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Recommended Citation

Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, 11 Disp. Resol. Mag. 13 (2005).
Available at: https://scholarship.law.tamu.edu/facscholar/991

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EYES ON THE PRIZE

The Struggle for Professionalism

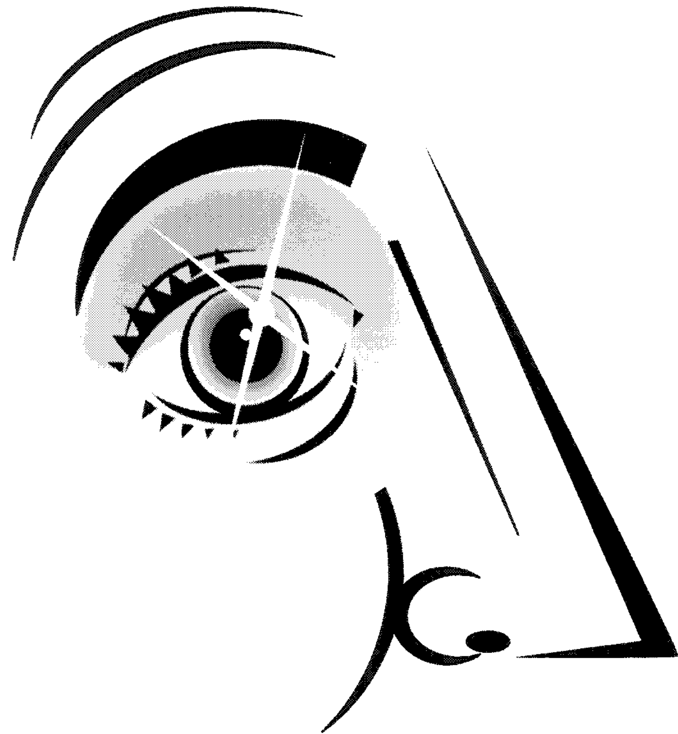
BY NANCY A. WELSH AND BOBBI McADOO

A MERE FIFTEEN YEARS AGO, THE term mediation was confused regularly with meditation. Much has changed. The courts, frequently derided as overcrowded and expensive for individual litigants and the public, now rely on mediation to resolve cases and reduce dockets. Attorneys and judges are advocates; many have become mediators themselves.

Disputants generally express satisfaction with the process. It is not surprising that mediation—along with other ADR processes—has achieved institutionalization in the courts, public agencies and the private and nonprofit sectors.

We are now embarking on the next stage: professionalization. There are increasing references to "dispute *professionals*" or "*professional* mediators." Presumably, these terms signal something more than simply being paid for dispute resolution services or achieving popular recognition of the title "mediator."

It seems that dispute resolution practitioners, especially mediators, now seek the status and autonomy that society grants to lawyers, accountants and doctors. Mediators have attempted to adopt many of the characteristics that distinguish professions from occupations. They have created national organizations that offer vibrant conferences, hammered out ethical codes and persuaded sponsoring courts and agencies to establish training and experience requirements for admission to mediator panels.



This progress, however, should not obscure a central problem. Professions, as distinct from occupations, are characterized by a distinct knowledge system that serves as a conceptual map binding together the members of the profession and framing the way in which they think about, reason through and act upon problems. This shared sense of identity enables the profession to determine appropriate mechanisms for training, regulating entry and enforcing ethical and competent practice.

In reality, the mediation field is simply not as professional as many of us would like to believe that it is.

Among mediators, however, it is difficult to discern any substantial agreement regarding a systematic body of esoteric, abstract knowledge upon which the work of mediation is based. Consequently, it should come as no surprise that there is no consensus regarding the approach, skills or ethics mediators should share. The Model Standards for Mediators certainly exist, but many practicing mediators seem unaware of them or any other discrete set of norms that should be used to guide and evaluate their work. Perhaps mediation advocates' faith in the potential of this field keeps us from seeing the reality of institutionalization—that many "professional" mediators' practices and even their values are influenced more by the needs of the institutions within which they work, or of the repeat players they often serve, than the independently-held values of a mediation "profession." In reality, the mediation field is simply not as professional as many of us would like to believe that it

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is. Professionalism will be within reach only after mediators acknowledge current problems and limitations—and work to correct them.

To be fair, we are unaware of any extensive research regarding mediators' compliance with the ethics espoused in the Model Standards. Particularly in the court-connected context, however, it is easy to find quantitative and qualitative research with worrisome implications. Add alarming anecdotes and conversations to the mix, and it seems time to take a serious look at whether mediators can claim to be members of a profession that is faithful to certain key principles and knowledge.

Faithfulness to self-determination

The Model Standards, even in their proposed revised form, describe party self-determination as a "fundamental principle of mediation practice" which may only need to be balanced with "a mediator's duty to conduct a quality process" consistent with mediators' ethics. Yet, there are many examples of mediators behaving inconsistently with party self-determination—both in terms of parties' control over the decision to mediate and over the mediation process and outcome. Moreover, this behavior seems not to be tied to any commitment to quality process.

Parties' control over the decision to mediate. Today, many court-connected mediation programs rely on mandatory referrals and make it difficult for parties to opt out. This system of coerced education for lawyers and parties is largely responsible for mediation's widespread use, but it is also in tension with party self-determination. We are aware that some mediators reconcile this tension by making it easy for parties to opt out of the mediation session. We are not aware of any mediators, however, who refuse to handle mandatory referrals. In fact, we worry that many more mediators view their authority to require parties' continued participation as an essential tool rather than a threat to party self-determination.

Also, despite the strong likelihood that pro se parties are unaware of their rights, less able to negotiate for themselves when facing a represented party and thus less able to exercise meaningful self-determination, many trial judges are nearly as likely to order them into mandatory mediation as they are to order represented parties to participate in the process. We are not aware of any mediator who has refused to mediate one of these cases, even when the pro se party faces a represented party.

Parties' self-determination also is not respected when judges force participation in mandatory mediation sessions and refuse to provide the merits-based decision requested by a party who has moved for summary judgment. Recent research, however, reveals that a worrisome percentage of trial judges in the state of Minnesota, for example, take just this approach. One judge explained: "Don't bother the court until you have exhausted efforts" to settle the case. Another commented: "It is a needless expenditure of limited court time to rule on summary judgment when the case may settle." A third judge wrote pithily: "Uncertainty breeds resolution."[1] We are not aware of any mediator who has refused a court's mediation referral under these circumstances, despite the clear signal from at least one of the parties that she wished to receive a decision regarding the application of the law.

Finally, when one judge was asked recently about the ethics of serving as a mediator in a case, learning confidential information, and then trying that case, he had a ready answer. He said that before he mediates, he brings all the parties together and, on the record, reassures them that if they are unable to settle, he will try the case as though he did not learn anything from the mediation. Although the judge then gives the parties the choice about whether to have him proceed as their mediator, it is difficult to see how that choice truly respects party self-determination.

The coercion evident in these examples is reminiscent of the power imbalance that generally underlies and infects mandatory arbitration clauses in employment and consumer contracts. Like the employees and consumers who enter unknowingly or reluctantly into these contracts, the parties mediating under the circumstances described above are not freely assenting to participate in mediation. They are simply acquiescing under the constraints of a severe power imbalance. How then can the mediators—or "mediating" judges—claim to be upholding the fundamental principle of all parties' self-determination?

If mediation is a profession with a clear and shared set of norms, judges would not even think about mediating a case and then presiding over its subsequent trial. They would never assume that the parties' assent to mediation under these circumstances is truly voluntary. In addition, at this point in the evolution of the field, professional mediators should be seen refusing to accept mandatory referrals or, at the very least, making it easy for the parties to opt out after they have been educated regarding the potential benefits of the mediation process. This should be especially true for mediation sessions involving pro se parties. Professional mediators who are asked to mediate cases in which summary judgment motions are pending should refuse unless the parties freely agree to proceed.

In addition, professional mediators should urge courts with successful court-connected mediation programs to abandon the crutch of mandatory

As professionals, we should demand of ourselves and our field that we add special value, not merely serve as understudies who mimic the primary actors in a system.

referrals. Indeed, mediators could emulate those arbitrators who have such strong concerns about mandatory arbitration clauses in the consumer context that they now refuse to handle such cases. These arbitrators are behaving like professionals, whose faithfulness to a set of ethical norms is stronger than their acceptance by, or referrals from, powerful institutions.

Parties' control over process and outcome. There are also numerous examples of mediators behaving in a manner inconsistent with parties' self-determination in their control over the mediation process and its outcomes. The case law, for example, now includes sad tales in which judges have mediated cases and then refused to recuse themselves from proceedings to decide the merits of objections to the mediated settlements. In one such case, the judge thought the case had settled; one of the parties disagreed. In the subsequent challenge, the judge chose to enforce the supposed settlement. The appellate court affirmed, rejecting the argument that the judge's actions violated the appearance of fairness doctrine.[2] Faithfulness to party self-determination was not even considered.

In court-connected family mediation, and now in some general civil mediation programs, mediators are required to provide recommendations to judges for cases that do not settle. Apparently, many mediators do not like this requirement, but continue to take these cases and provide recommendations, even though parties' control within the mediation process and over the ultimate outcome are likely to be affected by their knowledge that the mediator may make disclosures to the presiding judge.

Mediators' behavior during mediation sessions also can undermine parties' self-determination. Especially in the civil court context, mediators regularly move quickly out of joint session and into caucus—if they even *have* a joint session—reducing the parties' direct and active participation in the determination of the issues to be decided, the norms to be invoked and the options that might exist for resolution.

Evaluation by mediators also occurs in many mediation sessions. This intervention is not inconsistent with parties' self-determination per se. Indeed, respectful and nonaggressive evaluation can be consistent with party self-determination. We are concerned, however, that many mediators do not understand—or care—that *aggressive* or *premature* evaluation is *not* consistent with party self-determination. Indeed, if attorneys expect mediators to aggressively reconcile clients to the reality of the law, it seems that mediators are allowing lawyers to use them to circumvent the lawyers' obligation to abide by their clients' ultimate authority over the decision to settle.[3]

Professionals stand up for their ethics and serve as the catalysts for institutional reform.

Similarly, mediators may be allowing themselves to be used inappropriately if they agree to serve in court programs that focus on settlement as the core criterion of success or that require mediations to be completed quickly—in an hour or so. Mediators working under these conditions are likely to be tempted to propose specific settlement terms, and research shows that such proposals can undermine parties' perceptions of mediation as a fair process. Further, parties' agreement to settlement terms is more likely to be the result of pressure than of a process devoted to party self-determination.

In these examples, mediators are either creating conditions themselves that fail to show respect for the fundamental principle of party self-determination or are agreeing to mediate under court-created circumstances that make it unlikely that party self-determination will be at the core of the mediation process. As professionals, we should demand of ourselves and our field that we add special value, not merely serve as understudies who mimic the primary actors in a system.

So, for example, professional mediators should:

- object loudly when judges mediate and then preside over subsequent trials or motions to vacate or enforce mediated settlement agreements
- refuse to make recommendations to judges in cases that do not settle
- know that evaluations are not appropriate until after both parties—the clients, unless they clearly choose to defer to their attorneys—have had the opportunity to tell their stories and know that they have been sufficiently heard by the mediator and each other
- never propose specific settlement terms
- refuse to participate in mediation sessions that are too short to permit the time for the parties to be fully heard before they move to the possibilities for resolution, and
- encourage parties to think about their agreement before signing a binding settlement agreement—or include a short-term cooling off provision that would allow rescission without penalty.

Of course, this is a lot to expect of mediators alone. Courts also should be obligated to design programs that protect party self-determination. Professionals, however, stand up for their ethics and serve as the catalysts for institutional reform.

Faithfulness to impartiality

There are also signs that mediators are not behaving consistently with the ethical duty to be impartial and, even more specifically, the duty to

"disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality."

We are aware of mediators who have chosen not to disclose their previous work with a repeat player at the table—an insurance company, school district, or major employer—even when their interaction suggests familiarity. We suspect this is simply because such previous work will raise understandable concerns about the mediator's impartiality, especially if the repeat player is a regular source of business.

If professional mediators truly identify with the need for impartiality, they will always disclose their prior work with one of the parties and do it in such a way that both parties—especially the one-time player—truly exercise self-determination in choosing whether to continue or find another mediator.

The core concepts of self-determination, impartiality and justice represent mediation's roots, and hopefully, its future.

Faithfulness to justice

Mediators should be committed to providing parties with both an experience of justice (procedural justice) and fair outcomes (substantive justice). We are concerned that mediators' failure to convey their commitment to justice, whether defined by the parties in the full and creative exercise of their self-determination or determined by the parties' agreement to follow the prescriptions of social—that is, legal—norms, may help to explain the following developments.

- Comment 5 to Rule 2.4 of the ABA Model Rules of Professional Conduct now makes it crystal clear that lawyers are under no ethical obligation to be candid with mediators. Rather, they are bound only by the requirements of Rule 4.1, which provides that a lawyer "shall not knowingly ... make a false statement of material fact or law" or "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Thus, lawyers owe no greater duty of candor to court-connected, court-appointed mediators than they do to opposing counsel. Is this development consistent with the goal of protecting the integrity of our public courts and the justice to be delivered by our litigation system? Is it consistent with the notion that mediators are professionals who have earned autonomy and respect because they serve a beneficial and important societal purpose?

- Though Rule 2.4 of the Model Rules now requires a lawyer serving as a mediator to explain to an unrepresented party that he or she is serving as a third-party neutral and to distinguish this role from that of the lawyer representing a client, the rule provides absolutely no guidance regarding the unique characteristics or responsibilities of the mediator. Should the lawyer-mediator say: "I don't represent you as a lawyer, but you can be assured that I am here to facilitate a fair process, one that respects your full participation and self-determination and ultimately produces what you regard as a fair result, whether a settlement is reached or not?" Or should that mediator say: "I don't represent you as a lawyer, and you need to know that all I care about is the settlement of this case, so watch out for the tricks I might play to manipulate you into saying 'yes' to me and the other side?" Either statement seems to fulfill the lawyer-mediator's obligation under Rule 2.4, and the second disclosure just might be more honest.

Looking ahead

Every stage in the evolution of the field of mediation has had its promise and its problems. Mediation has achieved widespread institutionalization. Now, mediators have their eyes on the prize of professionalization. Like all meaningful prizes, though, this one requires mediators to prove themselves worthy.

The core concepts of self-determination, impartiality and justice represent mediation's roots—and hopefully, its future. We dare to hope that these concepts—along with a better theoretical and practical understanding of what exactly they mean and of the conditions that enhance them—will one day bind us together as an honored and valuable profession.

Committing to these values is likely to mean, as the song "Eyes on the Prize" proclaims:

So keep your eyes on the prize,
Don't be dismayed . . .
Deep in your heart,
You must believe:
Everything is gonna be alright,
Everything is gonna be alright,
Everything is gonna be alright
someday.

And we say amen.

Endnotes

[1] *See*, Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nevada L. J. __ (2005).

[2] *DeMers v. Lee & Lee*, 2000 WL264022 (Wash. App. Div. 1) (unpublished opinion).

[3] Model Rules of Professional Conduct, Rule 1.2(a).