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THE ETHICAL COMPASS

Truth and Consequences:

What Should a Mediator Ethically Disclose About Her Mediation Style? How Might a Mediator's Style Compromise a Mediator's Neutrality?*

By Elayne E. Greenberg

Transparency is fast becoming the buzzword of mediation. Part of that transparency includes the ethical obligation of mediators to disclose in a meaningful and comprehensible way precisely how that mediator will conduct the mediation. Yes, mediation consumers have an ethical right to such information so that they may then make informed decisions about which mediator to select. Isn't that what the long-held mediation tenets of consent and self-determination are all about? Legitimizing this ethical entitlement, the revised 2005 Model Standards for Mediators guides:

A mediator shall conduct a mediation based on the principle of self-determination. Self-determination is the act of coming to a voluntary uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, *including mediator selection* [italics added for emphasis], process design, participation in or withdrawal from the process, and outcomes.¹

Mediators, what do you tell your clients about your mediation style prior to beginning a mediation? Advocates, what do you and your clients really know about a potential mediator's style before selecting that mediator? What information should mediators disclose about their mediation style in their oral and written mediation communications so that mediators comport with this ethical mandate? As we shall see, the devil lies in the detail.

Disclosing your mediator style is no easy task. If asked, many mediators may avow the practice of one of the recognized mediation ideologies: evaluative, facilitative, transformative or understanding based. Others may espouse employing a more eclectic approach. However, merely evoking a mediation ideology without more may be an inadequate response to the mediator's ethical obligation to disclose mediation style.² After all, outside the walls of our cloistered mediation community, what do these ideology labels really mean to a mediation consumer? Moreover, even if a sophisticated mediation consumer intellectually understands the meanings of these different ideologies, how accurately do these labels describe and predict how a mediator will actually mediate?

Professor Len Riskin offers a more realistic approach to describe a mediator's mediation behavior and rescue us from this ethical quagmire. In his ground-breaking article that bridges the disconnect between mediation ideology labels and mediation practice, Professor Riskin conceptualizes a mediator's behavior as a dynamic behavior that varies on a continuum from elicitive to directive.³ On this continuum, an elicitive mediator tends to support party-generated communications, ideas, options and decisions, while a directive mediator tends to guide the parties in the directions that the mediator believes they should go. As with any dynamic behavior, a mediator may, during any one mediation, exhibit a spectrum of behaviors on this continuum ranging from elicitive to directive.⁴ Moreover, a mediator may exhibit different mediation behaviors on the elicitive-directive continuum when mediating the procedural components of the mediation than when mediating the substantive components of a mediation. For example, a mediator may be primarily elicitive during the parties' discussion of the conflict while being more directive in structuring the time of mediation sessions, requiring pre-mediation submissions and holding caucuses.⁵ Thus, a mediator may exhibit a range of behaviors on the elicitive and directive continuum in the course of any given mediation.

Continuing to flesh out this more accurate conceptualization that describes a mediator's behavior, Riskin elaborates that mediators also vary in how they characterize the conflict to be mediated, from narrow to broad.⁶ A mediator who characterizes the conflict as narrow focuses on mediating the presenting conflict; whereas a mediator who defines the conflict as broad takes a more expansive view of the conflict and tends to address not only the presenting conflict but other ancillary issues as well. It is the confluence of the mediator's dynamic mediation behavior, ranging from elicitive to directive, intersecting with the mediator's definition of the conflict, ranging from narrow to broad, that helps provide a more accurate prediction of how mediators will actually mediate. Therefore, if we wish to accurately describe our mediation style, the mediator should not merely assume a mediation ideological label but explain the dynamic behavior and conflict definition that will be used in the mediation and how they may intersect.

You may be reading this, still wondering how you may explain what you do as a mediator. The task becomes more daunting for those mediators who "handle many

different types of disputes and really do not know how we are going to handle the mediation until we talk to the parties, see how its going and what feels right on the spot. We do not have one defined style of mediation, and it can change in the course of the day.”⁷ Unfortunately, that is the challenge. As Riskin explained, whether or not a mediator subscribes to one mediation ideology, that mediator is likely to display different types of mediation behavior in any given mediation. Mediators may find it helpful to review their mediation behavior by stepping back and, applying Riskin’s framework, analyze their practice (truth and consequences).

Once the mediator has figured out how to accurately describe her mediation style in a way that satisfies the ethical mandates, the next challenge is to consider how any of a mediator’s practices may impinge on a party’s right to self-determination. Answering the following questions will help meet this challenge:

- A. Are you a directive mediator?
- B. Do you decide whether the presenting mediation conflict is discussed in a broad or narrow way?
- C. Do you control or shape the way the mediation process is set up or structured in any way?
- D. Do you ever assess the strengths and weaknesses of each side’s case, predict outcomes of court or other processes or propose position-based compromise agreements based on your substantive knowledge or experience?
- E. Do your ideas about good mediation practice influence in any way how you mediate?

If you have answered affirmatively to even one of the questions, you may be exhibiting directive behavior. Directive behavior without informed party consent may be in violation of a mediation party’s right to self-determination⁸ (truth and consequences once again). Even though debate abounds about whether or not directive behavior actually impinges on a mediator’s neutrality and impartiality, it is an issue worthy of your consideration.⁹ Again, this is an opportunity for the mediator to step back and re-evaluate what she may disclose about her mediation style to potential mediation consumers so that they may continue to exercise their right to informed consent and self-determination.

Although too many of you may be groaning and dismissing this conversation, along with many other conversations about ethics, as one of those esoteric discussions that have nothing to do with real-world practice, ethically savvy practitioners are taking heed and rethinking customary practice:

- How do you describe your mediation style in a way that is understandable and reflects your actual practice in any given mediation?

- How accurately do your agreement to mediate and other written communications describe what your actual mediation style is?
- How much of your mediation style and practice comports with parties’ ethical right to make informed decisions and exercise self-determination?
- If you are going to be directive, how may you alert the parties in a way that promotes mediation consumers’ meaningful informed consent and self-determination?

Like many ethical discussions, unfortunately this article presents more questions than answers. However, hopefully the ideas that are put forth will help you to recalibrate your ethical compass and more adroitly address the truth and consequences.

Endnotes

1. Model Standards for Mediators Standard IA Self-Determination (August 2005); see also Virginia standards of ethics and professional responsibility for certified mediators D 1:
 - c. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and the mediator must include in the agreement to mediate a general statement regarding the mediator’s style and approach to mediation to which the parties have agreed.
 - d. The stages of the mediation shall be described by the mediator.
2. Frank E.A. Sander, *Achieving Meaningful Threshold Consent to Mediator Style(s)*, 14 disp. resol. mag 2, 9 (Winter 2008).
3. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1 (2003).
4. *Id.*
5. *Id.* at 11.
6. *Id.*
7. E-mail from Edna Sussman to author on 1/8/09.
8. *Id.*
9. Susan Naus Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F.L. Rev. 577 (2008).

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**This column is intended for the education of the readership and does not intend to give advice to a specific individual.*