Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model

Julie Macfarlane

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss1/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model

Abstract
Discussions regarding the appropriate ethical behaviours for mediators and the subsequent development of formal codes of conduct have focused on hallmark issues such as third party impartiality and party self-determination. However, in an informal process, ethical choices are inherent in every intervention made by a mediator. In adopting the standard-setting approach of an adjudicative model, mediator codes of conduct are a poor fit with the conceptual and structural characteristics of this fluid, uncertain, and essentially private process. Confining the substantive and conceptual debate over mediation ethics to formal codes dangerously underestimates both the scope and the significance of choices faced constantly by intervenors in their process management role. A disclosing and questioning dialogue among mediators and others, using Sch6nian principles of reflective practice, is proposed as a more candid and complete recognition of the ethical dilemmas that arise in mediation. Two real-life case studies drawn from the writer’s experience are used to illustrate this approach.
MEDIATING ETHICALLY: THE LIMITS OF CODES OF CONDUCT AND THE POTENTIAL OF A REFLECTIVE PRACTICE MODEL

BY JULIE MACFARLANE

Discussions regarding the appropriate ethical behaviours for mediators and the subsequent development of formal codes of conduct have focused on hallmark issues such as third party impartiality and party self-determination. However, in an informal process, ethical choices are inherent in every intervention made by a mediator. In adopting the standard-setting approach of an adjudicative model, mediator codes of conduct are a poor fit with the conceptual and structural characteristics of this fluid, uncertain, and essentially private process. Confining the substantive and conceptual debate over mediation ethics to formal codes dangerously underestimates both the scope and the significance of choices faced constantly by intervenors in their process management role. A disclosing and questioning dialogue among mediators and others, using Schönian principles of reflective practice, is proposed as a more candid and complete recognition of the ethical dilemmas that arise in mediation. Two real-life case studies drawn from the writer's experience are used to illustrate this approach.

I. INFORMALITY AND DISCRETION IN MEDIATION ................. 50
II. EFFORTS TO COMPENSATE FOR INFORMALITY .................. 53
III. WHAT DOES MEDIATING ETHICALLY MEAN? ...................... 57


Professor of Law, University of Windsor, Visiting Professor, Osgoode Hall Law School. The author wishes to thank Sibyl Macfarlane, John Manwaring, Richard Moon, Cinnie Noble, and Fred Zemans for their helpful comments on earlier versions of this article. The author also wishes to thank her research assistant, Melanie Borowicz (LL.B 2000); and Ian Coffin.
For disputants and mediators alike, one of the most attractive characteristics of the mediation process is its informality and almost infinite flexibility to accommodate different needs and interests. Conversely, a number of writers, particularly those concerned with the protection of vulnerable parties, emphasize the dangers associated with an absence of regulated procedural equality.\(^1\) The freedom to fashion tailor-made processes and outcomes in private, unobserved proceedings also means that there is potential for exploitation by parties with greater expertise, resources, and social power. It is the mediator who assumes the primary responsibility for ensuring the realization of mediation's benefits without creating or perpetuating unfairness. The mediator's ethical sensibilities and judgments are critical to this process.\(^2\) In this article, I shall argue that minimizing the dangers of private negotiated settlement and providing fair, non-coercive structures for settlement discussion require the self-conscious development of a strong, reflexive, and transparent culture of ethics in mediation. The current approach—largely limited to the development of

---


2. Michael Coyle has written that "the mediator is a moral agent involved in the process." See M. Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625 at 640.
voluntary codes of conduct for mediators—consistently underestimates and oversimplifies the complexities of what it means to mediate ethically.

Ethical professional behaviours and actions are uniquely problematic in the context of mediation. The special nature of the ethical dilemmas which confront mediators becomes clear when one compares the mediator's role with other third party roles in dispute resolution. The discretion exercised by the third party in dealing with the many novel and morally complex issues that arise before, during, and after mediation critically shapes the mediation process. In addition, the discretion exercised by a mediator differs from that of an adjudicator. External standards guide and constrain an adjudicator. Unlike an adjudicator, the mediator is constrained by neither procedural rules governing process, nor substantive rules determining outcome. In the absence of formal rules from procedure or the evaluation of arguments which allow the parties to function more or less independently of the third party so long as they abide by the rules, the mediator must pay attention to every aspect of party interaction in the course of their negotiations, and assumes a very broad responsibility for the management process that unfolds. The mediator's process management role may include structuring, focusing and balancing the discussion, and facilitating the design of any agreed procedures. The known end point of adjudication—the judge's decision—gives shape and direction to the actions and decisions of the third party. By contrast, the end point of a mediation session is unknown. The process may, or may not, achieve an agreed outcome. In their oversight of both process and dialogue, mediators make whatever choices they believe will advance the internal goals of the process. Every time mediators intervene in the dialogue between the parties, they must choose from among the numerous ways of exercising their third-party role. For example, they may be directive, suggestive, or simply facilitative. They may be supportive or attempt to discourage particular proposals. They may move the parties into private caucus, or keep them together in joint session. They may adopt a probing or cross-examination style of questioning, or they may simply summarize the information provided by each party. These choices over type and level of intervention reflect the practitioner's conception of the values and goals of the mediation process itself.

At a general level, mediators appear to share some common goals which allow mediation to be presented as a distinctive process choice despite a wide range of practice styles. These goals include enabling each party to contribute their perspective to the dialogue, explaining and clarifying the sources of the conflict, encouraging collaborative problem solving by the parties, and developing mutually acceptable outcomes. These goals may be collectively summarized as enhancing constructive
communication. Other goals which are often treated as universally accepted and tend to find their way into the codes of conduct developed for conflict resolution practitioners include mediator impartiality, mediator expertise, and process and outcome fairness. However, since notions of impartiality and expertise are inevitably culturally specific, they may not be universally embraced by mediators. The belief that mediators are responsible for ensuring fair outcomes is also highly contentious. Historically, the greatest support for this position has been among family mediators, but it is by no means universally accepted.

Nonetheless, impartiality, expertise, and fairness have great appeal as common or universal goals for mediation because they suggest standards external to the process which enable mediators to anticipate ethical dilemmas and identify the right course of action, regardless of the context in which the dilemma arises. The problem is not only that these goals are less than universally accepted by mediators, but that their external character obscures the nature of ethical choices in mediation. In this article, I shall argue that mediating ethically requires the constant generation of internal norms appropriate for a specific mediation and set of parties. The goal of facilitating constructive communication, where the norms and practices for a case must be generated from the actual interaction between the parties and the mediator, fits more naturally within this model.

Even if the facilitation of constructive communication can be regarded as a universal objective for mediation processes, there is significant diversity in how individual mediators choose to advance this goal. These choices reflect different philosophical, strategic, and stylistic convictions. As a result, the character of any one mediation process is highly dependent upon the exercise of discretion by the mediator. This is

---

3 For an example of a list of functional goals for mediators, see ibid. at 632-36.
4 Moreover, the constant repetition of these values in codes of conduct for mediators highlights the dangerous potential of codes to entrench an unquestioned culturally dominant perspective.
precisely what troubles many critics of mediation. The exercise of this broad discretion often comes down to on-the-spot judgments made as the dialogue unfolds, reflecting instinctive preferences over style and strategy. The pressured and rapidly moving circumstances of a mediation mean that the practical potential for extended discussion on questions of process management or mediation style, either with the parties themselves or a co-mediator, or even reflection by a solo mediator, is often lacking. Aside from egregious process abuse or party misconduct, the mediator’s judgements are often invisible to the parties themselves.

II. EFFORTS TO COMPENSATE FOR INFORMality

One response to the difficulty of promoting a process that is so dependent on individual idiosyncracy is the development of training conventions regarding procedure in mediation. Characteristically, these include opening statement protocols which afford equitable speaking time to each party, attention to balancing representation on each side, and equitable time spent in private caucus with each party. Conventions provide useful procedural safeguards against unbalanced processes that may otherwise be dominated by stronger parties. However, these safeguards represent the tip of the iceberg in relation to the scope and complexity of ethical issues that might arise in mediation.

The development of codes of conduct for mediators is another widely promoted response to concerns about fairness in mediation processes. Codes of conduct are usually framed as generalized commentaries on the mediation process and the mediator’s role. They characteristically include the mediator’s commitment to a set of key values such as voluntariness, lack of coercion, and party self-determination, and stipulate responses in given situations; for example, how the mediator should respond to what is often described as “bad faith” by one or more parties or a proposal for an apparently unfair agreement. Many codes also include assumptions about the general nature of impartiality, expertise, and fairness. Codes of conduct for mediators have proliferated in North America over the past ten years. Prominent examples include the code of

---

conduct developed by the Society of Professionals in Dispute Resolution, in partnership with the American Arbitration Association and the American Bar Association, and the Standards of Practice for the Academy of Family Mediators. In Canada, Family Mediation Canada and the Canadian Bar Association-Ontario have produced influential codes.

Codes of conduct have both moral and political significance as an effort to set benchmarks and parameters for appropriate conduct. Professor Robert Bush describes the need for ethical standards for mediators that "identify the hazards and point in the right direction." In theory, codes provide a means of ascertaining a mediator's commitment to a particular

---

See “SPIDR Code of Conduct”, supra note 7. See also “SPIDR Ethical Standards of Professional Responsibility”, supra note 7.

See “Standards of Practice for Family and Divorce Mediation”, supra note 7.

See “FMC Practice, Certification and Training Standards”, supra note 7.


“Dilemmas of Mediation Practice", supra note 7 at 4.
set of values and objectives for the process, although these are usually 
framed in very general terms. Codes of conduct also frequently set out 
important parameters. For example, they may constrain the mediator from 
providing an evaluative opinion on the merits and prohibit any person in a 
conflict of interest to act as a mediator. They also may specify the 
circumstances under which concerns for party safety will override 
confidentiality.\footnote{13} Thus, codes tend to compensate for the absence of a 
formal structure in mediation by setting out some minimum expectations 
for the process. Furthermore, a code of conduct may assist a party to 
launch a complaint against a mediator who agreed to abide by the 
principles of a particular code, but apparently acted in breach of one or 
more of the code’s provisions.\footnote{14} Most importantly, codes of conduct along 
with the development of a legal standard of care for mediators\footnote{15} provide the 
trappings of respectability and credibility for a new group of specialists 
seeking professional status.\footnote{16}

Most practising mediators recognize that the generality of these 
standards seriously limits their usefulness in resolving dilemmas raised by 
the interaction of the parties and the mediator. In practice, many situations 
seem to fall outside any given principle or parameter. For example, what 
should the mediator do when one side accuses the other of lying? How 
should the mediator respond when a party refuses to disclose a significant 
document because they do not trust the other side to keep it confidential? 
While codes of conduct offer general guidance for issues such as abuse of 

\footnote{13} Codes have tended toward a litany of restraints rather than positive obligations for mediators. For a striking exception, see “Florida Rules for Certified and Court-Appointed Mediators”, \textit{supra} note 7, r. 10.350 which states “a mediator shall be patient, dignified, and courteous during the mediation process.”

\footnote{14} Although it is not clear how particular codes would be enforced, or what sanctions would apply, in the event of a complaint of a breach. Under the Ontario Mandatory Mediation Program, Local Mediation Committees (LMC) must compile a roster of mediators who, in turn, are required to abide by the Program’s Code of Conduct, an adaptation of the Canadian Bar Association-Ontario Model Code of Conduct. See “CBAO Model Code of Conduct”, \textit{supra} note 7. The LMC may revoke membership of the roster or refuse to renew it, but it is not clear under what circumstances. The LMC must also investigate complaints brought under the program's complaints procedure. For a forthright approach to the question of an effective complaints process, see P. Portlock, “Certification and Complaints” (1996) 8:4 \textit{Interaction} 10.


\footnote{16} By publicly committing to standards of ethical practice, dispute resolution professionals seek to avail themselves of the traditional bargain of self-regulation. For a discussion, see C.D. Schneider, “A Commentary on the Activity of Writing Codes of Ethics” in J. Lemmon, ed., \textit{Making Ethical Decisions} (San Francisco: Jossey-Bass, 1985) 83 at 83-84.
process, party self-determination, and good-faith bargaining, applying these principles requires the exercise of personal discretion and an understanding of context. Even if it were possible to make the articulated standard both specific and complete, it is difficult to imagine how it might take into account the organic and dynamic character of the mediation process. Codes tend to present a series of standardized problems—an apparently unfair outcome, the appearance of coercion, or mediator bias—and suggest appropriate or ideal responses. This conveys the misleading impression that mediation ethics are limited to particular aspects of the practice of mediation (such as ensuring that the mediator is impartial and free from any conflicts of interest), or to extreme choices (such as between terminating a mediation or continuing). The codes seem to imply that such choices are culturally or situationally neutral. Codes are not a panacea for resolving the moral dilemmas of unregulated, informal third party intervention in disputes, nor are they likely to have a direct impact on consumer experiences of mediation.17 But if not codes, then what?

This article explores and attempts to expand our understanding of what amounts to ethical decision making in mediation. I shall argue that part of the difficulty of relying on codes for guidance is that they assume a narrow, abstract, and externalized definition of ethical decision making in mediation. The expanded understanding proposed in this article views ethical dilemmas as inherent to the management of a constructive, fair, and balanced dialogue between parties in conflict, and the exercise of personal judgment in relation to ethical practice choices as intrinsic to the mediator’s role. I shall propose a “reflective-practice”18 approach as an alternative or complementary vehicle to codes of conduct for thinking about and communicating mediation ethics, using as illustration two case studies from my own practice. I shall argue that this reflective-practice model holds greater promise for both conceptualizing and promoting ethical decision

17 For an excellent review and appraisal of codes of conduct, see C. Morris, “The Trusted Mediator: Ethics and Interaction in Mediation” in J. Macfarlane, ed., Rethinking Disputes: The Mediation Alternative (Toronto: Emond Montgomery, 1997) 301 [hereinafter “Trusted Mediator”]. Morris also offers a model for a personally constructed approach to mediation ethics which foreshadows many of the ideas in this article.

making in mediation than the written codes of conduct on which we presently rely.

III. WHAT DOES MEDIATING ETHICALLY MEAN?

Ethics are generally understood as the choice between two or more competing courses of action, where one choice, made on the basis of a particular principle or value, will be morally superior to the other.\textsuperscript{19} Mediators must constantly choose which types of intervention techniques and strategies they will use, raising issues well beyond those commonly understood as ethical dilemmas in mediation.\textsuperscript{20} The first choice faced by a mediator is whether or not to directly intervene at a given moment—by asking a question, making a suggestion, or providing a short summary—or to remain silent and let the events naturally unfold. Once a mediator decides to intervene, a multiplicity of further choices open up. Will the mediator suggest a different and less inflammatory way of framing the issues as tempers rise, or will the mediator move the parties to a less contentious topic? Will the mediator call a private caucus, and if so, which party will the mediator meet with first? What will the mediator say to a party who is speaking loudly or aggressively? The choices for process management and strategic intervention within mediation are endless. Even outside formal meetings, further issues may arise once negotiations are underway. Will the mediator call a party between sessions when there is concern about that individual’s level of comfort, commitment, or understanding of the process? Is it appropriate for the mediator to speak to one party, or the party’s counsel, about seriously considering the settlement offer made by the other side? In the micro-management of dialogue that is the mediator’s task, the list of choices for action is interminable. Implicit in each decision is a balancing of alternate courses of action and an appraisal of how far each advances the goals—and the mediator’s understanding of the underlying values—of the mediation process.

\textsuperscript{19} See The Canadian Oxford Dictionary, s.v. “ethics” which is described as “the science of morals in human conduct.” See also ibid., s.v. “morals” which are defined as “the distinction between right and wrong.” The usefulness of this dichotomy in the context of mediation is further discussed in Part IV(A).

\textsuperscript{20} Typically these include the mediator’s impartiality, their freedom from conflicts of interest, and confidentiality in all but exceptional circumstances. A contemporary Western model of mediation assumes these to be central aspects of the mediator’s role and any departure from these norms is viewed as an egregious breach of responsibility.
But do all such choices raise questions of ethics? Some choices appear to be functional; for example, whether to use a round table or a rectangular one. Other choices are apparently dictated by practical circumstances; for example, can the first meeting between the parties be scheduled in the evening, as the plaintiffs prefer? Yet others are simply expedient; for example, what should a mediator do to silence Party A in order to prevent Party B from leaving? An ethical choice implies a principled or value basis for decision making rather than simple expediency, logic, or other legal, economic, or social pressures. However, this distinction may not be very helpful in the context of mediation. Even the most mundane and mechanical decisions have a habit of turning into issues of principle in the volatile climate of conflict. For example, the plaintiff's refusal to meet during the daytime is characterized by the defendants as "typical of their uncooperative stance." Thus the question of scheduling, and how the mediator deals with it, is transformed into an ethical dilemma. The mediator must decide whose preference shall prevail and what values are implicated. Deciding whether or not and how to quiet Party A thirty minutes into his or her monologue raises fundamental questions about the role of parties and mediators in a facilitated dialogue. Some mediators contend that Party A should talk for as long as necessary and that Party B, alone, must decide whether to stay or leave; others argue that the mediator's basic responsibility is to ensure an equitable sharing of speaking time. Even the design of the meeting table may convey an important message about the values of the mediation process. Bush has noted that the ethical dilemmas identified by practising mediators tend to reflect value dilemmas over the mediator's role. The mediator makes innumerable choices while managing the process and interaction between the parties, and these choices go to the root of the values that the mediation process espouses. Accordingly, each time an intervention is made, there is at least the potential for a principled choice that seeks either consciously or unconsciously to promote those values.

Are there ways to narrow the scope of ethical decision making in mediation? One approach, which excludes apparently trivial or mundane choices, is to conceive as ethical only choices over action or inaction which

---

21 In a survey, practising mediators were asked to identify an ethical dilemma that they had faced in their practice. See "Dilemmas of Mediation Practice", supra note 7 at 43.

22 A similar point has been made about the relationship between conceptualization of the lawyering role and legal ethics. "Legal ethics is the applied philosophy of lawyering; it goes to the heart of what it means to be a lawyer." See A.M. Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) 50 U.T.L.J. 115 at 116.
have the potential to influence the ensuing outcome. Understanding ethical choices as those having the potential to influence outcome is an interesting conceptualization because it highlights the moral responsibility implicit in the mediator's role. However, it could be argued that *everything* a mediator says or does has the potential to influence outcome. Negotiation is an incremental process, and settlement may suddenly materialize, or vapourize, in unexpected and sometimes quite mysterious ways.\(^2\) Part of the complexity of mediation is discerning what does and does not influence the parties and how. Thus, defining ethical decision making as choices that may influence outcomes may also amount to *everything* a mediator says or does.\(^2\)\(^4\) Even if it were possible to draw such distinctions, limiting the characterization of ethical choices to those that influence outcomes probably underestimates the moral complexity and significance of other mediator actions. Choosing to give priority, for example, to the plaintiff's scheduling requirements may have no apparent effect on the outcome of a particular negotiation, but it may influence the defendant's appraisal of the process and their willingness to use mediation again. The reality of mediation is that ethical judgment making occurs constantly, intuitively, and often unconsciously.

If we understand ethical decision making in mediation as any value-based choice, either conscious or unconscious, between alternate courses of action, the range of issues that we understand as ethical expands exponentially. Moreover, some issues which are conventionally described as ethical issues, such as mediator neutrality and freedom from conflicts of interest, begin to look like questions of threshold qualification rather than choices between alternate courses. Mediators appear to confront a unique level of ethical decision making in their work as a consequence of their role in managing party interaction and their responsibility for both the integrity of the process and the comfort of the parties. Other types of third-party intervention, such as the work of judges or arbitrators, do not face the same scope of choice in ethical matters, as they are constrained by external rules and a journey toward a fixed end. The judgments made by mediators in managing party interactions are closer to the strategic choices made by lawyers when they negotiate with opposing counsel. However, unlike mediation, traditional lawyer-to-lawyer negotiations tend to adopt a highly ritualized format which is focused on formulating and rebutting substantive


arguments over the appropriate application of external standards; interaction is significantly less organic than in mediation. Ethical dilemmas tend to arise out of a narrower band of behaviours and actions, and are generally more predictable. Moreover, the framing of ethical responsibility is clearly different for an advocate than for a third party who owes an equal responsibility to all parties. A closer parallel with mediators might be the work of counsellors or therapists, who also work in private sessions with clients, and who exercise a similar discretion in goal setting and issue framing.

IV. CODES OF CONDUCT AND ETHICAL DECISION MAKING IN MEDIATION

Each time a mediator wonders "What should I do in this situation?" and where there are no clear external rules governing the choice of action or inaction, there is the potential for a value-based decision reflecting either an explicit or implicit principle about the goals of mediation. Leda Cooks and Claudia Hale make a similar point when they argue that ethical choices take place in the fashioning of all storytelling and occur "as part of the sense making in everyday, mundane experience." Codes of conduct understand ethical decision making in mediation quite differently. Codes reduce ethical choices to a set of generic principles, fastening on relatively uncontentious virtues for the mediation process, which appear in a virtually identical form across numerous codes of conduct. Ethical issues are identified as discrete topics such as mediator impartiality, conflicts of


29 Ibid. at 61. However, despite the apparent consensus among codes over some of the goals of the process, there is little consistency in professional practice.
Mediating Ethically

interest, and self-determination; ethical dilemmas are those that threaten the integrity of these principles. Codes of conduct for mediators also assume that it is possible to describe and regulate the process of dialogue and the content of dialogue quite separately. Principles for process management dominate codes of conduct for mediators and often precede the commencement of dialogue (for example, principles governing set-up). This dichotomy permits the development of a core of principles for process management in mediation which are presented as applicable regardless of context and circumstance. Separating process and content in this way obscures the dynamic relationship between the process and content of dialogue in mediation,\(^3\) and serves to further distance codes from the practical exigencies of ethical decision making.

The mismatch between the assumptions of codes of conduct and the ways in which ethical dilemmas actually arise in mediation leads to a series of further problems, three of which are highlighted below.

A. A Right-Wrong Paradigm of Action

A general premise of professional codes of conduct is that the ethical dilemmas of practice admit of morally “right” and “wrong” responses which are applicable to others acting in similar situations. To the extent that this is the case, agreement on shared standards of professional practice may answer questions of alternate principled choice. Sometimes these standards are determined by laws or regulations external to the ethics code itself. For example, engineers “shall approve only those engineering documents that are in conformity with accepted standards” and they “shall not complete, sign, or seal plans and/or specifications that are not in conformity with applicable engineering standards.”\(^31\) The practical utility of promoting professional approaches within a code of conduct largely depends on the extent to which particular ethical dilemmas, and the circumstances under which they arise, can be accurately predicted.\(^32\) For example, following a series of recent accounting scandals, the American

---

\(^30\) See S. Cobb, “Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation” (1991) 7 Negotiation J. 87. This suggests that the distinction drawn in Coyle, supra note 2 at 636-67 between the procedural and substantive dimensions of fairness is a false dichotomy.


\(^32\) However, a dilemma that can be readily anticipated and easily identified, because a clear and uniform best practice has been set out, is no longer a true dilemma but rather a formalized professional response.
banking industry is currently engaged in discussions over the development of appropriate standards for risk management and disclosure responsibilities for financial institutions. The debate over revisions to the so-called risk-based capital management functions of banks is centred around agreements on standards which can anticipate (by applying minimum capital requirements), and forewarn (via a supervisory review process) in order to reduce the chances of excessive exposure and risk. While there will always be room to argue over the cases-by-case application of any such rules, they are a good example of a professional ethical response to circumstances that can be anticipated, and where the appropriate ethical response—to protect banks and their investor clients by minimizing risk—is self-evident.

In other types of professional practice, a particular problem may arise fairly regularly, for example, the use of apparently “bad faith” negotiation tactics in mediation. In this case, both the problem and the appropriate ethical response are less amenable to clear definition. An exception is the rare instance where this problem occurs in an extreme manner. Ordinarily, the identification of the problem is a function of the context in which it arises; in turn, the context affects the appraisal of how to respond. The ambiguities created by context may be even more pronounced where, as in mediation, ethical dilemmas characteristically arise from the management of human relationships rather than procedures (for example, accounting auditing) or events (for example, trading insider information). The types of ethical dilemmas that arise in the course of managing client relationships are also likely to be less predictable, making the exercise of individual discretion inevitable. Where discretion is intrinsic to professional decision making, it is generally a response to unique circumstances, and thinking of ethical choices in terms of “right” and “wrong” becomes increasingly problematic. Some professional codes explicitly acknowledge the reliance placed on individual judgment and recognize that this will critically shape the actual implementation of formal

---

33 See “Bank for International Settlements Committee on Banking Supervision”, online: American Bankers Association <http://www.aba.com/industry+issues/gr_re_bis_rbc_sum.htm> (date accessed: 3 July 2002). The present regulations which are contained in the 1988 Capital Accord are considered to be insufficient in light of evolving financial services and products.

34 For example, persisting by threats or using abusive or offensive language. The most extreme and obvious example of process abuse that I have come across in my practice occurred when a plaintiff used the mediation meeting as an opportunity to serve court documents on the defendants who had travelled two hundred kilometres to attend in a good faith attempt to resolve the dispute.
guidelines. Where individual discretion is integral to decision making, a professional code of conduct can provide a common set of values and a starting point for thinking about ethical choices; but its usefulness may depend on how far the specific profession is prepared to recognize and tolerate diversity. Within the mediation community, there is a widespread assumption that there is, and should be, diversity in practice. Practitioners are expected to have a significant degree of personal autonomy in steering the mediation process in the direction they believe best, and the exercise of individual discretion permeates every mediator behaviour promulgated by codes of conduct. All the more striking, then, is the presentation of codes of conduct for mediators as universal moral principles for practice, and the absence of any acknowledgment of the critical role of individual judgment and discretion.

Choices made while exercising professional discretion will always reflect the mediator's personal values and experiences, including those that precede and supercede a particular mediation. For example, the manner in which mediators choose to deal with high emotions reflects the meaning they construe from this behaviour. Rather than being universal in nature, or somehow beyond cultural differences, the experiencing of emotion, and our responses to it, rest on particular cultural meanings and consequent moral orders. Some mediators respond to destructive behaviours by being directive and controlling; others prefer to let storms blow over by themselves. Some feel that emotions play an important role in mediation; others do not. Personal values are neither fixed nor static; the mediator's personal response to this conflict, and these particular parties, is also affected by the dialogue emerging between them. In each case, there is a relationship between the espoused values of a particular code, or the

---


36 S.C. Grebe, K. Irvin & M. Lang, “A Model for Ethical Decision Making in Mediation” (1989-90) 7 Mediation Quarterly 133 at 142-43. For a case study that raises a particularly explicit personal moral issue, see Part VII.

37 Feminist theory uniquely emphasizes the significance of individual, experiential, and affective responses to the world. See e.g. J. Macfarlane, “A Feminist Perspective on Experience-Based Learning and Curriculum Change” (1994) 26 Ottawa L. Rev. 357 at 379-82.

mediation philosophy to which a mediator subscribes, and the mediator's intuitive choices and assumptions. Occasionally, espoused values are thoroughly internalized and mesh seamlessly with personal values; however, there will often be some, perhaps unarticulated, tension. Where there is unresolved tension between these two influences on decision making, this dissonance will likely be resolved in favour of intuitive values.  

The centrality of personal discretion to mediation practice means that ethical practice must respond to the unique situational constraints and possibilities of each mediation, whereas ethical standards are unable to do so. The context of any one dialogue, including the evolving interactive dynamics, inevitably impacts any absolute standard. For example, decisions on whether or not to settle, and for what, always occur within situational constraints. Generally, each negotiating party enjoys some degree of power—whether moral, legal, practical, or simply nuisance—and also experiences some constraints on their preferred courses of action as a consequence of the power held by the other side. If a party knows that a continuing conflict will expose them to the verbal hostilities of their opponent who may have the power to damage their reputation, business interests, or relationships with others, does agreeing to settle diminish their self-determination, or is it a pragmatic appraisal of their best interests? What should a mediator do when one party's decision will apparently be affected by the relative power and authority of the individual making promises on the other side? In practice, the mediator must judge the acceptable levels of free will and coercion within the context of the particular relationship, the discourse between the parties, and the interaction between the parties and the mediator, including any bargains, explicit or implicit, that have been made over how the process will be conducted. The mediator must be sensitive to party needs and expectations, including the cultural norms of the parties and what is at stake for them,

---

39 See generally Educating the Reflective Practitioner, supra note 18. See also the discussion in Part V at 24-25.

40 In my experience, a complex power dispersal is far more common than a clear power imbalance, although some negotiations do inevitably manifest this type of clear inequality. For an excellent analysis of the possible sources of power in negotiation, see B. Mayer, "The Dynamics of Power in Mediation and Negotiation" in C.W. Moore, ed., Practical Strategies for the Phases of Mediation (San Francisco: Jossey-Bass, 1987) 75; B. Mayer, The Dynamics of Conflict Resolution: A Practitioner's Guide (San Francisco: Jossey-Bass, 2000) c. 3.

41 The cultural norms of the parties will be an important variable in comparing party behaviour to any given standard. Michelle LeBaron Duryea makes a similar point in relation to performance assessment standards for mediators, arguing that it is misleading to imagine that these could be complied in a culturally neutral manner. See M. LeBaron Duryea, "The Quest for Qualifications: A
and the stage the dispute is at because behaviour might also reflect the ebb and flow of escalation and de-escalation. What might be unacceptable in one context might be regarded as part of the expected rough and tumble of settlement negotiations in another. In these ways, the principle of self-determination is constantly mediated by the realities of power and accountability, and the formal definitions provided in codes of conduct can be contrasted with the nuance and subtlety of the dialogue which actually takes place.

The exercise of personal discretion in the real-time context of mediation means that what appears to be the right choice in one situation may not be right in another. Outside the internal coherence of a particular mediation philosophy, there can be no clear and universal basis for determining a morally superior choice. In this way, the whole notion of ethical behaviour is problematized within the context of mediation. In fact, a search for "right answers" or "moral solutions" to ethical dilemmas may undermine the hallmarks of facilitative mediation practice, namely contextual responsiveness, openness, and flexibility. Mediators confronting ethical dilemmas, as they are defined in this article, are more likely to be looking for the "best" course rather than a universal "right" one. While they may certainly wish to avoid a "wrong" decision which might harm the parties or the process, they are unlikely to find an uncontentious and universally applicable solution to any of the dilemmas they encounter in practice.

B. Standard-Setting "Snapshots"

Any standard-setting instrument must determine at what temporal point the given standard will apply; it must create a "snapshot" or series of snapshots for evaluation purposes. This immediately raises structural problems for codes of conduct for mediators. Codes developed for mediators usually focus on principles for pre-mediation set-up such as ensuring the mediator's impartiality, lack of conflicts of interest, the


42 See e.g. "SPIDR Code of Conduct", supra note 7, ss. II, III; "CBAO Model Code of Conduct", supra note 7, ss. IV, V; "Standards of Practice for Family and Divorce Mediation", supra note 7, s. IV; and "CDRC Standards of Practice for California Mediators", supra note 7, s. 2.
guarantee of confidentiality throughout the entire process, and that the parties understand the process they are about to engage in, as well as the evaluative criteria for the mediation’s conclusion, should an agreement result.

Codes of conduct quite reasonably assume that ethical dilemmas can often be avoided by planning for readily anticipated issues. However, while there are important preliminary questions about the mediator, process, and preparedness of the parties, ethical dilemmas also emerge during mediation despite careful attention to set-up; only so much can be predicted in advance. The other structural premise of codes of conduct is that mediation processes will be judged primarily by their outcomes. Consequentially, codes generally include standards for evaluating final outcomes such as the importance of informed decision making and party self-determination, the absence of any coercion or pressure to settle, and sometimes the reasonableness and fairness of the outcome itself. Of course, it is easier to apply standards to concrete outcomes than to other moments in the process or to the experience as a whole. For example, did the parties feel fairly treated throughout the process? Did they feel that the mediator always took their concerns seriously? Did they at any time feel coerced? Consider code provisions on self-determination. These are

---

43 See e.g. “SPIDR Code of Conduct”, supra note 7, s. V; “CBAO Model Code of Conduct”, supra note 7, ss. VI; and “Standards of Practice for Family and Divorce Mediation”, supra note 7, s. VI.

44 See e.g. “CBAO Model Code of Conduct”, supra note 7, s. VII(1); “Standards of Practice for Family and Divorce Mediation”, supra note 7, s. III.

45 Interestingly, a similar approach to specifying the conditions for set-up is found in “APA Ethical Principles of Psychologists and Code of Conduct”, supra note 35. Specifically, Rule 4.02 imposes the obligation to ensure that the patient begins therapy only after giving informed consent to treatment and Rule 5.01(b) requires a discussion of confidentiality and its limitations to occur “at the outset of the relationship and thereafter as new circumstances may warrant.” Other than the need to possibly revisit the issue of confidentiality, there is little guidance about how to manage the ongoing patient relationship aside from Rule 4.05 which strictly prohibits sexual relationships with patients.

46 Examples include “Standards of Practice for Family and Divorce Mediation”, supra note 7, s. X(d) which requires the mediator to terminate the mediation if “a reasonable agreement is unlikely”; “SPIDR Ethical Standards of Professional Responsibility”, supra note 7, s. 6 which requires the mediator to ensure that agreements “will not impugn the integrity of the process”; and “Florida Rules for Certified and Court-Appointed Mediators”, supra note 7, r. 10.042(b)(3) which terminates “the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process.” See also “SPIDR Ethical Standards of Professional Responsibility”, supra note 7, s.v. “unrepresented interests”; “Standards of Practice for Family and Divorce Mediation”, supra note 7, s. VII(b) which ensure that any third parties’ interests which may be affected by a settlement are taken into account in a final agreement.
generally expressed in terms of the final result; for instance, “voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute.” However, practising mediators know that it is common for parties to admit, at the successful conclusion of negotiations, to feelings of coercion earlier in the process, overridden by a sense of relief that an agreement has been reached. Does this mean that mediators have failed in their ethical duty to ensure self-determination? How far do mediators encroach upon self-determination when they encourage the parties to stay in the process and keep trying for a solution? If the parties are ultimately happy that they did continue, is it only the end result that matters? If so, what about second thoughts a week later? Do these considerations matter for an ethical standard of self-determination?

Focusing evaluative criteria on outcomes is more than simply methodologically expedient; it also assumes, borrowing from the adjudicative paradigm, that what matters most to the disputants is the outcome. The focus of codes of conduct on beginnings and endings seems to reflect the assumptions of the adjudicative process, which is primarily evaluative in function and in which, as a consequence, results are understood to be what matters. In a trial process, every choice and every step is directed at the substantive evaluation of the contentious issues and their final determination. As a result, success is measured by outcome. Mediation is quite a different process with no fixed end point. Ongoing decisions over process may reflect other goals such as enabling each party to contribute their perspective to the dialogue, explaining and clarifying the sources of the conflict, or encouraging collaborative problem solving by the parties. Mediation is as much a process, replete with ongoing negotiated understandings, as it is a result. The “snapshots” represented by

---

47 “CBAO Model Code of Conduct”, supra note 7, s. III(1).

48 Of the codes reviewed for this article, only the “Florida Rules for Certified and Court-Appointed Mediators”, supra note 7, r. 10.310, refer to the mediator’s need to protect party self-determination.


50 Cooks & Hale, supra note 28 at 58.
beginnings and endings which dominate standard-setting in codes of
court for mediators are but a fragment of this process. Instead, the
expanded definition of what amounts to ethical choices suggested in this
article shifts the focus from an evaluation of end result, or proper
procedure in mediation set-up, to the choices made in the course of micro-
managing the dialogue between the parties.

C. When Standards Collide

Another problem inherent in a standard-setting model is its
inability to deal with the potential tension between competing principles or
goals. The mediators in Bush's 1989 study identified the collision of
standards within the context of any one intervention as a persistent
dilemma; inevitably, some goals and values in mediation may be competing
and may need to be balanced.51 How should mediators balance their
responsibility to strongly advocate for a problem-solving solution while
ensuring that the parties do not feel any pressure to remain in the process
if they prefer to withdraw? Codes of conduct, constructed as a set of
universal moral precepts, do not provide the means to resolve this tension;
no existing code of conduct for mediators acknowledges this problem nor
establishes priorities for weighing or choosing between standards.52 For
example, what should a mediator do when one party reveals information in
caucus which they want to keep confidential but the lack of knowledge on
the part of the other party may jeopardize the principle of informed
consent?53 Should the mediator exert energy into a strategy that prioritizes
genuine acknowledgment of the one party's concerns (the principle of
respectful dealing) over encouraging that party to disclose vital information.

51 K. Gibson, "The Ethical Basis of Mediation: Why Mediators Need Philosophers" (1989-90)
7 Mediation Q. 41. For a case study of an ethical dilemma in which two conflicting principles were
involved, see Grebe, Irvin & Lang, supra note 36 at 140-46. For an interesting discussion of the tension
created between mediator techniques to persuade the parties to move their negotiations along, and
party voluntariness and autonomy, see D.E. Matz, "Mediator Pressure and Party Autonomy: Are They
Consistent with Each Other?" (1994) 10 Negotiation J. 359. See also Coyle, supra note 2 at 645 for a
discussion of the potential for conflict between the duty to ensure fairness and respect for party
autonomy, and confidentiality.

52 Compare the "Canadian Code of Ethics for Psychologists", 3d ed., s.v. "When Principles
Conflict", online: Canadian Psychological Association <http://www.cpa.ca/ethics2000.html> (date
accessed: 27 May 2002) which addresses the problem of conflicting principles by anticipating that
ethical principles, in some circumstances, will conflict and therefore each principle can not possibly be
given equal weight. To deal with this problem, a general order is suggested for its four key principles.

53 "Dilemmas of Mediation Practice", supra note 7 at 41.
(the principle of full disclosure)? Most of the scenarios collected by Bush in his 1989 study of mediators reflect an unresolved collision of values. Each one is relatively uncontroversial as a single principle, but is problematized when their application places other key values at risk.

The problem of competing principles may be seen as the result of a contradiction between party autonomy and empowerment, and third party intervention inherent to many, if not all, mediator strategies. This is sometimes described as the "strange loop" made by the joining of often apparently contradictory impulses in mediation, for example, the mediator's commitment to neutrality, while also being committed to structuring a dialogue in which each party is able to fully present his or her own case.54 Achieving the goal of a disclosing, communicative exchange in mediation almost certainly requires the mediator to be something other than neutral, in the sense of refraining from intervention. Instead, intervention may be held up to a standard of non-partisan fairness or impartiality.55 Maintaining impartiality while intervening to facilitate productive dialogue by encouraging or even coaching reticent or inarticulate parties requires the mediator to perform a delicate balancing act. This "interactive paradox"56 is the source of many of the tensions between competing principles and goals widely encountered by practising mediators.

Perhaps as a consequence of this inherently paradoxical dimension of the mediator's role, the types of conflicts between competing principles that arise in practice do not seem readily susceptible to prioritization. For example, is the higher ethical imperative party self-determination or the protection of vulnerable parties from inappropriate pressure from the other side or the mediator? Does the protection of personal privacy and the honouring of undertakings regarding confidentiality have a higher moral value than commitment to full and frank disclosure? These values appear to be incommensurate; that is, they represent different world views and realities that cannot be "mapped onto," expressed as, or reduced to the other.57 The competing values are neither integrative, nor do they cancel one another out; instead, the result is some gain and some loss of another

55 See the extensive discussion in "Trusted Mediator", supra note 17 at 318-32.
56 Rifkin, Millen & Cobb, supra note 54 at 154.
57 Pearce & Littlejohn, supra note 38 at 15.
principle. Thus, each case requires some judgement in order to determine what gain and what loss is ethical.

A standard-setting model, however, exacerbates rather than resolves these tensions between values. The assumptions of a right-wrong paradigm—that the practice of ethical mediation is susceptible to universal and paramount moral principles—cannot accommodate the complexity of either incommensurability or the "strange loop." A simplified approach within the standard-setting model would be a hierarchy of obligations in which mediators are directed to prioritize certain principles over others. This would offer some general guidance and create a semblance of predictability around ethical decision making. However, a hierarchical approach can only externalize and objectify values such as impartiality, confidentiality, and fairness that consistently collide in practice, thus removing them from the reality of the interaction itself and compounding the inherent limitations of the standard-setting model described above.

V. NEW WAYS TO THINK ABOUT MEDIATION ETHICS

Re-framing the questions about when and how mediators make ethical choices demonstrates the need for a methodological approach that avoids the "standards trap." Indeed, efforts to regulate ethical behaviour using codes of conduct may inadvertently reinforce the assumption of mediation's most vocal critics, namely that what occurs in the interaction between parties and mediators can be anticipated and generalized regardless of context. There is an implication that problems in mediation arise mostly in procedural ways—usually by one party taking over and manipulating the process and the outcome—so that a more complete set of external constraints and standards would either avert or address these problems. A common complaint is that the failure of some mediators to recognize and sanction bad behaviour in mediation, perhaps by terminating the process, is evidence of the danger of exposing vulnerable parties to such

58 See ibid. at 15ff for a discussion of the application of the concept of incommensurate ends to conflict analysis.
59 "Dilemmas of Mediation Practice", supra note 7 at 44.
a level of procedural informality.\textsuperscript{62} While concerns over the potential for process abuse are justified, and there is some evidence to suggest that mediators fare poorly in identifying and responding to such behaviours, both in individual cases and at a systemic level,\textsuperscript{63} it is misleading to imagine that oppressive or inappropriate party behaviour can be captured by generic descriptions within codes of conduct. Codes that attempt to provide classifications and definitions of bad behaviour and follow these with prescriptions about appropriate responses by mediators reinforce the widely held misconception that it is possible to describe and prescribe behaviour and response in mediation independent of context. In this way, codes of conduct for mediators appear to be guilty of raising expectations about ethical certainties that cannot be met. It seems similarly unrealistic to imagine that the personal awareness of mediators who are slow to recognize the signs of intimidation and domination will be affected by a standard in a code of conduct. The discussion undertaken each time a new code or benchmark for liability standards develops may be absorbing and useful for those directly involved, but is unlikely to have a long-term impact on either the ethics or competence of the profession as a whole.\textsuperscript{64}

In order to achieve such results, we need to redirect our efforts toward uncovering and critiquing the basis for an ethical choice in a given situation and examining its impact, rather than determining whether it was the “right” choice. The outcomes of ethical judgments by mediators must be supported by the reasoned and contextual perspective of that mediator and that mediation. This epistemological approach to ethical decision making reflects feminist theories of knowledge which understand truth as contextual and therefore forever fluid.\textsuperscript{65} This enables the development of a process in which individual and experiential truths can be identified, deconstructed, and shared. The resulting ideas about good practice would


\textsuperscript{64} Recent research on the impact of ethical codes on maintaining standards of professional behaviour among lawyers has suggested a similar problem. There is a further suggestion that the existence of ethical codes serve to limit or inhibit individual reflection and reasoning about moral problems. See M.A. Wilkinson, C. Walker & P. Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill L.J. 645.

have the same character as the communicative agreements made between parties in mediation as they attempt to coordinate their different understandings and to develop a joint approach that reflects the context of a particular set of circumstances rather than any universal truths. Such an approach has been described as “discursive ethics”\(^\text{66}\) and demands a commitment to a transparent professional culture of ethical mediator behaviours. The first step is the development of self-conscious reflection on practice and the enhancement of commensurate skills and attitudes.

The reflective-practitioner model was first developed by Donald Schö\(\text{en}\) and Chris Argyris in the 1970s and 1980s, and has become highly influential in a number of professional fields and disciplines.\(^\text{67}\) This approach to professional education and training attempts to bridge the gulf between the acquisition of professional knowledge and competence in practice. It does so by challenging the traditional assumption that professional knowledge can be systematized and taught as facts, rules, and procedures which can then be instrumentally applied to practice situations.\(^\text{68}\) Instead, what Schö\(\text{en}\) describes as “professional artistry” requires the capacity to deal with unique and uncertain areas of practice by drawing on past experiences and by constantly experimenting and revising.

A reflective-practice model requires each practitioner to develop a capacity for reflective self-analysis of their effectiveness in practice situations and to adopt a systematic approach to the learning that accrues. Reflective practice increases professional effectiveness by enhancing awareness of the impact of contextual factors and constraints, raising the level of responsiveness and flexibility, and emphasizing self-growth which builds on experience. Research consistently demonstrates that the individual practitioners considered by their peers to exemplify excellence are significantly better than both novices and their more experienced colleagues at successfully integrating their new experiences into their existing models of action and knowledge.\(^\text{69}\) Simply put, they are better at

\(^{\text{66}}\) Cooks & Hale, supra note 28.

\(^{\text{67}}\) See Theory in Practice, supra note 18; Reflective Practitioner, supra note 18; and Educating the Reflective Practitioner, supra note 18.


learning from their experiences because of their superior ability to analyze and synthesize those lessons.

Reflective practice seems to offer the potential for self-conscious and context-responsive approaches to ethical choices in mediation without advocating for a single "right" way. Indeed, Schön and Argyris describe their approach as particularly apposite "for individuals struggling with difficult current problems, especially ones which have been avoided or covered up." The reflective-practice model is heavily influenced by a constructionist perspective; practitioners are seen as actively involved as they apply their personal values and assumptions to the many unique and indeterminate areas of practice, and map out professional behaviours and actions. On the surface, professional education and codes of professional conduct convey the impression that there is a single map and that it is dominated by the so-called technical-rational model. Schön's rejection of the technical-rational model of professional practice means that rather than simply dealing with things as they are, all professionals—musicians, artists, lawyers, managers, doctors, or teachers—are directly involved in making design choices whenever they engage in decision making under anything other than routine or predictable circumstances. If professional roles are conceptualized in this way, there can no longer be an assumption of absolute standards for truth or professional effectiveness in any given area. Instead, choices may be truthful or effective when analyzed within a specific frame, such as a particular intervention or mediation, and comparisons across different frames, while not impossible, become complex.

The most effective practitioners, argues Schön, are those who are able to engage in "frame reflection," in which they expose their values, strategies, and assumptions to analysis and evaluation. At its highest level, this type of reflection aims to make explicit the tacit cognitive assumptions over practice choices. The aim is to uncover what Schön describes as the

---

70 Theory in Practice, supra note 18 at xxiv.
71 Similar assumptions about the actor's role in conflict and conflict resolution are reflected in the work of John Paul Lederach. See e.g. J.P. Lederach, Preparing for Peace: Conflict Transformation Across Cultures (New York: Syracuse University Press, 1995).
72 For a more detailed discussion of this dimension of Schön's work, see "Look Before You Leap", supra note 68.
73 Educating the Reflective Practitioner, supra note 18 at 217-18.
practitioner's "theory-in-use." Because individual theory-in-use inevitably only represents truth within a particular frame, the sharing of individual "theories-in-use" and the commitment to constantly monitor and publicly test decisions are central to Schön's methodology of reflective practice. The reflective-practice model seems especially appropriate to a field such as mediation that is at an early stage of professional and self-conscious development, and to a form of intervention that is so diversified, unregulated, and context-dependent. As an examination of "practitioner cogitation," it focuses on teasing out the values and assumptions behind the choices often made intuitively by mediation practitioners when they face ethical dilemmas in the course of their practice and the values they imply. These values can then be debated, critiqued, and diversified across different frames of action.

As a contribution to the sharing of mediation narratives which might enable the development of a reflective approach, I describe below two mediation sessions that raised especially difficult ethical dilemmas. Having confronted the limits of codes to resolve my ethical dilemmas in each case, I analyze and evaluate the choices I made and try to uncover my theory-in-use, the hitherto unarticulated basis of the on-the-spot choices which emerge in mediation. I have included brief descriptions of other mediation sessions which presented similar or related dilemmas.

VI. CASE ONE: ANTHONY'S STORY

In this case, the dilemma confronting my co-mediator and I was the level of comprehension of one of the parties to a proposed agreement. The agreement actually favoured this individual, but its breach would carry negative consequences—in all likelihood, an eviction. The absence of legal counsel or other strong personal representation for this individual exacerbated our concern over the possible lack of comprehension.

---

75 Theory in Practice, supra note 18 at 6-18.
76 This is the opposite to the defensiveness that characterizes professional decision making where there is little emphasis on reflection, which Schön describes as "Model I" learning. See Educating the Reflective Practitioner, supra note 18 at 257.
78 In each case, the parties' names and some other facts have been changed in order to safeguard anonymity. I have included references in each case study to code of conduct principles that appeared, at first glance, to be relevant to the dilemmas that arose, in an attempt to connect the universal prescriptions of the codes to the exigencies of these particular situations.
Anthony was a tenant in an apartment building belonging to Joe. Joe had known Anthony and members of Anthony’s family for many years. Anthony owed significant rent arrears to Joe. There were also complaints that Anthony had been bothering other tenants by making noise and knocking on their doors late at night. Anthony’s health had declined in recent years and he had experienced periods of deep depression. His social worker reported that he sometimes became confused and occasionally had difficulty separating fact from fiction, but she assessed him as able to participate in the mediation and to comprehend the basis of any proposed settlement. She was scheduled to accompany Anthony to the mediation, along with a clinic lawyer. Joe would attend with a paralegal. Having had some previous experience working with individuals with mental health or developmental disabilities, I was optimistic that Anthony would find mediation both helpful and manageable so long as special care was taken to slow down the process, take frequent breaks, and ensure that everything was clearly explained.

The clinic lawyer representing Anthony arrived five minutes before the mediation’s start to inform us that the clinic would no longer represent Anthony because they found him difficult to deal with and had trouble obtaining clear instructions from him. Anthony said that he was happy to be rid of a lawyer who did not listen to him. Concerned with the power imbalance resulting from only one side being legally represented, we asked Anthony if he wanted to adjourn the mediation in order to retain another lawyer. Anthony said that he wanted to avoid any delay because he had a court date scheduled for later that week. We explained that the court date could also be adjourned, on consent, but Anthony was adamant about proceeding.

Thirty minutes into the mediation, Anthony started to ramble. He seemed unfocused and frequently launched into long, complex stories that appeared, we thought, to be irrelevant to the issues that had been identified by both parties. After an hour, in addition to the difficulty of maintaining focus, Anthony also appeared to be confused about some of the dispute’s basic details. For example, he now claimed to own the building in which he lived as Joe’s tenant. When this was addressed, it appeared that Anthony understood himself to be the landlord’s agent since he had, in the past, collected rents from the other tenants on the landlord’s behalf. Anthony

---

79 The issues identified by the parties were rent arrears, complaints from other tenants, Joe and Anthony’s long-standing personal relationship, and Anthony’s expressed interest in purchasing the building.
had also discussed buying the property from the landlord a few years ago, when he was in better health and financial circumstances. It was difficult to know how far Anthony was using the claim of ownership as an analogy for his hopes and feelings about his residence, and how far he held this claim literally.

At around the same time, approximately ninety minutes into the mediation, the basis of an agreement began to appear. Joe had applied to the court to evict Anthony for rent arrears. He was now willing to give Anthony time to pay the arrears and to also investigate his finances to determine whether he could in fact buy the property. This did not seem likely since Anthony had a low income and no savings, but throughout the mediation he had repeatedly stated that he wanted to explore financing options. In return, Anthony was asked to stop making the alleged noise that had been disturbing the building’s other tenants, and to desist from knocking on doors claiming to collect rents on the landlord’s behalf. From discussions with first Anthony, and then Joe, in private caucus, it was evident that both were eager to draw up and sign this agreement. Anthony's social worker seemed relieved that such an agreement would, at a minimum, buy her client some time since a court hearing had been scheduled for the following day to obtain an eviction order. Asked on several occasions, including in private caucus, for her view on whether Anthony fully comprehended the details of the proposed agreement, the social worker refused to be drawn into a discussion. Although the agreement favoured Anthony, it did have some negative consequences if he failed to pay the rent arrears and continued to disturb other tenants. In these circumstances, Joe would certainly bring Anthony back to court and if it could be shown that Anthony had not kept his obligations under the agreement, an eviction order would almost certainly be made.80

After a short break in which we conferred privately, my co-mediator and I concluded that we would not allow Anthony to sign this agreement because he did not appear to fully understand it or its possible consequences. We made this judgment in the moment and on the spot rather than on the basis of expert advice. The most important factor was that neither of us felt comfortable proceeding. Back in the mediation session, we explained our concerns and our decision to the parties. Anthony was very unhappy, repeating that he wanted to sign. Joe was also unhappy since he wanted to make peace with Anthony. The parties were free, we

---

80 See Tenant Protection Act, S.O. 1997, c. 24, ss. 61(1), 69(1).
explained, to make their own agreement but we could not continue in this role with them.

Codes of conduct conventionally emphasize twin principles of client self-determination (if Anthony says he wants the agreement, the mediator has no reason to argue with him), and informed choice\(^8\) (all possible implications of making this agreement must be fully explained, understood, and accepted). However, codes are not clear about the relationship between these two principles. In practice, ambiguity over what constitutes informed choice means that there is often tension between this and self-determination, as there was in this case. If the “self” of self-determination is also the sole arbiter of what constitutes an informed decision, then the appraisal is an internal, personal one with no role for the mediator. Most codes suggest that mediators, at a minimum, have a responsibility to encourage informed choice; most mediators probably understand themselves as having at least some responsibility for appraising the sufficiency of a party’s relevant knowledge and comprehension when reaching a decision. However, it is less clear what the moral and practical scope of the mediator’s responsibility is in this regard. In an apparent effort to limit the mediator’s responsibility for ensuring informed choice, the SPIDR Code of Conduct, along with several other codes,\(^2\) distinguish between the responsibility to ensure that the parties are aware of the importance of informed decision making—for example, by encouraging them to consult with another professional—and the responsibility to ensure that the parties actually make an informed choice. The SPIDR Code of Conduct limits the obligations of the mediator to the former. Some codes suggest that to go further than ensuring a party is aware of the importance

\(^8\) See e.g. “CBAO Model Code of Conduct”, supra note 7, s. III(4) which states that mediators have a responsibility to advise unrepresented parties to obtain legal advice, or to consult other professionals in order to make informed decisions; “Standards of Practice for Family and Divorce Mediation”, supra note 7, s. VIII(a) which states that “[t]he mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement...” An interesting parallel definition of “informed consent” can be found in “APA Ethical Principles of Psychologists and Code of Conduct”, supra note 35, p. 4.02(a) which states that “informed consent generally implies that the person (1) has the capacity to consent, (2) has been informed of significant information concerning the procedure, (3) has freely and without undue influence expressed consent, and (4) consent has been appropriately documented.” However, unlike most mediators, psychologists have relevant professional training in order to make an assessment of clinical capacity to consent. Furthermore, the type of additional external information significant to consent likely differs for individuals involved in legal disputes than for patients undergoing psychological examinations.

\(^2\) “SPIDR Code of Conduct”, supra note 7, s. I, s.v. “Comments”; “Dilemmas of Mediation Practice”, supra note 7, s. IV(d) at 52-53.
of informed choice may compromise party self-determination. The Florida Rules for Certified and Court-Appointed Mediators state that mediators must "not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however a mediator may point out possible outcomes of the case and discuss the merits of a claim or defence."  

This particular dilemma is a good example of the inadequacy of decontextualized theory to prescribe practice in mediation. In practice, the distinction between making someone aware of the importance of an informed choice and being satisfied that they actually are informed, is tenuous. The distinction only works if the disputant comprehends what it means to be informed or to receive outside advice, whether or not they choose to do so; this may be an issue for clients other than those with specific mental health or developmental disabilities. Even then, this may be a tautology; how can a disputant fully appreciate the significance of informed choice unless they have been informed about other available options and choices? Code provisions also leave outstanding and unacknowledged the question of how to appraise individual understanding of the significance of informed choice. This varies for every mediation client and each mediation. What it might mean to satisfy oneself that a party such as Anthony understood the importance of informed choice would be completely different than with a commercial client experienced in litigation.

Some argue that one way to resolve this dilemma is to impose a minimal requirement that no party to meditation makes an agreement without having first had access to independent legal advice. For example, the Professional Standards of Practice for Mediation of the Mediation Council of Illinois state that "the mediator should ensure that each of the participants has an understanding of, as well as a reasonable opportunity to weigh, the application of appropriate legal information to his or her situation before reaching an agreement." This enables the disputant to appraise a settlement offer by situating it within an alternative (legal) frame of reference. A more constrained view of this principle is that independent legal advice should always be provided where legal rights are given up in exchange for the settlement. The Standards of Practice for Family and Divorce Mediation states that the mediator should assist parties to obtain

---

83 "Florida Rules for Certified and Court-Appointed Mediators", supra note 7, r. 10.370(c).
84 "Standards of Professional Practice for Mediators, Illinois", supra note 7, s. VI.
independent expert advice where it is necessary for informed consent or "to protect the rights of a participant." Consequently, a mediator should withdraw where a disputant either has no access to, or refuses to obtain, legal advice. But what should a mediator do when a client insists that he or she does not want—perhaps because he or she cannot afford or does not see the relevance of—independent legal advice before making a decision to settle? These provisions further assume not only that parties have ready access to legal advice, but that this advice will be, or will be perceived to be, relevant and practical to their bargaining choices. Where the law is difficult to enforce, legal rights may seem a lot less relevant to the client than to the lawyer. In the area of landlord-tenant law, examples of difficulties include collection on a default judgment, the collection of tenant interest on rental deposits, or where one party, for personal and practical reasons such as avoiding a search for a new home or a new tenant, prefers peace to conflict.

Even where legal advice is provided, it may be overridden or disregarded for reasons that appear to be contrary to that individual's best interests. Can a person make an informed choice to disregard legal advice when the decision appears detrimental to their interests? In a protracted dispute, especially where a personal relationship between the parties exists, what may appear to be an uninformed or even irrational choice may be comprehensible in light of their relationship. In a case involving a personal debt between a former couple, the debtor insisted that to demonstrate his intent to pay off the debt, he would accept a punitive and illegal level of interest on any failure or delay in paying an agreed installment. The mediators spent a considerable period of time in private caucus canvassing the issue of the penalty rate of interest but were repeatedly told that this conformed to the party's wishes. He saw it as a symbol of his good faith in making and keeping this agreement because he had breached a previous verbal agreement and felt badly about it. Ironically, the agreement could not be drafted according to his wishes. If such a provision had been included, not only would this have rendered the whole agreement

85 "Standards of Practice for Family and Divorce Mediation", supra note 7, s. VIII(a). But it may be difficult to draw this line. In Anthony's case, Joe's settlement offer had no legal disadvantages. However, a judge would almost certainly have ordered eviction in the case of default, which would be regarded as the final straw.

86 See Tenant Protection Act, supra note 80, s. 118(6).

87 Criminal Code, R.S.C. 1985, c. C-46, s. 347 which prohibits interest on loans above 60 per cent per annum and makes charging more than 60 per cent interest, or assisting in drawing up a contract to charge more than 60 per cent interest, an indictable offence. Both the person charging the rate of interest and any individuals assisting in making such an agreement are liable.
unenforceable, but the mediators themselves could have been charged under the *Criminal Code* for facilitating it.

The exhortations of codes of conduct to simultaneously ensure party self-determination and protect informed choice do not resolve these real-life dilemmas for mediators. How can I make sense of my on-the-spot decision in Anthony's case? Was it the right one? I continue to agonize over this case primarily because responsiveness to parties' wishes is one of my core mediation values. My immediate reaction to Anthony's situation and my continued reflections on this case have brought this key value to the surface, and have enabled me to understand this case as the exception that proves the rule. This reflection makes me appreciate how strongly I believe that the client in mediation—however apparently irrational in making a settlement that appears not to be his or her logically best option—must be provided the freedom to make his or her own decisions. This includes disputes where a party has rejected the possibility of access to legal advice, even after being offered free legal advice or other appropriate resources, or has rejected the substantive advice itself. The only restriction I would place on this is that the client must be able to respond to any concerns I raise by describing a clear, self-conscious, and consistent reality—even if that reality is quite different from my own. In making a discretionary judgment about consistency and self-awareness, I do not claim to be value-neutral, but I do commit to recognizing the existence of many realities other than my own. Mediation allows issues and priorities to be framed and dignified within the social reality of each individual, unconstrained, unless by choice, by rules of law or mainstream social norms. For this reason, I resist routinely excluding individuals with mental health or developmental disabilities from mediation, or those without legal representation or access to legal advice. As a mediator, I should only override client wishes under extreme and exceptional circumstances, such as apparent lack of capacity to comprehend the consequences of an agreement. In the absence of any clinical expertise, my intuitive benchmark is whether the reality described and perceived by the client—whether or not it is the same as my own—is described and perceived consistently, demonstrating to me that they are clear about it. Anthony's case presented those exceptional circumstances which required me to override his wishes. As important, however, is the realization that I could not justify such a step where a consistently expressed reality—shaped perhaps by a relationship history, a particular set of needs and circumstances, or a particular set of expectations and aspirations—means that a party regards a particular settlement offer as acceptable, where I see downside risks.

From Anthony's case I also learned that while it is a matter of good practice to anticipate questions of informed choice before they arise, and
to encourage each participant in mediation to work with an external advisor or supporter with whom he or she can discuss possible settlement decisions, it is extremely difficult prior to the commencement of bargaining to predict and control those factors which might be relevant to appraising self-determination and informed choice. These are so highly context dependent that we underestimate their complexity and variability if we assume that a complete assessment is possible in advance of mediation. Setting rules, such as always requiring independent legal advice before mediation, may make unfounded assumptions about the parties and their situation. This means that the responsibility to behave ethically in order to maximize the potential for both self-determination and informed choice requires more than precautionary planning. Such assessments must also take place in the moment and one-on-one at appropriate times during mediation, such as when the parties are contemplating settlement.

VII. CASE TWO: THE DRUG DEAL

Don contacted me and asked if I could help resolve a loan dispute he was having with Clive, a friend and former business partner. Don ran a small credit operation. He said that he had lent Clive money for a business venture which had failed. Don said he had been patient, but now wanted his money back. He had commenced an action against Clive in Small Claims Court. I contacted Clive who expressed great surprise that Don had sought the intervention of a mediator. A mediation time and date was set for the following week.

At the mediation, it transpired that the loan, using standard credit documentation, was for an illegal drug deal. Clive was involved in a much larger operation as a dealer for a consignment of cannabis which was being imported into Canada. Clive had borrowed the money to finance his share of the operation. Apart from supplying financing to Clive, and charging a hefty rate of interest to be financed by the profits of the drug operation, Don was not involved in the drug operation. Both parties agreed that similar arrangements had been made between them several times before. This time, however, the authorities had intercepted the shipment and the operation had collapsed. Clive had already invested his money, and said that he now had no means of repayment. Don reasoned that Clive had taken an ordinary business risk and had failed; he now wanted the loan repaid pursuant to the terms of the agreement. He had commenced a legal action assuming that Clive would not incriminate himself in court by telling the judge what the money was for. In mediation, however, the parties were protected by confidentiality, and both were willing to be open about the
nature and purpose of their transaction, either because the original transaction was illegal, immoral, or both.

Both Don and Clive wanted to resolve this matter without involving more people and before tempers worsened. They negotiated an agreement in mediation which included a partial repayment schedule and some work provided by Clive to Don; Clive was required to paint Don’s offices. A few months later, Don informed me that Clive had completed the agreed work and that the payments were being made. I silently registered some alarm at his apparent enthusiasm about the mediation process, presumably reflecting my ambiguity over my decision to continue to work with the parties once I became aware of the source of the conflict. I was also acutely aware that other mediators might feel that I should have withdrawn as soon as I became aware of the substance of the failed transaction.

References to illegal conduct or activities in codes of conduct are limited to either exceptions to the duty of confidentiality or strictures against allowing the mediation process to be used “to further illegal conduct.” It is not clear how one would distinguish, in any particular case, between the resolution of the issues in dispute, including the illegal behaviour, and “furthering” the illegal activity itself. Another difficulty for mediators is where to draw the line between thoroughly distasteful illegal activities and those which are illegal but more socially accepted and widespread. For example, a number of cases I have mediated involved a measure of tax evasion in the organization of the financial affairs of one or more parties. In one case involving a partnership dissolution, the disputing partners had obviously colluded in the past to disguise actual revenues and to reduce their tax burden. In another case involving several employment disputes, it was clear that the employer was either not paying all the required taxes and benefits, or income was not being declared by the employees. It becomes difficult to distinguish between illegal activity in excluding some cases from mediation, but not others. Perhaps a distinction can be made between illegal activities that are the focus of the dispute itself, as in the drug deal example, and related illegal activities on the part of either one or both parties that come to light as the full story unfolds. Illegal activity uncovered in the course of storytelling which is not part of

88 See “Code of Ethics (Minnesota)”, supra note 7, s. V(5) which stipulates that under these circumstances the mediator must withdraw. The same language is found in the “Comments” in “SPIDR Code of Conduct”, supra note 7, s. VI.

89 This may be be relevant to ascertain the mediator's criminal liability, such as to assess whether they are susceptible to a charge of criminal conspiracy under the Criminal Code.
the substance of the instant conflict between the parties might not be considered to be the mediator’s business. A further distinction might be drawn between illegal activities that cause physical harm or endanger others, and those that do not. However, none of the distinctions described above between more or less socially acceptable illegal behaviours, illegality that is incidental or central to the conflict, or behaviour that causes injury or harm appears in any code of conduct. Aside from the general admonition not to further illegal conduct, existing codes are silent on the question of whether or not to become involved in the mediation of issues arising out of illegal behaviour.

A different question is the issue of mediator liability. Could a mediator who brokers an outcome to an illegal transaction be subject to a charge of criminal conspiracy? When does a mediator have a responsibility to report information disclosed in mediation? One of the possible distinctions described above does appear in this context; most standard terms of mediation make an exception to the mediator’s undertaking of confidentiality when they have learned about something that indicates a threat to human safety. The SPIDR Code of Conduct goes further, stating that the obligation of confidentiality is overridden where disclosure is “required by law or other public policy”; but this potentially allows for wide discretion. It is not clear whether mediators are released from the obligation of confidentiality where, in the absence of a positive requirement or duty to report, they have become aware of illegal activity which they feel should be reported to the relevant authorities; however, most codes of conduct refer to the general obligation to hold information obtained during mediation in the strictest confidence.

Another possible basis for refusing or discontinuing mediation services is the perceived immorality of the substance of the dispute, whether or not it constitutes illegal activity. An individual mediator may

---

90 Below is an example of my own standard terms of mediation.

The mediator shall not disclose to anyone who is not a party to the mediation anything said or any materials submitted to the mediators, except:
1. to the lawyers or other professionals retained on behalf of the parties or to non-parties consented, as deemed appropriate or necessary by the mediator;
2. for research or education purposes, on an anonymous basis;
3. where ordered to do so by a judicial authority or where required to do so by law;
4. where the information suggests an actual or potential threat to human life or safety

91 “SPIDR Code of Conduct”, supra note 7, s. V.

92 See e.g. “SPIDR Ethical Standards of Professional Responsibility”, supra note 7, s. 3, which states “[a] commitment by the neutral to hold information in confidence within the process also must be honored.”
consider some activities and behaviours to be immoral that are constrained by law. For example, common-law relationships may be morally offensive to some mediators on religious or other grounds, making it difficult for such individuals to assist a common-law couple in resolving their separation details. Most mediators must adopt an arms-length approach to the moral circumstances of any conflict in which they are asked to intervene. However, some circumstances may raise moral questions for individual mediators which erode their impartiality—for example, where the behaviour of one party repulses the mediator such as in a case of admitted sexual abuse or domestic violence. Some might further argue that offering mediation to parties whose immoral behaviour has brought them into conflict—a credible view of what transpired between Don and Clive—is inappropriate. This is clearly a precipitous slope but just as clearly, a matter of personal judgment.

A somewhat different perspective on the question of offering mediation in questionable moral or legal circumstances is that such intervention brings the profession into disrepute. Practically speaking, and assuming that mediators conform to their undertakings regarding confidentiality, the substance of private discussions is generally not in any danger of being brought to the attention of either the profession or the public. But regardless of whether such choices are ultimately public or private ones, some mediators may feel bound to consider the impact of their choices directly or indirectly on others in their professional community, and on the reputation of the community as a whole. I am aware that my decision to proceed in assisting Don and Clive to solve their conflict may be subject to criticism on this basis.

I still feel that I made the appropriate decision in assisting Don and Clive. My underlying values or theory-in-use—which also seems to fit other disputes that I have mediated involving elements of illegality—emerges as follows. First, I assume that individuals involved in drug deals can still contract in good faith. I believe that the motivation to make and to keep a bargain exists for all disputants regardless of their previous experiences with conflict or the circumstances that bring them together. Individuals who have behaved unlawfully or dishonestly in other situations may nonetheless make a powerful personal compact in mediation. Second, I would draw

---

93 See e.g. “Florida Rules for Certified and Court-Appointed Mediators”, supra note 7, r. 10.600 which speak of the mediator’s responsibility to “preserve the quality of the profession.”

a clear distinction between cases in which illegal activity has already taken place and directly or indirectly led to the conflict, and those in which the parties wish to find an illegal or morally dishonest solution. The possibility that the parties will propose illegal outcomes or solutions to their conflict raises a different raft of ethical issues. In the case of Don and Clive, their approach to dealing with the outstanding debt was lawful. I routinely inform parties that I will not participate in structuring outcomes which are dishonest or may impact negatively on another person not present, whether or not they are unlawful as such. In Don and Clive’s case, where the illegal activity had already occurred by the time I was asked to intervene, my intervention did not condone or further the illegal drug trade, but rather helped to resolve the consequences of an already broken agreement. By the time I got involved, their conflict was already a reality, and my moral view of their previous behaviour seemed irrelevant. The agreement Don and Clive made in mediation did not enable them to continue with their illegal activities—as with any parties, they may or may not choose to do so regardless—since it did not complete or repair an existing arrangement to buy or sell drugs. It dealt with the fall out of a failed transaction. At the same time, I recognize that had I experienced a strong moral repugnance to their earlier behaviour, for example if they had been involved in selling child pornography or even had the drugs been identified as heroin or cocaine instead of cannabis, I would probably have been unable to work with them. But given the facts as told to me, I understood my task as providing an opportunity for structured de-escalation rather than moralizing about the circumstances that produced the conflict. The potential for private, off-the-record discussions which may alleviate a greater harm is a real strength of the mediation process. As a result of Don and Clive’s case, I am convinced that these types of ethical and personal judgments can only be made on a case-by-case basis and I am skeptical about the utility of distinctions between acceptable and unacceptable moral or legal activities. This conclusion does raise, however, the question of how

---

95 Although even where the outcome is perfectly lawful, as it was in this case, there is the additional question of whether a court would enforce such an agreement as contrary to public policy. This did not seem to be a practical concern for either Don or Clive.

96 This is a far more common ethical problem and one which codes of conduct deal with only tangentially. See e.g. “CDRC Standards of Practice for California Mediators”, supra note 7, s. 3 which states that a mediator should discontinue if he believes that “the integrity of the process has been compromised”; “CBAO Model Code of Conduct”, supra note 7, s. XI(3)(b) which stipulates that a mediator should terminate the mediation if “one or more of the parties is using the process inappropriately.”
to solicit feedback and input in order to ensure that personal moral judgments are not made in a vacuum, without the benefit of supportive scrutiny or hindsight.

As the dispute resolution community and the public continue to debate the question of standards of practice and ethical conduct, my colleagues in this field have a legitimate interest in my decision to offer mediation services where illegal activity has taken place. I have chosen to tell this story because I believe that any risk to my own reputation is more than offset by the importance of such a debate. I have also reflected on how I balanced my obligation to protect the integrity and reputation of the profession with my responsibilities towards Don and Clive. My conclusion is that my moral and professional responsibility to assist the parties in resolving their dispute was a stronger moral imperative here than the potential for my intervention to bring the profession or the mediation process itself into disrepute.

This suggests that my judgment over when it is appropriate to offer mediation is responsive first to client needs, and only secondly to the concerns of those who seek to professionalize and promote mediation services. Responsibility to the broader profession for ethical choices implies a different kind of moral consideration than obligations to the parties themselves; an assessment of the possible wider consequences for the profession as a whole may even be incompatible with making client-centred decisions over particular ethical decisions in individual cases. Learning this lesson through reflection has implications for how I approach the broader issues of the professionalization of conflict-resolution services, as well as for my own practice.

VIII. CONCLUSION

The analysis of my theory-in-use for the cases I have described above suggests some principled basis for my choices. In the spirit of reflective practice, the purpose of laying bare these values and assumptions is not to suggest that they constitute the right answer to these dilemmas, but rather to present some problematic decisions for further debate. The case studies also serve to illustrate the inadequacy of the conceptual and structural frameworks of codes of conduct. The ethical dilemmas presented in these two cases are stark ones. A myriad of less obvious and recognizable

97 An interesting further question is whether this means that my theory-in-use in this case is consistent with or different from my theory-in-use for Anthony's case.
ethical choices arise in every mediation. Recognizing that choices between alternate courses of action in mediation are inherently value-based is critical to the development of a professional culture of ethical behaviours; regarding such decision making as technical, mundane, or merely intuitive (and thereby neglecting to examine it) seriously underestimates the complexity and nuance of decisions over interventions and their responsiveness to context. Understanding ethical decision making in mediation from this perspective places great store on the personal discretion of the mediator, precisely the concern that was identified at the start of this article.

The responsibility to mediate ethically goes well beyond that assumed by codes of conduct, which are neither conceptually nor structurally able to address the complex and unique moral dilemmas of practice. In the absence of an established informal culture of good practice to provide guidance for particularly challenging or unique situations, codes are merely generalized, albeit worthy, sentiments into which mediators will read their own version of moral relativism. They can do little to enhance the informal moral culture of the profession or to challenge the wisdom and professionalism of idiosyncratic individual approaches. In contrast, the reflective-practice approach described in this article offers a paradigm for both formalized professional development and personal self-study, but conspicuously does not offer the comfort of right answers. Moreover, putting the principles of reflective practice into practice requires the conscious nurturing of a collaborative professional environment in which personal experiences and choices are shared in a continuous, self-critical, non-defensive, and open dialogue. It needs practitioners—new and old, experienced and less experienced—to talk and write analytically and self-critically about their approaches to ethical dilemmas. At a minimum, this approach offers the field the potential of a credible democratic process for engaging in discussion over ethical dilemmas with each other and with clients. At best, a culture of reflective practice in which experiences are made the subject of questioning analysis provides a microcosm for the development of theory and perhaps ultimately a meta-narrative of ethical behaviours.

98 Leda Cooks and Claudia Hale have argued that if mediators take over responsibility for defining fairness and balance of procedure in mediation through the development of codes of conduct, the disputants themselves are deprived of the right to frame the process in their own moral terms. See Cooks & Hale, supra note 28. Client perceptions of fairness—particularly their feelings about voluntariness, pressure and mediator judgement making—are critically significant for a field that places such emphasis on client empowerment and self-made solutions.