Bridging the Theory-and-Practice Gap: Mediator Power in Practice

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Although mediators are assumed to be neutral third parties, effective fulfillment of their role involves exercising a significant amount of authority and power. Mediators employ a range of approaches, orientations, and strategies. This article reviews some of the scholarship in this area. It then examines the various dimensions of mediator power, looking specifically at (1) the nature of mediator power and (2) its exercise of power through knowledge and expertise, through designing and controlling the process through reframing, and through imposing pressure to settle. Finally, the article discusses "ethical mediation" in light of mediator power.

Mediators have a very sensitive and difficult job. They are expected to take on an impartial role and facilitate dispute resolution between the parties, in order to help them reach "a voluntary, mutually acceptable resolution of some or all of the issues of their dispute" (Canadian Bar Association Code of Conduct, http://www.cba.org/CBA/activities/code/). Mediators are to respect and encourage self-determination of the parties and preserve their objectivity and impartiality, while at the same time carry out their own role effectively. Although mediators take on a range of orientations (Riskin, 1994) and approaches (Coyle, 1998), they carry out a number of functions to varying degrees: establishing a framework for cooperative decision making, promoting constructive communication, providing appropriate evaluations, empowering the parties, and ensuring a minimum level of process and outcome fairness (Boulle and Kelly, 1998).

In this article, I argue that there is a significant tension between the mediator's effective fulfillment of his or her functions and maintaining

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impartiality throughout the mediation process. To carry out her role and her various functions, the practice of mediation requires the mediator to employ particular techniques and strategies and in the process inevitably exercise a significant amount of authority and power. Of course, the degree of influence by the mediator, the goals set out to be achieved through the mediation process, and ultimately the power she can exercise will vary with the orientation of the mediator and the model or approach she employs.

I also attempt to demonstrate the importance of moving beyond the theoretical construct of the impartial mediator, to fully explore and better understand the delicate and complex dynamic of power between the parties and the mediator. Unless it is acknowledged that mediators exercise a significant power in the mediation process, the limits of that power and how it ought to be controlled to prevent abuse and ensure legitimacy and fairness cannot be properly examined. In fact, mediators need to develop a keen awareness of their power, share their experiences, and generate best practices as to how the exercise of mediator power should be tailored to serve the essential objectives of the mediation process as well as the interests of the parties. We hope this will also bring to light the interplay between mediator power and mediator self-interest, presenting an opening for discussion of the real day-to-day tensions and challenges faced by mediators, as well as the significant responsibility that is often placed on them.

The first section of this article examines the traditional understanding and purpose of mediation. It explains that even though mediation has some basic or common elements, mediators employ a range of approaches, orientations, and strategies in the mediation process. Secondly, the article sets a foundation for its central argument by reviewing some of the earlier scholarship in this area, which has analyzed the concept of mediator impartiality and neutrality. The third section then examines the various dimensions of mediator power in the practice of mediation, looking specifically at (1) definition of power and the nature of the mediator's power and (2) exercise of power through knowledge and expertise of the mediator, through designing and controlling the process, through reframing, and through imposing pressure to settle. Finally, the article discusses what it means to mediate ethically and how mediators should move forward, given the reality of the challenges they face in mediation and the ethical choices they have to make in the mediation process.

Throughout the article, I argue that there is a growing gap between the theory and practice of mediation. Mediation theory intended to address the parties' underlying interests and real needs, but quite commonly, and

in particular in the context of civil disputes, mediations are "very narrow and very adversarial" (Riskin, 2003, p. 22). Similarly, although experts have touted the potential of mediation for facilitating the parties' self-determination, in practice many mediation processes have not fulfilled that promise (Riskin, 2003). More recently, a study in the context of mandatory mediation in Ontario by Colleen M. Hanycz has found "little if any talk of the quasi-religious 'promise' of mediation as a tool for achieving a paradigmatic shift akin to a new world order" (Hanycz, 2005, p. 43).

What Is Mediation?

Mediation is considered an attractive alternative to our traditional system of justice, which is known for entangling the parties in a lengthy, formal, and costly process. The distinguishing characteristic of mediation as a dispute resolution process is its goal to produce a voluntary and consensual outcome, and the decision maker's lack of authority to impose a settlement on the parties (Macfarlane, 2003). Mediation is supposed to offer a more creative and flexible process, allowing confidentiality, direct participation, and control by the parties, thereby enhancing the parties' self-determination. Throughout this process, the mediator takes on the role of a neutral third party, facilitating communication and assisting the parties to work out a mutually acceptable resolution.

However, despite some of these commonly recognized elements, mediation is certainly "not a monolithic process"; it has many variations and comprises a range of practices and procedures, reflecting "a diversity of philosophies, styles and strategies" (Macfarlane, 2003, pp. 281, 289). Mediators follow a number of models, ranging from facilitative to evaluative, and from transformative to bureaucratic (Menkel-Meadow, 2003). Moreover, there are a number of tendencies characterizing the work of mediation practitioners (Macfarlane, 2003). Some mediators focus on reaching a settlement, displaying a tendency to be more proactive and offer their own suggestions. Other mediators focus on enhancing communication and fostering constructive dialogue, placing more emphasis on encouraging the parties to bring forth their needs, concerns, and interests.

The Neutral and Impartial Mediator?

Impartiality and neutrality are considered the "critical defining characteristics" of an independent mediator (Macfarlane, 2003, p. 298). But what do

these terms really mean? Is it actually possible to be a neutral and impartial mediator and at the same time fulfill the role of a mediator effectively? The question goes to the heart of the matter being explored in this article—that is, the power of the mediator.

The Impartial Mediator?

One of the fundamental assumptions on which the practice of mediation is built is the impartiality of the third-party intervener. The Canadian Bar Association's *Model Code of Conduct for Mediators* defines *impartial* as "being and being seen as unbiased toward parties to a dispute, toward their interests and toward the options they present for settlement" (Canadian Bar Association Code of Conduct, http://www.cba.org/CBA/activities/code/). It also indicates that mediators can serve only in a matter in which they can remain impartial; they must remain impartial throughout the mediation, and if they become aware that they cannot maintain their impartiality then they must immediately disclose this to the parties and withdraw from the mediation.

In this section, I argue that although the mediator is theoretically held out to be impartial, in practice, this is very difficult to sustain. The concept of impartiality implies an observer with a completely neutral perspective or even none (Grillo, 2001). The mediator is not supposed to favor, support, or demonstrate a preference for the position of one party over another. He or she should dispose of a preconceived bias toward any one solution or a particular party, and as much as possible not interject his or her personal interests (Moore, 2003). The core meaning of the term *impartial* has been summed up as "the quality of being principled enough to remain equally committed to the legitimate interests of all parties" (Morris, 1997, p. 321).

However, even if the mediator makes a genuine attempt to remain impartial, invariably his role entails comparison of the two parties' arguments and perspectives, which at some level requires the mediator to make an assessment and exercise judgment. In fact, just hearing the parties' description of the dispute and presentation of their issues initiates a thought process, whereby the mediator (consciously or subconsciously) begins to assess, judge, and evaluate. This automatic thought process also shapes and affects the mediator's reactions, suggestions, proposals, and strategies, which in turn influences the outcome of the mediation and potentially favors one party over another. Thus, it has been argued that mediators influence both process *and* outcome by affecting the legitimacy

of each party's point of view through their interventions, determination of the order of speaking, caucusing, and reframing of parties' statements (Fuller, Kimsey, and McKinney, 1992). Nonetheless, it is important to keep in mind throughout this discussion that the degree of influence, and ultimately the power that a mediator can exercise, is likely to vary with the type and orientation of the mediator, as well as the model or approach that he or she employs.

Unfortunately, there is little objective evidence on which to assess the alleged partiality of mediators, or to demonstrate that the mediation process is immune from the inevitable failures of impartiality. In fact, even in the case of judges, impartiality is likely an aspiration and not the reality. In the context of judging, though, the formal and public setting, judicial forms of distancing, and the existence of rules of procedure to check overt signs of prejudice afford some protection against bias (Grillo, 2001). In contrast, in the context of mediation, thanks to the intimate relationship of the mediator with the parties, the informality and flexibility of the process, and the lack of a formal public record, there is a great potential that bias will influence the outcome (Grillo, 2001). As stated by Hanycz (2005, pp. 819–885):

> As a field, both scholars and practitioners have linked the "magic" of mediation to the impartial and neutral third parties who act as mere process facilitators, avoiding the crossover into advocacy, substantive analysis or the creation or promotion of specific solutions. As noted, this idealization was expressed by many subjects in this study, most of whom claimed to achieve these objectives in practice. However, one of the key findings of the emergent data points to a significant gap between the theory of practice and the practice itself. When this gap becomes especially critical is in the context of mediator power.

Finally, mediators are influenced by their own professional agenda and interest in settling cases. After all, mediation is also a business, which means ensuring a steady and reliable referral base, visibility in the field, and building a reputation (Kolb, 1996). This in turn makes mediators more susceptible to allowing self-interest to influence their conduct in the mediation process, and creating an inevitable impetus to use pressure and coercion (Kolb, 1996). For example, in the study conducted by Colleen M. Hanycz, one of the respondents stated, "From a marketing point of view, there is a strong interest in settling cases and you may use your power to achieve that interest if it is the strongest one at the table" (2005, p. 50).

Likewise, another respondent stated, "Unfortunately, I don't think too many mediators use their power for 'the good,' choosing instead to serve their own interests" (p. 52). Hanycz's study was conducted in the context of Ontario's mandatory mediation program. It was based on a random sampling of rostered mediators who participated in semistructured interviews "through which their views were elicited on philosophy, process and power, as they relate to mandatory mediation" (2005, p. 5).

The Neutral Mediator?

Similarly, mediator neutrality is considered central to the theory and practice of mediation (Cobb and Rifkin, 1991) and operates on the assumption that the mediator has "little or no power over the parties" (Cohen, Dattner, and Luxenburg, 1991, p. 341). However, even though most mediation agreements indicate that the mediator is a third-party neutral, it is questionable whether anyone can be neutral in a conflict situation, especially when the mediator is hired because of his or her specific knowledge and experience.

Cobb and Rifkin have challenged the existing definitions of neutrality as well as the objectivism at the core of our understanding of mediation. They maintain that the absence of practical guidelines for the practice of neutrality is actually "a function of the rhetoric of neutrality" (1991, p. 36). They point out that when deconstructed, the meaning of neutrality is "emergent from a set of interrelated, interdependent terms: justice, power and ideology," which function "as a discursive unity" (p. 37). These terms function to "obscure the workings of power in mediation," forcing mediators "to deny their role in the construction and transformation of conflicts" (p. 41). They maintain that mediators may act on biases without necessarily being aware of it themselves, in the process endangering neutrality consciously as well as unconsciously. They state:

> In order not to bias the process, mediators struggle to keep their prejudices and their interest out of the process and are prohibited from judging the substance of the agreement; but in order to bring the hidden interests of the parties to the surface, mediators must attend to the content of the agreement, so that all interests are represented. Yet, this "representation" is also discussed as an exercise of "power" and is hotly contested precisely because it cannot be separated from the concerns about justice that orbit neutrality. From this perspective, the practice of neutrality is fraught with paradox, raising dilemmas for mediators [p. 48].

Various Dimensions of Mediator Power

Having argued that in practice it is very difficult for the mediator to maintain impartiality and neutrality, I now proceed to explore the various dimensions of mediator power. My argument here is that the mediators are a central figure in the mediation process; they knowingly or unwittingly exercise a significant amount of power and influence the decisions of the parties as well as the mediation outcome. This power comes to light in the various functions and roles that the mediator takes on throughout the mediation. In particular, I discuss the exercise of mediation power in the areas of power as knowledge and expertise, power as design and control of the process, power as reframing, and power as pressuring to settle (through various communication techniques, caucusing, reality checking, and threatening to withdraw).

Definition of Power and Nature of Mediator's Power. The dictionary definition of *power* is a useful starting point for understanding its meaning in the context of mediation. Definitions of power include the ability to do, act, or produce; the ability to control others; authority; sway; influence; a person or thing having great influence, force, or authority; and the ability to regulate, restrain, or curb. According to Moore (2003), "Power or influence is the capability of a person or group to modify the outcome of a situation—that is, the benefits received by another and the costs inflicted, in the context of a relationship. The capacity to influence the outcome for another party depends on the exercise of various means of pressure or persuasion that either discourage or encourage the possibility of various options."

I will attempt to demonstrate that these definitions are relevant to the role and function of the mediator.

The very presence of the mediator transforms the dispute into a three-way dialogue whereby the mediator is an "active and influential agent of change" (Morris, 1997, p. 347). In fact, social anthropology research by Gulliver also found that "mediators regularly exercise influence, either passively or actively, and that such influence serves to assist in an outcome palatable to the mediator, corresponding to his own ideas and interests" (1977, p. 15). The mediator brings to bear his or her experience, expertise, and knowledge of the process, working with the parties to reconcile their interests and arrive at a resolution that is agreeable to them.

Looking at the mediator's influence and authority through another lens, Gary Smith frames mediators as playing the role of the "writer, director, and

one of the central characters in the play," employing "various moves, or techniques to promote the success of the mediation" (1998, pp. 849, 861). He describes the game of mediation as one of "altering perceptions" by breaking down the impossible into smaller pieces, rendering them more attractive, and "gradually re-polarizing and merging the inner portions of the model with those surrounding them," in order to bring about a resolution to the dispute.

Thus, to achieve their goals mediators have to exercise a measure of control, authority, and influence (as in enforcing the ground rules, directing the agenda, shaping preferences, and reality checking). In the context of Ontario's mandatory mediation program, Colleen Hanycz found three groupings with respect to mediators' own conceptions of power (2005). The first group viewed power as the ability to impose one's will on another through use of subject expertise; the second group adopted this definition but also indicated that the idea of power encompasses the ability to manage the issue agenda; and the third approach to power encapsulated the two preceding frameworks but added that the idea of power also includes the capacity to shape interests and preferences (Hanycz, 2005).

However, it must be remembered that the exercise of power does not necessarily have to be overt. There are many ways in which the mediator can exercise power indirectly, through "threat of use, or by perceptions held of it by others, regardless of the accuracy of such perceptions" (Hanycz, 2005, p. 54). As pointed out by Hanycz, the mediator may be viewed as powerful for a variety of reasons, and the parties may govern themselves according to these perceptions, even where the mediator is completely unaware of this dynamic and has not exhibited any overt behavior or expression of power. Thus use of power can range from very indirect and subtle (more likely in the therapeutic, facilitative, and transformative models) to the more overt in the case of strategic and evaluative models (Saposnek, 2006).

Accordingly, it is unlikely that mediators can hold themselves completely separate from the dispute resolution process, in an attempt not to access and employ their power. This is not feasible, given the role that mediators have to play (Saposnek, 2006), and the fact that at some level they will also undertake their own assessment and evaluation of the conflict. If the mediator truly succeeds in not exercising any power, then the process is not all that much different from straight negotiation, with an additional person present but not adding anything more (Saposnek, 2006).

Exercise of Power Through Mediator Knowledge and Expertise. Understanding the conflict, having knowledge of the subject matter and its underlying issues and complexities, can place the mediator in a position of power. The mediator becomes an elder who knows more and knows better, and who can speak and make suggestions with a certain amount of authority. Mediators are not allowed to provide legal advice, but when asked by the parties they can give their evaluation on how the matter is likely to turn out if it goes forward through the courts, emphasizing the relative strengths and weaknesses of both sides' case. Thus whenever the mediator is asked what he thinks of the case and what the chances of success are, he has the power if he can offer some of the answers (Hanycz, 2005).

The knowledge and skill of the mediator also engenders a certain amount of respect, as the parties may come to view the mediator as someone they can trust to help them solve their dispute. The more informed the mediator is about the particular dispute and the legal process, the greater power she has to attain credibility and get the parties to accept her evaluation of the case. This does not mean that the parties are passive recipients of what the mediator gives them. Of course, the mediator plays an important role in asking the right questions, in raising the central issues, and in overall participation. Mediation is a dynamic and interactive process, and the parties also play an important and potentially powerful role in shaping its contours and the eventual outcome. However, my focus here is specifically on the mediator and her role and exercise of power.

Exercise of Power Through Designing and Controlling the Process. As the mediator thinks through the meeting, he or she tries to set an agenda and follow a road map on how to proceed. This initial design of the process often needs to be altered and a new path pursued; however, process decisions do have an impact on how the content of mediation emerges and is discussed. For example, the mediator may encourage discussion of certain topics to build common ground or keep certain topics off the table if she anticipates a clash of views and positions. This management of agenda and control of process is an additional element of the mediator's power.

Mediators also decide on the particular approach they will be taking. They may determine that a dispute is better suited for an interest-based approach or a rights-based approach and, in taking the chosen approach put in place a framework to lead the parties in a specific direction. Depending on what kind of process the mediator emphasizes, he can strategically guide the parties and direct them toward a particular set of options. Again,

the mediator may start with leading the process in one direction and recognize that another approach is more suitable, making the necessary shift in orientation.

However, an effective mediator can and should steer the wheel and bring the parties along, working them toward *their* destination. The key is for the mediator to move the parties through the mediation process in a way that is responsive to their needs and interests, as opposed to the self-interest of the mediator. If the mediator has in mind the overriding goal of achieving settlement and allows this mindset to influence his role and his exercise of power in mediation, then he will be violating the parties' fundamental right to self-determination, and altogether subverting the underlying goals and benefits that the mediation process is supposed to produce.

Thus mediators should at no time use their power at the mediation table to guide the parties toward an outcome that corresponds to their own self-interest. Yet, in the context of the Ontario mandatory mediation, because of the explicit focus on achieving a significant rate of settlement, a "tangible settlement orientation" was determined to exist among mediators, as well as a willingness to "view and use their own power as a tool for satisfying that orientation" (Hanycz, 2005, p. 62).

It is important to conduct further studies and explore the extent to which mediator self-interest and personal goals may be affecting mediators' particular management and control of the process in the mediation context more generally. There are quite significant implications to this; if mediators use their expertise and knowledge to shape the preferences and interests of the parties, convincing them that their interests correspond to the mediator's interests, then they are in effect abusing their position of power to manipulate the parties (Hanycz, 2005). The parties are being misled, and not making decisions based on *their* real interests, because the mediator is persuading them that it is in their *common* interest to settle the case. This kind of undue influence is unethical and can amount to coercion, violating the four cardinal ethical principles of most professions: "do no harm, do good, let the client be self-determining and ensure fairness and justice" (Taylor, 1997, p. 215).

Exercise of Power Through Reframing. Framing entails shaping, focusing, and organizing in order to examine and understand a particular problem and make sense of a cluster of issues. Through framing, we create a boundary whereby certain aspects of a particular problem are declared meaningful, while other aspects are left out (Gray, 2006). In mediation,

parties begin by providing their own account or frame of the dispute. The mediator then uses the technique of *reframing* to "alter the language used to describe the dispute" (Smith, 1998, p. 12) as well as the "perceptions, and current frames of the behaviour, attitudes or issues in the dispute" (Candlin and Maley, 1994, p. 80).

Through reframing, the mediator attempts to furnish an "alternative social account of the conflict," helping parties to reinterpret their circumstances, their counterpart's motivations, and the range of possible solutions (Gary, 2006). He highlights the common elements of the discourse between the parties, attempting to create "a single perception of the dispute from a shared point of view" (Smith, 1998, pp. 12, 13) in order to create an opportunity for constructive discussion. Effective framing can be characterized as a "genuine and thoughtful effort to change the ways in which conflict is presented in language" (Macfarlane, 2002, p. 381).

However, in this reframing process the mediator is once again exercising power by reshaping the discourse and changing the language used to describe the conflict. For example, in "definitional reframing" the conflict is redefined in order to render the conflict resolution process more integrative, attempting to incorporate the needs and concerns of the parties (Mayer, 2000, p. 382): "Often, definitional reframing involves changing the level of generality or specificity at which an issue or idea is presented and also altering the time frame in which it is being considered."

Reworking the presentation of the problem in this manner empowers the mediator to reconstruct the contours of the conflict by altering the meanings and definitions as understood by the parties, which in turn can also affect presentation of the parties' underlying interests: "By changing how the action is described, how different participants are characterized, and how the setting is presented, the dramatic frame can be altered" (p. 384). Essentially, the mediator changes the story line and shifts the entire conflict paradigm through reframing, altering how the parties view themselves and making sense of the conflict (pp. 383–384).

Although an effective mediator dedicated to helping people resolve their dispute can rely on reframing as an essential part of the communication process to bring about a fair resolution, there is also room for manipulation and undue influence of parties through reframing and shifting of the conflict paradigm. According to Mayer:

> Depending on how deep the mediator needs to dig in order to find a positive goal, an underlying interest, or a need that can be positively

> expressed, reframes sometimes appear to incorporate a different perspective from the one originally articulated by the disputant. Reframing that seems emotionally disconnected from the actual statement that preceded it may be resented or rejected by the parties who feel patronized or manipulated. The mediator might be regarded as imposing his or her own agenda or frame of reference on the parties. If this were the case, it would represent a significant undermining of party autonomy and self-determination in mediation [2000, p. 385].

Exercise of Power Through Imposing Pressure to Settle. Mediators use a range of methods to move the parties toward settlement, among them various communication techniques, caucusing, reality checking, and threatening to withdraw. To bring the parties to settle, the mediator has to get them to accept that settlement is a better option than litigation, in which the parties incur significant costs in time and expenses. To achieve this goal, the mediator has the power to direct the parties by "focusing discussion, procedurally and substantively, toward settlement" (Silbey and Sally, 2001, p. 14).

The parties are also geared toward settlement by the mediator's control of communication and interactions in the mediation. Pragmatics of communication reveals that the meaning of a word changes depending on how, where, and by whom it's spoken (Smith, 1998). The contextual reality accompanying a phrase or a sentence plays a key role in conveying the intended meaning: "In mediation, the pragmatics of communication is used as a major tool to change polarity, and therefore participant perceptions" (p. 7). In the context of settlement discussions, this gives the mediator the power to use his expertise and authority, as well as nonverbal communication techniques such as display of impatience or displeasure (Moore, 1996), to convey settlement as the best option to the parties and focus discussion on the grounds of settlement.

Mediators also make use of caucusing to engage in direct and more open communication with the parties. Here, each party can reveal information to the mediator, which has to be kept confidential and not revealed to the other party. However, the mediator can steer the discourse in both caucuses along similar paths, without revealing the confidential information (Smith, 1998). He shuttles between caucuses, taking the knowledge gained from each party and reformulating it into his own suggestions, in order to blur the origin of the discourse. As such, caucusing gives the mediator significant power to alter the parties' perceptions and transmit his

message indirectly. In fact, "since the pragmatics of framing reach their deepest level in the caucus, it is the most powerful tool in the mediator's armoury of techniques" (p. 14).

Moreover, mediators use reality checking to point out the time and energy that has been invested in the mediation process and the progress that has been made, contrasting it with the negative option of litigation if the parties fail to arrive at a reasonable resolution. Highlighting the potential loss of everything the parties have accomplished allows the mediator to get the parties to awaken to what will surely lie ahead if they return to litigation, encouraging them to seize this opportunity to reach a settlement.

Finally, where the mediator deems it necessary, she may use the "most direct and coercive means of influencing parties," that is, threatening to withdraw from negotiations or actually doing so, in order to pressure parties toward settlement (Macfarlane, 1997). For example, if the mediator determines that the parties are not making any progress and just wasting time and delaying settlement, she may decide to use the threat of withdrawal. In one case, a mediator believed the parties were not negotiating in good faith and decided to announce she would be terminating her participation; but before she made her way out the door the parties called her back and thereafter reached a settlement. However, taking the risk and making the threat of withdrawal only works if the mediator thinks the parties will believe the threat and have also made sufficient progress that they feel they are close to making a deal. Using this technique when the dynamics are not ripe could lead to the breakdown of negotiations, or result in alienation of the parties.

Thus mediators use a variety of techniques to impose direct and indirect pressure on the parties to settle. Some of the comments from respondents in the context of the mandatory mediation program in Ontario are insightful and worth repeating here (Hanycz, 2005, pp. 50–51):

> Mediators definitely use their power to get a settlement. I try very hard not to do this, push towards settlement I mean, because I think that is an abuse of my position and of the system. However, I also think that if I allowed myself to push harder towards settlement, I would settle way more cases, which would be a very good thing as it would meet my own goals and the goals of the roster. That is what power is used for. . . .
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> Mediators must use their power to move parties toward settlement. That is what the power is for, and that is what the mediator is for.

> It is that simple. That doesn't mean that you have to be aggressive or belligerent. There are many ways of achieving settlement; whatever works, you do it. You are there to get a deal and you have lots of power to make this happen. . . .
>
> I recognize that we are trained as mediators to focus on the parties' interests. But frankly, sometimes the parties have no idea what is really good for them. The lawyers get in the way; they feed them an idea that they might hope to achieve results in the trial process that are just not feasible. So, I use my power to achieve the only thing that is truly good for the parties: settlement. Don't get me wrong; it's not that I don't realize settlement is good for me too. It's good for everyone and I use whatever resources I have to get there.

On the one hand, it is recognized that pressuring parties to settle can interfere with the parties' autonomy and self-determination and undermines some of the most important values of mediation. On the other hand, the reality of mediation seems to be revealing that mediators do in fact use various techniques to move parties toward settlement. This brings us back to the role of the mediator; to what extent should the mediator take an active role in the process and use power and position to shape the outcome? When is the line between appropriate and inappropriate use of this power crossed? Finally, to what extent should the mediator remain aware of the need to maintain this delicate balance? Some of these issues are touched on in the next section through discussion of how to move toward mediating ethically.

Conclusion: Revisiting the Responsibility to Mediate Ethically

Thus far in this article, I have discussed some of the challenges faced by mediators, and in particular balancing the exercise of power with which the mediator is endowed (by virtue of his or her role and function) with the need to ensure that the parties' right to self-determination is respected and *their* goals and interests guide the process. I have argued that there is a significant tension between maintaining impartiality and taking an active role as a mediator, which entails engaging in a host of activities requiring evaluation, judgment, and decision making. Looking at the exercise of mediator power and its various dimensions (knowledge and expertise of the mediator, mediator's design and control of the process, mediator reframing, and imposing pressure to settle), I have demonstrated that mediators are situated

in quite an influential position and their exercise of power can have a significant impact on shaping the parties' conduct, the process of mediation, and the final outcome reached by the disputants. In this concluding section, I discuss how the mediator can carry out an ethical practice. In other words, how should we move forward, given what we know about the realities of the mediation practice and the role played by the mediator?

Conducting mediation ethically means making choices, based on a principle or value considered to be morally superior to the other (Macfarlane, 2002). This requires balancing alternative courses of action in the mediation process and deciding how far each advances the goals and underlying values of mediation. However, the mediator is left with the discretion to make this determination and to decide what is fair and reasonable. Of course, there are model codes of conduct that are supposed to guide the mediators' choices, but these models are often framed in general terms and do not offer specific examples or concretely demonstrate where the line should be drawn and how the mediator should apply the general rules and principles provided therein in a specific context.

It may be argued that mediation is supposed to be flexible and creative; hence mediators should be given wide discretion to achieve the goals of mediation. However, the dilemma is that by leaving it up to the mediators to exercise their discretion, they have to exercise their ethical judgment "constantly, intuitively, and often unconsciously" (Macfarlane, 2002, p. 6). They have to decide what is fair and reasonable, when they should intervene, how far they should intervene, how they should exercise the various dimensions of their power (or refrain from exercising it), and so on. According to Julie Macfarlane:

> 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. . . . Unlike an adjudicator, the mediator is constrained by neither procedural rules governing process, nor substantive rules determining outcome. . . . The mediator must pay attention to every aspect of the party interaction in the course of their negotiations, and assume a very broad responsibility for the management process that unfolds [2002, p. 3].

Thus mediators have quite an onerous task; but there is no systemic problem-solving approach to assist them in finding "context-based solutions" (Coyle, 1998, p. 3) to the various challenges they confront and the ethical choices they are expected to make. For the most part, mediators are left on their own to use their experience and their good judgment to help them make the right decisions. I believe this simply leaves too much responsibility in the hands of the mediator, without much in the way of professional support or practical guidance. This gap also makes the practice susceptible to abuse through manipulation by the more powerful parties in the mediation process and by the mediator himself.

In this context, a helpful first step may be to see the role of the mediator for what it really is and not what we theoretically imagine or wish it to be. This requires conducting further interviews, and undertaking studies to better understand what actually takes place in mediations, how parties are conducting themselves, how mediators are exercising their powers, and to what extent the outcome of mediation is driven and shaped by mediators' personal or professional goals as opposed to the parties' real interests. The results of such studies can go a long way in shedding light on the approaches and policy decisions that should appropriately be taken in the context of mediation.

If it is the case that mediators routinely exercise their power to steer the parties toward settlement, compromising fundamental notions of fairness and justice, then it would be difficult to promote mediation as an attractive alternative to litigation. When mediation was embraced as the better way over the court system and pursuing the lengthy and costly route of litigation, it was promoted as a process that would allow greater party control and give overall flexibility to the parties. The parties would forgo the formal rules, the requirements of evidence under oath, and disclosure and various procedural protections, but they would enhance their self-determination and resolve their conflict quickly, efficiently, and effectively.

However, as we have learned about the mediation practice over the years and become enlightened about the contradictions, complexities, and risks entailed in the process, it may be time to engage in a reassessment of the practice. If we know that mediators cannot maintain their impartiality and neutrality, then we cannot simply assume mediators will be neutral and impartial in designing model codes of conduct. If mediators routinely exercise their power to achieve certain goals in mediation, then they need to become more sensitive to their own conceptions of power, the actual role of power, and their everyday exercise of power in mediation.

Moreover, mediators need guidance to better carry out their role; this will not be accomplished by promulgating model codes of conduct. These codes offer some general principles and objectives for mediators, but they do not yield practical solutions for the kind of challenges mediators face day-to-day. Mediators need to share their own experiences and set up practice support groups to discuss best practices. They need to become more conscious of the important role they play and the delicate balancing of interests involved in the mediation process. Through identifying, deconstructing, and sharing individual and experiential truths, mediators can better understand and promote ethical behavior, and (it is hoped) develop a more transparent professional culture (Macfarlane, 2002). Essentially, "Minimizing the dangers of privately negotiated settlement and providing fair, non-coercive structure for settlement discussion, require the self-conscious development of a strong, reflexive and transparent culture of ethics in mediation. . . . Putting the principles of reflective practice into practice requires the conscious nurturing of a collaborative professional environment in which personal experience 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 the approaches to ethical dilemmas" (pp. 2, 12).

Finally, it may be wise to look at the realities of the mediation practice and through discussion with mediators and other affected parties determine whether mediation needs to change, or stay the same; whether mediators should continue to exercise their power and be trusted to make the right ethical choices in different contexts; and whether some of the contradictions and tensions we currently see emerging in the practice of mediation need to be more closely examined and addressed (particularly in the context of mandatory mediation), in the interest of protecting the fundamental rights of the parties and ensuring that a minimum level of integrity, fairness, and legitimacy is sustained in the process.

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