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## Study of Ethical Dilemmas and Policy Implications, A

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**SYMPOSIUM**

**THE DILEMMAS OF MEDIATION  
PRACTICE:  
A STUDY OF ETHICAL  
DILEMMAS AND POLICY  
IMPLICATIONS**

*A report on a study for the  
National Institute for Dispute Resolution\**

*Robert A. Baruch Bush\*\**

Over the past two decades, mediation has been developing as a means of resolving conflicts of many kinds, including interpersonal or community disputes, divorce and custody conflicts, and civil legal claims for personal injury or business dealings. However, alongside this growth of mediation, serious concerns about mediation have also increased, especially on the grounds that the practice of mediation is insufficiently professionalized and disciplined. One central concern is the absence of any clear and demanding standards of practice for mediators, both in the context of initial training and as an ongoing guide to practitioner conduct.

This paper is based on research sponsored by the National Institute for Dispute Resolution and by Hofstra University School of Law. The research involved interviews with roughly eighty mediators working in one of the three areas mentioned above. The mediators were asked to identify situations they had

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*\*\* Rains Distinguished Professor of Alternative Dispute Resolution Law, Hofstra Law School. The author wishes to acknowledge and thank all the mediators who participated in the interviews, who gave so generously of their time and experience to make this research possible. Special thanks go to Professor James Alfini, Mr. Michael Bridenback, and Judge Frank Orlando, who provided invaluable assistance in helping the author contact mediators willing to participate, and to Dr. Joseph Stulberg, who first introduced the author to the Florida mediation system.*

experienced in mediation that, in their view, raised difficult ethical dilemmas on which they felt the need for guidance by professional standards and program policy. This report summarizes and illustrates the findings of the research as to the major types of dilemmas practicing mediators are confronted with and analyzes these dilemmas and their interrelationships. It then offers some suggestions regarding policies that can help train and guide mediators on how to recognize and respond to these dilemmas in practice.

## 1. BACKGROUND: THE DEVELOPMENT OF MEDIATION PRACTICE

Over the past two decades, dissatisfaction with the formal judicial process — its high costs, its adversarial character, and its frequent inability to provide satisfying remedies — has led to the development and expansion of a range of non-judicial alternatives for resolving various kinds of disputes.<sup>1</sup> These "alternative dispute resolution" (ADR) mechanisms include such well-known processes as arbitration, mediation, and negotiation, as well as lesser known devices such as mini-trial, summary jury trial, and early neutral evaluation.<sup>2</sup>

All these processes are alternatives in the sense that they resolve disputes by means other than full-blown adjudication of the case in court. All have, in varying degrees, at least some common elements distinguishing them from adjudication — most notably, privacy, relaxation of procedural formality, nonapplication of substantive legal rules, and emphasis on compromise to find a solution.<sup>3</sup> Such ADR processes have increasingly been utilized in many different areas, including business and commercial disputes, environmental and public policy conflicts, consumer disputes, divorce and custody conflicts, and many others.<sup>4</sup>

The focus of this paper is on one ADR process, mediation, as it is used in three important areas: interpersonal neighborhood or community disputes, divorce and custody conflicts, and disputed legal claims for civil damages. Mediation is commonly described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help

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1. See Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 1-10 (1987); Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 1-3 (1985).

2. See AMERICAN BAR ASS'N, *ALTERNATIVE DISPUTE RESOLUTION: A PRIMER* (1987); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2-6 (1987).

3. See Brunet, *supra* note 1, at 11-14.

4. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 311-436 (1985); Sander, *supra* note 1, at 3-11.

them reach a mutually acceptable resolution of some or all of the issues in dispute.<sup>5</sup> Since the 1970s, there has been a marked growth in the use of mediation in these three areas. First, mediation was used beginning in the early 1970s as "an alternative to criminal prosecution" to resolve minor interpersonal disputes between neighbors, acquaintances, co-workers and so on, that could otherwise lead to complaints to local law-enforcement agencies.<sup>6</sup> By 1980, mediation was well-established and widely used in this field, and today there are more than 500 community mediation programs operating across the country. Second, mediation was used beginning in the late 1970s as an alternative to civil litigation to resolve contested divorces, especially child custody, visitation, and support issues.<sup>7</sup> By the mid-1980s, child custody mediation was also in widespread use, and many states have adopted legislation requiring the use of mediation in contested custody cases.<sup>8</sup> Finally, in the last several years mediation has been employed increasingly in business and personal injury legal claims as an alternative to the litigation process.<sup>9</sup>

The use of mediation in these types of disputes makes good sense in terms of the general theory of mediation and its benefits.<sup>10</sup> Since it is nonadversarial and consensual, mediation can, according to theory, resolve disputes without destroying an important relationship between the disputants. Since it is not bound by formal legal definitions and rules, mediation can fashion creative and integrative solutions of higher quality than a by-the-rules court decision. And since it allows the parties themselves to find a solution to their problem, mediation permits and promotes disputants' exercise of self-determination and autonomy. One or more of these objectives — preserving relationships, finding creative solutions, and promoting self-determination and autonomy — are almost always of importance in all three types of disputes mentioned. Thus, using mediation in

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5. See AMERICAN BAR ASS'N, *supra* note 2, at 1-2; JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1984); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 VT. L. REV. 85, 88 (1981).

6. See GOLDBERG ET AL., *supra* note 4, at 347-49; DANIEL MCGILLIS & JOAN MULLEN, *NEIGHBORHOOD JUSTICE: AN ANALYSIS OF POTENTIAL MODELS* (1977); TOMASIC & FEELEY, *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* (1982); Joseph B. Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALBANY L. REV. 359 (1975).

7. See AMERICAN BAR ASS'N, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982); Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation*, in *DIVORCE MEDIATION: THEORY & PRACTICE* 3 (Jay Folberg & Ann Milne eds., 1988).

8. See Folberg & Milne, *supra* note 7.

9. See LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES AND THE LEGAL SYSTEM* (1990).

10. On this theory, as summarized in the text, see, e.g., FOLBERG & TAYLOR, *supra* note 5, at 245-46; Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 266-73 (1989); Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315-27 (1971); Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 347-59 (1984); Stulberg, *supra* note 5, at 113-16.

these three areas makes good sense: It offers important benefits that are likely to be sacrificed by formal court adjudication in these kinds of disputes.

As a result of such considerations, mediation has grown rapidly during the 1980s in these and other areas and appears likely to continue to expand.

## 2. FOCUS OF THE STUDY: THE NEED FOR ETHICAL STANDARDS

While the use of mediation has expanded steadily, this growth in itself has given rise to some important, and as yet unaddressed, concerns. Most of these concerns stem from the fact that one of mediation's great strengths — its informality — is also a potential weakness.<sup>11</sup> The absence of any structure of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners. In other words, in mediation much more than in other dispute resolution processes, the quality of the process depends heavily on the quality of the practitioner. Therefore, mediation requires special attention to qualifications, training, and standards of practice for practitioners. One major concern about mediation today is that such attention has not kept pace with the growth in utilization of the process.<sup>12</sup>

The expansion of mediation has meant an influx of new mediators to handle these cases, some with prior mediation experience in other areas and some with none. Although new mediators undergo training before handling cases, neither training nor qualification requirements are standardized according to any generally accepted definition of what constitutes adequate preparation for practice. Equally problematic is the absence of any generally accepted, clear, and demanding standards of practice for mediators, both as to quality of performance and, especially, as to ethical conduct.<sup>13</sup> Ideally, standards of practice should be incorporated in training from the earliest point on and should be a clear guide for the practicing mediator on an ongoing basis. Mediation offers the prospect of many important benefits, as noted above, but it also poses dangers. Realizing the benefits while avoiding the dangers requires that mediators be trained in and guided by standards that identify the hazards and point in the right direction. This is the major concern addressed by the study summarized in this paper. The focus on this concern is intended not as an objection to the use of mediation, but as a way of making mediation more effective and beneficial.

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11. See FOLBERG & TAYLOR, *supra* note 5, at 244; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359, 1367-75, 1385-91 (1985); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076-78, 1085-90 (1984); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

12. See Bush, *supra* note 10, at 253-59.

13. See *id.* The only significant exception to the absence of standards is in the divorce mediation area, where there has been some development, although little consensus. See *id.* at 256 n.9. See also Part 7 *infra*.

In sum, this paper starts from the assumption that the establishment of standards of practice, and their incorporation in training and supervision of mediators, is one of the critical policy issues to be addressed in the mediation field. However, in order to establish sound standards, a solid basis of knowledge and theory is the necessary first step. At present, little is known about the ethical dilemmas faced uniquely by mediators, as opposed to other dispute resolution professionals. Yet without a clear grasp of the relevant questions or dilemmas, it is hard to identify good answers in the form of standards of practice. Moreover, information about the dilemmas of mediation practice, once it is gathered, needs to be analyzed in light of sound theory, theory founded on the values uniquely served by the mediation process. Thus, until research clarifies the special dilemmas of mediation practice, and sound theory is applied to those dilemmas, it will be difficult to establish any adequate guide to train practicing mediators and offer them ongoing direction on how to recognize and handle the ethical dilemmas presented in the cases they handle. The study summarized in this paper was designed to gather information relevant to these fundamental questions by interviewing mediators regarding the ethical dilemmas they encounter in daily practice. The study and its findings are summarized in the remainder of the paper.

### 3. CONTEXT: MEDIATION IN THE STATE OF FLORIDA

Florida has a long history of using the mediation process to resolve disputes. It was among the first states to adopt community mediation on a statewide basis in the early 1970s, and today has an extensive network of community mediation centers, some public and some private-nonprofit, in which roughly 400 mediators practice. It was also an early center for divorce mediation and one of the first states to begin using court-ordered custody mediation, beginning in the early 1980s. Today, there are court-adjunct divorce mediation programs in many of the state's counties, as well as a fairly large number of privately practicing divorce mediators. Including public programs and private practice, there are roughly 200 divorce mediators across the state.

In 1987, the Florida legislature passed a comprehensive law that brought all of the state's community and divorce mediation activities within the purview of a policy favoring voluntary or court-ordered mediation.<sup>14</sup> That is, Florida courts now have full discretion to recommend or order parties to mediation in all community and divorce cases (including not only custody but all issues), and of course, parties can still voluntarily choose to go to mediation on their own. The providers of the mediation are the pre-1987 mediation programs and practitioners, supplemented by new programs and practitioners established and trained since 1987. In addition to supporting and expanding the state's pre-1987 community and divorce mediation field, the new law facilitated and encouraged the spread of

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14. See Bush, *supra* note 10.

mediation into business and civil legal disputes by also authorizing courts to recommend or order mediation in any civil claim filed in court. The result was the establishment of both court-adjunct programs and private practices for what Floridians call "civil mediation," and today there are roughly 150 practicing civil mediators, public and private.

In short, the state of Florida now has a large population of mediators — nearly 700 — practicing in all three major mediation fields — community, divorce, and civil. And those mediators include both public-agency staff mediators and private practitioners, handling both voluntarily-initiated and court-initiated cases. As a result, Florida presented an excellent field for the research undertaken in this study — it enabled the conduct of interviews and collection of data, in a relatively short period, from a significant number of mediators representing all the areas of Florida mediation practice. Over 80 mediators were interviewed (roughly 30 divorce, 35 community, and 15 civil mediators), in both mediation programs and private practice, in several major population centers of the state. This was by no means a scientific sampling, but the mediators interviewed for this study do cover a very broad range of mediation practice. Therefore, while differences certainly exist in mediation practice in other states and localities, the kinds of problems faced by Florida mediators, as described below, will probably resonate to some degree with mediators everywhere.

#### 4. THE STUDY: METHODOLOGY, DEFINITIONS, AND QUALIFICATIONS

The interviews conducted with mediators revealed several important types of dilemmas that mediators are concerned about. They are described in the next part of the paper, with specific illustrations wherever possible. In each case, the aim is to indicate as clearly and concretely as possible what the mediators' concerns and questions were, so that this information can help to clarify what kind of training and guidance mediators need.

The method for gathering the information was straightforward and simple. Mediators were asked to describe situations that they had encountered in practice that presented some kind of ethical dilemma regarding what course of action was proper for them to take as mediator. They were then asked to explain why they viewed the situation as presenting a dilemma. In other words, mediators were asked to tell and explain stories from their own practice that involved encountering ethical dilemmas. The findings are presented here so as to preserve, as much as possible, the mediators' own sense of the stories they told. Each of the dilemmas presented usually represents the voices of several mediators: that is, many mediators encountered the same questions in slightly different factual settings.

An important point here concerns the definition of the terms used in the study and in this report. In order to allow mediators the greatest latitude in responding, and thus elicit as much information as possible, the study intentionally avoided any narrow or formal definition of the central concept, "ethical dilemma." Instead, in

framing the question for the mediators, the interviewer defined "ethical dilemma" only as

a situation in which you felt some serious concern about whether it was proper for you as a mediator to take a certain course of action, *i.e.*, where you were unsure what was the right and proper thing for you as mediator to do.

To clarify the point for the mediators, the interviewer distinguished between a "skills dilemma," where the mediator is unsure of how to effectuate the course of action she wants to pursue, and an ethical dilemma, where the mediator knows how to effectuate the course of action but is unsure of whether it is proper to do so at all. The reason for employing this broad and open definition of ethical dilemma relates directly to the purpose behind the study: the development of training and standards of practice for mediators. If training and standards are to be meaningful and helpful, they must provide guidance in situations where mediators themselves feel the need for guidance. The purpose of this study was to identify such situations, so any narrow or formal definition of ethical dilemma would have been counterproductive. Indeed, the same is true for the eventual development of standards of practice: defining the meaning of good practice formally and narrowly will fail to provide mediators with guidance where they themselves feel the need for it.<sup>15</sup> Therefore, wherever the term "ethical dilemma" is used in this report, it has the broad meaning indicated here.

A further explanatory point is that, as will be evident from the findings reported below, when mediators were asked to explain the nature of the dilemmas they identified, their explanations generally followed a similar form. That is, they pointed out the possible responses to the situation, and then explained how each response would preserve some important value but undermine another. In other words, they emphasized the fact that there was an inevitable value conflict in any response to the situation, and defined the dilemma in terms of the particular values in conflict. The reason for mentioning this pattern here is that it explains the form in which the findings are reported below, which directly corresponds to the way mediators responded in the interviews: the situation is described, the alternative responses are imagined, the value consequences of each response are pointed out, and the dilemma becomes apparent and is summarized in a specific question regarding how to proceed.

It should be emphasized that the findings reported here are offered neither as the original nor as the final word on the dilemmas of mediation practice. There has been important and instructive work on the dilemmas of mediation from several sources.<sup>16</sup> Indeed, some of the findings reported here will confirm and

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15. See Bush, *supra* note 10, at 276-86.

16. See, *e.g.*, FOLBERG & TAYLOR, *supra* note 5, at 244-80; SPIDR, MAKING THE TOUGH CALLS (1991); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 262-82, 299-307 (1986); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas*



clarify familiar ground, rather than reveal totally new ground. Nevertheless, the existing work on mediation ethics has many gaps. It focuses more on providing the answers — standards of practice — than describing (or confirming) the questions or dilemmas. Where it does discuss dilemmas, it is usually speaking from an author's singular experience rather than the collective experience of a body of practitioners. And it tends to focus on particular dilemmas rather than providing a comprehensive view of the whole range of dilemmas mediators may face. It is these gaps that the current study addresses. This study focuses almost exclusively on the questions or dilemmas themselves. It gives voice to collective rather than individual experience. And it tries to present a panoramic picture of the whole range of dilemmas encountered in mediation practice. It does also reveal, probably as a result of the collective wisdom it represents, some new and interesting ground not described by previous work on mediators' dilemmas.

Nevertheless, as noted, it is not meant as the final word on the subject, but rather as the beginning point for an expanded and more comprehensive discussion of the subject. Therefore, apart from organizing the questions raised by mediators into categories, the findings, for the most part, simply present the questions as the mediators themselves raised them, using concrete examples from the interviews to illustrate each type of dilemma. The categories were arrived at inductively, by looking for similarities and differences in the situations mediators described. While the categories are believed to have some face validity, there are points of overlap or blurring. Again, the presentation here is offered as a point of departure for further study, not a final model. However, the findings have the virtue that they represent virtually *all* the situations described by mediators as dilemmas, and *only* those situations. In other words, no reported situation was excluded from this report because the author did not consider it a "real" dilemma, nor was any unreported situation added because the author considered it a good "hypothetical" dilemma. Thus, the picture offered here represents what mediators themselves see as major ethical questions that arise in mediation practice.

Finally, while some analysis is offered, the aim here is not to fully analyze — and certainly not to give resolutions of — each dilemma, but rather to indicate the range and character of the dilemmas encountered by practicing mediators, and, therefore, to suggest the dimensions of their need for training and guidance in this area. Where analysis is offered, it is intended to be suggestive rather than conclusive. In sum, the primary character of what follows is descriptive and evocative rather than analytical. Given the current state of knowledge about the dilemmas of mediation practice, description must precede analysis.

With this perspective in mind, consider the following picture of the dilemmas that mediators encounter in the three areas of mediation studied here.

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*in Divorce Mediation*, MEDIATION Q., June 1984, at 61; Sarah Childs Grebe, *Ethical Issues in Conflict Resolution: Divorce Mediation*, 5 NEGOTIATION J. 179, 179-190 (1989). See generally, *Making Ethical Decisions*, MEDIATION Q., June 1985, (special issue). Many other sources could also be cited.

## 5. FINDINGS OF THE STUDY: MAJOR TYPES OF DILEMMAS REPORTED BY PRACTICING MEDIATORS

The dilemmas reported by mediators are divided here into nine major categories, each of which contains subdivisions. A summary outline of the nine categories and their subdivisions is presented in Table I, to make the detailed findings more easily accessible to the reader.

**TABLE I: TYPES OF DILEMMAS**

"Mediators encounter situations presenting dilemmas about:"

- A. Keeping Within the Limits of Competency
  1. When "diagnostic" competency is lacking
    - (a) to diagnose a history of violence
    - (b) to diagnose mental incapacity
  2. When substantive or skill competencies are lacking
- B. Preserving Impartiality
  1. In view of relationships with parties or lawyers
    - (a) after disclosure and waiver of objections
    - (b) when relationships arise after mediation
    - (c) when class or group "relationships" exist
  2. In view of a personal reaction to a party in mediation
    - (a) antipathy to a party
    - (b) sympathy for a party
- C. Maintaining Confidentiality
  1. Vis-a-vis outsiders
    - (a) reporting allegations of violence or crime
    - (b) communicating to a court or referring agency
    - (c) communicating to a party's lawyer
  2. Between the parties
    - (a) when disclosure would prevent "uninformed" settlement
    - (b) when disclosure would break "uninformed" impasse
- D. Ensuring Informed Consent
  1. In cases of possible coercion of one party
    - (a) by the other party
    - (b) by the party's own lawyer/advisor
    - (c) by the mediator's "persuasive" measures
  2. In cases of party incapacity
  3. In cases of party ignorance
    - (a) of factual information known to the mediator
    - (b) of legal/expert information known to the mediator
- E. Preserving Self-Determination / Maintaining Nondirectiveness
  1. When tempted to give the parties a solution
    - (a) at the parties' request
    - (b) on the mediator's own initiative
  2. When tempted to oppose a solution formulated by the parties
    - (a) because the solution is illegal
    - (b) because the solution is unfair to a weaker party
    - (c) because the solution is unwise
    - (d) because the solution is unfair to an outside party

**F. Separating Mediation from Counseling and Legal Advice**

1. When the parties need expert information
  - (a) therapeutic information
  - (b) legal information
2. When tempted to express a professional judgment
  - (a) therapeutic advice
  - (b) legal advice
3. When a party needs a therapist or advocate

**G. Avoiding Party Exposure to Harm as a Result of Mediation**

1. When mediation may make a bad situation worse
2. When mediation may reveal sensitive information
3. When mediation may induce "detrimental reliance"

**H. Preventing Party Abuse of the Mediation Process**

1. When a party conceals information
2. When a party lies
3. When party "fishes" for information
4. When a party stalls to "buy time"
5. When a party engages in intimidation

**I. Handling Conflicts of Interest**

1. Arising out of relations with courts or referring agencies
2. Arising out of relations with lawyers / other professionals

Table I can serve as a quick reference to the detailed findings, which follow, and which give concrete illustrations of each of the types of dilemmas listed in the Table.

*A. Keeping Within the Limits of Competency*

Mediation is a skilled process, so simply by entering into practice a mediator is impliedly representing that he possesses the required skills. However, while there is general agreement on the basic skills needed for competent mediation, there are areas in which even skilled mediators find themselves confronted with the need for skills beyond their competency. The question is how to respond. These situations fall into two general categories.

1. Diagnostic competency. One skill many mediators are not trained in is recognizing certain situations or conditions that may negate the consensual assumptions on which mediation is conducted. The most important of these are past violence/intimidation and lack of capacity.

(a) In some cases, there are indications in the session that one party feels intimidated by the other, perhaps as a result of fear or past violence. If this is so, then that party's participation and decision making may not be consensual in any meaningful sense; this might warrant terminating the mediation. (See Section D. below on Consent.) However, the mediator is not trained in recognizing the signs of abuse or violence, so it is difficult for him to determine what the situation is and exercise his judgment on whether to continue the mediation or not.

**Example 1:** In a custody mediation, Husband is "dictating terms" and Wife, though she offers some objections and seems dissatisfied, readily gives in, appearing nervous and fearful. At one point, Husband voices an actual threat of violence; but Wife says, "He always talks like that, but he never does anything," excuses or dismisses Husband's conduct, and insists she is satisfied with the way the session is going. Should the mediator, lacking any special training in the signs of domestic violence, assume that any suggestion of violence is real, and discontinue the session? Should he try to ask questions to clarify the matter, despite the fact that he lacks training on what questions to ask or how to evaluate the answers? If he always plays it safe and discontinues, he avoids the risk of coercion, but he may be overriding the parties' wishes and losing a potential settlement for nothing. A second question is: are there whole classes of cases, such as family disputes, in which violent intimidation is so common and so tricky to diagnose, that a mediator should simply abstain from taking any of those cases unless trained to diagnose the presence of violence? If a mediator abstains until trained, he saves some parties from diagnostic errors he might make, but he deprives others of valuable help he might otherwise provide.

**(b) In other cases, there are indications that one party temporarily or permanently lacks capacity to comprehend the discussion and its consequences, i.e., lacks the capacity for rational thought or decision. If this is so, then that party's participation and decision making are not consensual, and the mediation should probably be discontinued. However, the mediator lacks training in the indices of incapacity, so it is difficult for him to evaluate the situation and determine whether to continue.**

**Example 1:** In a landlord/tenant mediation, Tenant, who has appeared "normal" in the session, tells the mediator in caucus that the reason he is late with payments sometimes is that "the voices from the transmitter in my neck get me confused sometimes." Assuming it is clear that Tenant is not referring to a real medical implant, does such a remark indicate lack of mental capacity? Should the mediator, lacking any special training in diagnosis of mental incapacity, play it safe and assume incapacity whenever any suggestion of it arises? If so, he avoids the risk of noncomprehension in some cases, but runs the risk of disempowering parties in others.

2. **Specific substantive or skill competencies.** Sometimes, grasping or handling an important aspect of a dispute may require specific background knowledge, information, or skills that a mediator does not have. If she realizes this in advance, of course she should decline to serve. But it may not always be clear in advance that the case will go beyond the mediator's skills.

**Example 1:** A nonlawyer family mediator is asked to mediate a business dispute regarding a failed business deal, in which both parties are represented by attorneys. Both parties know that she is a nonlawyer, but they want her because of her expertise in mediation. She knows that legal issues may be involved, but does not know how central they will be, or how complicated. Should she automatically refuse the case because she has no background or training in law, or go ahead on the belief that her mediation skills are sufficient? If she refuses, she spares the parties possible wasted cost and effort, but she deprives them of the chance that her skills could facilitate a desired settlement.

### *B. Preserving Impartiality*

Mediation is held out to be a neutral and unbiased process, in which the mediator is not partial to either side. But questions arise regarding what is necessary to maintain both the appearance and fact of impartiality. There are two basic problem areas.

1. Relationships with parties or lawyers. It is commonly accepted that relationships with parties can compromise impartiality. In fact, mediators are concerned about not only prior but subsequent relationships. They are also concerned about "relationships" that arise not because of personal contact but because of class or group affiliations/identities.

(a) Normally, where the mediator has had some sort of prior relationship with one party (or lawyer), the accepted response is to disclose this fact to the parties and let them decide whether to continue. However, mediators remain concerned about the situation where a prior relationship is disclosed and the parties waive objections and agree to proceed, but the mediator is uncomfortable.

**Example 1:** One of the parties is the manager of the mediator's condominium complex. (The dispute has nothing to do with the complex.) This fact is disclosed and the other party has no objection and is willing to proceed. But the mediator is concerned whether, if he has to engage in persuasion with that party later in the mediation, the party will wind up being suspicious because of the relationship, despite his present unconcern. The question is: should the mediator ever refuse to serve because of a prior relationship, even though the parties know and want him anyway? If he does, he protects the parties from possible future regrets, but he deprives them of their choice for mediator, an important element of control over the process.

(b) Sometimes, though no prior relationships existed at the time of mediation, the mediator has an opportunity to enter a relationship with one of the parties subsequent to the mediation.

Example 1: Two weeks after a mediation, one of the parties contacts the mediator and invites him to lunch to discuss a matter totally unrelated to the mediation. At the restaurant, they encounter the other party to the mediation, who may now wonder, in retrospect, whether the mediator and this party "got cozy" even during the mediation. In effect, impartiality is compromised retroactively. Should the mediator, in order to avoid this, simply avoid future new relationships with parties to past mediations?

(c) Even where there is no personal relationship, the mediator sometimes shares a class or group identification — race, sex, religion, class — with one of the parties, which might lead the other party to question the mediator's impartiality.

Example 1: In a community mediation over damage to property, one of the parties is white and one Hispanic, and the mediator is Hispanic. Should the mediator do anything to directly address the possible appearance of partiality, even if neither party raises any question? If the mediator asks the white party if he objects, that party may be offended at the question, or embarrassed to respond honestly. But if the mediator says nothing, the white party may in fact suspect partiality. Also, if the white party does raise the question, should the mediator automatically withdraw from the case? If so, who will replace him without facing the same problem? If not, how is impartiality satisfied?

2. Personal reactions to parties during mediation. A second and quite different situation also gives rise to mediator concerns about maintaining impartiality. Even where there are no personal relationships or group connections with either party, the mediator may experience a strong personal reaction — whether of sympathy or antipathy — to one of the parties during the mediation itself because of that party's situation, actions, or positions. Mediators are concerned that, if this occurs, it may affect their ability to conduct the mediation with impartiality.

(a) In some cases, the mediator's reaction is one of antipathy.

Example 1: In a community mediation between two co-tenants of an apartment building, one of whom is a white man with a black daughter, the other party, who is white, makes constant references to "them," "their kind," "those people," etc. These statements lead the mediator to perceive this party as a racist, which the mediator finds repulsive.

**Example 2:** In a custody mediation, Husband (the noncustodial parent) wants to arrange for a visit with the child for a few days around the Christmas holiday, and Wife refuses to agree to any visits of more than one afternoon at a time, even for the holiday. The mediator sees no reason for Wife's refusal other than plain meanness, and the outrageousness of Wife's attitude makes her feel highly negative to Wife.

Of course, the ideal is for the mediator to avoid such reactions. But mediators are human, and, therefore, the reactions will occur in some cases. The question is what to do then. Should the mediator simply withdraw from the case? How does she know when to do so, *i.e.*, when her reaction has become too strong to continue? Should she automatically withdraw if she has any questions whatsoever about her reaction? If she does, she plays it safe, but she may inconvenience the parties in many cases for what is really not a serious problem.

(b) In some cases, the mediator's reaction is one of **sympathy**.

**Example 1:** In a divorce mediation, Wife is a displaced homemaker, a middle-aged woman who has never worked outside the home or dealt with complicated financial matters; and there is a great disparity of knowledge between her and Husband, a business executive, in dealing with the property issues in the dissolution. Mediator sees Wife struggling with these issues and experiences a strong reaction of sympathy toward Wife because of her difficult position.

The questions here are the same as those regarding reactions of antipathy. It is to be noted here that many of the examples described below in the discussion of nondirectiveness (Section E.) also raise the question of sympathetic/antipathetic reactions to parties.

### *C. Maintaining Confidentiality*

Mediation is a private process, *i.e.* it is conducted privately, even if it may be ordered by a public court or other entity. The privacy of the process is one of the features that makes it so useful for exploring possibilities for settlement since, in private, potentially sensitive information can be more freely discussed. This is true, however, only so long as the promise of confidentiality guarantees the privacy of the discussions. Therefore, mediators typically promise confidentiality. However, mediators have concerns about the limits to the principle of confidentiality, because other values sometimes point in the direction of disclosure. There are two main areas where mediators experience this tension — confidentiality from outsiders, and confidentiality between the mediator and each of the parties.

1. **Confidentiality vis-a-vis outsiders.** Mediators are sometimes legally required, sometimes requested, and sometimes tempted to disclose or report information from or about a mediation session to outside parties or agencies. In some instances, it is easy to see that confidentiality should prevail, but in others mediators do not find it so clear.

(a) **Allegations of past or threatened violence or crime are sometimes made in mediation sessions.** Sometimes there are statutes requiring the mediator to report such allegations. Where there is no statute, mediators must decide for themselves whether to report or not. Both situations raise questions.

**Example 1:** In a community mediation between two tenants over noise and disturbances, one party accuses the other of having sold drugs from his apartment, thus causing annoyance and danger to his neighbors. In the session, the accused party never admits but never clearly denies past drug dealing. He ultimately agrees "to have no illegal substances in the apartment at any time." Even if there *is* a statute requiring reporting of serious criminal allegations, should the mediator report this? When is an allegation substantial enough to require reporting? Given the importance of confidentiality, should the mediator make a presumption *against* reporting, despite the statute, unless the allegation seems extremely well founded? Or, given the risks of harm from criminal action, should he report every allegation? If there is a middle ground, where is it? If there is no statute requiring it, should the mediator never report allegations of crime, no matter how serious and well founded they appear, and even if people might be badly hurt as a result?

(b) Mediation is sometimes court-ordered, sometimes entirely voluntary. Either way, and though most cases are easy to resolve in favor of confidentiality, situations arise where mediators are tempted to communicate to a court, either upon request or on their own.

**Example 1:** In a court-ordered mediation of a personal injury case, the permanently disabled victim, with a strong claim of \$500,000 damages, has accepted a \$250,000 settlement. All but \$45,000 of this will be consumed by fees and costs, including a \$100,000 attorney's fee. The victim's attorney advised him to accept the deal, but the mediator sees it as leaving the victim with a grossly inadequate sum for his life-long support. The mediator suspects the court will just rubber stamp the settlement, unless the mediator attaches a note to the file suggesting the judge look closely at the settlement before approving it. Would this be a breach of confidentiality, since nothing substantive is disclosed? Should a mediator ever initiate communication with a court on his own, without any request, for reasons of fairness or other values, or should confidentiality always take precedence?



**Example 2:** The parties to a mediation over a condominium dispute reach oral agreement in the session, and the lawyers agree to write up the agreement later for signature. A week later, one of the parties calls the mediator and tells him that the other party now denies ever having agreed to anything. He asks the mediator to testify in court to the fact that a settlement was reached, without saying more. Would doing so be a breach of confidentiality? Should the mediator in such cases of delayed signature ask the parties for a waiver of confidentiality to testify to the fact of a settlement?

(c) Sometimes mediators can see in the session that a party has a severe need for professional help of some kind, beyond the matter in mediation, but the party seems reluctant to follow up by themselves on any suggestion or referral made by the mediator.

**Example 1:** In a divorce mediation, the mediator sees that Wife badly needs both emotional and financial counseling in order to come through the divorce in decent shape, and it is clear that she is not getting any. Wife's lawyer is not present at the session, and has apparently never seen Wife try to deal with Husband, which she will have to do in the future. The mediator suggests to Wife that she discuss counseling with her lawyer, but is very doubtful that she will. Wife declines the mediator's offer to call the lawyer directly, but she still seems reluctant to bring the matter up with him herself, perhaps thinking he will not respond. Should the mediator call Wife's lawyer anyway to recommend counseling, since Wife has not flatly refused her permission to do so? If she does, she will be helping Wife to get needed services, but she will also be compromising confidentiality.

2. **Confidentiality between the parties.** Often one party reveals information to the mediator, in caucus for example, on condition that it be held in confidence from the other party. Despite the importance of honoring such confidences, mediators sometimes feel strongly pulled to reveal confidential information, for a few reasons.

(a) **An agreement is about to be reached that the other party would probably not accept if the confidential information were disclosed.**

**Example 1:** In a business mediation over repayment of a loan, the parties agree to a settlement in which one of the major items is assignment to Lender of an interest in a lawsuit Borrower has filed against a third party. Borrower tells the mediator confidentially that the lawsuit is somewhat tenuous and that he may not even have enough funds to carry through with it, though he hopes to. Assuming Borrower

says flatly that he does not want the other party to know this, and resists any suggestion to disclose the information himself, should the mediator disclose it, or else discontinue the mediation? If the latter, would this not be a form of disclosure in itself? Should the mediator, therefore, simply maintain the confidence and proceed, no matter what? If so, confidentiality is preserved, but at the expense of the values of consent and fairness.

**(b) Disclosure of the confidential information would probably convince the other party to reach a settlement, and, otherwise, no settlement is likely.**

Example 1: In a personal injury mediation, Injurer has made an offer, but Victim is holding firm with a much higher demand. Injurer tells the mediator in confidence that he has Victim under surveillance and knows his injuries are not as severe as claimed. The mediator strongly believes that disclosure of the surveillance would lead Victim to accept Injurer's offer, but Injurer adamantly opposes telling him. Should the mediator maintain confidentiality, even where it appears in everyone's interest to breach it?

#### *D. Ensuring Informed Consent*

Mediation is by definition a consensual process, in which both parties must consent to any proposed settlement. In order for meaningful consent to exist, there must be an opportunity for free and informed choice by both parties regarding any options for settlement. Sometimes, however, situations arise in which one party may be experiencing coercion or may be deprived of crucial information. Where either of these is true, mediators express concerns about what to do.

1. The possibility of coercion. There are a number of possible sources of coercion on parties to mediation. Mediators are most concerned about three: the other party; lawyers; and the mediators themselves. The problems presented differ.

**(a) In some cases, though expressly wanting to continue the mediation session, one party appears afraid of and intimidated by the other party but insists on going on with the mediation.**

Example 1: A good example of this problem is the family mediation case given above to illustrate the competency dilemma, in which Husband spoke threateningly and Wife seemed frightened but denied the seriousness of Husband's threats and wanted to continue the session. Assume that the mediator feels qualified to determine that the intimidation is real, *i.e.*, that past violence has occurred and is now

influencing Wife's actions, so that no competency dilemma is presented. There is still a dilemma regarding consent: namely, should the mediator discontinue the mediation because of the presence of coercion by one party, or not? If she does, she avoids making the mediation process an instrument of coercion, but she denies Wife the right to make the decision of whether or not to continue the mediation. In effect, either way the mediator responds, Wife is denied her freedom of choice, either by Husband or by the mediator. Is there any way to avoid this? In short, wherever the mediator intervenes to "protect" one party from coercion by another, even though that party insists they do not need protection, there is an element of paternalism inconsistent with the principle of free choice underlying the value of consent itself.

**(b) In other cases, the lawyer for one of the parties is preventing that party from participating and communicating with the mediator and/or pressuring the party to accept (or reject) a proposed settlement that the party does not appear to fully understand.**

Example 1: In a multiparty personal injury case, with several victims of a single injurer, the lawyer for one of the victims has stated a flat demand and refuses to consider any counteroffer, also refusing to let his client speak or be spoken to directly by the mediator or other parties' lawyers. The other victims have all begun to strike a package deal with the injurer, and this victim may, as a result, be left with little or nothing from the limited insurance coverage. The mediator believes this victim does not fully understand the situation, but her lawyer refuses to let him speak to her and insists that his client reject any offer lower than their original demand. The victim seems uncertain, but clearly feels compelled to follow her lawyer's advice and reject the offers to settle. Should the mediator here simply back off on the theory that lawyers are true surrogates for their clients, so that lawyer coercion is simply not possible, *i.e.*, you cannot coerce yourself? Doing so will avoid offense to the lawyer and respect the lawyer-client relationship. Or should the mediator insist on speaking directly to the victim, and question her about her own personal understanding of the consequences of rejecting participation in the group settlement? This may offend the lawyer and interfere with the lawyer-client relationship, but it may also help shield the victim from lawyer pressure and preserve her opportunity for understanding and true consent.

**(c) Quite often, mediators are concerned about whether they themselves might be stepping over the line from persuasion to coercion. The question arises when the mediator sees the possibility of a settlement if he/she can only overcome the resistance of a recalcitrant party. Many mediators raised the question of how far they should go to do so.**

**Example 1:** In a divorce mediation, Husband objects to Wife having custody, on religious grounds. Wife was unfaithful and hence is "a sinner," and Husband feels "a moral obligation to keep the child away from her influence." The mediator knows there are arguments she can make based on children's needs that may influence Husband, but is it proper to ask someone to compromise religious principles in order to reach a settlement for other reasons, whatever they are?

**Example 2:** In a community mediation of a landlord-tenant case, the main issue is nonpayment of rent. Landlord has a clear legal right to the rent, is insistent that he is entitled to get what is legally his, and feels he should not be asked to compromise. There is no doubt that Tenant is simply stiffing him, in the hope that he can get something off of what he owes. The mediator has no direct knowledge of what it takes to evict someone and collect rent in the local court system. Two questions arise: First, is it proper to pressure someone to compromise their clear legal rights, when they are "clearly right" and the other party "clearly wrong," and they insist on standing "on their rights"? If the mediator does so, she may be perceived, at least, as coercing the party. But if she does not, settlement is very unlikely. Second, if the mediator decides to exert pressure here, is it proper, in order to raise doubts in the party's mind, to raise hypothetical or speculative problems about which the mediator has no actual knowledge? For example, should the mediator here suggest that it may well take months to get an eviction, and cost thousands of dollars, when she has no idea of local court conditions and whether or not this is true? To go further, can she lie about her knowledge, *i.e.*, pretend that she knows when she does not? If such questions are raised, the party may back down and settle based on what turns out to be inaccurate assumptions, which undermines the value of consent. But if such questions cannot be raised, the mediator may lack any means of generating movement towards settlement.

**Example 3:** In a mediation of a personal injury claim, Victim has made what the mediator knows, based on his own experience, is a very fair demand. Injurer, represented by an attorney, has flatly rejected it. Mediator sees that Victim can be pushed to lower her demand even more, though it is quite fair as is. He also knows that both parties see him as quite experienced in this field. Several questions arise: Should the mediator pressure Victim to go lower, just to get a settlement, even though her demand is already very modest? That is, should the mediator always "push" on whichever side where there is give, regardless of any question of fairness? On the other hand, with Injurer, should the mediator, if he thinks that the attorney is the source of the resistance, talk directly to the client, and tell him something like, "Based on my experience — and I have a lot of it — she is making a very

reasonable demand, and you would be lucky to get away with so little — give it to her." That is, should the mediator, in pursuing a possible settlement, go around an attorney directly to the party; and, in any case, should he make direct personal recommendations to a party to accept an offer in order to overcome the party's resistance? If he goes around the lawyer, he may get a settlement, but he may be seen as interfering with the lawyer-client relationship to coerce settlement (see Section I. below). If he injects direct recommendations, this may also promote settlement, but it may be unduly coercive depending on how he does it.

In all these situations, and numerous others like them, the question is whether the mediator should push any party by any means in any situation, or whether there are limits on persuasive tactics, and if so what are those limits? Generally, if the decision is to push, this will help promote agreement, but it may run the risk of seeming or actually being coercive. A decision against pushing will avoid coercion, but risk losing a possible settlement that the parties would ultimately desire.

2. Suspicion of party incapacity. Another situation in which concern is raised about consent is where the mediator suspects that one of the parties is temporarily or permanently suffering from an incapacity to comprehend the discussion and make decisions.

Example 1: In a divorce mediation session, Husband appears dangerously depressed and disoriented, drifts away from the discussion, cannot remember what is being discussed at times, and shows other signs of mental disturbance. Nevertheless, when asked about his condition, he rallies and focuses on the discussion and says he wants to proceed with the session. Apart from the question raised earlier, regarding whether the mediator has sufficient competency to diagnose incapacity and what to do in that regard, a separate question is raised regarding consent. For even assuming that the mediator accurately diagnoses signs of incapacity, should she, therefore, discontinue mediation and overrule the party's stated desire to continue? Like the party-coercion dilemma discussed above, this situation forces the mediator to choose between two undesirable options — allowing mediation to proceed when one party lacks understanding, so that consent is compromised, and discontinuing mediation, and in doing so overriding the expressed choice of a party, compromising consent and choice in a different way.

3. Party ignorance. A final type of consent dilemma involves the situation in which a party is deciding whether to accept or reject a proposed settlement, but is doing so without realizing that he lacks relevant information, and that information is known to the mediator. Of course, there are always limits on what

information is available to parties, and as long as parties "know what they are missing" in the way of information, they can make informed choices about how to proceed in the absence of information. But where information is available, and this fact itself is not known, then it is arguable that the party's decision is not made with full (available) information, and, therefore, lacks meaningful consent. And when the mediator has the information that the party unknowingly lacks, he may unavoidably be implicated in this problem of lack of consent. Sometimes the information in question is legal (or technical), sometimes it is factual.

(a) **Lack of factual information.** Frequently, but not always, this problem is connected to the problem of nondisclosure and confidentiality between the parties, discussed above (Section C.). Both are connected to the problem of party abuse of the process, discussed below (Section H.). That is, **the information in question is often confidential information given to the mediator in caucus by the other side.**

Example 1: In a mediation of a business dispute over a breach of contract, after most of the terms of a settlement have been worked out, including the amount of damages to be paid by Party A to Party B, A tells the mediator in caucus that there is a good chance he will be filing for bankruptcy before the agreed time for payment to B arrives. In other words, without some sort of collateral or security, B may only be able to collect pennies on the dollar for his settlement in mediation.

The questions raised here are similar to those discussed above, but it is clarified that this type of dilemma pits the value of confidentiality squarely against that of consent: to maintain confidentiality (as owed to one party), the mediator must sacrifice the meaningful consent of the other, and vice versa.

(b) **Lack of legal information.** It happens with some frequency that **one of the parties is ignorant of a legal rule that would operate in his favor, and which the mediator knows of.** That is, the party is on the verge of making a settlement on certain terms, when if the legal rule were known to him, he would be able to get more favorable terms or might not settle at all. The question here is whether the mediator should provide the information to the party — or hint to him that he should do further research, or otherwise put him on notice — or do nothing. If the mediator does something to bring the information to the party's notice, he preserves the opportunity for meaningful consent, but he runs the risk of crossing the line that separates mediation from legal advice and advocacy, as discussed below. If he does nothing, he avoids crossing that line, but knowingly allows the value of consent to be compromised. Examples of situations in which this dilemma arises are given below in the discussion of separating mediation from legal advice (Section F.), because the two dilemmas are closely connected as just noted.

### *E. Preserving Self-Determination/Maintaining Nondirectiveness*

One of the central bases and values of the mediation process, according to accepted theory, is party self-determination and control over whether, and on what terms, to settle disputes, without imposition from any outside authority. The mediator helps with and facilitates the parties' problem-solving efforts, but she is not supposed to be directive or controlling in any way. That is a key aspect of her impartiality, which permits the process to educate and empower the parties rather than provide an externally imposed solution to the problem. Despite this ethic of empowerment, many mediators experience great tension between the dictates of this principle and the desire to intervene more directly and substantively in certain cases. In general, the question is when, if ever, the mediator can and should abandon the nonjudgmental posture and be more directive. It is noteworthy that this type of dilemma was reported more often than any other. It clearly represents a central concern for mediators. The nondirectiveness dilemma comes up in several different types of situations.

1. Temptation to "give" the parties a solution. In one type of situation, the parties have not yet agreed upon any solution, or have reached an apparent point of impasse. Either way, the parties have not found an acceptable resolution themselves. When this is the case, the nondirectiveness dilemma can arise because the mediator is tempted to give the parties a solution.

(a) Sometimes, struggling to find a solution and/or facing impasse, the parties themselves ask the mediator for a recommendation or for an actual decision on how to end the dispute.

Example 1: In a divorce mediation, all issues have been settled except one — the value of a business that is a major asset of the marriage and must be valued in order for the property settlement to be finalized. The parties simply cannot agree, after much discussion, on a figure. They turn to the mediator and ask her to make a decision, which they will accept as binding, on what the value of the business is in dollar terms. Should the mediator agree to decide this issue for the parties, especially since they have specifically requested it? Or should the mediator refuse to take on a decisional role, even at the parties' request? If the mediator accepts, she guarantees the settlement of the dispute, but she takes control of the outcome from the parties' hands, seemingly undermining the value of self-determination. However, since this taking of control is specifically requested by the parties, perhaps it does not conflict with self-determination. Nevertheless, if the parties know that the mediator can be called upon at some point to simply decide the outcome, this knowledge may undermine both the potential for self-determination and the confidence in the mediator's complete impartiality as regards outcome.

**Example 2:** In the mediation of a business contract dispute, plaintiff originally claims \$200,000 damages and defendant offers to pay \$75,000. After three hours of discussion, the parties are stalled at 150 versus 110, \$40,000 apart. No further progress is produced by caucuses, etc. The parties ask the mediator to tell them his opinion as to what would be a reasonable settlement, based on what he has heard. That is, they ask for a mediator's recommendation. Should the mediator give one or not? The question is similar to that above, with the difference that, since a recommendation would not be binding, there is both less risk of imposition and less certainty of settlement. However, the risk to perceptions of impartiality may be even greater, especially if the recommendation will lead to further discussion.

(b) In other cases, either before any agreement has started to jell or when a point of impasse has occurred, **the mediator thinks she can see a good or ideal solution that the parties have not seen but will find acceptable.** Though the parties have not asked for her recommendation, she feels pulled to step in on her own initiative and say "what the case is worth."

**Example 1:** In a personal injury mediation, the mediator, an experienced personal injury litigator, sees that the case is "worth in the neighborhood of \$50,000" if it were to go to trial. She is quite confident about this estimate. The parties are still feeling each other out and have not begun to move from their initial demand and offer. No one has asked her opinion.

**Example 2:** In a personal injury case, the bottom lines of the two parties, as communicated to the mediator in caucus, overlap. Injurer tells the mediator that he would go as high as \$40,000; Victim says he will take as little as \$30,000. The mediator knows that "a figure in the middle will leave everyone happy," and that all she has to do is to suggest it to wrap things up.

In either of these cases, should the mediator take the initiative to voice her "authoritative" opinion of "what the case is worth," or "what a fair settlement would be," or should she refrain from expressing any opinion, regardless of how much experience she can bring to bear? If she gives her opinion, this may produce a settlement more quickly and smoothly, but it may also influence the parties unduly and hence undermine self-determination. If she holds back, she protects self-determination, but risks wasted time and even impasse. In some situations, this variation of the nondirectiveness dilemma overlaps with the legal advice dilemma discussed below in Section F.

2. Temptation to oppose a solution formulated by the parties. In the second major type of situation presenting the nondirectiveness dilemma, the parties have



arrived at (or are about to reach) a solution of their own design, but the mediator believes that it is a "poor quality" solution to the dispute, for one of a variety of reasons, and feels pulled to direct the parties away from it or, if necessary, to block it entirely. There are a number of variations of this situation, corresponding to the type of quality concern the mediator sees. In most of the variations, there are overlaps between the nondirectiveness dilemma and other dilemmas, including consent and impartiality (Sections B. and D.) and separating mediation from therapy and legal advice (Section F.).

(a) **Because the solution is illegal.** Sometimes the parties agree to a solution that is against the law, and the mediator is concerned about whether he should step in to prevent this from happening.

Example 1: Husband and Wife agree in a divorce mediation that, for various reasons, Wife will have sole custody of their child; Husband agrees to waive even visitation rights. The parties have fully discussed the issue, and decided this is what they want. The law of the state, however, is that sole custody is against public policy.

Example 2: In a mediation of a personal injury wrongful death case, with several survivors including a minor child, the surviving spouse and Injurer agree to a settlement providing for \$20,000 for each survivor. They are preparing to formalize the agreement. The law of the state, however, is that a settlement on behalf of a minor requires the appointment of a guardian *ad litem*.

Example 3: In a community mediation of a dispute over the quality of a roofing job, the homeowner and contractor reach an agreement providing that the \$500 job will be totally redone for \$100 additional charge. However, the contractor is not licensed, and the law of the state prohibits work (and contracts to work) by unlicensed home contractors.

In such cases as these three, assuming that the mediator is aware of the law, should the mediator say anything at all? Should he ask generally whether the parties have considered whether the agreement complies with legal rules, in order to "put them on notice?" Should he point out the specific legal rule involved, and suggest they look for another solution? Should he, if the parties want to proceed anyway, refuse to draft an agreement and discontinue mediation? Should the answers to these questions be different for mediators handling cases brought to mediation privately, as opposed to mediators handling cases referred from courts and public agencies? That is, is the obligation to prevent violations of law greater for the latter than the former? In any case, if the mediator advises the parties or blocks the agreement, he disempowers the parties and risks crossing the line between mediation and legal advice. But if he does nothing, he may bring mediation into disrepute if the illegal agreements are later discovered. And, if the

settlement needs court approval (as in custody cases) and is likely to be reviewed rather than just rubber stamped, he risks wasting the parties' time in the initial mediation, which will be thrown out.

**(b) Because the solution is unfair due to imbalance of power.** Sometimes the parties agree to a solution, but the mediator believes the solution is highly unfair to one party because of a gross imbalance of power between the parties that leads the weaker party to accept an unfair solution because of a poor bargaining position and/or poor bargaining skills. When this is so, mediators often feel impelled to intervene in a directive way to prevent such an outcome.

Example 1: In a divorce mediation, Husband, a construction worker, states that he built the family house himself and, therefore, it is legally his own personal property. He is adamant about this, and Wife, who seems uncertain of her ground and intimidated by him, is prepared to accept this claim and give Husband the house, although there is little other property to divide. The mediator sees that Wife is being bullied, and knows that Husband's legal argument is absolutely groundless.

Example 2: In a divorce mediation, with no lawyers present, Wife is a middle-aged woman who has never worked outside the home or dealt with complex economic issues, instead deferring to Husband for this. Now, Husband, a business executive, is taking advantage of this to dictate terms of a property settlement to Wife, and she is prepared to accept. If Wife had any knowledge of such matters, she would realize the terms are grossly unfair to her.

Example 3: In a personal injury mediation, the mediator sees that Victim's attorney is preparing to settle for half the value of what is clearly a solid \$500,000 claim, primarily because the other attorney is a far better advocate and negotiator. The Victim's attorney has misread both the Injurer's attorney and his own case, and so has grabbed at a low initial offer. Injurer's attorney, realizing the situation, has capitalized on it and is nailing down the unfair settlement.

Should the mediator in such cases, in order to prevent unfairness to a weaker party, ever go beyond the normal steps of questioning the parties regarding their understanding of the terms and consequences of the settlement? For example, assuming the mediator has questioned the weaker party and sees that they understand and accept the settlement terms, should the mediator at least advise the weaker party, if unrepresented, to consult an attorney? If the party disclaims any need for legal advice, should the mediator insist on their getting such advice before drafting an agreement? If the weaker party refuses to do so, or is already represented, should the mediator then warn the party/attorney that they are making

a "bad deal?" Or, if this is too explicit, should the mediator simply refuse to draft the unfair agreement, without saying why?

If the mediator takes any of these steps, he not only risks compromising his impartiality (see Section B.) and scuttling a settlement; he also infringes (increasingly with each step) on the self-determination of the parties, becoming a paternalistic protector of the weaker party and ultimately preventing the party from their chosen course of action. He may also cross over the line from mediation to legal advice. On the other hand, if the mediator refrains from such steps, he allows and becomes party to what he sees as a gross injustice. The choice is a hard one for many mediators.

**(c) Because the solution is unfair or unwise in mediator's judgment, even though no imbalance of power.** In numerous cases, even though there is no clear gross imbalance of power between the parties, what the parties agree upon is a poor solution in the mediator's judgment, because it is either unfair, lopsided, violative of fundamental rights, or simply a bad idea. Therefore, the mediator feels impelled to intervene directly to prevent the outcome.

**Example 1:** In a divorce mediation, Wife has a new lover and wants a quick end to the divorce so she can "get out and start over." She is, therefore, willing to "buy out" by accepting a very small property settlement in which Husband keeps over eighty percent of the property, just to get out quick. The mediator's judgment is that Wife is acting too hastily and emotionally and that she will regret her decision in the future, once the dust of the divorce settles and she realizes she gave everything away.

**Example 2:** In a business mediation over an unpaid business loan to start a gemstone business, Lender is fed up with Borrower after months of collection efforts and wrangling. Lender is about to accept, in full settlement of the \$70,000 unpaid balance, Borrower's entire on-hand stock — a bag of loose gemstones of unknown identity/quality and value. The agreement does not provide for valuation of the stones before settlement, but Lender is willing to take the risk they are worth something. The mediator's judgment is that Lender is acting out of frustration, and that he is probably making a very bad deal just to "get it over with."

**Example 3:** In a community mediation, Landlord claims that Tenant has harassed her by "bugging" her room and eavesdropping on her. Tenant says he must do this to prevent Landlord from continuing a sexual relationship with Tenant's fifteen-year-old daughter. Tenant says he will stop if Landlord agrees to cooperate with an investigation of her behavior by a child abuse agency. Landlord says she has nothing

to hide, and agrees to cooperate and to waive any rights she has against questioning. The mediator's judgment is that Landlord may be opening herself up to extremely serious legal problems, simply out of desperation to end the harassment.

**Example 4:** In a community mediation of an intra-family (parent-child) dispute, the parties agree on, among other things, guidelines for appropriate disciplinary measures. One of the guidelines the parents and children agreed upon is that, "if the belt is used for spanking, only the end without the buckle will be used." Both sides accept that spanking is normal punishment and that it is normal to use a belt for spanking. The mediator's judgment is that, while perhaps not legally considered child abuse, spanking with a belt is horribly wrong.

In all these situations, the questions are similar to those posed in paragraph (b) above. In general, beyond questioning the party making the "bad deal" to confirm that they fully understand and accept its terms, how far should the mediator go? Should he suggest legal advice, or even insist on it, if the party is unrepresented; if the party refuses to seek legal advice or is already represented, should he directly warn the party/lawyer that it is a "bad deal"; should he insist on a cooling off period before drafting the agreement to avoid hasty decisions; if all else fails, should he refuse to draft an agreement on the proposed terms? Again, all of these steps help guard against unfair and unjust outcomes. But all of them, in varying degrees, deny self-determination, impose the mediator's values on the parties, compromise impartiality, and risk lost settlements and increased costs.

(d) **Because the solution is adverse to the interest of an absent third party (especially children).** This final situation is really a special but important subset of the "agreement contrary to mediator's judgment" situation discussed in paragraph (c). However, since it is so frequently mentioned by mediators, it deserves separate mention here. The situation is that the parties are making an agreement that, in the mediator's judgment, would adversely affect some absent third party, especially a vulnerable party such as a child. To avoid this outcome, the mediator feels impelled to intervene in a directive way. Almost all the cases reported here were in divorce mediation, but some were in other areas.

**Example 1:** Husband and Wife agree to share custody of the child, with actual custody to alternate from week to week. But the ex-spouses will be living on opposite sides of the (large) city, so in the mediator's view, the child will wind up spending large amounts of time travelling, "living on the school bus," and will be unable to go to after-school programs and otherwise live a normal life.

**Example 2:** Husband and Wife agree that the three-year-old child should live with Wife and visit with Husband once per month. In the mediator's judgment, seeing the father only once per month will be insufficient for such a young child's emotional needs and psychologically damaging in the long term.

**Example 3:** Wife wants to leave the state with the children, and Husband agrees to allow her to do so, on the condition that she waive any right to child support out of state. She agrees, but the mediator's judgment is that she will not be able to support them on her own and that their welfare will suffer without Husband's support.

**Example 4:** In a community mediation, a woman barber has claimed sex discrimination and harassment by her male boss. The boss admits the bad conduct, of which there is plenty of evidence, but offers a nice financial settlement, which the woman seems ready to accept. The mediator's judgment is that settling this claim out of court may help this woman, but it will allow sexual harassment of women barbers to continue throughout the industry; whereas a major court victory in a case with strong evidence like this one would benefit women barbers across the state.

Again, the questions in cases like these are similar to those noted in paragraphs (b) and (c) above: beyond questioning the parties as to their understanding and acceptance of the terms of agreement, how far should the mediator go in suggesting or requiring legal or family-counseling advice, warning or advising parties himself, or refusing to draft agreements? The consequences of choosing one way or the other are also parallel to those discussed above, although here there is the special feature that the risk of injustice falls not on the parties themselves, but on (vulnerable) third parties. Therefore, the mediator's concern for fairness is not a matter of paternalism toward the parties, but a matter of protecting unrepresented (public) interests, and this may carry a stronger claim against the value of self-determination.

#### *F. Separating Mediation from Counselling/Therapy and Legal Advice/Advocacy*

Mediation is, according to its practitioners and proponents, a unique dispute resolution process. It is distinct from adjudication and arbitration, and mediators are distinct from judges and arbitrators. More important here, it is also distinct from both therapy and legal advice/representation; and mediators are distinct from therapists and lawyers in what they do. Nevertheless, drawing the line between mediation and these other forms of practice — therapy and lawyering — is difficult at times. Mediators sometimes feel pulled into actions that may border on or merge into counseling/therapy or legal advice/advocacy. They are concerned about

the lines to be drawn, and feel a real tension in hewing to the mediation side of these lines. There are several different problems that recur, falling in three main areas. (Again, it must be noted that in the situations reported, there are overlaps between this dilemma and other dilemmas, especially the impartiality and nondirectiveness dilemmas discussed above [Sections B. and E.], and the self-interest dilemma discussed below [Section I.]. Note also that the questions here are not concerned with whether the mediator's actions violate the law or legal/therapeutic codes of ethics, but whether they conform to proper *mediation* standards.)

1. When the parties need expert information. In one type of situation, the dilemma is raised because **the parties are discussing an issue on which they lack (knowingly or not) important information that is known to the mediator because of her expertise in counseling or law.** The mediator feels pulled to provide this information to them, either in response to a question or on her own, but is uncertain whether to do so. Counselors and lawyers certainly provide this kind of information to clients; but should mediators provide it to parties?

(a) **Therapeutic information.** Sometimes the information relates to family systems, child welfare, or personal psychology, and the mediator is a practicing family counselor.

Example 1: In a divorce mediation, Wife wants custody and opposes any visitation with Husband because she believes he has a "dangerous mental condition," which she describes. The mediator knows that the family therapy literature recognizes Husband's condition as normal "post-divorce trauma," which is not dangerous; the literature also reports broad-based research showing that a child's needs include regular contact with her father.

Should the mediator tell the parties this information, and frame it not simply as her opinion but, for example, as "expert knowledge based on current research about the emotional impact of divorce and children's needs?" Only by providing the information and framing it as expert knowledge can she help the parties make informed decisions, based on full knowledge. But information can be inherently directive or controlling. That is, conveying the expert knowledge risks overwhelming the parties with the outside authorities' viewpoint and thereby undermining self-determination. (How many parents will feel free to ignore child welfare experts in deciding how to handle their children?) Thus the expert suggestion becomes determinative itself. This is another example of a conflict between concerns for informed consent and concerns for self-determination which, although related, can still be opposed.

More generally, once the mediator begins to act as "information expert" for the parties, it is difficult to get out of that role, and he becomes the expert problem-solver rather than a facilitator helping the parties find their own solution.

So, if the mediator provides the information, he risks confusing his role, deflecting energy from mediation to what is more like counseling, and becoming too directive. But if he withholds the information, the parties lack important and relevant knowledge. Finally, if the case is one in which the parties are disagreeing about what to do — as in this example, though not in all cases — then providing expert information will almost always favor one party, just as in this case it favors the Husband. One mediator called this the "one-sided information" dilemma. Wherever parties disagree, information will often be seen as favoring one party and disfavoring the other. So, if the mediator provides the information, he risks compromising impartiality. But if he withholds it, he undermines consent and may compromise the quality and justice of the solution.

(b) **Legal information.** In many cases, the information in question is information about legal rules or procedures, and the mediator is a practicing attorney.

Example 1: In a divorce mediation, Husband is asserting that Wife's heart condition automatically makes her legally unfit to be the primary custodian of the children. Wife asks the mediator if this is so. The mediator, an experienced divorce attorney, knows to a certainty that Husband is wrong about the legal rule.

Example 2: In a personal injury mediation, the parties' lawyers are arguing about the admissibility in court of certain evidence establishing the cause and extent of Victim's injury. If it is admissible, it would mean that Victim's chance of winning a large award in court is much greater. The mediator, a litigator himself, recently tried a case in the same court in which this case is pending, and the same issue arose. He knows from his own case that the judge will almost certainly admit the evidence at issue here.

Example 3: In a community mediation between an employer and employee over alleged damage of merchandise by Employee, Employer threatens to withhold wages unless Employee pays for the damage. Employee says Employer has no right to do so. The mediator, a lawyer, knows that withholding wages is illegal unless pursuant to a wage garnishing action in court.

Example 4: See Section E.2.(b) Example 1.

The questions here are similar to those regarding giving therapeutic information. Should the mediator simply tell the parties "what the law is," when he knows it beyond question, and they are uncertain? If the parties disagree about the law and one party is clearly "wrong," should the mediator say so directly, or limit himself to indirect hints — *i.e.*, raising questions about that party's source

of information or degree of certainty, or suggesting that the parties consult their lawyers (or that the lawyers take another look in the library)? Should it make a difference if one or both parties are represented by lawyers, *i.e.*, should information be given only to unrepresented parties? Or should the mediator refrain from giving *any* legal information, no matter what?

The concerns here are also similar to those above. If the mediator offers the legal information, or even indirectly challenges one party's knowledge of the law, he may by doing so direct or determine the outcome, as well as compromise his impartiality. He may also alienate any lawyers involved. But if he withholds the information, he permits one or both parties to act without full knowledge and undermines informed consent. And whatever he does, one or the other of the parties is likely to feel injured by the mediator, because he either concealed a law that favored them or revealed a law that disfavored them.

2. When tempted to express a professional judgment. Another level of the dilemma involves the situation where the parties are considering a solution on which the mediator, by virtue of his expertise in counseling or law, feels qualified to express a professional judgment or opinion, either in response to a question or on his own, and he sees that doing so could make a difference to the parties' decisions about what to do. Here the issue is not just providing objective information, but expressing a subjective judgment. This is something that counselors and lawyers regularly do for their clients. But should mediators ever do this for parties? Again, the situations fall into two areas — therapeutic advice and legal advice. Many of the examples given here also raise nondirectiveness questions, as discussed in Section E.2. above. However, the questions there concerned the propriety of mediator advice-giving as one form of directiveness, where the mediator is not speaking as an expert or professional. The questions here concern the propriety of the mediator specifically acting as "expert-advice-giver," *per se*.

(a) **Therapeutic advice.**

Examples: See Section E.2.(d) Examples 1-3. In each of these examples, the mediator's judgment is based on long experience as a family counselor.

In cases such as these, should the mediator express her professional opinion, to one or both parties, either in response to a question or on her own? Should she do so only if she qualifies her statements as "just my personal opinion, which of course you are free to disregard?" Or should a mediator simply refrain from expressing her own judgment, however framed, even if she believes that the best interests of the child are threatened by what is being proposed? If she does express expert opinions, as with giving expert information, she risks undermining party self-determination and, where the parties are at odds, compromising impartiality. If she refrains, there is not a great problem with consent, since she



is withholding only an opinion, not objective information; but there is still the risk of damage to family or child welfare, if her judgment is accurate.

(b) **Legal advice.** In the following examples, the mediator's opinion is based on long experience as a trial attorney or judge in the kind of case in question.

Example 1: In a personal injury mediation, Victim is about to refuse an offer from Injurer that, in the mediator's opinion, is as much as or more than Victim is likely to get if the case actually goes to trial. Victim does not ask for the mediator's opinion, but there is still time to offer it before the refusal is voiced.

Example 2: In a divorce mediation, Wife has received a property settlement offer from Husband that, in the mediator's opinion, is a very generous offer. Wife asks the mediator whether she thinks it is a good deal.

Examples 3-11: See Section C.1.(b) Example 1; Section D.1.(b) Example 1, (c), Example 3; Section E.2.(b) Examples 2-3, (c) Examples 1-3, (d) Example 4.

The questions here parallel those regarding therapeutic advice. Should the mediator express his professional legal judgment to one or both parties? Should he do so only if he qualifies it as a mere personal opinion, not a professional judgment? Or should he always refrain from expressing his own opinion, no matter how it is framed, even if he believes that one party is unwisely ignoring or giving up important legally protected rights? Does it matter whether or not the affected party has a lawyer? (If the affected party already has a lawyer, this raises a separate dilemma — See Section I. below.)

The concerns to be balanced also parallel those mentioned above. Expressing the expert opinion risks undermining self-determination and compromising impartiality. Additionally, expressing legal opinions in mediation runs the risk of alienating the practicing Bar, losing their support for mediation, and exposing oneself to legal disciplinary action. (See Section I. below.) Refraining from expressing opinions, however, risks complicity in an agreement that compromises someone's legal rights. (If the mediator tries to avoid this dilemma by saying nothing but discontinuing the mediation, this simply shifts the problem to the nondirectiveness dilemma [See Section E.2.(b) and (c)]. The same is true for therapeutic advice-giving.)

3. When a party needs a therapist or advocate. A third level of this general type of dilemma arises when the events of the mediation show that one or both parties have a serious and immediate need that could be helped by counseling, or that one party lacks the skills or ability to effectively advocate his interests

**with the other party** (especially if this is due to an imbalance of power between the two). Where such a situation arises, and the mediator has counseling or advocacy expertise, there is a strong pull to step in and do something.

Example 1: In a divorce mediation session about which school the child should attend, the mediator realizes that underlying Wife's objections to Husband's proposal on this specific issue is a deeper issue: Wife's desire to "hang on" to Husband, *i.e.*, her unresolved feelings about their relationship, and her even more deep-seated fears of rejection generally. Dealing with these issues would probably make the specifics easier to work out, and it would certainly help Wife to deal with her situation.

Example 2: In a community mediation the dispute concerns several allegedly dangerous conditions of rental premises, especially the heating system. Landlord concedes the heating has been breaking down for three weeks, it is mid-winter in a Northeast state, and sub-freezing weather is predicted. Landlord reluctantly agrees to fix the system right away, but complains bitterly about the cost of doing so. Tenant is happy to accept Landlord's simple promise to fix the heat, and makes no demands for guarantees, etc. The mediator realizes that Tenant will be badly compromised if the Landlord fails to carry out his part of the agreement. It will mean going back to court, which could take days or weeks, and Tenant will be freezing without heat in the meantime. The mediator thinks that Landlord could be pushed to put up a bond or escrow to guarantee the performance of the repair, but he sees that Tenant is not sophisticated and assertive enough to push for this himself.

Examples 3-4: See Section E.2.(b) Examples 2-3.

In cases like these, the question is whether the mediator should ever go beyond the specific issues and proposals raised by the parties, and either: (1) using counseling skills, raise and address personal or interpersonal (relationship) issues at a more general or deeper level; or (2) using advocacy skills, raise suggestions to one party on how or what to argue to get a better deal for himself (going even beyond expressing opinions about whether or not to accept/reject proposed terms of settlement).

Steps such as these seem clearly to cross the line from mediation to counseling or advocacy, and taking them poses many risks: compromising self-determination and impartiality, delaying or losing settlements, increasing time and cost, violating consent (assuming parties to mediation do not expect counseling), opening up problems that cannot be effectively treated, and offending other professional groups. However, always refraining from these steps means that some parties who badly need help in counseling or advocacy simply will not get it —

because they will not go to a counselor or lawyer even if referred — and they will suffer serious dysfunction or harm as a result. Even if the line between mediation and therapy/advocacy seems clearest in these cases, and even if they rarely if ever cross it, mediators still feel the tension quite keenly.

*G. Avoiding Party Exposure to Harm  
as a Result of Mediation*

Mediation is a process in which, through the informality of the process, the encouragement of open discussion and exchange of information, and the unpredictability of the outcome, a party may be rendered more vulnerable to harm as a consequence of participation than they would have been otherwise. The possibility of increasing exposure to harm as a result of mediation concerns some mediators, who point to a few different types of situations that can arise.

1. Mediation can make a bad situation worse. Sometimes, because of the volatility and intensity of mediation sessions, issues can be raised, information disclosed or words exchanged that, if no agreement is reached, leave the parties in greater distress, discord, and even danger than if no mediation had taken place at all.

Example 1: In a divorce mediation, the parents ask the mediator to interview the kids to find out their preference for custody. The mediator does so, and the kids prefer Wife, and their expectation is raised that the parents will take their preference into account. But when informed of the kids' desire, Husband totally rejects it and says he will never agree to Wife having custody, no matter what the kids want. The result is that the kids are in even worse emotional shape than before.

Example 2: In a community mediation of a dispute between co-tenants in an apartment house, with allegations of past violence by one of the parties, the mediation session surfaces a great deal of anger, raises the tension level, and then reaches impasse. The result is an even greater potential for violence than before.

The general question here is whether, because of the potential volatility of the process, the mediator should try to avoid emotionality as much as possible, both in screening issues and in controlling dialogue, and discontinue mediation as soon as it begins to move in the direction of too much emotionality. Or should the mediator allow and try to work through emotionality? If he controls it tightly, he limits the risk of volatility and exposure to harm, but he also limits the potential to reach and resolve important issues that have emotional dimensions. If he permits it, the reverse is true.

**2. Mediation can reveal sensitive information.** Sometimes information is disclosed by one party in a mediation session that, if no agreement is reached, will give the other party a bargaining advantage (in court or elsewhere) that they would not otherwise have had. Mediators feel the need to protect parties from this kind of exposure, especially if they are unrepresented by lawyers. Some of the examples here also raise questions relevant to the party abuse dilemma, discussed in Section H. below.

**Example 1:** In a personal injury mediation, the parties are close to an agreement. Injurer has reluctantly raised his offer to meet Victim's last demand. But now Victim seems to be wavering and considering backing out. If Victim does back out now, he will know from Injurer's last offer the fairly firm value Injurer puts on the claim at this point. This may help Victim strategically, for example, in deciding how much to spend on litigation in order to push Injurer to an even higher settlement offer.

**Example 2:** In a divorce mediation, Husband agrees to pay wife \$1,000 per month in temporary support, during the mediation, just to make things easier at this time. Both agree that he cannot afford to pay this much permanently, and that his agreement to do so now does not mean anything about the future. But, if the mediation fails, Wife's lawyer might take the temporary support checks to court and use them to try to get a permanent support decree of the same amount.

Should the mediator, in these kinds of cases, simply warn the parties at the outset to be aware that "any information you provide may be used against you if this process fails to produce an agreement?" Should she go further and monitor questions and disclosures as the process continues, and raise a warning flag if necessary? Should she suggest specific protective measures or ground rules, to avoid backouts or violations of common understandings? If she does any of these, she formalizes the process and treats the parties paternalistically. If she does not, she exposes them to risks of harm at each other's hands.

**3. Mediation can encourage "detrimental reliance."** Sometimes a mediation produces an agreement, or is heading toward one, but the mediator is convinced that, despite the parties' expressed satisfaction with the result, the agreement will not really solve the problem. But more than this, it will create a false sense of resolution, and this will discourage a party from taking other important measures and leave him vulnerable to serious harm. The only way for the mediator to avoid this is to derail the mediation process.

**Example 1:** See Section F.3. **Example 2.**

Where the mediator suspects that a party with an urgent need is at risk of serious harm because he will rely to his detriment on an unreliable mediated agreement, should the mediator insist on guarantees of performance, discontinue the mediation, refer the case to court, or do nothing at all? The tension is between the concern for self-determination and the concern to avoid being an instrument of harm to a vulnerable party.

#### *H. Preventing Party Abuse of the Mediation Process*

Mediation is an informal and private process and, as such, is open to abuses by parties seeking to use its informality and privacy to take undue advantage of others. Mediators are very concerned about controlling this potential for abuse, but it is not always easy to do so without becoming policemen over the parties and intruding on their autonomy. Several kinds of abusive behaviors recur, many of which have already been described in previous examples. (Note here that several of the types of abuse also raise questions about consent [see Section D. above], since they involve lack of information or some degree of coercion.)

1. **Nondisclosure.** Sometimes, one party intentionally conceals information that, if known to the other party, would lead him to make a different decision about a proposed solution, and the mediator finds out about the information.

**Examples 1-2:** See Section C.2.(a) Example 1; Section D.3.(a) Example 1.

How far should the mediator go to prevent this abuse? Should the mediator refuse to continue the mediation without disclosure of the information? Should he disclose it himself whether or not learned in confidence? Or should he simply urge the concealing party to disclose but do nothing himself? The further he goes in policing nondisclosure, the more he intrudes upon the parties' own decision-making autonomy and the value of self-determination. That is, even if there is a nondisclosure, all parties know that this is a risk of negotiation and make their decisions with this background knowledge. Does the mediator have an obligation to protect them from this risk? Or is it different when the mediator actually learns of the information, because then he becomes, in effect, a party to the concealment?

2. **Lying.** Sometimes, one party goes further and intentionally lies to the other (and the mediator), and the mediator finds out.

**Example 1:** In a community mediation over property damage to rented premises, Landlord says in everyone's presence that he has no property insurance covering this damage. Then, while showing the mediator some other documents in caucus, he inadvertently displays a property insurance policy on the premises.

Should the mediator discontinue the mediation immediately? Discontinue unless Landlord reveals the truth? Or should she do nothing on the ground — as above — that parties lie to each other all the time and both parties know it and take that risk?

3. **"Fishing" for information.** Sometimes parties use the mediation process to fish for information or pump information from the other party, without ever intending to come to any agreement.

**Example 1:** In a personal injury mediation, Injurer in caucus with the mediator says, "I have made an offer, and I am not going to say anything else until Victim shows some movement. Let them take the first step, tell me how far they are willing to go, and then I will see what I can do." The mediator's concern is that Injurer may just want to use the process to discover how low an offer Victim is currently willing to accept, in order to plan for future negotiations or trial, and without any real intent to settle at this time. On the other hand, perhaps Injurer really will respond to a first move by Victim. So what should the mediator do? If he refuses Injurer's request, he may scuttle a potential settlement; but if he honors it, he may be abetting a fishing expedition.

**Example 2:** In a mediation over a government building project that is two inches under water due to flooding from improper drainage, the government agency and developer want to discuss possible settlement terms. A third party to the dispute, the architect, is also present at the mediation. He disclaims any responsibility, says he will make no settlement offer, but he still wants to sit in on the mediation. The mediator sees this as a potential spying exercise by the architect, to gain information that he may later use to defend himself in court. Should the mediator exclude him from the mediation unless he expresses a willingness to bargain? If she does, she protects the other parties against potential abuse; but she also loses the chance that the architect, once present, would wind up fully participating and entering the settlement. She also creates the opportunity for a partial deal between government and developer that may disadvantage the architect.

4. **Stalling to "buy time."** Sometimes parties may try to use the mediation process to stall or buy time, not only by dragging out mediation with no intent to settle, but by agreeing to a settlement they have no intention of carrying out. By the time the other party can take them to court, to get an outcome no different than the settlement, they will have gained weeks or months.

**Example 1:** See Section F.3. Example 2. In this case, if Landlord does not agree to guarantees, it may be that he is just stalling for time,

promising to repair the heat without really intending to carry out his agreement. Should the mediator in such a situation go ahead and draft the agreement anyway, respecting both parties' desire to do so? Or should she refuse to draft it and discontinue mediation, to protect one party from potential abuse by the other and resulting harm?

5. **Intimidation.** As noted above, mediation sessions can be volatile, intense and emotional, and sometimes this is all part of the process of surfacing issues and working toward a resolution. However, the line between useful ventilation and communication and abusive intimidation can be difficult to draw.

**Example 1:** In a community mediation Party A claims that, after she bumped Party B's car slightly at a red light, he verbally abused and threatened her and then kicked in her car's grille. A is black, B white. At the session, B speaks through clenched teeth, constantly using expressions like "them," "their ways," "welfare cheats," and other possible racist code words. Though B never gets loud, violent, or explicitly racist, A is obviously distressed and fearful because of B's tone and language. Should the mediator step in here to control and tone down B's communication, or should he just regard it as useful ventilation? One way, he risks stifling B and possibly blocking progress to a settlement; the other way he risks allowing abusive treatment of A.

### *I. Handling Conflicts with the Mediator's Self-Interest.*

The final type of dilemma reported by mediators was the classic conflict of interest dilemma — situations in which the mediator's sense of what was proper to do for the parties' interests conflicted with his concern for his own professional interests. A few different types of conflicts recur.

1. **Conflicts arising from relations with courts or other referring agencies.** Mediators frequently receive cases from courts, either through mandatory court-ordered mediation or court referral to mediation (voluntary for the parties). A few different types of conflicts arise from this relationship.

(a) First of all, the mediator is serving not only the parties but the court. Therefore the mediator has an interest in satisfying the court, which itself is interested primarily in keeping settlement rates high and time and cost consumption per case low. This is true for both publicly employed mediators (court or agency staff) and private mediators. The former are working directly for the courts, and the latter depend for their income on continuing to receive cases from the courts; so both feel the pressure to satisfy the courts' expectations. Mediators feel tension between the need to satisfy the court and the obligation to do what is best for the parties.

**Example 1:** For a court staff mediator, even where it appears that the parties would be best served by taking three or four hours for a mediation session, the pressure from the court to schedule and process a certain number of cases per day or week makes it very difficult to spend so much time on a single case. For both staff and private mediators, the court's interest in settlement rates means that mediators feel at least some pressure — reports differ as to the degree — to be more directive and push harder (in the direction of some type of settlement) than they might if only the parties' interests were taken into account.

**Example 2:** In a business dissolution case, the partners are miles apart in their positions, highly emotional and very antagonistic. Each recites a long history of past deceit and abuse by the other. Each is obdurate in stating that his original position is "final." Forty minutes has gone by in this fashion, and the mediator can see that if any settlement can be reached here — which seems unlikely — it will take a long time to get there. Given this, and given the concern for settlement rates, should the mediator make a quick assessment in cases like this and end (or recommend ending) the mediation early on, instead of taking a lot of time only to find settlement unattainable anyway? Or is this a disservice to parties who might reach settlement if given sufficient time and help?

(b) A second complication of the court-mediator relationship, reported indirectly by some mediators who are not in this position themselves, arises from the possibility that **sitting judges may, after retirement, become mediators themselves.** One concern about this is that a judge might prefer a particular private mediator in referring cases, in the hope or expectation that, when he retires, that same mediator might take him in, or otherwise help him enter the private mediation field.

2. **Conflicts arising from relations with the legal and other professions.** A second type of conflict of interest arises from the fact that mediation, and mediators, must coexist in the professional and dispute resolution world — and establish acceptance for their relatively new field — with other more established groups, such as the Bar. This is even more of a concern because of the skepticism and hostility of many lawyers and others to mediation. **Mediators need lawyers and others to accept and support the process, if it is to grow. The result is an interest on the part of mediators in, at least, not offending lawyers and other professional groups, which may sometimes conflict with the mediator's obligation to serve the parties' interests.**



(a) One type of situation in which the conflict arises has been mentioned above in connection with the consent, nondirectiveness and legal advice dilemmas (Sections D., E., F.).

**Example 1:** The mediator sometimes sees a need to talk to a represented party directly and question him regarding his understanding and acceptance of his lawyer's advice, for example, in order to ensure consent and self-determination. But doing so involves intervening in the lawyer-client relationship, and this may easily provoke hostility from the lawyer, not only in this mediation but beyond, affecting the wider reputation of the process.

**Example 2:** Sometimes, as noted above, mediators feel impelled to express opinions regarding the wisdom of proposed solutions. Wherever legal or family welfare issues are involved, such opinions may be interpreted as giving legal advice or counseling, and an intrusion onto the ground of another profession. If it is, it will certainly provoke a hostile response. Therefore, there is a pressure to hold back, even if the opinion might help the parties, to avoid offense to other professions.

(b) A second situation involves the reverse problem of the example just given. That is, mediators may see it as proper, and consistent with the principle of self-determination and nondirectiveness, to avoid comment or reaction on the wisdom of a solution agreed upon by the parties. However, they may fear that doing so exposes them to criticism by lawyers or counselors who may be asked by the parties to review the agreement and who may view it as contrary to the parties' legal or psychological interests. The more general fear is that such incidents will fuel the view that "mediation should be avoided, because you will wind up with a bad deal," and the profession will suffer. Combining this with the previous example suggests that mediators, in their relations with other professionals, are in something of a double bind. If they intervene to give parties advice, they risk offending the other groups by intruding on their ground; but if they are nondirective and refrain from advice, they risk fueling the claim that mediation gets people into bad deals without warning them.

## 6. COMMENTARY ON THE FINDINGS

As noted much earlier, the primary purpose of this study is descriptive, not analytical. However, some comments on the findings detailed above may highlight some of the most interesting patterns and insights they suggest.

First, while many of the general categories of dilemmas described above have been identified in previous work on the subject, the findings here go further in several respects. (1) They identify some new categories of dilemmas not recognized as such previously, such as the consent and exposure dilemmas. (2)

They identify specific sub-types of dilemma within each general category, many of which have not been clearly articulated before. (3) They provide a wealth of concrete examples of the various dilemmas and sub-types, which give a greater basis for understanding the nature of the dilemmas. (4) They provide information about mediators' understanding of why each of these situations represents a dilemma, *i.e.*, what the problem really is.

Second, the findings strongly suggest that the dilemmas of mediation practice are similar in all the fields of practice studied — community, divorce, and civil mediation. That is, in most categories and sub-types of dilemmas, examples were offered from more than one field. Indeed, but for the limitations of space, this would have been true even more often. Of course, there are differences in the specific form the dilemmas take in each area, and some dilemmas do seem specific to certain fields of practice, or forms of practice (*i.e.*, public versus private). But there is a great measure of commonality running throughout. One implication of this is that there is a place for general standards of practice, applicable to guide all mediators, even if there is probably also a need to supplement those standards with specialized guidelines for each field or form of practice.

Third, as noted in the discussion of methodology, the device of dividing reported dilemma situations into categories has limitations. Though it helps to organize the information and make it more accessible, it does not always capture important distinctions and it sometimes suggests distinctions that are more conceptual than real. In other words, there is both blurring of and overlap between the categories as described. The cross-references in the findings are intended to draw attention to this in specific cases. However, even where there are overlaps, the categorical division is useful, in at least two important respects. First, although some of the overlapping reflects a basic similarity between the categories in question, the separation into different categories still serves a useful function. For example, the self-determination and counseling/legal advice categories both involve situations where mediators feel pulled to intervene in a directive manner. In the former, however, the directive impulse comes from the mediator's personal judgment and values; while in the latter the impulse is connected with the mediator's professional expertise in law or counseling. Drawing the distinction helps mediators recognize *both* kinds of situations more easily, and increasing recognition of dilemmas is one important function of a "catalogue" of dilemma situations, as discussed in the conclusion below. Second, although many dilemma situations can be viewed as posing either of two "types" of dilemmas — a different kind of overlap of categories — the identification of such situations with *both* categories is very important. For example, where a party conveys crucial information to the mediator in caucus but insists on nondisclosure to the other side, the situation can be seen as a confidentiality dilemma *or* as a consent dilemma, and is reported here in both categories. In this case, and others, the overlap or ambiguity in classifying the situation vividly illustrates the way in which mediators' different obligations can conflict with one another: preserving confidentiality may undermine consent, or vice versa. In short, the overlaps here are very real, but so are the typological distinctions, and together they point up the

conflicting character of mediators' obligations, and the resulting need to establish some hierarchy of obligations, a subject also discussed in the conclusion below.

Finally, in many cases, the reason the situation reported raises several dilemmas, or fits into several categories, is that all of those dilemmas/categories derive from a common underlying concern — the concern for respecting the parties' autonomy and their capacity for self-determination. Consider how many of the dilemmas arise, at least in part, because this constant concern for self-determination competes with some other value. This is so for the dilemmas of consent, nondirectiveness, separating mediation from counseling/legal advice, avoiding party exposure to harm, and controlling party abuse. Reviewing the findings demonstrates that, in each of these dilemmas, the concern on one side of the scale is the concern for self-determination. One interpretation of this pattern is that preserving and strengthening self-determination is, in the minds of mediators, a fundamental and ever-present value of the mediation process itself, about which they must constantly be vigilant. This is not to say that they are not also concerned regularly about other values. They clearly are. For example, the values of justice/fairness, and gaining settlement also recur in the mediators' explanations of their concerns. But none seems so pervasive, across so many types of dilemmas, as the value of self-determination. If this pattern does represent an existing attitude or sensitivity of mediators, it may provide a basis on which training and guidance on proper mediation practice can build, a suggestion pursued in the conclusions below.

These few comments must suffice as preliminary observations on the findings. The final section offers some similarly preliminary conclusions regarding the implications of the findings for policy.

## 7. CONCLUSION: POLICY IMPLICATIONS

The primary purpose of this study, as noted above, was to identify the range of ethical dilemmas, broadly defined, on which practicing mediators need guidance from training and standards of practice. The findings and comments presented above indicate clearly that mediators — in community, divorce, and civil mediation — face numerous and intense dilemmas about which they feel the need for guidance very keenly. How to respond to this need is the key policy question raised by this study. A complete answer to that question is beyond the scope of this study, but this final part of the report offers some preliminary conclusions as a basis for further study and discussion.

### *A. Encouragement and Caution*

The findings of this study give cause for both encouragement and caution regarding the use of mediation in a broad range of disputes. As noted at the outset, mediation seems to offer many potential benefits over more formalized processes — preserving relationships, providing better solutions to conflicts, and

fostering self-determination and autonomy. However, in order to realize these benefits while avoiding the risks of abuse inherent in such an informal process, it is crucial that mediators themselves be sensitive to what the risks are and committed to avoiding them. The most encouraging part of the findings of this study is that they provide strong evidence of just such sensitivity.

Recent criticism of mediation, taken as a whole, could give the impression that mediators are a cadre of insensitive and/or oppressive practitioners, who simply manipulate disputants into solutions — often unfair or slapdash — of the mediator's own design.<sup>17</sup> While no one can say that this never occurs, the findings of this study do not support this view of mediation practitioners generally. On the contrary, they suggest that most mediators are concerned about and committed to responsible and ethical practice.

First, all of the many dilemmas described in this report, including the often subtle explanations of their conflicting dimensions and values, were identified by practicing mediators themselves. These mediators are obviously concerned about, and sensitive to, the pitfalls of mediation. The contents of this report are thus strong evidence that mediators are in fact concerned about good practice, sensitive to what the dilemmas are, and anxious to resolve them responsibly. Of course, they may need guidance to do so. But they themselves are describing the problems and asking for that guidance. This is far from a picture of an irresponsible and abusive profession. Indeed, it suggests the very opposite, and that is cause for encouragement.

Second, the findings reported here show that mediators' concerns are not only for narrowly defined ethical dilemmas such as conflict of interest, intimacy with clients, etc. Mediators' concerns also include broader "value dilemmas" involving hard conflicts between different values and objectives at stake in mediation. Indeed, many of the dilemmas they describe go to the central question of what their job or role is, as mediators, and what they should consider the primary purpose of the mediation process when different objectives clash. In short, their concern for good practice is not only very real, but quite broadly defined. They do not just want to avoid gross abuses; they want to practice good mediation.<sup>18</sup> And they recognize that they need guidance in order to do this. Here too, the picture described by these findings is encouraging.

At the same time, the findings reported here are cause for concern and caution. For mediators' interest in good practice, however encouraging, will not be enough by itself to guarantee the responsible handling of the numerous and

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17. See, e.g., Richard L. Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE*, VOL. 2, 267 (Richard L. Abel ed., 1982); Richard Delgado et al., *supra* note 11; Robert Dingwall, *Empowerment or Enforcement: Some Questions About Power and Control in Divorce Mediation*, in *DIVORCE MEDIATION AND THE LEGAL PROCESS* (Robert Dingwall & J. Eekelaar eds., 1988); Robert J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 *FAM. L.Q.* 525 (1983); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *L. & POL'Y* 7 (1986); Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE*, *supra* note 6, at 215.

18. See Bush, *supra* note 10, at 282-86.

difficult dilemmas described above. The mediators themselves know this. They need guidance: training, standards, supervision, etc. And that guidance must come from policy makers — at the program, the state, and the national level. The real cause for concern is not what mediators are doing, but what policy makers are doing — or rather, not doing.

From the findings reported and analyzed above, it should be very clear that mediators are confronted with many quite difficult dilemmas in the cases they handle. No one could claim that the appropriate solutions to these dilemmas are easy or self-evident. No one could deny that, if improperly handled, they can lead to serious harms. Yet, comparatively little attention is given to addressing them, at the program or policy level. Indeed, too little attention has been given even to identifying them, as was the primary purpose of this study.<sup>19</sup>

This is the caution: if identifying and solving problems of the subtlety, complexity, and seriousness of those described above is left to the ingenuity and conscience of the individual mediator, without coherent programmatic guidance, there is serious cause for concern. The core of the problem is not with the mediators or the mediation process; it is with those responsible for the guidance of both. The problem is the confusion, if not silence, that answers concerned mediators when they ask how to deal with the dilemmas they face. The caution is that if mediation is to continue and develop positively, direction must replace this confusion.

This is not to ignore the efforts that have been undertaken to identify mediators' dilemmas and articulate standards that will guide them. Earlier in this report, mention was made of previous work describing the dilemmas mediators face. But, as noted, that work has important gaps and limitations. At this point, mention must be made of work done to develop standards of practice to guide responses to dilemmas. In the divorce mediation field, for example, several organizations have worked on and promulgated standards. In some states, private organizations or state bodies have set out general mediator standards, and the Society of Professionals in Dispute Resolution (SPIDR) has done so on a national level.

Despite this valuable work, however, there remain real problems. Two problems in particular are most important. First, the codes and standards promulgated thus far almost always suffer from internal inconsistency. That is, where the mediator is confronted in a dilemma with the need to choose between two values, like fairness and self-determination, the codes typically contain provisions that, read together, tell her to *choose both*. For example, they tell her to protect *and* to leave alone, when she cannot possibly do both — which is why

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19. Indeed, the mediators interviewed for this study often complained of not having sufficient opportunity to discuss the ethical aspects of practice in training sessions or professional development meetings. They seemed to relish the opportunity the interviews presented for discussing the subject, especially when the interviews were conducted with several mediators at a time, giving them the chance to hear each others' experiences and views.

she is in a dilemma! The result is that these codes and standards are often not very helpful in providing guidance where it is most needed.<sup>20</sup>

The second problem also results in a lack of effective guidance. That is, the codes and standards are framed at a level of generality that is not responsive to the mediator's need to know how to apply the principles in specific situations. They lack concreteness, and rarely include examples or illustrations of situations that may arise, and sample responses. Yet clearly, given the kinds of problems mediators encounter, specific guidance is what they most need. Of course, standards and examples alone may not be enough, without training in how to apply them — another element largely lacking in mediation practice at present.

The general point is that, despite significant work on standards, equally significant problems remain in meeting mediators' need for guidance. The continuing need to address these problems and provide this guidance is the most important implication of this report. The observations offered below are meant to provoke discussion on what form that guidance should take.

### *B. Structural Measures*

Some of the dilemmas described above can be, and some are currently being, addressed by structural measures. For example, the problem of mediators being tempted to act as counselors and resource experts can be addressed by linking the mediation process to other services, as is frequently done now in so-called parent-child or family mediation programs.<sup>21</sup> In those programs, the process is in effect divided or bifurcated, and staged, so that families receive informational counseling before mediation by intake and education workers, and, if necessary, therapeutic counseling after mediation by counseling professionals. The mediator is thus freed of the obligation, and the temptation, to do these other jobs, and can concentrate on the mediation role and task without conflict. This kind of bifurcation and staging of the process seems to be a very effective and desirable way to deal with some of the problems identified. In some jurisdictions in New York, there is a current move to extend this approach to community dispute mediation, and it would certainly make sense in divorce mediation as well. It might also be useful in dealing with the dilemma of providing legal advice. Of course, it means establishing the entire network of services necessary, and this raises both administrative and fiscal issues. All structural solutions, however, are likely to raise such issues.

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20. See Bush, *supra* note 10. For example, the American Bar Association's *Standards of Practice for Lawyer Mediators in Family Disputes*, reprinted in 18 FAM. L.Q. 363 (1984), admonish the mediator not to intrude upon the parties' right to determine the outcome for themselves (Standard I.C.), but simultaneously oblige the mediator to watch over, and ensure, the fairness and reasonableness of the ultimate agreement (Standards III.C.-D. and V.A.).

21. See Margaret L. Shaw, *Parent-Child Mediation: A Challenge and a Promise*, *MEDIATION Q.*, March 1985, at 23, 24-25. The Brooklyn PINS mediation program is a good example of this approach.

### C. Training and Standards

Other dilemmas identified above have no easy structural solution. The nondirectiveness dilemma is a good example. The temptation mediators face to be directive cannot be avoided or eliminated by arranging the process in a certain way. Nevertheless, as discussed at length above, it is a serious problem. If mediators give in to this temptation and act in a highly directive way, then they become de facto arbitrators or judges, directing the parties to a certain outcome of their own choosing and design.<sup>22</sup> As one person noted, this could, in effect, turn mediation into a rough reincarnation of the old Justice of the Peace courts, where judges imposed solutions on parties without the niceties of legal procedure or representation. Moreover, directiveness undermines the very benefits that make mediation valuable in the first place — the potential for generating creative solutions and strengthening parties in dispute resolution skills and self-determination. Finally, directiveness may often work to the detriment rather than the benefit of vulnerable parties.

There is no easy way to avoid these dangers, or those associated with other dilemmas described above. Indeed, as noted in the comments on the findings, the concern for preserving self-determination that underlies the nondirectiveness dilemma underlies several other major dilemmas as well — consent, counseling and legal advice, etc. If so, these dilemmas present similar dangers that cannot be avoided by any structural solution.

Instead, to help mediators resolve these dilemmas in a way that captures the benefits and minimizes the dangers of mediation, some system of practical guidance is necessary. Such a system should start with careful and systematic training of mediators, coupled with some type of subsequent supervision or monitoring. The training should be designed to sensitize mediators to the existence and importance of the kinds of dilemmas identified above, not only in general concept but in very concrete terms. Training should confront mediators with specific dilemma situations, like the illustrations given in this report. It should help mediators to understand why each situation presents a dilemma, and get them to struggle to find and justify a solution. As noted above, this kind of training in simply identifying the ethical dimensions of mediation practice is very rare at present, if it exists at all.<sup>23</sup> Yet, it is probably the best strategy for helping mediators to achieve the standard of practice they want to meet. Of course, developing and implementing such training would add to the cost of mediation training. However, the investment is surely justified to improve the

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22. Some researchers claim that significant numbers of mediators behave in just this manner, and they characterize this type of practice in the same kind of language suggested in the text. See Silbey & Merry, *supra* note 17, at 7-32.

23. For a move in this direction, see Bush & Lang, *Ethics at Work: Case Applications*, in AMERICAN BAR ASS'N, FAMILY DISPUTE RESOLUTION: OPTIONS FOR ALL AGES 129 (1990); Sarah Childs Grebe et al., *A Model for Ethical Decision Making in Mediation*, MEDIATION Q., Winter 1989, at 133, 133-148.

chances that mediation as a whole produces the benefits it promises rather than the dangers it risks.

It is worth noting that, for the kind of training envisioned, the findings of this study — and others like it — could be invaluable. In the context of training, a "typology" of dilemmas like that presented in this report could be used to give mediators a literal road-map of the ethical terrain of mediation practice, pointing out the whole range of pitfalls they may encounter, and the kind of specific shape they take in concrete cases. The concrete illustrations could also provide the basis for discussion and exercises.

However, beyond presenting and analyzing the dilemmas, training must provide some answers. That is what mediators want and need, and what they deserve. Therefore, training should also delineate for mediators what are considered appropriate and inappropriate responses to the dilemmas, *i.e.*, give them a set of standards and guidelines to follow. And of course, this is needed not only for training but for ongoing practice and supervision. This brings us back to the point that such guidelines must be formulated, building on previous efforts and curing their deficiencies, as discussed above. This is another essential step that must be taken. In this regard, the findings of this report are also relevant. First, the concrete illustrations they provide could be used as a basis or model for constructing standards that are accompanied by specific case illustrations and sample responses. Second, as is clear from this study, the mediators interviewed here were concerned about ethical dilemmas broadly defined, *i.e.*, value dilemmas; the need is for standards and illustrations that address the many value conflicts inherently posed by mediation and establish coherent priorities among competing values. Their point should be not just to prevent gross abuse, but to provide guidance to mediators about what mediation is.

Therefore, standards should be clear and coherent and should reflect a consistent commitment to the most important reasons supporting the use of mediation in these cases in the first place. Those reasons, referred to in Part 1 above, have been expressed in a variety of different terms. However, as noted in Part 6, the recurring concern of many mediators for the value of self-determination may reflect a shared view that the key reason for using mediation is to provide disputing parties with the opportunity to find solutions to their own problems without imposition of others' values. If so, then standards of practice should reflect a consistent commitment to the principle of self-determination. If not, if a different principle is more important, then standards should reflect a commitment to that principle. In any case, however, standards should be based on some ordering of principles that allows for clarity and coherency and thus provides guidance to mediators when they really need it — when principles and values conflict. Of the various suggestions made here, the development of coherent and justifiable standards probably involves the least expense in fiscal terms, but the greatest effort in both intellectual and political terms. Yet, it is an important foundation for every other step.



#### *D. Conclusion*

Mediation continues to present great promise. However, much remains to be done at both the practical and the policy level to ensure that it has a beneficial impact not only in theory but in fact. This study demonstrates clearly that practicing mediators are already aware of the kind of problems they face and the kind of guidance they need. But they can only do so much. It is time for policy makers to pay more attention to the dilemmas mediators face, and do more to provide the help and guidance they need.

## A: Appendix

As noted at the outset, the purpose of this study was to generate more information on the dilemmas of mediation practice, not to analyze all those questions and suggest how they should be answered. Therefore, it is beyond the scope of this report to propose a comprehensive set of standards, show how each of the dilemmas should be resolved under those standards, and justify the answers that emerge. Nevertheless, the study of dilemmas leads naturally to the impulse to formulate responses and standards. Appendix A to this report is offered, *not* as a fully evolved and justified set of responses to the myriad dilemmas reported above, but as a tentative effort to formulate standards that would be responsive to the kinds of dilemmas presented, *and* consistent with the principle of self-determination that seemed so important to so many of the mediators interviewed.

Moreover, the author of this report has suggested elsewhere that the reasons supporting the use of mediation are perhaps best captured by the concepts of "empowerment" and "recognition."<sup>24</sup> In other words, many support the use of mediation because: (a) it empowers disputing parties, by providing them an opportunity to exercise their autonomy and self-determination to seek solutions to their problems without imposition of others' values; and (b) it fosters mutual recognition between disputing parties, by providing them a nonadversarial opportunity to air their differences and realize each other's common humanity. Appendix A is a beginning attempt to show how these concepts, if accepted as guiding principles, would affect standards of practice. Space limitations here preclude a commentary explaining the reason for each of the standards adopted. Nevertheless, the general intent was to draft standards that would be internally consistent and avoid sending conflicting messages regarding mediators' obligations, and to do so by consistently following the principle of empowerment or self-determination.

Finally, the proposed standards presented below focus specifically on the categories of ethical dilemmas identified in the text of the report. As a result, they cover the areas of mediation practice that mediators seem to find most problematic. In complete form, standards should cover certain other areas as well, such as fee-setting, co-mediation, details of orientation to mediation sessions, etc.; but since many existing codes do so, I did not duplicate that effort for this study. Some of the areas covered by the Standards below are also covered in existing codes; but many are not. The standards as presented here are primarily original in form and content; but they are based in part on a draft version of the Florida Standards of Professional Conduct for Court Appointed Mediators.

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<sup>24</sup> See Bush, *supra* note 10. [Ed. Note: This theory of mediation is more fully developed in: R.A.B. Bush and J.P. Folger, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (FORTHCOMING 1994).]

**PROPOSED STANDARDS OF PRACTICE  
FOR MEDIATORS**

**PREAMBLE: THE MEDIATION PROCESS AND THE  
MEDIATOR'S ROLE**

A. Mediation is a consensual process in which an impartial third party, with no power to impose a resolution, works with the disputing parties to help them explore, and if possible reach, a mutually acceptable resolution of some or all of the issues in dispute.

B. The mediator's role is (1) to encourage and assist in the parties' exercise of their autonomy and self-determination in deciding whether and how to resolve their dispute, and (2) to promote the parties' mutual recognition of each other as fellow human beings despite their conflict.

**STANDARDS OF PRACTICE**

**STANDARD I: COMPETENCY.**

A MEDIATOR SHALL MAINTAIN PROFESSIONAL COMPETENCY IN MEDIATION SKILLS AND, WHERE HE/SHE LACKS THE SKILLS NECESSARY FOR A PARTICULAR CASE, SHALL DECLINE TO SERVE OR WITHDRAW FROM SERVING AS MEDIATOR.

A. A mediator is obligated to obtain necessary skills and substantive training, appropriate to his/her areas of practice, and to upgrade those skills on an ongoing basis.

B. A mediator is obligated to disclose to the parties to a case the limits of his/her skills or substantive expertise wherever this may be relevant to the handling of the case.

C. Beyond disclosure, a mediator is obligated to exercise his/her own judgment regarding whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving (or, if the case has begun, withdraw from serving) as mediator.

## **STANDARD II: IMPARTIALITY.**

A MEDIATOR SHALL, IN WORD AND ACTION, MAINTAIN IMPARTIALITY TOWARD THE PARTIES AND ON THE ISSUES IN DISPUTE, AND WHERE HIS/HER IMPARTIALITY IS IN QUESTION, SHALL DECLINE TO SERVE OR WITHDRAW FROM SERVING AS MEDIATOR.

A. Impartiality means absence of favoritism or bias — *i.e.*, expressed sympathy or antipathy — toward any party or any position taken by a party to a mediation. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. To ensure not only the fact but the appearance of impartiality, a mediator is obligated to disclose to the parties, at the earliest moment, any present or prior relationship, personal or professional, between the mediator and any party (or party representative).

C. A mediator is obligated to decline from serving (or, if the case has begun, withdraw from serving) as mediator, if:

(1) as a result of disclosure of relationship, any party (or representative) objects to the mediator's serving;

(2) despite disclosure, and despite no party objections, the mediator's own judgment is that a relationship with a party will compromise the fact or appearance of impartiality;

(3) the mediator or any party believes that, apart from relationships, the fact or appearance of impartiality is compromised, either by the mediator's personal reaction to any party (or party position) or by the mediator's background and experience.

D. A mediator is obligated to exercise discretion, and due regard for the appearance of impartiality, in establishing new relationships with parties to past mediations.

## **STANDARD III: CONFIDENTIALITY.**

A MEDIATOR SHALL, SUBJECT TO STATUTORY OBLIGATIONS TO THE CONTRARY, MAINTAIN THE CONFIDENTIALITY OF ALL COMMUNICATIONS MADE TO HIM BY THE PARTIES WITHIN THE MEDIATION PROCESS.

A. Apart from statutory duties to report certain kinds of information, a mediator is absolutely obligated not to disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.

C. Where a case is referred or ordered to mediation from any agency, a mediator is obligated to limit the information given to the referring agency to the sole fact of whether or not a settlement was reached.

D. A mediator is absolutely obligated not to disclose, directly or indirectly, to any party to mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so.

E. Where confidential information from one party might, if known to the other party, change their decision about whether to accept or reject certain terms of settlement, a mediator may encourage the first party to permit disclosure of the information; but absent such permission, the mediator is obligated not to disclose it on his/her own.

#### **STANDARD IV: CONSENT.**

**A MEDIATOR SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT EACH PARTY UNDERSTANDS THE OPERATION OF THE MEDIATION PROCESS AND THE OPTIONS AVAILABLE TO THEM AND THAT EACH PARTY IS FREE AND ABLE TO MAKE WHATEVER CHOICES HE/SHE DESIRES REGARDING PARTICIPATION IN MEDIATION GENERALLY AND REGARDING SPECIFIC SETTLEMENT OPTIONS.**

A. A mediator is obligated to explain the mediation process to the parties, including its comparative risks and benefits and the role and function of the mediator, and to inform the parties of their right to refuse any offer of settlement and to withdraw from mediation at any time and for any reason. This obligation continues throughout the mediation of any case.

B. A mediator is obligated to avoid exerting undue pressure on a party — whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and should encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under pressure of any kind, or without fully comprehending the process, issues, or options for settlement, the mediator is obligated to explore these matters with the party and to assist them in making freely chosen and informed decisions.

D. Where a party appears to be acting under complete coercion or fear, or without capacity to comprehend the process and issues and make decisions, the mediator is obligated to explore this question and, unless the party in question objects, discontinue the mediation. If that party insists on continuing, the mediator may do so, but should continue to raise the question and check for willingness to proceed.

#### **STANDARD V: SELF-DETERMINATION.**

A MEDIATOR SHALL RESPECT AND ENCOURAGE SELF-DETERMINATION BY THE PARTIES IN THEIR DECISION WHETHER, AND ON WHAT TERMS, TO RESOLVE THEIR DISPUTE, AND SHALL REFRAIN FROM BEING DIRECTIVE AND JUDGMENTAL REGARDING THE ISSUES IN DISPUTE AND OPTIONS FOR SETTLEMENT.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether, and on what terms, to resolve their dispute. He/She may and should assist them in making informed and thoughtful decisions; but he/she shall never substitute his/her judgment for that of the parties, as regards any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator is obligated to raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement — including their impact on affected third-parties. Furthermore, a mediator may make suggestions for the parties' consideration. However, at no time shall a mediator make a decision for the parties, or directly express his/her opinion about or advise for or against any proposal under consideration.

C. Subject to Standard VI.C. below, if a party to mediation declines to consult an attorney or counselor, after the mediator has raised this option, the mediator is obligated to permit the mediation to go forward according to the parties' wishes.

D. Whenever the parties are advised by independent counsel or experts, the mediator is obligated to encourage the parties to assess such advice for themselves and make their own independent decisions.

E. If, in the mediator's judgment, an agreement reached by the parties is an agreement that a court would refuse to enforce because of illegality, substantive unconscionability, or any other reason, the mediator is obligated to so inform the parties. The mediator may choose to discontinue the mediation in such circumstances, but should not violate the obligation of confidentiality.

**STANDARD VI: SEPARATION OF MEDIATION  
 FROM COUNSELING AND LEGAL ADVICE.**

A MEDIATOR SHALL LIMIT HIM/HERSELF SOLELY TO THE ROLE OF MEDIATOR, AND SHALL REFRAIN FROM GIVING LEGAL OR THERAPEUTIC INFORMATION OR ADVICE AND OTHERWISE ENGAGING DURING MEDIATION IN COUNSELING OR ADVOCACY.

A. A mediator may, in areas where he/she is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session, including information about the law and about family welfare. However, the mediator shall not provide such information him/herself, either in response to statements or questions by the parties or otherwise.

B. Even in areas where he/she is qualified by training and experience, legal or therapeutic, a mediator shall never offer professional advice to the parties or express his/her professional opinion on an issue or option for settlement.

C. When a mediator believes a party is acting without adequate information or advice on legal or psychological aspects of the issues presented, the mediator is obligated to raise with the parties the option of obtaining independent expert counsel prior to resolving the issues, and afford them the opportunity to do so.

D. A mediator is obligated to limit his/her role to that of mediator, and shall never assume the role of advocate for either party's interests or provide counseling or therapy to either party during the mediation process.

**STANDARD VII: PROMOTION OF RESPECT  
 AND CONTROL OF ABUSE.**

A MEDIATOR SHALL ENCOURAGE MUTUAL RESPECT BETWEEN THE PARTIES, AND SHALL TAKE REASONABLE STEPS, SUBJECT TO THE PRINCIPLE OF SELF-DETERMINATION, TO LIMIT ABUSES OF THE MEDIATION PROCESS.

A. The mediator is obligated to inform parties, at the outset of the process, of the possibility of abuses of the process, and of their own obligation to

participate in good faith. He/She should at the same time inform them of the need to be realistic in protecting themselves against possible abuse.

B. A mediator is obligated to make reasonable efforts not only to ensure a balanced dialogue and prevent manipulation or intimidation by either party, but also to ensure that each party understands and respects the concerns and positions of the other, at least to some degree, even if they cannot agree.

C. Where a mediator discovers an intentional abuse of the process, such as nondisclosure of vital information or lying, the mediator is obligated to encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, nor to discontinue the mediation; but the mediator may discontinue, so long as this does not violate the obligation of confidentiality.

#### **STANDARD VIII: CONFLICTS OF INTEREST.**

**A MEDIATOR SHALL, AS FAR AS POSSIBLE, AVOID CONFLICTS OF INTEREST, AND SHALL IN ANY EVENT RESOLVE ALL SUCH CONFLICTS IN FAVOR OF HIS/HER PRIMARY OBLIGATION TO IMPARTIALLY SERVE THE PARTIES TO THE DISPUTE.**

A. Where a mediator handles cases referred by courts or other agencies, either as a staff mediator or a private practitioner, the mediator is obligated to place the interests of the parties above the interests of the referring agency, if the two come into conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator is obligated to place the interests of the party over his/her own interest in maintaining cordial relations with the other professional, if the two come into conflict.

C. A mediator who is a lawyer shall not advise or represent either of the parties in future proceedings concerning the subject matter of the dispute; and a mediator who is a counselor shall not provide future counseling to either of the parties (or both of them) regarding the subject matter of the dispute.

D. A mediator shall not give or receive any commission, rebate, or other monetary or nonmonetary form of consideration in return for referral of clients for mediation services.



