not compatible with normative rigidity. Preference should be given to a flexible and evolving framework based on individual ethical reflection fuelled by the community of mediators. Mediation really is a collaborative dialogue between the mediator and the parties and between the mediator and his peers.

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27. G.-A. Legault, “La médiation et l'éthique appliquée en réponse aux limites du droit” (2002-2003) 33 R.D.U.S. 81.

28. J. Macfarlane, “Mediating ethically: the limits of codes of conduct and the potential of a reflective practice model” (2002) 40 Osgoode Hall Law Journal 1.