RETHINKING DISPUTES: THE MEDIATION ALTERNATIVE

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12 THE TRUSTED MEDIATOR: ETHICS AND INTERACTION IN MEDIATION

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THE NATURE OF DISCOURSE ON ETHICS IN MEDIATION

Mediators tend to consider ethics most intensely when they are in a dilemma. Where, then, can they turn for guidance? The usual and obvious answer is to look to codes of ethics created by respected mediation organisations. Both the literature and the agendas of dispute resolution organisations indicate that discussions about ethics are often framed by people preparing to set standards which they believe are needed as 'safe-practice' guidelines for practitioners, or to protect the public from unsavoury or unwise practitioners. Another setting for discussions about ethics is training. Ethics are often taught either as an addendum or in the form of handouts. Except in the presence of an actual dilemma, the topic of ethics in mediation usually takes a back seat in favour of discussions about dispute resolution qualifications, skills and models. The irony is that ethical principles are fundamental to every assumption of both dispute resolvers and disputants. Judgments of right and wrong, good and bad, are at the root of virtually every dispute and every dispute resolution process.

Looking back at my own mediation and arbitration experiences, there have been no disputes in which ethics were unimportant to the people involved. Parties are rarely concerned only with pragmatic issues. Ethics are almost always brought into the argument, often with the cliché: 'It's not the money, it's the principle of the thing.'

A NARROW APPROACH: THE EXCLUSIVE FOCUS ON THE MEDIATOR

In spite of the importance of ethics to virtually all disputants, discussions about mediation and ethics often focus exclusively on the mediator's role, especially on ethical dilemmas faced by the mediator[1] or on the need for and possible contents of mediator codes of ethics. In the mid-1980s many conflict resolution organisations began to promulgate codes of ethics for mediators. Literature and codes of ethics focus almost exclusively on the role of the mediator. Codes of ethics are considered in some depth later in this chapter.

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1 Society of Professionals in Dispute Resolution (SPIDR), *Making the Tough Calls*, 1991, Washington, DC: Society of Professionals in Dispute Resolution.

A BROADER APPROACH TO ETHICS IN MEDIATION: THE INTERACTION BETWEEN MEDIATOR AND PARTIES

To be practical, discussions of ethics need to recognise that when mediators are invited into a dispute, they are usually invited into a problem laden with ethical undertones. The parties come ready with positions and arguments, and they believe strongly that they are right and the other is wrong. The mediator brings independent values and opinions about the dispute and a process for managing or resolving it. The parties and the mediator may or may not share a common set of ethical assumptions. The problem of mediation is essentially one in which an independent third party, the mediator, is asked to work with parties experiencing ethical tension, to help them interact in a way that will produce at least relief, and ideally consensus or even reconciliation.

Even where conflicting parties are not using an ethical framework to accuse one another, ethical dilemmas are often involved. For example, a dispute concerning the siting of a waste land-fill may be framed in functional terms. When one looks at the perspectives of the parties, however, the elements involving environmental and other public concerns are often expressed in terms of ethics.

The definition of an ethical dilemma is a difficult choice between two or more options which make seemingly equal ethical demands (or which seem equally difficult to support). Disputants typically do not see the problem in this way; rather each is polarised toward the desirability of one option over the other. The mediator, perceiving the dispute as a whole, often sees that the problem initially presents itself as a dilemmic choice between two or more 'positions' or options for solution which, seen together, are (from the mediator's perspective) framed as both 'best' and 'worst' by the parties collectively.

The very introduction of a non-partisan third party, who is called upon to understand and maintain the trust of people who are contradicting one another, provides an opportunity to transform the nature of the ethical problem. The transformation occurs as the mediator interacts with the parties in ways that help them recognise that the problem is not most usefully described as a struggle between one party who is 'good or right' and the other who is 'bad or wrong.' Since both parties see themselves as 'right,' the problem can be reframed as a difficult jointly-held ethical dilemma in which both parties can participate to resolve, sometimes, perhaps, in ways that acknowledge that the very essence of an ethical dilemma is tension of making choices between two 'rights' or 'goods', or alternatively between 'the lesser of two evils.' The very fact that the parties have consented to the involvement of a mediator means that at some level they are capable of contemplating the possibility of a solution neither has thought of, based on a common ground of jointly discerned ethics or values that transcend what the parties can presently perceive. This transformative role becomes complicated as the mediator's own independent ethical perspectives interact, either implicitly or explicitly, with those of the parties.

GRAPPLING WITH ETHICS IN MEDIATION: FOUR EXERCISES

While is it useful to see ethics in mediation as a dynamic issue involving active participation by parties and mediator, parties have opportunities to consider ethics in mediation only when they are involved in the mediation of a particular dispute. Mediators as vocational process leaders are in a better position to consider ethics in depth.

Mediators grappling with the problem of interaction with parties about ethical situations can be assisted by four exercises. First, as leaders of dispute resolution processes, mediators can develop understanding of their own general ethics and their values surrounding the purpose of mediation generally and the purpose of a particular mediation. This paper provides a sampling of values ascribed to mediation, as well as descriptions of general ethical theories with which it is hoped that mediators can begin the process of reflection about their own ethical values. Second, mediators can compare their ethical understandings with those of others engaged in the practice of mediation as well as critics of mediation. This can be done through critical analysis of codes of ethics and relevant literature. The second part of the paper provides an analysis of several codes of ethics by which mediators can be prompted toward their own reflections and discussions with other mediators. Codes of ethics from Canada, the United States and Britain are considered along with literature primarily from the United States and Canada. The basis of current codes of ethics and proposals is questioned: what are the assumptions behind them? To what degree are proposals relevant to diverse societies? Third, mediators can develop a framework by which to work through the individual dilemmas they face in their day-to-day work. An example of such a framework is articulated in the third part of this essay. Fourth, mediators can interact at a policy level with others engaged in leading dispute resolution processes. Comments are offered about ethical accountability and the meta-message of current trends by mediation organisations, coalitions of mediation organisations and government agencies to propose broad-based standards for ethical practice.

WHAT DOES IT MEAN TO BE 'ETHICAL'?

Groups of mediators often debate ethics without examining their implicit underlying assumptions. People may intuitively say about a particular practice: 'That's unprofessional and unethical' or even 'I don't know what they're doing, but it ain't mediation!' Statements like these are laden with implicit assumptions which spring from individual or group world views and associated beliefs and values.[2]

2 Bush, RAB and Folger, JP. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, 1994, pp 229–59, San Francisco: Jossey-Bass.

A consideration of ethics in mediation needs to start with a broader discussion: what does it mean to be 'ethical?' Does it mean acting consistently with one's own principles, one's own ethical compass? If so, how does one know one's compass is accurate? Are there different (but equally valid) ethical compasses for different people in different contexts and cultures? Are there some universal ethical principles that can guide discussions about ethics? Should moral decisions be made by autonomous individuals? Or should they be made in the context of shared community values, rights and responsibilities?

Placing these questions into the framework of an actual mediation creates another question: who should be the ethical decision-maker? The mediator alone? Each party autonomously? Or does the invitation of a mediator into a dispute demand that the ethical decision-making process be shared among the disputants and the mediator?

DIVERSE VALUES AND GOALS OF MEDIATION

Policy on ethics in mediation practice depends on the goals established for mediation. The goals are always dependent on the social and ethical values that drive particular programmes or organisations. Bush[3] has pointed out that mediators' ethical dilemmas should be analysed according to the values served by the mediation process. Determining the ethical values underlying mediation is complicated by the existence of diverse and overlapping views within the field.

Choices of goals include the following:

- *party autonomy* and control over outcome. The process is seen as a means to strengthen the parties' capacity for resolving their own problems or developing their own agreements without dependency on external institutions or professionals,[4] or to provide opportunities for increased direct democracy;
- *party satisfaction*. The process and/or outcome satisfies party needs, cost and time efficiency, and the stability of business or other interests;
- *community solidarity*. Particular groups or communities are strengthened in the use of mediation processes to resolve problems themselves, or empowered to achieve greater social justice;[5]

3 Bush, RAB, 'Symposium: The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' (1994) *Journal of Dispute Resolution* 1 at 1–55. First published as *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1992, Washington, DC: National Institute for Dispute Resolution.

4 Bush, RAB, 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) *Denver University Law Review* 66, pp 335–80 at 347–48.

5 Bush, 1989, see above note 4; Bush and Folger, 1994, see above note 2.

- *social justice*. Mediation processes and/or outcomes contribute to fairer apportionment of material wealth or power,[6] or prevention or reparation of harms;[7]
- *social order*. Social order is enhanced through the development of increased consensus or resolution of underlying conflicts, rather than mere settlement of manifest disputes;[8]
- *personal, group or societal transformation*. Mediation processes provide disputants and groups with opportunities for personal change and growth in social responsible ways.[9]

Mediation programmes and processes may attempt to serve one or a combination of these goals. Definitions of 'success' and standards of practice will differ depending on what goals are set. Dispute resolution programmes which strive for efficiency tend to offer short processes aimed at settlement. An example is the mandatory mediation programme of 'settlement conferences' in British Columbia in which judges act as mediators to assist parties to settle small claim cases before trial. The mediation process tends to last about thirty minutes and focuses on the issues identified in the small claim pleadings. Evaluation of this programme found it was successful in terms of saving court time (that is, successful in the sense of being efficient).[10] Other programmes may emphasise party autonomy, social justice or community empowerment. Often these are community-based mediation programmes which utilise community volunteers and co-mediation. These programmes may offer longer processes which define parties and issues as broadly as necessary to resolve issues.

In terms of ethical choices, judge-mediators may consider it quite appropriate to use recommendatory methods ('muscle mediation') during the short time they have available for settlement. In contrast, community mediators may make an

6 *Ibid.*

7 Gilman, EB and Gustafson, DL, 'Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim Offender Mediation' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 89–106 at 97; Landau, B, 'Qualifications of Family Mediators: Listening to the Feminist Critique' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 27–49, at 35–37 and 46.

8 Bush, 1989, see above note 4, at 347–48; Bush and Folger, 1994, see above note 2, at 22–23. This goal has been criticised because of the possibility that mediation processes may maintain the pre-eminence of powerful elites by pacifying individual disputants and thereby depoliticising conflict and diverting attention from the need for collective action. (See, for example, Abel, RL, 'The Contradictions of Informal Justice' in Abel, RL (ed), *The Politics of Informal Justice*, 1982, pp 267–320, New York: Academic Press; Nader, L, 'Harmony Models and the Construction of Law' in Avruch, K, Black, P and Scimecca, J, *Conflict Resolution: Cross Cultural Perspectives*, 1991, Westport, Connecticut: Greenwood Press and Nader, L, 'Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology' (1993) 1 Ohio State Journal on Dispute Resolution 9, pp 1–25).

9 Bush and Folger, 1994, see note 2, at 20–21; Bush, 1989, see above note 4.

10 Adams, P, Getz, C, Valley, J and Jani, S, *Evaluation of the Small Claims Programme*, Vol 1, 1992, Victoria, BC: Province of British Columbia, Ministry of Attorney General.

ethical choice to be non-interventionist by avoiding recommendations to the parties. They may consider that muscle mediation is unconscionable because of its infringement on party autonomy. Thus, value choices lead to definitions of success, which in turn determine policies concerning practice ethics.

Sometimes mediation programmes find themselves constrained by funders or sponsors whose values differ from the sponsors of the programmes. For example, sponsors of some mediation programmes may value social justice or community empowerment. Other sponsors, especially if they are governments, tend to provide funding on the basis of the efficiency goal of reducing court case loads. Efforts to satisfy funder evaluations which emphasise high case loads and low costs may lead to ethical squeezes for mediators and mediation programmes. Programmes which find themselves trying to serve two competing masters may find themselves in ethical tension.

Divorce mediators may value party autonomy, social justice or both. These goals, if seen to compete, may place mediators in ethical tension concerning whether to mediate (or terminate mediation) in cases where party choices differ from mediator conceptions of social justice. For example, in a (real life) divorce mediation, the couple refused all mediator suggestions (in caucus and in joint session) to seek a valuation of the couple's pension plans. They both insisted that they would each keep her or his own pension plan, and each refused to consider any other alternatives. The wife was vociferous in her refusal. Predictably, the husband's pension plan was vastly more valuable than that of the wife. The law in the particular jurisdiction provided that in the normal course they should divide both pension plans equally.

The mediator was ethically torn between her commitment to autonomous informed consent of the parties and her belief in equity and social justice. She saw this case not as an isolated one, but as a case-type which reflected problems of social justice. Belief in party autonomy might lead to an ethical choice of maintaining non-directiveness.[11] Belief in social justice might lead to an ethical choice to use 'empowerment' techniques directed toward the woman, or to persuade the parties toward one outcome or another either by direct suggestion or by insisting on accounting or legal advice, or by terminating mediation. Mid-range choices could lead the mediator to utilise 'reality testing' questions or other supposedly non-directive methods which can be seen as serving either as a persuasive tool (social justice) or as a method of ensuring informed consent (party autonomy).[12]

Values concerning the goals of mediation lead directly to policy choices concerning ethical behaviour. All the issues reflected in the scenarios cited above have been the subject of animated and sometimes controversial discussion among mediators. Bush suggests that codes of ethics need to articulate the values on

11 Bush, 1994, see above note 3, at 9–10.

12 See the discussion about a similar case in Grebe, SC, Irvin, K and Lang, M, 'A Model for Ethical Decision Making in Mediation.' (Winter 1989) *Mediation Quarterly* 7(2), pp 133–48, at 140–46.

which they are based. Increasingly, newer codes of ethics are doing this.[13] Overwhelmingly, the dominant underlying principle articulated (or implicit) in the codes is party self-determination.

Part of 'exercise one' (of the four exercises suggested in this chapter) involves reflection by mediators (or mediation programmes) on their own values concerning the purpose of mediation, and their own definition of 'success.' These values, purposes and definitions may vary depending on the context of the dispute. Values, purposes and definitions of success in a given case may also be determined through interaction with the parties. Another part of 'exercise one' is a consideration of one's more general assumptions about ethics, and reflection on some of the following issues.

PHILOSOPHICAL PROBLEMS IN A PLURALISTIC SOCIETY

In rapidly changing societies, one can not assume homogeneous ethical values among either disputants or mediators. Most countries are affected by increasing cultural diversity as a result of immigration as well as social change. This creates challenges for mediators in particular cases, as well as for mediation organisations creating codes of ethics.

LeBaron Duryea's research[14] demonstrated that people who immigrate to Canada do not necessarily share the perceptions of the dominant Canadian culture as to how disputes should be resolved. In particular, the individualistic approach to conflict evidenced in Western thinking is not mirrored by those from more collectivist cultures, including Aboriginal peoples in North America.[15] The image of a fishing net may better impart the kind of 'network conflict' reported by members of some immigrant groups in North America:

> Each person is like one of the knots in a large fishing net with its intricate interlacing of innumerable knots. Each person is tied to many others. When all of the knots are firmly tied, the net is in good working condition. If any one of the knots is too loose or too tight, the whole net is skewed. Each knot, each relationship, has an effect on the whole. If there is a tear, a gap, in the net, the net is not a working one ... Nets are to be checked frequently, knots cared for tenderly, and if tears do appear they must be repaired. [16]

13 Mediation UK, *Mediation UK Practice Standards*, 1993, Bristol: Mediation UK; Academy of Family Mediators (AFM), *Standards of Practice for Family and Divorce Mediation*, 1995, Article I, Lexington, MA: Academy of Family Mediators; American Arbitration Association (AAA), American Bar Association (ABA) and Society of Professionals in Dispute Resolution (SPIDR), *Model Standards of Conduct for Mediators*, 1995, Article I, Washington, DC: Society of Professionals in Dispute Resolution.

14 Duryea, Michelle LeBaron and Grundison, JB, *Conflict and Culture: Research in Five Communities in Vancouver, British Columbia*, 1993, Victoria, BC: UVic Institute for Dispute Resolution.

15 Monture-OKanee, PA, 'Alternative Dispute Resolution: A Bridge to Aboriginal Experience?' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 131–40 at 138–39. Price, RT, and Dunnigan, C, *Toward an Understanding of Aboriginal Peacemaking*, 1995, Victoria, BC: UVic Institute for Dispute Resolution, at 3.

16 Le Resche, DN, 'Procedural Justice of, by, and for American Ethnic Groups: A Comparison of Interpersonal Conflict Resolution Procedures Used by Korean-Americans and American Community Mediation Centres are Procedural Justice Theories', PhD dissertation, 1990, George Mason University, cited in Duryca and Grundison, 1993, see above note 14, at 205; Lederach, JP, 'Of Nets, Nails and Problems: The Folk Language of Conflict Resolution in a Central American Setting' in Avruch, K, Black, P and Scimecca, J (eds), *Conflict Resolution: Cross Cultural Perspectives*, 1991, Westport, Conn: Greenwood Press.

Similarly, the individualist approach to ethics dominant in Western societies is not reflected in the ethics of many non-Western societies, where ethical values may reflect loyalty to family, religious or cultural values.[17] Codes of ethics developed for mediators in the West implicitly incorporate dominant Western views of both conflict and ethics. In pluralistic societies, this unexamined approach to the framing of mediator ethics may not be realistic in the long-term.

Working across cultures: 'Empower or Imperial?'[18]

It is increasingly recognised that mediation must be culturally sensitive when practised in a multicultural society. In addition, more and more trainers are being asked to conduct training or facilitate the implementation of dispute resolution programmes internationally. Significant ethical issues are raised, including the issue of working with people whose cultural and ethical frameworks may differ from those of the mediator or trainer.

Ethical concerns are being raised as commentators become concerned about imposing dominant culture standards on minority groups, or in the case of international work, neo-colonialism in the form of exportation of dispute resolution processes based on Western values. Readers are directed to the valuable literature which points to these issues.[19]

WESTERN THEORIES OF ETHICS

Mediation codes of ethics developed in Western nations will inevitably reflect Western ethical traditions. However, the literature on mediation ethics demonstrates only cursory knowledge of the vast and continually growing body of literature on Western moral philosophy. Likely, this is because few people in the field of dispute resolution are trained in moral philosophy. The undeniable

17 Salem, PE, 'A Critique of Western Conflict Resolution from a Non-Western Perspective' (1993) *Negotiation Journal* 9, at 361–69.

18 This was the title of a workshop given by John Paul Lederach at Interaction '92, a conference on dispute resolution held in Winnipeg, Manitoba, 6–9 May 1992 ('Cross-cultural conflict resolution training' (Fall 1992) *Interaction* 4(3), at 9–10).

19 Augsburger, DW, *Conflict Mediation Across Cultures: Patterns and Pathways*, 1992, Louisville, Kentucky: Westminster/John Knox Press; Duryea, Michelle LeBaron, *Conflict and Culture: A Literature Review and Bibliography*, 1992, Victoria, BC: UVic Institute for Dispute Resolution; Duryea, Michelle LeBaron, *Conflict Analysis and Resolution as Education: Culturally Sensitive Processes for Conflict Resolution. Training Materials*, 1994a, Victoria, BC: UVic Institute for Dispute Resolution; Duryea, Michelle LeBaron, 'The Quest for Qualifications: A Quick Trip Without a Good Map', in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994b, Victoria, BC: UVic Institute for Dispute Resolution, pp 109–29; Duryea and Grundison, 1993, see above note 14; Lederach, JP, *Mediation in North America: An Examination of the Profession's Cultural Premises*, 1986, Akron, Pa: Mennonite Central Committee; Lederach, JP, *Preparing for Peace: Conflict Transformation Across Cultures*, 1995, Syracuse, NY: Syracuse University Press; Lederach, JP, 'The Mediator's Cultural Assumptions' (1986b) *Conciliation Quarterly* 5, at 2–5; Lederach, 1991, see above note 16; Lederach, JP and Wehr, P, 'Mediating Conflict in Central America' (1991) *Journal of Peace Research* 28 (1) at 85–98; Wiggins CB, 'Exporting Process Technology: Transplanting Public Interest Mediation to Central Europe' (Spring 1993) *Mediation Quarterly* 10 (3), at 273–89; Wildau, ST, Moore, CW and Mayer, BS, 'Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad' (Spring 1993) *Mediation Quarterly* 10 (3), at 303–20.

relevance of moral philosophy to the discussion on mediation and ethics provides opportunities for more in depth research and consideration which would provide valuable guidance for the field of dispute resolution. Cooks and Hale,[20] Gibson,[21] Grebe[22] and Williams[23] are among the few who have examined mediation from the perspective of moral philosophy. For individual mediators seeking to understand their own ethical underpinnings, this section briefly outlines a few of the dominant themes of Western ethics that may implicitly weave their way into discussions of mediation and ethics.

This paper does not discuss concepts of moral theory from non-Western sources. However, other disciplines are addressing ethical issues from a cross-cultural and cross-religious perspective, and their work would provide a useful topic for further research. As one example, John McConnell's book, *Mindful Mediation: A Handbook for Buddhist Peacemakers*[24] provides a useful outline of Buddhist ethics relevant to dispute resolution.

Universalism versus relativism

Universalism

One of the most important questions in ethics is whether ethics are 'universal'. That is, are there some principles of ethics that apply to all human beings regardless of culture or context? The literature on moral philosophy provides many complex discussions on what it means for an ethical maxim to be universal. Thomas Aquinas acknowledged Divine Law as the basis for morality. Others, such as Kant, founded universalism not on God, but on the application of reason. More recently, efforts have been made to find a more pluralistic universalism (see below, 'communicative ethics').

In mediation, the practical relevance of universalism might be experienced in a dispute over parental responsibilities after divorce where there is an issue involving religious education. Each parent struggles with the dilemma of what, if any, exposure to religious teaching is best for the children. One party may adopt a universalist approach to religious or cultural values. 'My religious values are right (universally right, whether you believe it or not) and it is important that my children be taught correctly.' The mediator can become embroiled in the

20 Cooks, LM and Hale, CL, 'The Construction of Ethics in Mediation' (Fall 1994) *Mediation Quarterly* 12(1), at 55–76.

21 Gibson, K, 'The Ethical Basis of Mediation: Why Mediators Need Philosophers' (Fall 1989) *Mediation Quarterly* 7(1) at 41–50.

22 Grebe, SC, 'Ethics and the Professional Family Mediator' (Winter 1992) *Mediation Quarterly* 10(2) at 155–65.

23 Williams, BB, 'Implications of Gilligan for Divorce Mediation: Speculative Applications' (Winter 1994) *Mediation Quarterly* 12 (2) at 101–15.

24 McConnell, JA, *Mindful Mediation: A Handbook for Buddhist Mediators*, 1995, Bangkok: Buddhist Research Institute and others. Distributed by Asia Books Co Ltd, telephone 662–391–2680. Coordinated by Foundation for Children publishing house, 1845/328 Soi Charaslarp, Sirindhorn Rd, Bangplud, Bangkok, Thailand, tel/fax 662–424–6404).

dilemma when her or his own sense of ethics is offended by choices that the parents are wishing to make, for example, if a particular parent's religious choice is one that the mediator feels will not be in the best interests of the children.

An obvious problem with universalism is that it is difficult to find any test to determine the universal 'rightness' of any maxim. This is not only a philosophical problem but also a practical one. Another problem with universalism is that conflict among two 'universal' principles can qualify universality. For example, if one accepts the universal value of two ethical maxims, keeping promises and looking after aged parents, which of the two principles should prevail when one is faced with the dilemma of either keeping a promise to be the key-note speaker at an important conference on human rights, or caring for one's suddenly sick mother? Essentially, ethical dilemmas are not choices between right and wrong, but between two equally compelling (or equally undesirable) alternatives.

Ethical relativism

Ethical 'relativism,' by contrast, provides that there are no universal ethical principles. What is wrong for one person may be right for another. This sort of ethical relativism is popularly accepted. People are often heard to say 'I live by my own standards' or 'You have your standards; they may be okay for you, but don't impose them on me.'

Relativism judges behaviour by prevailing standards. A Canadian example is the law relating to pornography which defines pornography by what is acceptable according to prevailing community standards. The factual problem in determining the community standard is that communities are not very homogeneous.

Serious ethicists find little to commend the idea that 'anything goes.' Relativist morals are considered to be justified only if they are accepted with informed consent, that is, the moral views are held with full awareness of natural and logical consequences of one's assent to the principle.

Discussions of both ethics and qualifications standards for mediators implicitly reflect a struggle with the issues presented by ethical relativism and universalism. In the above-cited example involving parental struggle over religious education, the relativist parent may answer 'your religion may be right for you, but it is also right for me to have no religion, and further, when we consider what is right for our children, it is equally valid for our children to be taught no religion. My views about what is right are just as valid as yours.'

Another example involves cases in which mediators wonder how to proceed where parties come from another culture or religious tradition which does not share egalitarian views concerning the role of women. To what extent should feminist mediators facilitate parties' goals which reflect the view that subordination of women is not only 'right', but that egalitarianism defies fundamental principles?

Ethical relativism does not provide an easy answer to this complex issue. Many Canadian immigrants report that they do not wish to adopt traditional patterns to the extent that they perpetuate male dominance.[25] They will not be content with policies which respect any and all kinds of traditional dispute resolution processes on cultural grounds.[26] The final report of LeBaron Duryea's research says:

> Immigrants to Canada report that the traditional means of resolving conflict they may have employed at home are no longer used because extended family structures are not intact, and their communities are less cohesive. Where traditional conflict resolution methods have been identified, the parties may not wish to use them, nor to participate in processes into which they have been incorporated, because the methods are often not compatible with Canadian practices and values. Examples include the traditional male, elder-driven processes used in some cultures.
>
> For conflicts where disputants choose not to involve courts, many report a sense of confusion, isolation and a vacuum of options. This is especially true for women and for youth of both sexes. Therefore, there is a need to find processes which will respect the values of disputants without importing features of processes they cannot now accept.[27]

This problem points to the difficulties inherent in versions of moral relativism which are based in the view that what is considered right in one culture is genuinely right in that culture, regardless of whether it is considered right or wrong in another culture. Moral relativism often places high value on self-determination, pointing out that ethnocentrism can blind us to appreciation of the value of other groups' ethical values and practices, and can also lead to inappropriate imposition of dominant moral values on non-dominant groups. For example, one of the major criticisms of Western development programmes is that they tend to promote Western notions of individual rights and democracy. This criticism is also made of United Nations initiatives to set universal standards for human rights; the United Nations is dominated by Western nations and thereby dominated by Western world views.[28]

Pluralism is not always considered relativistic. When considered carefully, moral pluralism often applies universal standards of mutual respect, self-determination and informed consent applicable to all people. In dispute resolution this 'universal' ethical principle might also be summarised as respect for the right of 'autonomous informed consent of all those involved or affected,' a familiar concept in the field of mediation.

25 Duryea and Grundison, 1993, see above note 14, at 48 and Lund, B. Morris, C. and Duryea, M LeBaron, in *Conflict and Culture: The Report of the Multiculturalism and Dispute Resolution Project*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, at 4 and 33.

26 Duryea and Grundison, 1993, see above note 14, pp xix, 196.

27 Lund, Morris and Duryea, 1994, see above note 25, at 33.

28 Many citizens working within their own countries to alleviate severe endemic human rights abuses do not agree with the criticisms that promotion of human rights will lead to corrupt Western individualism and the destruction of non-Western societal values of collective and family responsibility.

Relativism offers no way to adjudicate moral disputes conclusively. The prevalence of relativistic views in North America may be one reason consensus-based approaches to dispute resolution are increasingly being sought to replace adjudicative dispute resolution methods in pluralistic societies.

Consequentialist versus deontological theories of ethics

Consequentialism or utilitarianism

A dominant theory of ethics is 'consequentialism', which includes utilitarianism. Consequentialism says that the ethical value of a choice is based on its outcome. Classical theories of utilitarianism, including the work of John Stuart Mill, argue that the 'greatest happiness for the greatest number' is the most desirable outcome. In utilitarian theory an action is good if it is useful for promoting pleasure. The good of minorities might have to be sacrificed to the good of the majority.

Utilitarian goals for mediation can be seen when success in mediation is defined by party satisfaction with mediation, and satisfaction by funders and governments with the effect of mediation systems on the speed and cost-efficiency of the court system. Evaluations of a number of mediation services have been conducted using these criteria of success.[29]

Utilitarianism might manifest itself in family mediation where one parent asserts a better claim to custodial rights of children on the basis of being able to provide a more affluent lifestyle or a private-school education. In workplace or public disputes, utilitarian ethics could surface in the assertion of a particular solution to a policy or budget problem on the grounds of public palatability, efficiency or expediency.

The concept of consequentialist or utilitarian ethics is a relatively new one in Western culture and is not acceptable in many other societies. Salem points out that Western conflict resolution 'relies heavily on the assumption that pain is bad and pleasure, or comfort, is good'.[30] He points out that utilitarianism was not at all accepted in 19th century Europe where

> it flew (and still flies today among other cultures) against the more original principle that *'good* is good and *bad* is bad,' where the first usages of good and bad in this phrase are defined in general moral or religious terms having nothing to do with (individual) pleasure or pain.

Salem further suggests that Western preoccupation in the field of conflict resolution with

29 Moore, B, Morris, C and Pirie, A, 'Introduction', in Morris, C (ed), *Resolving Community Disputes: An Annotated Bibliography About Community Justice Centres*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 1–14, at 6–7.

30 Salem, PE, 'A Critique of Western Conflict Resolution from a Non-Western Perspective' (1993) *Negotiation Journal* 9, at 361–90, at 364.

> suffering generated by conflict rather than on the justice or morality of the cause may not strike resonant philosophical chords in other cultures. To the contrary, suffering itself in many cultures, including pre-modern Western culture, enjoys a fairly high valuation as a means for moral or spiritual purification or a necessary divinely-ordained component of life.

Deontological theories

In contrast to consequentialism, deontological theories hold that certain actions are inherently right, regardless of outcome. Some deontological views are based on the guiding principles of the Divine. Others, such as Kantian ethics, are based on principles understood through the application of reason rather than God. It has been said that mediator codes of ethics, being prescriptive in formulation, are deontological in nature.[31]

Rawls'[32] neo-Kantian egalitarian ethics currently appear to dominate the field of law. Lawyers, in turn, are dominant in the field of dispute resolution. Rawls' most famous contribution is an imaginative device in which one formulates an institutional arrangement which will benefit everyone impartially by imagining a social contract made in ignorance of one's personal situation ('the veil of ignorance'). The idea is that if you are ignorant of the social situation in which you might find yourself, you are more likely to act to set social policy that will be fair to you should you be in the position of less fortunate members of society.[33] One obvious criticism of Rawls is that the device of the veil of ignorance cannot possibly blot out one's cultural assumptions. Thus, it seems impossible for anyone to achieve the kind of neutral objectivity that the device is designed to provide. However, the idea that people, and in particular mediators, can and should achieve autonomous objective neutrality is pervasive in the field of dispute resolution. This will be discussed further in the section on impartiality and neutrality.

Autonomy, paternalism and interdependence

Autonomy

A dominant theme in the field of mediation is the concept of respect for party autonomy.[34] Informed autonomous consent is said by some to be the guiding principle of mediation. By definition, mediation is 'an informal process in which a third party helps others resolve a conflict or plan a transaction but does not (and ordinarily does not have the power to) impose a solution'.[35] To the extent that they retain authority and practical ability to decide the outcome, the parties are autonomous. Some say that party autonomy is so central to the philosophy of

31 Grebe, 1992, see above note 22, at 164.

32 Rawls, J, *The Theory of Justice*, 1971, Cambridge, Mass: Harvard University Press.

33 Raphael, DD, *Moral Philosophy*, 1981, London: Oxford University Press, at 72.

34 Bush, 1994, see above note 3.

35 LeBaron Duryea, 1992, see above note 19, at 6.

mediation that mandatory mediation schemes are an anathema to the philosophy of mediation, or even an oxymoron.

The principle of autonomy is carried through in discussions about mediation ethics, where the mediator faces choices as to how to proceed. In discussing the role of the mediator in making ethical choices, the mediator is generally considered responsible for his or her own choices and behaviour. In discussions of mediator ethics, rarely is the ethical decision considered as part of an interaction among the parties and between the mediator and the parties. Instead, the parties and the mediator are each considered as autonomous 'moral agents.' Autonomy and self-determination underlie most mediation codes of ethics.[36]

What does 'autonomy' mean? Boskey[37] sees autonomy as capacity to negotiate. He reframes the concept of mediator 'pressure' as 'encouragement':

> ... to my mind a party's autonomy is compromised only in cases where that party has lost the capacity to made the decision to walk away from the agreement. That capacity is not lost because of economic pressures or because of encouragement by the mediator to agree. It is lost when the party's basic ability to function as a negotiation has been compromised. In cases where that has occurred, it is the responsibility of the mediator to terminate the mediation process and advise the parties of their other alternatives for reaching a solution to their problems.

Matz,[38] in discussing the relationship between mediator pressure and party autonomy, says many authors present a picture of autonomy

> as a space that ought not to be touched, a kind of special ground that should be left alone or even enlarged. In this picture, inappropriate pressure is seen as touching of that which should not be touched, a violation. This is a static picture ... When I mediate ... I see a different picture: I see a party's autonomy as a large, three dimensional shape, malleable in part, rigid in part, and endowed with an internal structure and vitality. When pressure is applied, it may yield, resist, or push back. It may yield first and push back later; or it may push back first, and yield later. It is a dynamic picture.

While both Boskey's and Matz's statements reflect an individualistic approach, Matz's statement more explicitly acknowledges that the very nature of mediation is an interactive dynamism among the group composed of the parties and the mediator. Exclusive reliance on ideals of individual autonomy belie the very nature of group dynamics inherent in the process of mediation, which is better described in ways that acknowledge that dialogue within the mediation context is always set in a social and cultural context which is interactive, interdependent, and mutually influential.

36 Grebe, 1992, see above note 22, at 164.

37 Boskey, JB, 'The Proper Role of the Mediator: Rational Assessment, Not Pressure' (October 1994) *Negotiation Journal* 10(4), pp 367–72, at 372.

38 Matz, D, 'Mediation Pressure and Party Autonomy: Are They Consistent with Each Other?' (October 1994) *Negotiation Journal* 10(4), pp 359–65, at 363.

Paternalism

According to Grebe[39] paternalism is a considerable influence in the practice of family mediation. Paternalism presumes that some people are incapable of self-governance, for example infants, or those suffering permanent or temporary impairment. Grebe suggests that in family mediation, paternalism exists in discussions concerning mediation and abuse, where those who are or might be abused need special protection. She suggests:

> The principle of paternalism derives from male-dominated feudal society in Europe, where the lord had near-absolute authority over his vassals. In exchange for this authority, the lord was expected to protect his subjects in time of war.[40]

It should be noted that both utilitarian and Kantian ethics stand opposed to paternalism. John Stuart Mill said paternalism was justified only when harm could come to another. Immanuel Kant also rejected paternalism on basis of its lack of recognition and respect for others' moral autonomy.[41]

To the extent that paternalism can be found in formulations of mediation ethics, it may stand in contrast and opposition to principles of self-determination. On the subject of protecting less powerful or vulnerable parties, however, much of the thinking of mediators appears to counter paternalism. Boskey points out that many proponents of power-balancing are in fact primarily concerned with maintaining party autonomy and informed consent. Those who advocate mediator interventions to balance power or lead parties to agreement often believe that maintenance of party autonomy should be paramount and that 'an agreement that is functionally imposed on the parties by aggressive mediator intervention is fatally flawed.'[42]

Integrating ethics into a framework of interdependence

People in a variety of disciplines, including mediators and moral philosophers, are critically examining the dominance of Western concepts of individualistic self-determination as well as paternalism both from within and without. On this point it is useful to quote law professor Patricia A Monture-OKanee, a member of the Mohawk Nation living in Canada, who, in her essay critiquing alternative dispute resolution says:

> You have probably heard that the Mohawk word for law translates into English as the 'great law of peace'. This is not precisely true. The word actually literally translates to 'the way to live most nicely together.'[43]

39 Grebe, 1992, see above note 22, at 162.

40 *Ibid*, at 163.

41 *Ibid*, at 163.

42 Boskey (1994), see above note 37, at 367–68.

43 Monture-OKanee, P, 'Alternative Dispute Resolution: A Bridge to Aboriginal Experience?' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria BC: U Vic Institute for Dispute Resolution, pp 131–40, at 140.

Aboriginal commentators like Monture-OKanee are fair in their criticism that this principle has not been mirrored in relationships among Aboriginal and non-Aboriginal people in Canada, including the field of alternative dispute resolution. However, for those who believe concepts of interdependence to be foreign to Western thinking, it is important to note that the Hebrew concept of '*shalom*' provides an analogous concept which is at the root of the Western 'good neighbour' principle of reciprocal human concern and mutual responsibility. '*Shalom*' is the ideal in which the community of people lives together in harmony and wholeness which integrates both justice and peace.

The influence of Carol Gilligan

Carol Gilligan[44] is frequently cited in discussions about mediation and ethics. Gilligan has argued that dominant theories of moral development have ignored women's ethical perspectives. According to Gilligan, discussions on ethics (dominated by men) tend to be framed in terms of justice, rights and individual autonomy. Women's constructions of ethics in terms of relationship, care and responsibility have largely been ignored. Sociolinguist Deborah Tannen's work,[45] which studied the speech of men and women, appears to affirm that women 'speak and hear a language of connection, of intimacy, while men speak and hear a language of status and independence'. While Gilligan found that most people use the voices of both justice and care, they tend to prefer one to the other. Preference for one tends to lead to omission of the other in moral decision-making. Gilligan's writings suggest that both justice and care are needed in a complete ethical theory.

Williams[46] uses Gilligan's and Tannen's theories to suggest that mediators who are sensitive to the ethical language of both care and justice can assist parties to understand each other's moral language. Mediators can thus facilitate parties' development of solutions that reflect the perspectives of both justice and care, rights and responsibilities.

Communicative ethics

The idea of 'discourse ethics' or 'communicative ethics'[47] is beginning to find its way into the literature of mediation ethics.[48] This thinking is drawn from

44 Gilligan, C, *In a Different Voice: Psychological Theory and Women's Development*, 1982, Cambridge, Mass: Harvard University Press.

45 Tannen, D, *You Just Don't Understand: Women and Men in Conversation*, 1990, New York: William Morrow and Company, Inc at 42.

46 Williams, 'Implications of Gilligan for Divorce Mediation: Speculative Applications' (Winter 1994) *Mediation Quarterly* 12 (2), at 101–15.

47 Benhabib, S, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, 1992, New York: Routledge, Chapman and Hall.

48 Cooks and Hale, 1994, see above note 20.

Habermas[49] who points out that the development of ethics is not simply a rational exercise, and cannot be isolated from social experiences that occur in community. 'Communicative ethics' is said to provide an escape from moral relativism by thinking of universalisability not in terms of principles that cannot be contradicted, but 'as a test of communicative agreement'.[50] Thus, universalism is not seen as a particular 'truth' that cannot be contested, but as a product of communicative agreement within a particular social context. The universal ethical norms are said to be 'moral respect and egalitarian reciprocity.'[51] This theory is said to be deontological in that it contains particular conceptions of what is 'right' but 'pluralistic and tolerant in that it promotes the coexistence of all ways of life compatible with the acceptance of a framework of universal rights and justice'.[52]

Applying a framework of communicative ethics to conflict, it is said that 'disagreements emerge when two people become enmeshed within divergent ethical stories'.[53] The mediator's job is 'to help the disputants coordinate their meanings: to assist in creating a story commensurate with each person's goals and to help each party make sense of the other person's story ... The mediator's objective is to restore a moral and ethical order ...'.[54]

Using the ethics of mutual respect, reciprocity and interdependence, the task of the mediator is to help the parties integrate their concepts of right and wrong into a new framework which acknowledges the interdependence of the parties and their affected communities, and integrates the legitimate needs of all those affected into an outcome which all can recognise as both peaceful and fair.

EVALUATING CODES OF ETHICS

If mediators discover their 'ethical home' by comparing their own beliefs to some of the major ethical theories, they will be in a more informed position to participate in discussions about mediation ethics. An informed perspective is needed to evaluate existing discussions about ethics and to evaluate actual codes of ethics, because of the concise and often unexplicated form in which codes of ethics are promulgated by mediation organisations.

To assist mediators in the second of the four exercises proposed in this paper, the following section outlines and discusses the main ethical issues considered important by mediation organisations and in the literature. The discussion includes a survey and thematic analysis of selected codes of ethics from the

49 Habermas, J, *Moral Consciousness and Communicative Action*, translated by Lenhardt, C and Nicholsen, SW, 1990, Cambridge, MA: MIT Press.

50 Benhabib, 1992, see above note 47.

51 *Ibid*, at 29.

52 *Ibid*, at 45–46.

53 Cooks and Hale, 1994, see above note 20, at 59.

54 *Ibid*, at 59.

United States, Canada and Britain. The section is organised into a discussion of neutrality and impartiality (which subsumes a number of other topics), confidentiality, and competency. Exhaustive study of all the possible ethical topics raised by mediation is not possible in this paper, and readers are referred in addition to the codes of ethics themselves.

THE ROLE OF CODES OF ETHICS

Bush[55] believes practice standards are required for mediators for public policy reasons in order to provide clear standards that are both internally consistent and practical. Others believe qualifications and program goals should be created primarily for the purposes of education.[56] Codes of ethics reflect the considered thinking of groups of mediators. As such they can be a barometer of existing ethical philosophy and practice. Therefore, a variety of codes of ethics should be studied by any serious student of mediation.

However, when one considers the problem of ethics in mediation, codes of ethics for mediators provide a rather narrow answer. First, codes of ethics typically provide a prescriptive list of dos and don'ts which rarely fit the particulars of an ethical quandary. Second, codes of ethics focus only on one dimension of the ethical problem, tending to treat the situation as though ethical problems in the dispute were the exclusive responsibility of the mediator to resolve alone and independently of the parties. Third, codes of ethics usually do not detail the ethical values on which they are founded, and one is usually left with bare lists of dos and don'ts with little explication of the reasons for the prescriptions. Fourth, codes of ethics, generally framed in concise documents, give the illusion that the organisations of mediators who created them have reached a unified consensus about mediation practice; in fact, there is a considerable diversity of values and goals among mediators. What follows is a discussion of the most important ethical themes discussed in codes of ethics and in other relevant literature.

'IMPARTIALITY' AND 'NEUTRALITY': A CONFUSING DISCOURSE

Mediators are often referred to as 'neutrals'.[57] The terms 'neutrality' and impartiality' are deeply embedded in the discourse of ethics in mediation. However, significant challenges have been presented to the 'folklore'[58] of neutrality. Model attitudes and

55 Bush, 1994, see above note 3 and Bush RAB, 'A Reply to the Commentators on the Ethical Dilemmas Study' (1994) *Journal of Dispute Resolution* 1, at 87–91 (1994b).

56 Stamato, L, 'Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice' (1994) *Journal of Dispute Resolution* 1, pp 81–86, at 82.

57 Society of Professionals in Dispute Resolution (SPIDR). *Qualifying Neutrals: The Basic Principles:* Report of the SPIDR Commission on Qualifications. Washington, DC: National Institute for Dispute Resolution, 1989.

58 Rifkin, J, Millen, J, and Cobb, S, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (Winter 1991) *Mediation Quarterly* 9(2), pp 151–64 at 151.

behaviours of mediators described as 'impartial' or 'neutral', have been criticised as mythical, unethical, culturally biased, or impossible.

In reviewing literature and codes of ethics, it is a significant challenge to understand what authors mean by 'impartiality' or 'neutrality.' Most codes of ethics discuss impartiality, neutrality or both. The terms are not always defined. Existing definitions are inconsistent. Concepts are entangled. The result is considerable confusion.

The existing discourse on 'neutrality' and 'impartiality' is confusing because the terms have been defined in various and sometimes contradictory ways, reflecting the fact that they are intertwined linguistically, conceptually and practically. Impartiality and neutrality are variously defined or described as follows:

- 'Impartiality' or 'neutrality' are not defined, or the terms are used synonymously; and/or
- 'Impartiality' means unbiased, and fair to all parties equally;[59] and/or
- 'Impartiality' refers to an unbiased attitude and 'neutrality' refers to unbiased behaviour and relationships;[60] or
- 'Neutrality' is comprised of two contradictory concepts: impartiality and 'equidistance' between the parties;[61] or

59 Webster's dictionary defines 'impartial' as 'not partial or biased' and 'treating or affecting all equally'. It is synonymous with 'fair' which Webster's defines as 'marked by impartiality or honesty: free from self-interest, prejudice, or favouritism'.

60 Christopher Moore distinguishes 'impartiality' from 'neutrality': '*Impartiality* refers to the attitude of the intervenor and is an unbiased opinion or lack of preference in favour of one or more negotiators. *Neutrality*, on the other hand, refers to the behaviour or relationship between the intervenor and the disputants.' Moore, C, *The Mediation Process: Practical Strategies for Resolving Conflict*, 1986, San Francisco: Jossey-Bass. Moore suggests the attitude of impartiality will be reflected in the mediator's conduct. Moore counsels mediators to tell parties that they are 'impartial' meaning that they have 'no preconceived bias toward any one solution or toward one [party] over the other'. (Moore, 1986, 157). Since the Academy of Family Mediators has adopted Moore's definitions of impartiality and neutrality in its 1995 *Standards for Family and Divorce Mediation*, Article IV, A and B, it is important they be mentioned in this discussion. Moore's attempt to clarify the differences and connections between behaviour and attitude is useful. While Moore's definitions help readers to understand his uses of the terms, his definitions have not found their way into widespread use either among the public or among mediators.

61 An important discussion about 'neutrality' by Rifkin, Millen and Cobb has often been cited in mediation literature. Citing authors sometimes do not discuss Rifkin *et al's* ((1991), see above note 58, at 152–53) unique two-pronged definition of 'neutrality' which incorporates two concepts: 'impartiality' and 'equidistance.' 'Impartiality' refers to 'the ability of the mediator (interventionist) to maintain an unbiased relationship with the disputants.' According to Rifkin *et al*, this means the mediators 'make it clear that they are present simply to listen and not to influence the disputants' explication of the case' ((1991), at 154). Parties are given equal opportunities to speak. 'Equidistance,' they state, 'identifies the ability of the mediator to assist the disputants in expressing their 'side' of the case.' Thus, mediators will temporarily align themselves with parties to support each party. Equidistance involves actively supporting each party in a 'symmetrical' way. Rifkin *et al* (1991) see impartiality (as they define it) and symmetrical alignment with the parties ('equidistance') as fundamentally contradictory to one another. Empirical research (Cobb and Rifkin, 1991a, 1991b, see note 74, at 37; Fuller, RM, Kimsey, WD and McKinney, BC, 'Mediator Neutrality and Storytelling Order' (Winter 1992) *Mediation Quarterly* 10 (2), pp 187–92) has pointed out that mediators do, in fact, influence both process and outcome, by affecting the legitimacy of each party's point of view. They do this by determining the order of speaking, when to intervene, when to give the floor to another party, when to caucus and the order of caucusing, and how to respond and reframe parties' statements. Rifkin *et al* do not see this problem as one of deficiency of skill in balancing the two paradoxical roles. Rather, they see neutrality as 'a problematic discourse for the practice of mediation because it has proven to be inadequate to account for the dynamic process involved in mediation storytelling'(Rifkin *et al* (1991), at 159–60). While Rifkin *et al* have provided an extremely valuable critique of the myth that it is possible for mediators not be aligned with parties and not to influence outcomes, their use of the term 'neutrality' may be confusing to those who do not take the time to read their definition.

- 'neutrality' means non-intervention;[62] and/or
- 'impartiality' and 'neutrality' mean (or include) objectivity.[63]

Some of these ideas overlap and some are contradictory to one another.

Unburdening valuable concepts from the baggage of 'neutrality'

The various definitions and uses of the terms 'neutrality' and 'impartiality' have made these words less than useful. The concepts buried within these terms include at least the following: non-partisan fairness, the degree of mediator intervention, role limitation and objectivity. The following is an attempt to elucidate and critique each of these concepts.

Non-partisan fairness

Here the term 'non-partisan fairness' is used to refer to the general concept of fairness to all parties. Were it not for the confusing discourse, this concept could be termed 'impartiality'. The term 'impartial' is a worthy one, and it is unfortunate that its usefulness has been undermined through confusion between its meaning and the related but different meanings of 'neutrality'. *Mediation UK Practice Standards* refer to the concept of non-partisan fairness as 'impartiality' which they define as 'attending equally to the needs and interests of all parties with equal respect, without discrimination and without taking sides'.[64] These standards do not use the term 'neutrality', either synonymously with impartiality or independently. The standards contemplate a variety of mediation contexts including multi-party settings.

62 Yet another definition of 'neutrality' refers to non-intervention. Webster's dictionary suggests 'neutral' means 'not engaged on either side; not siding with or assisting either of two contending parties'. There are two shades of meaning here. One shade of meaning connotes fairness to all parties ('not siding'). The other shade of meaning connotes non-intervention ('not assisting'). This second meaning attached to 'neutrality' can be interpreted as 'a kind of passive objectivity – the idea of being inert, disengaged, colourless, bland and even impotent and powerless' (Scambler, CM, 'The Myth of Mediator Neutrality' (May, 1990) *Interaction*, Kitchener, ON: The Network: Interaction for Conflict Resolution, 2 (1), at 14.) Thus, the 'neutral' mediator has been described as 'a eunuch from Mars, totally powerless (and totally neutral)'. This colourful analogy attributed to Roger Fisher in 1981 (cited in Mediation Development Association of British Columbia (MDABC) *Brief on Standards and Ethics for Mediators Presented to the Attorney General of British Columbia*, 1989, Vancouver, BC: Mediation Development Association of British Columbia, at 27) introduces the concept of 'neutrality' as the extent to which a mediator deliberately intervenes to influence the process or outcome of mediation. It must be emphasised that in this definition of neutrality, neutrality is placed in contrast to interventionism (and would not necessarily mean aligning with both parties equally). This is different from Rifkin *et al's* concept of neutrality which incorporates interventionism (under the concept of 'equidistance'). Thus, the term 'neutrality' has two contradictory definitions.

63 The analogy of the 'eunuch from Mars' referred to above in note 62 points to yet another important conception of 'neutrality,' that being a 'outsider' or stranger to the parties will prevent any suggestion of bias toward one party or the other. This conception of neutrality springs from the idea that it is possible to put aside biases and be autonomously objective. Rawlsian 'impartiality' also includes this concept, which is critiqued later in this chapter.

64 Mediation UK, 1993, see above note 13, Summary, Art 20.

A joint effort by the American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR) has produced *Model Standards of Conduct for Mediators*.[65] which defines 'impartiality' as evenhandedness and lack of 'prejudice based on the parties' personal characteristics, background or performance at the mediation.'

Perhaps the desired attitude and behaviour connoted by the term 'impartial' can be summed up as the quality of being principled enough to remain equally committed to the legitimate interests of all parties. Thus 'impartial' persons may be ones who

> by virtue of their virtue, their relationships with both sides, and their commitment to the way of peace, are counted sufficiently trustworthy and wise to qualify as mediators or arbiters in the community's disputes.[66]

It is abhorrent to eliminate the term 'impartial' from the vocabulary of mediation; however, for the sake of clarity, this concept will henceforth be referred to as 'non-partisan fairness' except where quotation makes use of the term 'impartial' necessary.

Inappropriate pecuniary or other self-interests

Codes of ethics universally condemn the idea of mediating in cases where the mediator has a pecuniary or any other kind of self-interest in a particular settlement outcome. The concept of incorruptibility is central to non-partisan fairness. This concept may be a universal ethical principle of mediation.

Partisan relationships

Bush[67] has pointed out that problems with maintaining non-partisan fairness can arise in several ways. Problems can occur prior to mediator selection as a result of perceived partisan relationships with one or the other parties or with those they are affiliated such as lawyers, associates or family members. Sometimes, disclosure of affiliations can resolve potential problems or perception to the satisfaction of the parties and the mediator.[68] Problems can also arise once a mediation is in progress, if actual or perceived partisan relationships are discovered or arise after mediation commences. This is more problematic, as it can cause delays or dissatisfaction if there is a perceived need to change mediators.

These kinds of problems can spring from relationships with referral sources or repeat clients, or from previous professional relationships such as legal or

65 AAA, ABA and SPIDR, 1995, see above note 13, Article II.

66 Gilman and Gustafson (1994), see above note 7, at 101.

67 Bush (1994), see above note 3, at 9–10.

68 It is important that these kinds of problem be resolved to the satisfaction of the mediator, since a mediator's experience means they may be able to foresee future problems with perceived or actual partisanship that the parties cannot see at the commencement of mediation.

counselling relationships.[69] Article 2 of Mediation UK[70] provides an explicit 'duty to reveal to parties any conflict which may exist between their responsibility to their employers or referring agencies and their responsibility to act impartially between the parties.' AAA, ABA and SPIDR[71] explicitly refers to conflicts of interest that can arise from pressure to settle cases:

> Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

To the extent that previous relationships with parties may make the mediator corruptible, they interfere with non-partisan fairness. However, close relationships with all the parties may not be considered inappropriate in some settings. This is discussed further below (see 'objectivity' and 'insider-partials').

Other problems can arise during mediation when the mediator feels aligned with a party or finds one of the parties particularly reprehensible. No one is immune to feelings of more or less sympathy. The quality of having sufficient non-partisan fairness to be effective as a mediator may be part of the rather intangible 'mediator's mindset'[72] of being continuously able to avoid or suspend judgment, and maintain an attitude of unconditional facilitative service to all parties until mediation is concluded. This concept of non-partisan fairness may be a universal ethical concept in mediation. It is difficult to find a theory of mediation that does not hold the principle of non-partisan fairness to be foundational to the ethics of mediation, even in discussions of 'insider-partial' mediation in which the mediator must have and maintain the trust of all the parties (see also below).

Degree of mediator intervention

Mediator settlement strategies may differ 'according to their location along a continuum between two polar positions, neutrality and intervention.'[73] Both context and values determine how interventionist a mediator's strategy will be.

The degree to which mediators should intervene to influence the process or the outcome is one of the most important debates in the field of mediation. It is this discussion to which the research of Rifkin, Millen and Cobb, and Cobb and Rifkin,[74] have substantially contributed to challenge the notion that it is possible for mediators not to influence process and outcome.

69 See also below on 'role limitation', p 327.

70 Mediation UK, 1993, see above note 13.

71 AAA, ABA and SPIDR,1995, see above note 13, Article III.

72 Gustafson, 1994, see above note 7, at 103.

73 Bernard, SE, Folger, JP, Weingarten, HR and Zumeta, ZR, 'The Neutral Mediator: Value Dilemmas in Divorce Mediation' (1984) *Mediation Quarterly* 4, pp 61–74, at 62.

74 Rifkin *et al*, 1991, see above note 58. Cobb, S, and Rifkin, J, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' in Silbey, S and Sarat, A (eds), 11 *Studies in Law, Politics and Society*, 1991a, Greenwich, Conn: JAI Press. Cobb, S, and Rifkin, J, 'Practice and Paradox: Deconstructing neutrality in mediation' (1991b) *Law & Social Inquiry* 16(1), at 35–62.

Codes of conduct for mediators tend to be either non-interventionis ('neutralist') or interventionist in philosophy. Family Mediation Canada's (FMC *Code of Professional Conduct*[75] guides mediators to distinguish 'impartiality towar the participants' from 'neutrality on the issue of fairness.' Mediators are told t express their concern to parties if they think a proposed agreement is unfair. I also states that it is a mediator's duty to terminate mediation:

- when they are unable to eliminate 'manipulative or intimidating negotiatin techniques'.[76]
- 'whenever continuation of the process is likely to harm or prejudice one o more the participants ...'[77]
- if they are not able to 'restrain parents from coming to arrangements that ar perceived by the mediator not to be in the best interest of the children ...'[78]
- when parties appear to be making an agreement which the mediator think is unfair or unreasonable.[79]

(The first two provisions above refer to the process of mediation. The last tw provisions refer to the outcome of mediation.)

New draft clauses now being considered by FMC[80] propose a less interventionis approach, suggesting a mediator duty 'to assist participants to reflect upon and t consider how their proposed arrangements realistically meet the needs and bes interests of other affected persons especially vulnerable persons'. FMC[81] state mediation should be suspended if the parties are 'acting in bad faith ... or whe the usefulness [of mediation] has been exhausted'. Interventionist strategies ar maintained where process issues are concerned, but tempered where outcome are concerned unless the mediator find an agreement 'unconscionable' in whic cases the mediator should withdraw. FMC appears to be retaining a mor interventionist approach compared to the standards of the Academy of Famil Mediators' *Standards of Practice for Family and Divorce Mediation*, which are les interventionist.[82]

The Academy of Family Mediators (AFM) *Standards*[83] emphasise party self- determination, stating that 'decision making authority rests with the parties' an clarifying that the 'role of the mediator includes reducing the obstacles t communication, maximising the exploration of the alternatives, and addressin the needs of those it is agreed are involved or affected'. Further, AFM outline

75 Family Mediation Canada, *Code of Professional Conduct*, 1986, Guelph, Ontario: Family Mediatio Canada, Article 9:4.

76 *Ibid*, Article 10:4.

77 *Ibid*, Article 12:1.

78 *Ibid*, Article 8:2.

79 *Ibid*, Article 12:3.

80 Family Mediation Canada, *Code of Professional Conduct (Revised)*, 1996, Draft Article 8:2.

81 *Ibid*, Draft Article 13:1,2.

82 AFM, 1995, see above note 13.

83 *Ibid*, Article I.

the value principles on which mediation is based: 'fairness, privacy, self determination, and the best interest of all family members.' In comparing AFM's 1986 guidelines with its 1995 version, AFM has become substantially less interventionist in philosophy. Nevertheless, AFM's 1995 version retains a provision which suggests mediation be terminated if 'a reasonable agreement is unlikely'.[84]

A question for the individual mediator becomes 'what standard of reasonableness and fairness should be applied?' What does 'reasonable' or 'fair' mean, and who is the arbiter of reasonableness and fairness: the parties? The mediator? The law? Some other standard? The fairness of parties, mediators and the law can all be challenged, creating dilemmas for those who have universalistic ethical conceptions of 'fairness.' In a pluralistic society, there are significant ethical and practical problems in identifying universally acceptable ethical criteria for 'fairness.' A retreat to ethical relativism may be acceptable to those who are committed to party autonomy as their primary ethical value. However, critics of mediation who are primarily concerned with social justice are unsatisfied with answers that may disadvantage disempowered groups in society.

The extent to which mediators intervene to ensure outcome fairness depends largely on the context. Commercial mediators and community mediators tend to follow the example of labour mediators in taking a non-interventionist approach to the role of the mediator. Labour mediators act on the principle that parties should be free to do as they please, provided that they are fully informed as to their options.

While the FMC and AFM standards appear to be becoming less interventionist, some literature is advancing more interventionist approaches in family mediation especially in relation to woman abuse, with emphasis on developing methods of screening and safe termination of mediation. There is a growing suggestion among family mediators that the bargaining weakness of one of the parties, risks of woman or child abuse, and family power dynamics make neutrality on these issues inappropriate in family mediation.[85]

The *Mediation UK Practice Standards*[86] contemplate a variety of mediation contexts including multi-party settings. In terms of mediator intervention, the standards provide for party control of the content of the discussion and decisions on agreements.[87] These standards require mediators to ensure voluntary participation by parties, including a very useful acknowledgment that voluntariness:

84 *Ibid*, Article X.D.

85 Barsky, AE, 'Issues in the Termination of Mediation Due to Abuse' (1995) *Mediation Quarterly* 13, at 19–35; Ellis, D, 'Marital Conflict Mediation and Postseparation Wife Abuse' (1990) *Law and Inequality* 8(2), at 317–39; Fund for Dispute Resolution, *Report from the Toronto Forum on Woman Abuse and Mediation*, 1993, Waterloo, Ontario: Fund for Dispute Resolution; Landau, 1994, see above note 7; Ontario Association for Family Mediation (OAFM), *OAFM Policy on Abuse*, June 1994, Toronto: Ontario Association for Family Mediation.

86 Mediation UK, 1993, see above note 13.

87 *Ibid*, Summary, Article 6.

> is a relative concept and it is unlikely that many people come to mediation entirely without pressure of some kind—whether internal feelings of obligation, pressure from their communities or families, referral by criminal justice agencies, or threat of legal action.[88]

The standards do not, however, define what 'voluntary' does mean.

Regarding intervention into process issues, the *Mediation UK Practice Standards* also provide that mediators maintain conditions that will exclude violence, threats, shouting and discriminatory or provocative language 'by adequate preparation and by temporary or permanent abandonment of the mediation if necessary.'[89] Regarding outcomes, mediators are told they should not 'seem to recommend' a particular settlement, but may suggest options.[90] Mediators are also urged to encourage independent legal advice and to voice concerns about an agreement that is 'unjust, deleterious to any party (involved or not involved in the mediation) and in any other way unsatisfactory'.[91] No criteria are developed to describe what is meant by 'unjust', 'deleterious' or 'unsatisfactory'. The *Mediation UK Practice Standards* mirror Canadian and US family mediation standards which provide for significant intervention on process issues with less intervention to influence outcomes.

The AAA, ABA and SPIDR *Model Standards of Conduct for Mediators* explicitly recognise self-determination as 'the fundamental principle of mediation' and that mediation relies upon the 'ability of the parties to reach a voluntary uncoerced agreement'.[92] The document contemplates a variety of mediation contexts. These guidelines are remarkably non-interventionist, merely cautioning against providing professional advice (but instead suggesting to recommend outside professional advice). The only directive for mediator withdrawal is to prevent mediation from 'being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity'.[93] Interestingly, these standards are the only ones which explicitly caution mediators against permitting the behaviour 'to be guided by a desire for a high settlement rate.' This refers to mediators' temptation to coerce settlements in order to boost their reputation for effectiveness.[94]

Codes of ethics thus reflect a tension between party self-determination and mediator influence to avoid party exposure to harm, to prevent abuse of mediation, or to ensure fair outcomes. The concept of non-intervention is based on the Western preference for self-determination and autonomy, and ethical tensions concerning when and how much to intervene reflect this bias. Not all

88 *Ibid*, Detailed Statement, Article 5.

89 *Ibid*, Detailed Statement, Article 4.

90 *Ibid*, Detailed Statement, Article 6.

91 *Ibid*, Detailed Statement, Article 8.

92 AAA, ABA and SPIDR, 1995, see above note 13, Article I.

93 *Ibid*, Article VI.

94 *Ibid*, Article VI.

groups are so committed to individual autonomy. Many groups, particularly those with hierarchical collectivist backgrounds are comfortable with models of mediation that feature mediator recommendations or pressure, provided the mediator is respected and trusted by the parties.[95]

If the issue of degree of intervention is placed in the whole context of the philosophy of ethics, the reasons mediators use for exercising mediator influence seem to reflect utilitarian ethics. Both consequentialist and deontological ethical frameworks might lead to interventionist strategies, but for different reasons. For example, mediators who believe that the purpose of mediation is party satisfaction or high settlement rates (consequentialist ethics) may feel ethically constrained to use strong mediator influence by way of recommendations and suggestions to parties. On the other hand, the same consequentialist mediator may consider coercive tactics to be unethical if he or she considers that parties will not be satisfied with mediator pressure. Deontological theories of ethics may encourage mediators to intervene strongly to protect the interests of affected persons such as children, or to effect justice, even at the expense of party autonomy.

Mediators struggling with the ethics of how much to intervene in a particular case may find themselves acting according to three criteria: their own sense of the ethics involved in a conflict; the gravity of effects to the parties; and the degree to which they care about the outcome for the parties. Even those holding deontological ethical positions may also look to the possible consequences to determine the paramountcy of one intervention over another. To illustrate, a labour mediator may differ with the ethics of one or both parties concerning a wage clause in a collective agreement. Yet the labour mediator may not consider the issue of sufficient ethical importance to intervene to attempt to influence the outcome in such a way that the mediator's ethical preferences would prevail. The mediator may not consider that the consequences to the parties are sufficiently grave to warrant intruding her or his own sense of what would be right. By contrast, a family mediator faced with the prospect of harm to a party or a child as a result of a potential decision by disputing parties may feel ethically required to intervene in order to influence not only the process, but also the outcome. In some cases, particularly in situations of violence or extreme injustice, third parties may be sufficiently moved by the gravity of the situation that they will not wait to be invited but initiate and seek out opportunities to intervene, regardless of (or even because of) prior affiliations with the parties. This often occurs with diplomatic intervention into international conflict or internecine violence. In such situations, third parties may become clearly activist in their attempts to influence both the process and the outcome. An 'insider-partial' mediator (described in the next section) may be extremely interventionist, coaxing parties toward behaviour and outcomes which uphold the mutually held principles of the particular family, institution, religion or culture.

95 Duryea, 1992, see above note 19; Duryea, 1994, see above note 19, at 116 and also Duryea and Grundison, 1993, see above note 14.

To summarise, in deciding the method and degree of intervention, mediators may act from a variety, or even a combination, of ethical perspectives from consequentialist perspectives (that significant harm could occur to institutional, economic, national or other interests) to deontological perspectives (that 'right is right' and justice must be done no matter what the consequences).[96]

Role limitation

Ethical problems can occur when the parties need expert information, advice, counselling or advocacy. All of these roles can provide challenges to mediators, especially if mediation is conceived to be a process which fosters party self-determination. Where the goal of mediation is self-determination, it follows that mediators would tend to play a non-interventionist facilitative role rather than a directive one. Providing counselling or advice is also clearly inconsistent with a non-interventionist model of mediation.

Bush[97] describes this issue under the category of 'separating mediation from counselling and legal advice.' By using the term 'role limitation' Davis[98] expands Bush's classification to include distinguishing a variety of non-mediation roles other than legal and counselling.

Mediation UK[99] refers to this issue under the topic of 'impartiality' saying that mediators

> should not act as such in cases where one party is a client in another professional role, such as advocate or counsellor. Mediators should at all times keep their role as mediator distinct from any other roles they might play in other situations.

The issue has been most discussed by counsellor-mediators working with families. Counsellor-mediators are often enjoined to exercise caution against confusing mediation and counselling. AFM[100] warns that a mediator 'may be compromised by social or professional relationships with one of the participants at any point time' and prohibits mediation

> unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship, and the participants given the opportunity to freely choose to proceed.

96 The topic of power and its use and abuse in mediation is one of the many issues which require much more research and theory development within the field of dispute resolution. In spite of the importance of looking at ethics in mediation through the lens of power, the literature on ethics in mediation is largely silent on this topic. The exception is feminist critical literature on mediation which contains implicit ethical arguments concerning the ways power structures in society affect bargaining power of individuals in mediation. The field of mediation is beginning to address some practical issues raised by these critiques, mainly in the area of screening out of mediation those who may experience abuse or coercion during mediator-assisted negotiations. (See, for example, Fund for Dispute Resolution, 1993, see above note 85; Landau, 1994, see above note 7.) These works, however, tend to present the issues in terms of competency and qualifications rather than in terms of ethics.

97 Bush (1994), see above note 3.

98 Davis, AM, 'Ethics: No One Ever Said It Would Be Easy: Bush's Contribution to Mediation Practice' (1994) *Journal of Dispute Resolution* 1, pp 75–79, at 79.

99 Mediation UK, 1993, see above note 13, Article 2.

100 AFM, 1995, see above note 13, Article IV.C.

However, prior relationships, by themselves, do not proscribe the mediator's involvement unless she or he has provided previous legal or counselling services.

FMC[101] contains similar provisions, and refers not just to counselling, but to all 'prior involvements,' which could include any kind of professional or other relationship. FMC's new draft[102] refers to 'prior *professional* and personal involvement'.

Dworkin *et al*[103] suggest several reasons for clear differentiation of roles. First, alliances with one of the parties created in a prior professional relationship could lead to problems with maintaining non-partisan fairness. Second, professionals could inappropriately suggest multiple services for pecuniary gain. Dworkin suggests, however, that it may be appropriate for mediator to offer multiple services if the parties are not able to obtain needed services elsewhere, especially where there has been some time lapse which makes 'switching hats' more acceptable.[104] Third, mediation would be clearly contraindicated if the mediator had previously acted as an advocate for one party. This would be clearly incompatible with the role of mediator.[105] In spite of these cautions, there is a strong thread of self-determination philosophy in these guidelines. It is suggested that if parties have full information concerning prior relationships, and the differing roles of the mediator are clear, the parties should be able to choose.

A related question particularly applicable to counsellor-mediators is how much therapy should be incorporated in mediation. Benjamin and Irving[106] have developed a model of 'therapeutic family mediation' which, in a premediation stage they use 'a frankly therapeutic process but restricted to behavioural and attitudinal change sufficient to allow the parties to negotiate'.[107] There is a wide range of mediation practice including large doses of therapy. It is considered important that the purpose of therapy should be limited to helping the parties negotiate toward agreement.

Similar questions arise in mediation and facilitation of multiparty public disputes. It is said that mediators who are experts in the substantive issues involved in pubic disputes may inappropriately affect the non-partisan fairness of the process by providing expert information to the process or by pressing for particular solutions which they believe to be best.[108]

101 FMC, 1986, see above note 75, Article 8:5.

102 FMC, 1996, see above note 80, Draft Article 8:5.

103 Dworkin, J, Jacob, L and Scott, E, 'The Boundaries Between Mediation and Therapy: Ethical Dilemmas' (Winter 1991) *Mediation Quarterly* 9 (2), at 107–19.

104 *Ibid*, at 111.

105 *Ibid*, at 112.

106 Benjamin, M, and Irving, H, 'Toward a Feminist-Informed Model of Therapeutic Family Mediation' (1992) *Mediation Quarterly* 10(2), pp 129–53.

107 *Ibid* at 131.

108 Cormick, GW, 'How and When to Mediate Natural Resource Disputes'. Paper presented to the Institute on Resolution and Avoidance of Disputes, 23 March 1984. Denver, Colorado: Rocky Mountain Mineral Law Foundation, 1984. Diepeveen, B 'Substance Abuse: The Risks Involved' (Winter 1992–93) *Interaction* 4(4), at 5–6.

In codes of ethics, this issue is often referred to under the rubric 'conflict of interest'. AAA, ABA and SPIDR[109] define a conflict of interest as 'a dealing or relationship that might create an impression of possible bias' and holds mediators responsible for disclosure of conflicts. FMC[110] provides that mediators 'must avoid any activity that could create a conflict of interest'. Included in prohibited behaviour that 'that might impair their professional judgment or ... increase the risk of exploiting clients' is to mediate among 'close friends, relatives, colleagues/supervisors or students' or 'to engage in sexual intimacies with a participant in the mediation process'.

To summarise, there are two ethical issues involved in the question of role limitation. One ethical concern is the possibility that one party may benefit over another through a previous professional or social relationship. This affects the non-partisan fairness of the process. The other ethical issue is related to party self-determination and autonomy. Within a culture which values individual autonomy, it is considered unethical to infringe inappropriately on that autonomy. Infringement on party self-determination could occur through the giving of substantive professional advice by the mediator, especially if the advice is delivered in a manner that seems coercive. Also, there is a sense in which multiple professional or process roles for mediators could limit party self-determination by confusing the parties over the nature and purpose of the mediation process.

Objectivity: myth and reality

Western dispute resolution practice tends to aspire to the ideal of objectivity, the notion that the model mediator is autonomously objective as in Rawls's concept of the 'veil of ignorance'. This ideal mediator has an objective sense of fairness and is unaffected by the context or the parties. This ideal state of objectivity can be hampered merely by knowing one or both of the parties, which is said to present the mediator with a conflict of interest or at least an uncomfortable dynamic that should be avoided.

Within the idea that previous relationships and feelings of sympathy are undesirable, is the notion that the 'moral agent' is an autonomous individual who is capable of being 'objective' in the Rawlsian sense. This idea may be challenged by those from hierarchical collectivist societies whose ethics contemplate adherence to traditional ethical principles.[111] The possibility and desirability of autonomous objectivity might also be challenged by those whose ethical theories contemplate interdependent communities whose members have mutually reciprocal responsibilities.[112]

109 AAA, ABA and SPIDR, 1995, see above note 13, Article III.

110 FMC, 1986, see above note 75, Article 4:1.

111 See the section on 'universalism', 'utilitarianism' and 'insider-partials', at pp 309, 311, 330

112 See the sections above which refer to Gilligan and communicative ethics, at pp 308, 316.

In many Western settings it is considered highly desirable and sometimes even vital that the third party be an unknown outsider who cannot possibly be influenced by the context or the parties. Practices in North American jury selection are an example of this principle; the fair and objective decision of 'neutral' jurors should not be influenced except by carefully packaged information conveyed in controlled circumstances. This notion has been brought into practices surrounding the selection of mediators. As previously discussed, the idea that it is possible for a person to be objective has been strongly challenged on both philosophical and practical grounds. For example, labour mediators may deal with the same parties on more than one occasion. In British Columbia automobile insurance mediators are used by the Insurance Corporation of BC through whom virtually all motorists are insured. These mediators cannot possibly avoid knowing the parties in every case, and indeed, it has been said that working too much in such settings can 'pollute neutrality'.

Feminist critics of family mediation have questioned the possibility of unbiased, value-free neutrality. Mediators 'have been raised in a largely patriarchal social system in which gender roles have only recently been questioned, primarily by white, middle class North Americans'.[113] People who are enculturated within a given social system often consider the prevailing norms, however unfair, to be 'objective'.

This is one of the most potent critiques of mediator objectivity. Everybody has values and biases. It is not possible for mediators to park them at the door of the hearing-room. The ideal of autonomous objectivity does not recognise the fact that mediators are influenced far more than they may realise by the culture and social setting in which they live, and the political, social and power structures within which they operate.

The objective mediator who can set aside all prejudices may be an ideal for those whose ethical framework contemplates self-determination and autonomy. Objectivity may not be an ideal for others with a more collectivist approach to ethics. In either case, this 'objective' mediator is a mythical creature removed from the realities of interaction among human beings who live in communities.

Preference for 'insider-partials'

Research on cross-cultural issues in dispute resolution points out that not everyone prefers an 'outside-neutral'. Detached objectivity is not universally sought. People from some cultural groups prefer 'insider-partial' intervenors.[114] Insider-partials are intervenors who have strong and continuing affiliations with the parties, and who are known and trusted by all the parties.

113 Landau, 1994, see above note 7, at 33.

114 Lederach, JP, and Wehr, P, 'Mediating Conflict in Central America' (1991) *Journal of Peace Research* 28(1), pp 85–98, at 87. Lederach, 1991, see above note 16. Lederach, see further above note 19.

LeBaron Duryea[115] criticises current standards of practice that prescribe 'neutrality,' discussing, by way of example, the work of Honeyman and his associates in the Test Design Project outlined in Interim Guidelines for Selecting Mediators National Institute for Dispute Resolution.[116] Referring to the preference for insider-partials in some contexts, she states:

> Where this preference exists, the impartiality criteria ('asked objective questions' ... 'conveyed neutral atmosphere') set out in the Honeyman standards have little relevance. Insider partials will bring a sophisticated understanding of the parties, the issues, and the broader context in which the issues are situated. They may also bring set ideas about the 'right' conduct for each party and what roles parties should adopt in order to mend the rift. Conveyance of a neutral atmosphere is not anywhere on the map for such an intervenor, nor should it be.[117]

Because of the diversity of needs and preferences in different contexts, it is important that standards of practice be specific to the context in which they will be used. Codes of ethics promulgated by influential mediation organisations which prescribe neutrality may inadvertently delegitimise practices which are common not only among minority ethnic or cultural groups, but also in some mainstream institutions. There are numerous examples of informal and formal insider mediation conducted within a variety of institutional settings from universities to churches. In such cases, a person within the institution who is known and trusted by both persons is sought out for advice, counsel and conciliation. These processes may be unremunerated and informal and may bear little resemblance to the model of face-to-face mediation frequently taught in North America.[118] It would be unfortunate if the practice of these informal processes were either explicitly or implicitly discouraged by the heightened awareness of the option of 'professional' mediation with its accompanying structures and codification of ethical standards of practice. It would be worse if these practices were implicitly or explicitly labelled 'unethical' by professional organisations whose ethical framework excludes other perspectives.

The *Mediation UK Practices Standards* provides that mediators should be aware of 'local and cultural differences that need to be taken into account.'[119] This useful provision refers to all mediation practices generally. Family Mediation Canada is

115 Duryea, Michelle LeBaron, 'The Quest for Qualifications: A Quick Trip Without a Good Map', in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994b, Victoria, BC: UVic Institute for Dispute Resolution, pp 109–29.

116 National Institute for Dispute Resolution (NIDR), *Interim Guidelines for Selecting Mediators*, 1993, Washington, DC: National Institute for Dispute Resolution.

117 Duryea,1994b, see above note 115, at 116–17.

118 A frequently taught four-stage model includes: (1) pre-mediation assessment and introduction; (2) party narratives; (3) exploration of party interests; and (4) development of solutions and finalising agreements. Increasingly, training is emphasising flexible (but still largely staged) models which incorporate assessment, conflict analysis and process design at the outset; and the possibility of implementation and monitoring agreements afterward.

119 Mediation UK, 1993, see above note 13, Article 3.

considering these factors in the creation of its new draft code of ethics. While the other codes of ethics do not explicitly preclude insider-partial mediation, FMC's draft standards appear to be unique in explicitly acknowledging its possibility. However, this possibility is couched within the framework of a strong preference for 'outside neutrality'. The draft standard suggests that 'except where culturally appropriate mediators must be cautious about mediating disputes involving close friends, relatives, colleagues/supervisors or students'.[120] The intention appears to be that insider-partial mediation is to be considered as an exception, rather than as one of a number of possibilities within a diverse society.

In increasingly multicultural societies, discussions of ethics in mediation require more awareness of the culturally specific ethical biases that are inherent in all such discussions. Ethical stances are important, and they inevitably reflect the culture within which they are situated. Discussions about ethics are most useful, and more fair, when they are clearly understood and articulated for all members of society (not just members of the dominant culture) to see and evaluate.

CONFIDENTIALITY

Most codes of ethics reflect a strong commitment to confidentiality. It has been said that 'lack of confidentiality will deter disputants from using the mediation process ...'.[121] This is true for most cases of commercial mediation, in which the usual recourse upon lack of settlement is the courts. Most of the literature on confidentiality in mediation has centred on the legal principles which might or might not protect the confidentiality of the mediation process. Other literature discusses appropriate exceptions to confidentiality. The ethical underpinnings of the concept of confidentiality have not received much treatment in the literature.

Considerations of the appropriateness or inappropriateness of confidentiality is dependent on the specific context of mediation. The ethical issue appears to be quite simple: the mediation process and the process leader must be able to guarantee that it can keep whatever promises are made concerning confidentiality.

The purpose of confidentiality

Confidentiality of the mediation process is considered important to ensure that parties feel free to disclose all relevant information in mediation. If confidentiality could not be guaranteed, and mediators were called to give evidence in subsequent proceedings, there would be a strong deterrent to the use of mediation as a pre-trial settlement option. Another reason given is that compelling a mediator to give evidence could impugn the perceived or actual

120 FMC, 1996, see above note 80, Draft Article 4:1.

121 Pirie, A. 'The Lawyer as a Third Party Neutral: Promise and Problems', in Emond, DP (ed), *Commercial Dispute Resolution: Alternatives to Litigation*, 1989, Aurora ON: Canada Law Book, Inc, pp 27–54, at 47.

non-partisan fairness of the mediator by requiring her or him to provide opinions, for example, about whether the parties (or one of them) was bargaining in good faith.[122]

It is beyond the scope of this paper to discuss the law of confidentiality, which is specific to each jurisdiction. Generally speaking, the confidentiality of mediation has been respected by courts in North America in spite of the lack of specific legislation in many jurisdictions to provide for confidentiality of mediation.

Exceptions to confidentiality

While mediation appears to be assumed as a general principle, there are several exceptions, most of which require ethical deliberation on the part of the mediator. Some processes are deliberately 'open' in that the parties and the mediator intend at the outset that the mediator will be a competent and compellable witness in any subsequent court proceeding.

Compellability by a court

Unless there is guiding legislation in the particular jurisdiction, judges have considerable discretion about whether to compel testimony about a mediation process. In Canada, mediators can do a good deal to provide protection for themselves and their clients from surprises by making confidentiality provisions a matter of written agreement before entering into mediation. Also, draft settlement memoranda, documents and other letters can be marked 'privileged' and 'without prejudice' to enhance the chances that courts will respect the confidentiality of the process. Readers are advised to regularly update themselves concerning the law on mediation and confidentiality in their particular jurisdiction.

People in need of protection

Most jurisdictions provide a legal duty to inform the appropriate authorities where a person has grounds to believe a child is in need of protection. Many jurisdictions also provide a duty to warn where there is a threat of harm to any person, for example if in caucus a party threatens to harm another person. Law, however, is often ambiguous and usually provides insufficient guidance. A legal analysis is incomplete because the law does not provide an adequate ethical framework for the issues related to confidentiality. There may be a variety of circumstances in which maintaining confidential would be a breach of ethics either for personal reasons, or in the public interest. Codes of ethics provide only general guidance.

122 Gibson, K, 'Confidentiality in Mediation: A Moral Reassessment' (1992) *Journal of Dispute Resolution*, pp 25–66, at 44–48.

Mediators can create their own standards by agreement with the parties. Written agreements with the parties can provide, for example, that the mediator will report to the appropriate authorities any information arising out of the mediation process which gives her or him reasonable grounds to believe that a child or any other person may be in need of protection. Agreements can also make explicit what will happen to notes or any records, and outline other possible limits of confidentiality, such as the fact that courts may have the power to compel mediators to give evidence.

Caucusing

Another sensitive issue arises in caucusing with individual parties. Sometimes mediators hold all information confidential unless the parties authorise release. In other cases mediators may decline to guarantee that information shared in caucus will remain confidential. In still other cases mediators and parties together make decisions about the disposition of information shared in caucus during a preliminary 'process design' phase.

The decisions concerning what to do with information shared during caucusing is a sensitive one and depends almost entirely on the context. Valuable discussion on this issue is found in SPIDR's publication, *Making the Tough Calls.*[123] Mediators who prefer not to guarantee confidentiality during caucuses can make this a matter of discussion prior to mediation, or make it part of a written mediation agreement.

The need for public accountability

For public policy reasons, it may be undesirable for multi-party public policy disputes to be mediated confidentially. Public policy mediations usually include specific negotiations concerning how information conveyed during mediation is to be used. Some public policy mediations are open to the public and the press. Others are not. Useful sample clauses of 'ground rules' developed by parties for the purpose of round table negotiations may be found in the work of Carpenter and Kennedy.[124]

Implementing party promises of confidentiality

In most cases, parties agree to hold information obtained during mediation confidential. It becomes a difficult ethical issue when the mediator becomes aware during the course of mediation that one or both of the parties is sharing or

123 SPIDR, 1991, see above note 1.

124 Carpenter, SL and Kennedy, WJD, *Managing Public Disputes*, 1991, San Francisco: Jossey-Bass, at 111–15 and 123–24.

using information in contradiction to their agreement. Mediators may wish to discuss with clients, or make it part of their agreement, what the consequences will be if this occurs.

Most codes of ethics reflect the policy assumption that mediation will normally be confidential. FMC[125] implicitly assumes that mediation processes will be confidential and provides a list of exceptions to confidentiality including non-identifying information for research or education, written consent of the parties, court order, threat to a person's life or safety, and open mediation. AFM[126] is much more general, including provisions that a 'mediator shall foster the confidentiality of the process' and 'inform the parties ... of limitations on confidentiality' and 'circumstances under which mediators may be compelled to testify in court.' Mediation UK[127] explicitly provides for a 'strong presumption of confidentiality' with similar exceptions to those of FMC, AAA, ABA and SPIDR[128] simply state that the 'reasonable expectations of the parties with regard to confidentiality shall be met by the mediator', that the expectations depend on the circumstances, and that matters the parties expect to be confidential will not be revealed without the permission of the parties or unless 'required by law or other public policy'.

While demands of confidentiality pose significant practical tensions for mediators, its concepts are not as controversial as the issues surrounding 'impartiality' and 'neutrality'. Likely this is because of widespread acceptance that there are a variety of legitimate models concerning what and how information is to be shared, depending on the purpose of mediation, and often the preference of the parties. Thus, confidentiality may be as much a technical as an ethical issue.

The central ethical concern relating to confidentiality is one of trust. In order to trust a mediator or a mediation process, parties need to know what will or might happen to the often sensitive information that will be exchanged among the parties or with the mediator. Most codes of ethics reflect that the most important policy concerning confidentiality is informed consent by the parties. While practical issues may be complicated, the salient ethical issue is that of keeping promises made about the use of information produced by the mediation process.

COMPETENCE

Is there an essential difference between a consideration of ethics and competency standards? Is one subsumed in the other? Discussions on mediation and ethics do not distinguish clearly between ethical and technical issues in mediation. Bush's[129] very useful empirical study on mediator ethics has been criticised by

125 FMC, 1986, see above note 75, Article 7, 11.

126 AFM, 1995, see above note 13, Article VI.

127 Mediation UK, 1993, see above note 13, Article 2.

128 AAA, ABA and SPIDR, 1995, see above note 13, Article V.

129 Bush, 1994, see above note 3.

Stulberg[130] on the grounds that the study does not open up the dialogue about moral vs non-moral dilemmas. He points out that a dilemma about 'right' or 'wrong' is not necessarily an ethical question. A question about what is 'right' may be a non-ethical dilemma based on technical or prudential issues.

Moral versus non-moral dilemmas

Moral philosophers have differed on the question of whether there is an essential difference between morality and prudence. Some suggest that 'moral choices' are essential egoistic or based on self-interest.[131] However, Kantian ethics distinguish moral imperatives from prudential or technical imperatives.[132] An example of a prudential or technical imperative might be: 'If you want to preserve your perceived non-partisan fairness as a mediator, avoid asking closed questions or making suggestions as to outcome.' An example of a true ethical imperative might be: 'You ought to refuse to mediate cases where you think someone might be harmed by the process.' Thus, dilemmas may be moral or non-moral.

While the distinction between moral and non-moral issues is interesting, it may have limited practical relevance in day-to-day practice. When faced with a dilemma, mediators may not really care whether their dilemma is a 'moral' or a 'prudential' one. For practical purposes, a dilemma is a dilemma and the goal is to resolve it. Neat philosophical points aside, many codes of ethics suggest that continued competence is essential for ethical practice. This includes admonitions that mediators have adequate initial training and continuing education. It is difficult to criticise an ethical principle that mediators should not hold themselves out as competent when they are not. The ethical concern is with keeping promises: mediators should be able to deliver what they say they can deliver. Thus, there are two related problems: one is that competency is tied to the particular values and goals of mediation which are various and often ill-defined; the other problem is the practical one of determining what is 'competent' in a field which has only just begun to be systematically studied.

What skills and abilities lead to competency?

The question of what skills and abilities are essential for competent and ethical practice is currently a vexed question. A considerable literature has grown on this and the related debates about qualifications standards. These qualifications debates (and the related debate about professionalisation) have been discussed

130 Stulberg, JB, 'Bush on Mediator Dilemmas' (1994) *Journal of Dispute Resolution* 1, pp 57–69.

131 Raphael, DD, *Moral Philosophy*, 1981, London: Oxford University Press, at 18.

132 *Ibid*, at 55.

at length elsewhere.[133] It is broadly acknowledged that the field of dispute resolution is in its infancy, and it is not known with any certainty what practices are effective to resolve disputes. 'There is no clear foundation from whence qualifications can emerge.'[134]

133 Alfini, JJ, 'Trashing, Bashing and Hashing It Out: Is This the End of 'Good Mediation?' (1991) *Florida State University Law Review* 19, at 57–75; Birkhoff, J, 'SPIDR Research Committee Draft Report to the Qualifications Commission: Research on Mediation Qualifications' in *Qualifications Sourcebook Compendium*: Prepared for the 21st Annual SPIDR Conference, Pre-Conference Session, 21 October 1993, Washington, DC: Society of Professionals in Dispute Resolution, pp 143–52; Bush, 1989, see note 4; Davis, A, 'Ensuring High Quality Mediation: The Issue of Credentialling' (1992) *Conciliation Quarterly* 11, at 2–13; Duryea, 1994b, see above note 19, Edelman, J, 'A Commentary on Family Mediation Standards' (1986) *Mediation Quarterly* 13, at 97–102; Edwards, C and Morris, C, 'Competence and the Role of Standards for Neutrals' in *Alternative Dispute Resolution Practice Manual*, 1995, North York, ON: CCH Canadian Limited, at 8591–8699; English, P, 'Report and Recommendations of Certification and Standards' (February 1994) *Resolve* 7, at 1 and 14–20; English, P, *The Standards and Certification Project*, 1993, Guelph, Ontario: Family Mediation Canada; Gilman and Gustafson, 1994, see above note 7; Hartfield, EF, 'Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes' (1988) *Seton Hall Legislative Journal* 12, at 109–24; Honeyman, C, 'Five Elements of Mediation' (1988) *Negotiation Journal* 4 (2), at 149–60; Honeyman, C, 'On Evaluating Mediators' (1990b) *Negotiation Journal* 6, at 23–35; Honeyman, C, 'The Common Core of Mediation' (1990a) *Mediation Quarterly* 8, at 73–82; Honeyman, C, Peterson, N and Russell, T, 'Developing Standards in Dispute Resolution'. Paper presented at Law and Society Association Annual Conference, May 1992, Philadelphia; Honeyman, C, Miezio, K and Houlihan, WC, *In the Mind's Eye? Consistency and Variation in Evaluating Mediators*, 1990, Cambridge, Massachusetts: Programme on Negotiation at Harvard Law School; Honoroff, B, Matz, D and O'Connor, D, 'Putting Mediation Skills to the Test' (January 1990) *Negotiation Journal* 6, at 37–46; Landau, 1994, see above note 7; Maida, PR, 'Why Qualifications?' in *Qualifications Sourcebook Compendium*: Prepared for the 21st Annual SPIDR Conference, Pre-Conference Session, 21 October 1993, Washington, DC: Society of Professionals in Dispute Resolution, at 40–45; MDABC, 1989, see above note 62; Maute, JL, 'Mediator Accountability: Responding to Fairness Concerns' (1990) *Journal of Dispute Resolution* 2, at 347–69; Maute, JL, 'Public Values and Private Justice: A Case for Mediator Accountability' (1991) *Georgetown Journal of Legal Ethics* 4, at 503–35; Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution; National Institute for Dispute Resolution (NIDR) *Interim Guidelines for Selecting Mediators*, 1993, Washington, DC: National Institute for Dispute Resolution; Picard, C, 'The Emergence of Mediation as a Profession' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 141–63; Pirie, A, 'Manufacturing Mediation: The Professionalisation of Informalism' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 165–91; Riskin, LL, 'Toward New Standards for the Neutral Lawyer in Mediation' (1984) *Arizona Law Review* 26, at 329–62; Rubin, JZ (ed), 'On the Process of Dispute Settlement' (October 1993) *Negotiation Journal* 9, New York: Plenum Press; Schirch-Elias, L, 'Public Dispute Intervenor Standards and Qualifications: Some Critical Questions' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 79–87; Scimecca, J, 'Conflict Resolution in the United States: The Emergence of a Profession?' in Avruch, K, Black, P and Scimecca, J (eds), *Conflict Resolution: Cross Cultural Perspectives*, 1991, Connecticut: Greenwood Press; Shaw, ML, 'Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution' (1988) *Seton Hall Legislative Journal* 12, at 125–36; Society of Professionals in Dispute Resolution (SPIDR), *Environmental/Public Disputes Sector. Competencies for Mediators of Complex Public Disputes*, 1992, Washington DC: The Society of Professionals in Dispute Resolution; Society of Professionals in Dispute Resolution (SPIDR), *Qualifications Sourcebook Compendium*, 1993, Washington, DC: Society of Professionals in Dispute Resolution; Van Slyck, M, *Determining Sources of Mediator Effectiveness: Predisposition, Training and Experience*, 1993, Monograph Series, New York: Research Institute for Dispute Resolution.

134 Duryea (1994b), see above note 19, at 112.

There is considerable consensus that the skills and abilities needed for resolving disputes are largely dependent on the context of mediation. For example, the skills and knowledge required for mediation of a complex public policy dispute[135] significantly differ from the skills and knowledge required for family mediation (see, for example, Landau[136]). There are many powerful critiques from those who fear that women and other cultural minorities may experience further disempowerment in society with increased institutionalisation of currently available dispute resolution alternatives.[137] Skills and models that appear to be useful for members of the dominant culture in North America may not be suitable for those from minority ethnic or cultural groups.[138]

While links between competency and ethics have been drawn, it has been fairly asked: 'competent to do what?'[139] Different contexts, values and purposes for mediation may require different skills. While impassioned discussions assert understandings of what skills are required for mediations, intuitive claims to know what is 'ethical' or 'competent' are generally based on experience in the specific context for mediation in which these claims are made. Looking at the whole spectrum of mediation models, ethical injunctions to 'be competent' are difficult to interpret reliably in a field which is still a long way from understanding what specific behaviours of mediators are effective to resolve disputes.

135 Susskind, L, 'Environmental Mediation and the Accountability Problem' (Spring 1981) *Vermont Law Review* 6, at 1–47; Cormick, GW, 'How and When to Mediate Natural Resource Disputes', paper presented to the Institute on Resolution and Avoidance of Disputes, 23 March, 1984, Denver, Colorado: Rocky Mountain Mineral Law Foundation; Diepeveen, B, 'Substance Abuse: The Risks Involved' (Winter 1992–93) *Interaction* 4 (4) at 5–6; Duinker, PN and Wanlin, MA, 'Attributes of Consensus Facilitators: Lessons from Some Experiences with Natural Resources in Ontario', in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 65–77; Schirch-Elias, 1994, see above note 133; SPIDR, 1992, see above note 133.

136 Landau,1994, see above note 7.

137 Bailey, MJ, 'Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims' (1989) *Canadian Journal of Family Law* 8, at 61–94; Grillo, T, 'The Mediation Alternative: Process Dangers for Women' (1991) *Yale Law Journal* 100 (6), at 1545–610; Hart, B, 'Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation' (1990) *Mediation Quarterly* 7 (4), at 317–30; Landau, 1994, see above note 7; Leitch, ML, 'The Politics of Compromise: A Feminist Perspective on Mediation' in Saposnek, D (ed), *Applying Family Therapy Perspectives to Mediation* (1986–87) *Mediation Quarterly* (14/15), at 163–75; Maute, 1990, 1991, see above note 133; Rifkin, J, 'Mediation From a Feminist Perspective: Promises and Problems' (1984) *Law & Inequity* 2, at 21–22; Shaffer, M, 'Divorce Mediation: A Feminist Perspective' (1988) *University of Toronto Faculty of Law Review* 46 (1), at 162–200.

138 Avruch, K, 'Introduction: Culture and Conflict Resolution' in Avruch, K, Black, P and Scimecca, J (eds), *Conflict Resolution: Cross Cultural Perspectives*, 1991, Westport, Connecticut: Greenwood Press; Avruch, K, and Black, P, 'Conflict Resolution in Intercultural Settings: Problems and Prospects' in Sandole, DJD and van der Merwe, H (eds), *Conflict Resolution Theory and Practice: Integration and Application*, 1993, New York: St Martin's Press, pp 131–45; Barnes, BE, 'Conflict Resolution Across Culture: A Hawaii Perspective and a Pacific Mediation Model' (Winter 1994) *Mediation Quarterly* 12(2), at 117–33; Duryea, 1992, 1994b, see above note 19, Duryea and Grundison, 1993, see above note 14; Hermann, M, Lafree, G, Rack C and West, MB, *An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation*, 1993, New Mexico: Institute of Public Law, University of New Mexico; Huber, M, 'Mediation Around the Medicine Wheel' (Summer 1993) *Mediation Quarterly* 10 (4), at 355–65; Lederach, 1986a, 1986b, 1991, 1995, see above notes 16 and 19; Monture OKanee, 1994, see above note 15; Salem, 1993, see above note 17.

139 Birkhoff, 1993, see above note 133.

A PRACTICAL FRAMEWORK FOR MAKING ETHICAL DECISIONS

No code of ethics can imagine and take into account every ethical dilemma. Not only that, but codes of ethics inevitably reflect particular biases which may not be shared by all mediators in all contexts. Prescriptive codes of ethics can also lead to widespread rote development of unexamined mediation practices. This is especially so if codes of ethics do not indicate the specific contexts in which they are intended to be used, or fail to acknowledge the values on which they are based. For these reasons, codes of ethics are incapable of providing a complete or universal guide for conduct. Conduct guidelines are most useful when they articulate the contemplated purpose for mediation[140] and their underlying ethical assumptions, leaving the detailed working out to mediators in practice. Organisations can assist with this by providing ethics committees whose function is to assist mediators with ethical concerns in a facilitative manner.

A PRACTICAL FRAMEWORK FOR CONSIDERING ETHICAL ISSUES IN MEDIATION

How can mediators work through practical tensions and dilemmas in their everyday practices? As a third exercise (of the four exercises suggested in this essay), mediators can develop a framework with which to understand their values surrounding mediation and apply them to specific situations. What follows is one suggested framework[141] which might be used, developed or modified by individual mediators, groups of mediation practitioners in a business or non-profit agency, boards of directors of mediation organisations considering developing standards, and, to the extent it is relevant, by policy makers considering the establishment of mediation legislation, regulations or programmes. All or parts of this framework could possibly also be used during mediation to help parties work through ethical dilemmas facing them, or facing the mediator as a result of their situation. As such it can be a tool for the development of 'communicative ethics' as described by Cooks and Hale.[142] While the framework suggests a step-by-step process, one can likely begin anywhere and move through or around the framework in ways that suit the particular issue.

140 Bush, 1994, see above note 3.

141 The work of Bush,1994, see above note 3; Barsky, AE, 'Issues in the Termination of Mediation Due to Abuse' (1995) *Mediation Quarterly* 13, at 19–35; Callahan, JC and Grassey, T, 'Appendix 2: Preparing Cases and Position Papers' in Callahan, JC (ed), *Ethical Issues in Professional Life*, 1988, New York: Oxford University Press, at 465–76; Cooks and Hale, 1994, see above note 20; Davis, 1994, see above note 98; and Grebe, 1989, see above note 12, is acknowledged as providing source material for this framework.

142 Cooks and Hale, 1994, see above note 20.

A Know yourself

1 Understand your general ethical values. A brief outline of several ethical theories can be found at pages 307–17. Many people growing up in the mainstream society in Canada have never considered the basic principles on which they base their lives, their ethical values or the assumptions which underlie them. Understanding your general ethical philosophy anchors important decisions, and assists you to discern the relevance and value of advice you are given.

- do you believe in some ethical principles which you consider to be universally applicable?
- do you believe that some ethics are culturally or individually relative?
- do you believe that ethics must be determined with each new situation? If so on what basis do you decide what is ethical in each situation?
- do you believe that 'doing right' is 'right' regardless of foreseen consequences?
- what do you tend to emphasise: justice or caring; rights or responsibilities?
- what is your attitude to those who hold ethical values different from your own?

Guidance can be found through cultural traditions, religious teachings and sacred literature, United Nations principles, mediation literature and codes of ethics.

2 Understand your (or your organisation's) values concerning the practice of mediation. What are the quality goals of mediation, and your definitions of success?

- party autonomy
- party satisfaction
- community solidarity
- social justice
- social order
- personal, group or societal transformation
- cost/efficiency
- settlement rates

These options are explained at pages 304–07.

3 How do these goals mesh with your general ethical beliefs?

4 What are your (your organisation's) views concerning the following nine topics.[143]

- keeping within the limits of competency;
- preserving 'impartiality' (quotations mine);

143 Bush, 1994, see above note 3, at 9–10.

- maintaining confidentiality;
- ensuring informed consent;
- preserving self-determination/maintaining non-directiveness;
- separating mediation from counselling and legal advice (also described as 'role limitation'[144]);
- avoiding party exposure to harm as a result of mediation;
- preventing party abuse of the mediation process;
- handling conflicts of interest.

5 Analyse a variety of codes of ethics and read relevant literature.

6 Compare your ethical understandings with those of others engaged in the practice of mediation.

B Understand the problem

7 Define the ethical problem in question.

- what are the issues?
- outline all the relevant facts, including facts that would support any of the possible courses of action.

8 Define the moral principles and values involved in the particular issue or dilemma (eg honesty, loyalty to family or friends, keeping promises).

- the dilemma is, by definition, a problem in which a choice must be made between two principles and it seems that one cannot do both.
- some dilemmas are not really dilemmas in that the 'right' choice seems clear; the problem is that the 'right' choice is not a palatable or easy choice.

9 Define the options.

- what are all the possible decisions that could be made?
- what are the possible consequences to everyone of each possible decision?
- how grave are the consequences?

C Consider how to involve the parties

10 To the extent possible, discuss the ethical problem with the parties.

- what is the parties' understanding of the ethical dimension of the problem?
- in what ways could the problem be jointly framed by the parties?
- what ideas do they have about how to resolve the dilemma?

144 Davis (1994), see above note 98, at 79.

D Make decisions

11 To the extent possible, involve the parties in making the decision.

12 Make a tentative decision, reflect on it, and modify as necessary.

13 Communicate and implement the decision.

14 If appropriate, consider drafting clauses in mediation agreements to prevent future problems of a similar nature.

ETHICAL ACCOUNTABILITY

The fourth exercise for mediators involves a consideration of their interaction at the policy level with other members of the mediation community. The ethical question becomes: to whom is one accountable for ethical practice in mediation?

The development of literature on ethics and the creation of codes of ethics has its roots in concern about consumer protection in the light of the increasing institutionalisation of consensual alternative dispute resolution processes. With increasing institutionalisation come demands by governments, consumers and practitioners themselves for qualifications, practice and ethical standards. While mediators must certainly be accountable to their clients for what they do in mediation, individual consumers may have difficulty in addressing ethical concerns with mediators. Organisations of mediators have tried to address these concerns largely through the ongoing development of codes of ethics which are used mainly for educational purposes.

While this paper has its focus on substantive ethical issues in mediation, the related issue of how best to effect ethical accountability and how to deal with complaints about mediators is equally interesting. While it is beyond the scope of this essay to elaborate on the topic of ethical accountability, some brief comments are offered and some key questions identified.

All mediation associations receive complaints from time to time about the conduct of mediators. Associations can create procedures for discussing complaints with members, attempt to facilitate suitable resolutions suitable to the situation, or even remove mediators from membership. However, associations are unable to enforce accountability procedures against non-members. Conflicts can also arise when a complaint is made against a mediator who is member of a mediation association as well as another professional association. Whose responsibility is it to seek accountability from the mediator? Should it be done by the other professional association to which the mediator belongs? Or should accountability be sought by the mediation association? Or should mediators be accountable to both?

Mediation programmes and services can develop methods of seeking accountability from their staff or roster members, but what if the quality of work of an entire programme becomes an issue? How may an entire dispute resolution

programme be held accountable to the community? Are evaluations conducted by funding sources conduct sufficient to ensure the ethical practice of community mediation programmes?

It is concerns such as these that have led some to suggest licensure for mediators, an idea which has been dismissed by some dispute resolution organisations.[145] With virtually no lawsuits being filed against mediators and a lack of evidence that public harm is being caused by mediators, it is difficult to put forward an case for licensure. Many mediation associations provide for certification procedures (for example, the Academy of Family Mediators), or are in the process of developing certification procedures for mediators (for example, the Mediation Development Association of British Columbia) as another way to maintain accountability for ethical and competent mediation practice.

DEBATES OVER PROFESSIONALISATION

Development of certification and accountability procedures has raised fractious debates within the field of dispute resolution. This is largely an ethical debate at the policy level. The ethical debate also raises the possibility of mixed motivation on the part of mediators. In addition to a desire to protect consumers, there is within the field of dispute resolution a strong motivation to protect the reputation of mediation itself and to protect the development of the field from non-mediator driven legislation concerning standards and qualifications.[146] In addition, some fear that the drive towards professional codes of ethics is also fuelled by the desire of mediation organisations to define and control what is meant by 'mediation' and to define and control what practices are considered 'competent' or 'ethical.'[147] Some suspect that practitioners' demands for professional standards obscure an agenda of guild formation. Pirie suggests professionalisation may be more about power, market control, prestige, elitism and patriarchy than it is about specialised bodies of knowledge and commitment to service and the interests of society.[148]

Thus there are profound ethical questions surrounding the larger question of professionalisation as it is evidenced by the continued development of codes of ethics, certification procedures and accountability mechanisms by a number of growing organisations of mediators. While different in scope, these ethical

145 Mediation Development Association of British Columbia (MDABC). *Brief on Standards and Ethics for Mediators Presented to the Attorney General of British Columbia*. Vancouver, BC: Mediation Development Association of British Columbia, 1989. Society of Professionals in Dispute Resolution (SPIDR). *Ensuring Competence and Quality in Dispute Resolution Practice: Report No 2 of the SPIDR Commission on Qualifications*, April 1995, Washington, DC: Society of Professionals in Dispute Resolution.

146 See Davis, AM, 'Ensuring High Quality Mediation: The Issue of Credentialling' (1992) *Conciliation Quarterly* 11, 2–13. Gilman and Gustafson, 1994, see above note 7, at 92–95.

147 Gilman and Gustafson, 1994, see above note 7, at 92–95.

148 Pirie, A, 'Manufacturing Mediation: The Professionalisation of Informalism' in Morris, C and Pirie, A (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate*, 1994, Victoria, BC: UVic Institute for Dispute Resolution, pp 165–91 at 185–86.

questions are similar in nature to the ethical questions which concern actual mediations. That is, to what extent should a growing 'profession' intervene to influence the definition of mediation or the practices of individual mediators? To what extent should the principle of individual autonomy prevail in mediator selection and mediation practice?[149] Is it possible to say that there are universal 'rights' and 'wrongs' in the ethics of mediation? To what extent should a 'profession' composed of powerful organisations of mediators decide what are the goals, values and ethics of mediation? If groups of 'professional' mediators should make such decisions, on which ethical theories of which religions and cultures should they base their thinking?

The current thinking of those moving inexorably toward professionalisation does not reflect a widespread recognition of the validity of these questions. Instead, there is steady development of ethical standards which promote North American dominant culture values of individual autonomy and objectivity, without acknowledgement of the diversity of cultures and practices in the field of dispute resolution.

IS THERE A SOLID WAY FORWARD?

The increasing demand for both practice standards and qualifications, together with the debate about professionalisation and the incipient nature of knowledge within the field, makes for a great deal of uncertainty about ethical or competency standards. Nevertheless, there is no argument against the principle that dispute resolution practice should be of high quality, both ethically and technically.[150] Is there a way to resolve the tensions and move forward on solid ground?

First, given the uncertainties, perhaps the tensions should not be resolved but maintained, in order to provide an environment conducive for both studying and grappling with the issues. The ethical tensions between motives of consumer protection and motives of professionalisation should be clarified and emphasised. Second, given the growing consensus that ideal mediation practices are specific to their own contexts, including cultural contexts, there should be active resistance of efforts which suggest that certain ethical and competency standards are an adequate template for mediators across sundry jurisdictions. Third, there should be resistance to efforts that involve organisations' adopting each other's standards, furthering a monopoly on standards which marginalises minority or alternative perspectives on dispute resolution. Finally, mediation standards should not be used not to develop a powerful profession; rather mediation should be acknowledged as describing a diverse variety of processes for consensual dispute resolution. Mediators should direct their energies instead

149 SPIDR, 1989, see above note 57; 1995, see above note 145.

150 Herrman, M, 'On Balance: Promoting Integrity Under Conflicted Mandates' (Winter 1993) *Mediation Quarterly* 11 (2), at 123–38.

toward reflective experimentation in building high quality processes that can support and develop a community ethic of social harmony and justice.

Policy makers within dispute resolution organisations and governments need to recognise the ethical dangers inherent in mixed motivation for the development of standards. Policy makers need to develop sound practices and, if necessary, methods of accountability which do not at the same time foster prestige-building and monopoly-seeking by opportunists who see mediation as an opportunity to be part of 'a growth industry.' Policy makers need to beware of moves toward an elite, exclusive, formalised profession. Instead policy makers should include in the discussion the perspectives of those who are committed to being part of a diverse yet mutually accountable community devoted to understanding, promoting and enhancing both the skills and ethics of peacemaking.[151]

CONCLUSION: THE TRUSTED MEDIATOR

This paper has raised a number of complex questions, starting out with the broad questions: What does it mean to be 'ethical' and how is this question to be answered in a multi-cultural society? Who makes (and who should make) ethical decisions in mediation and in the broader field of mediation?

OVERARCHING PRINCIPLES: ARE THERE ANY UNIVERSALS?

Are there any universal principles? Michelle LeBaron Duryea's research tried to draw together a cross-cultural list of qualities of trusted mediators. Her project revealed the importance of trust, credibility and legitimacy in selection of mediators. The factors that contribute to trust, legitimacy and credibility may vary from group to group.[152] The overarching principles Duryea located in her literature search on conflict resolution across cultures boil down to the universal needs for respect, caring, and procedural fairness. What these mean may vary within different contexts and cultures.[153]

The dominant dialogue in North America is located within a policy framework which values individualist self-determination and assumes the possibility of individual objectivity. This paper has challenged the value both of these concepts, especially in increasingly multicultural settings.

151 For some practical suggestions about how this might be accomplished, see Morris (1994), at 20–22; Edwards, C and Morris, C, 'Competence and the Role of Standards for Neutrals' in *Alternative Dispute Resolution Practice Manual*, 1995, North York, ON: CCH Canadian Limited, pp 8613–24; SPIDR, 1995, see above note 145.

152 Duryea, 1992, see above note 19; Duryea and Grundison, 1993, see above note 14; Lund *et al*, 1994, see above note 25, at 37–38.

153 Duryea, 1992, *ibid*; Lund *et al*, 1994, *ibid* at p 26.

In North American societies, the primary discourse on mediator ethics is largely couched in the terms of 'impartiality' and 'neutrality.' The concepts buried within the terms 'impartiality' and 'neutrality' point to culturally specific constructions of the overarching principles of respect, caring and procedural fairness. It is hoped the discussion in this paper shows that continued discourse focusing on these rich, but variously conceived terms may be confusing, and should be replaced by discussion of the concepts that underlie these terms.

ETHICS AND INTERACTION

Finally, the dominant discussion has its central focus on the role of the mediator to the exclusion of the role of parties in ethical considerations. Ethical tension is inevitable among parties and mediators who may not share similar values. This ethical tension is also evident among groups of mediators in which there is ethical diversity. The tension cannot be entirely resolved by suggesting that there are overarching universal principles of interdependence, mutual respect, caring, and procedural fairness which affect mediation. These terms represent concepts that may be both intangible and variously interpreted.

The concept 'communicative ethics' may be of assistance in steering through the conundrums and complexities. Rifkin *et al* have proposed the adoption of a new and different discourse for mediation in which the mediator's role is 'to facilitate the production of a coherent narrative' by managing the process of story telling. The mediator is acknowledged as 'an active participant in the construction of the narrative'. Using the discourse of storytelling,

> the end goal of mediation can be redescribed as the construction of agreements in a discourse that empowers both the disputant and the mediators; that is, allowing agreements to be constructed in the absence of the conflicting demands of neutrality.[154]

Cooks and Hale suggest similar principles for the discussion of ethics in mediation. They argue

> that recognition of the discursive construction of mediation should be at the centre of any attempt to define a set of ethics or, at the very least, central to the explication of the ethical dilemmas extant in mediation. The term *discursive construction* refers here to the interactions and communicative challenges that define and describe the process of mediation for the parties (disputants and mediators alike). These interactions and communicative challenges constitute the reality of the mediation process, at least for the participants, and thus define the ethical accomplishment of a mediation.[155]

The discussion of ethics in mediation can be enhanced by expanding it to include not only mediators, but also the parties. This recognises the dynamic nature of the interaction among parties and mediator during mediation, as well as the fact that

154 Rifkin *et al*, 1991, see above note 58, at 162.

155 Cooks and Hale, 1994, see above note 20, at 56.

the very presence of a mediator transforms the dispute from a dialogue among parties (a two-way dialogue in the case of two parties) to a three-way dialogue in which the mediator is not just a passive participant but an active and influential agent of change to the very nature of the dialogue. The very presence of the mediator transforms the discussion from a discussion polarised among the parties to a discussion which is reframed and re-constructed through the third parties' interventions (and choices concerning non-intervention). Since conflicts are often essentially polarised differences in ethical interpretations of past acts or proposed plans, the discussion in a mediation may often be in essence an ethical discussion. The mediator's role is that of an active participant in trying to facilitate the creation of a transcendent and coherent ethical framework within which to resolve the problem peacefully and fairly. It does need to be acknowledged, however, that this transcendent framework may not always be found, and that respect requires that people's deeply held ethical values cannot be compromised.

The most important point for discussions of ethics in mediation is the fact of human interdependence. Human beings are not isolated, independent, autonomous units, nor are they independent from the environment and other living things. They live in interdependent and interactive communities. It is increasingly obvious that the whole world community shares in this interdependence. Therefore, theories of ethics which emphasise individuals over community (and individual rights over responsibility to others) do not reflect either the realities or the necessities of human social interaction, mutual care and interdependence. The ethical imperative for the creation of ethical policy in mediation will not be to prescribe 'impartiality' or 'neutrality', but to ask relevant community leaders, policy makers, mediators and parties what qualities of a process and process leader engender trust and demonstrate respect, caring and fairness.