Law Society of Ontario | Barreau de l'Ontario

How to Be Effective as Counsel at Mediation

CO-CHAIRS

Justin Nasseri
Ross Nasseri LLP

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Steinberg Mediation

January 18, 2024

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How to Be Effective as Counsel at Mediation

CO-CHAIRS: **Justin Nasseri,** *Ross Nasseri LLP*

David Steinberg, *Steinberg Mediation*

January 18, 2024
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2 h + 30 m Substantive + 15 m Professionalism
+ 15 m EDI Professionalism

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130 Queen St. W.
Toronto, ON

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Agenda

9:00 a.m. – 9:10 a.m. **Welcome and Opening Remarks**

Justin Nasseri, *Ross Nasseri LLP*

9:10 a.m. – 9:25 a.m. **Mediation Theory: A Helpful Framework**

Shannon Moldaver,
Shannon Moldaver Dispute Resolution Inc.

9:25 a.m. – 9:55 a.m. **Check Your Inner Pitbull at The Door: Using the Right Tools**

Moderator: Justin Nasseri, *Ross Nasseri LLP*

Panelists: Jennifer Egsgard, *Egsgard Mediation*

Shannon Moldaver,
Shannon Moldaver Dispute Resolution Inc.

David Steinberg, *Steinberg Mediation*

9:55 a.m. – 10:35 a.m. **Process Design** (15 m e)

Moderator: Justin Nasseri, *Ross Nasseri LLP*

Panelists: Jennifer Egsgard, *Egsgard Mediation*

Shannon Moldaver,
Shannon Moldaver Dispute Resolution Inc.

David Steinberg, *Steinberg Mediation*

10:35 a.m. – 10:40 a.m. **Question and Answer Session**

10:40 a.m. – 10:55 a.m. **Break**

10:55 a.m. – 11:25 a.m. **How to Be an Effective Representative Negotiator** (15 m P)

Moderator: Justin Nasseri, *Ross Nasseri LLP*

Panelists: Rahool Agarwal, *Lax O'Sullivan Lisus Gottlieb LLP*

David Steinberg, *Steinberg Mediations*

11:25 a.m. – 11:55 a.m. **The Art of Writing an Effective Mediation Brief**

Moderator: Justin Nasseri, *Ross Nasseri LLP*

Panelists: Rahool Agarwal, *Lax O'Sullivan Lisus Gottlieb LLP*

David Steinberg, *Steinberg Mediations*

11:55 a.m. – 12:00 p.m. **Question and Answer Session**

12:00 p.m. **Program Ends**

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TAB 1

How to Be Effective as Counsel at Mediation

Trust is a Factor in Designing Effective Mediation Processes

Proactive Avoidance of Mediation Dystopia: Setting Mandatory Ethical Standards for Mediators

Shannon Moldaver
Shannon Moldaver Dispute Resolution Inc.

January 18, 2024

cpd

TRUST AS A FACTOR IN DESIGNING EFFECTIVE MEDIATION PROCESSES

Shannon Moldaver[*]

Dispute Resolution professionals consider themselves designers of sorts. To do a good job, one must weigh the factors and people involved to build a custom process that will work best for the parties and increase the chances of resolution. To approach every process the same way, *i.e.*, each party is trotted off to caucus with the unlikely chance of seeing the opposing side for the rest of the day, is common but not always well suited for the cause. Much is written about factors that must be considered when designing the right process path to settlement, whether the location, timing, people involved and the list goes on. The concept of "trust" is necessarily embroidered into all aspects of what is called "Dispute System Design" ("DSD"). Trust is a critical de-escalator of conflict and dispute. Various opportunities for building trust are present in any mediation and must always be on the radar of the mediator. Opportunities include trust for the process, trust for the mediator, and trust among parties, each demanding different design elements depending on the type of dispute.

This paper will examine the concept of trust and its role in DSD, specifically in the context of mediation. The first step of analysis is to define the term "trust". Diverse disciplines are surveyed to find a common, working definition. Next, the importance of the concept of trust in dispute resolution will be explored through the eyes of experienced dispute resolution design professionals. As the last step of preliminary, background analysis, the following two questions will be asked: 1) "Can one mediate in the absence of trust?", and drawing on other disciplines and scientific study, 2) "Can trust be manufactured?"

Armed with this first-tier analysis, the second part of this paper explores mediation design, bearing in mind the key design opportunities for building trust, looking specifically at: i) the process; ii) the mediator; and iii) the parties. Each one will be teased out with examples of the changing considerations necessary in the varying types of processes described above, from large-scale to small and interpersonal.

* Shannon Moldaver, M.A., LL.B., LL.M. (ADR), Shannon Moldaver Dispute Resolution Inc.

What is Trust?

Trust is a concept routinely analyzed across a broad range of disciplines, including law, political science, business, psychology and sociology. While definitions are bespoke to each discipline, there are key similarities. Primarily, the concept of trust involves one party having positive expectations about the intentions and actions of another party. There is usually some element of risk, vulnerability, and interdependence involved.[1] An early contributor to the theory of trust, Deutsch, noted trust tends to breed *cooperation*, while suspicion tends to breed *competition*. When a person is perceived as having nothing to gain from untrustworthy behaviour, he is more likely to be trusted.[2]

In business, law, and often in international politics, a calculative model is most common. Contracts, deterrence and sanctions are key ingredients. Building trust among parties is said to foster economic efficiency.[3] Some theorists argue that this cannot be the purest form of trust. They contend that true trust levels can hardly be high if parties are relying solely on other parties refraining from undesirable behaviour for fear of sanction or reprisal.[4]

From a sociological perspective, trust is measured on a continuum over time, rising and falling depending on relationship dynamics. This type of trust is referred to as relational trust. History of the relationship and intervening events shape the depth of trust.[5]

Psychologists tend to look at individual personalities and attribution issues. In his book *The Conflict Resolution Toolbox*, mediator Gary Furlong provides a simple, but useful definition of trust as "having positive expectations about another's motives and intentions toward us where potential risk is involved". He then drills down into the concepts of "risk", "motives and intentions", and "attribution" of blame, explaining that people tend to hold themselves in the most positive light, attributing blame to others. We tend to have a "self-serving or egocentric bias", which in turn has a "profound effect on trust".[6]

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1. D. Rousseau, S. Sitkin, R. Burt et al., "Not So Different After All: A Cross-Discipline View of Trust" (1998), 23 *Academy of Management Review* 393-404 ("*Not So Different After All*").
2. M. Deutsch, "Trust and Suspicion" (1958), 2 Journal of Conflict Resolution 265-279.
3. Kenneth J. Arrow, *The Limits of Organization* (New York: Norton, 1964) at 23.
4. *Not So Different After All*, *supra*, footnote 1.
5. *Ibid.*

Furlong gives the example of an employer firing an employee and the employee relying on "Situational Attribution", perceiving the termination as a need to reduce staff because the company is close to bankruptcy. Low levels of blame and higher levels of trust remain in those situations because the blame is less on the individual and more on the situation.[7]

"Intrinsic Nature Attribution" is another common justification model for conflict, which is also not extremely disruptive to trust in a relationship because a person is holding another person's intrinsic nature responsible for the problem. Furlong gives the example of when a manager is stepping on people's toes simply because she is a workaholic. People may be angered by the situation, but trust is maintained throughout this conflict because the issue is attributed to the manager's personal nature rather than a breakdown of trust.[8]

Finally, he names "Intentional/Hostile Attribution" as the most destructive to trust where, for example, a manager degrades employees in front of a team to "teach them a lesson" or fires an employee to make himself look good and ensure his own promotion.[9]

Lewicki and Wiethoff use a hybrid of the different meanings and separate trust into two types, "Calculus Based Trust" (CBT) and "Individual Based Trust" (IBT). CBT is based on the premise that people are trustworthy only when there are factors of deterrence present. This is a clinical approach that would be used in a business setting (as described above), *i.e.*, if one company or employer acted in one way, the other party would act as expected to avoid negative fallout. IBT, on the other hand, is present when a individual tries to understand another's interests and bind together around a common theme or principle, instilling a feeling of accountability. The employment relationship seems to foster both types of trust. Managers tend to trust subordinates more when IBT exists. Given IBT is more personal in nature, it requires intentional work of individuals in a business relationship to build in that extra dimension.[10]

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6. G.T. Furlong, *The Conflict Resolution Toolbox* (Mississauga: John Wiley & Sons Canada Ltd., 2005) at 135-136 ("*The Conflict Resolution Toolbox*").
7. *Ibid.*, at 133.
8. *Ibid.*, at 133.
9. *Ibid.*, at 135-136.
10. R. Lewicki and C. Wiethoff, "Trust, Trust Development, and Trust Repair" in M. Deutsch and P. Coleman eds., *The Handbook of Conflict Resolution* (San Francisco: Jossey-Bass, 2000), at 88-90 and 96-99.

All theorists tend to agree that relational trust may be more resilient than CBT because exchanges are likely to be terminated in CBT once a breach has occurred.

The Importance of Trust in Mediation

Why does trust matter? Salem notes that no other factor is more important in most types of mediation than the ability to build trust. In referring to collective bargaining negotiations, Alan Gold stated, "The key word is 'trust.' Without it, you're dead. Without it, stay home!"[11]

> When trust levels are high, parties are less defensive and more willing to share information with other parties at the mediation table and in private sessions with the mediator – information that may be crucial to finding a mutually acceptable solution.[12]

Dispute resolution scholars and practitioners report that acts of reciprocity and kindness spawn feelings of trust and that the most effective negotiators are cooperative in an effort to build trust.[13]

Schneider points out that a communicative, accommodating, flexible and caring attitude can promote similar behaviour. Conversely, adversarial behaviour is actually of greater risk and less effective.[14]

To de-escalate conflict, mediators try to build trust among parties. Honest communication among parties fosters trust. Kelman notes that distrust is self-perpetuating and important to stem in order to get parties to the table. To start to rebuild relationships, he like other theorists highlights the importance of symbolic gestures to demonstrate a new resolve and a willingness toward change and peace.[15] Some theories refer to this initiative as a "Confidence Building Measure" or "CBM".[16] Kelman suggests the role of mediator as a "third party repository of trust", and explains how the

11. R. Salem, "Trust in Mediation", *ADR Times* (2011), at www.adrtimes.com/library/2011/7/22/trust-in-mediation.html ("*Trust in Mediation*").
12. *Ibid.*
13. H. Raiffa, *The Art and Science of Negotiation* (Massachusetts: Harvard University Press, 1982) at 344; and G.R. Williams, *Legal Negotiation & Settlement* (St. Paul: West Publishing Co., 1983) at 91.
14. A.K. Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style" (2002), 7 Harv. Negot. L. Rev. 143 at 167, 175, 185.
15. H. C. Kelman, "Overcoming the Psychological Barrier: An Analysis of the Egyptian–Israeli Peace Process" (1985), 1 Negotiation J. 213 at 217.
16. D. Landau and S. Landau, "Confidence-Building Measures in Mediation" (1997), 15 Mediation Q. 97 at 99.

mediator must first foster trust of herself among parties, then the process, and then each other. To that end, he suggests exploratory discussion with a low level of commitment can build enough trust to have parties interested in moving to the next step of resolution.[17]

Also along these same lines of layering processes toward building a foundation of trust, Furlong further draws the distinction between "Interpersonal Trust" among individuals and "Procedural Trust". Procedural trust denotes a clinical trust of the process rather than that of the other people *i.e.*, court supervised visits of children after a divorce when parents cannot agree to access. He encourages mediators to employ the building of procedural trust first as a stepping stone in the process to return to a deeper interpersonal trust.[18]

Mediating when Trust Is Lacking

Can mediators function when they lack the trust of one or more parties? The mediation may not be as effective but it is certainly possible. Sometimes a party will agree to come to the table in the hopes that the mediator will educate, influence or control the other party's behaviour or perhaps just buy time.[19]

George Adams notes that there are times when parties simply must mediate as their best alternative to adjudication. However, they are *not* willing or able to share all of their information. He suggests creative solutions, like working around conscious dishonesty or omission of truth, otherwise corrosive to trust building, with financial incentives. For example, if the value of the claim is X but one party cannot provide information to prove amounts necessary, it can be mutually decided that the omitting party's bottom line expectation will be lessened slightly to accommodate for that missing information.[20] The net result of this strategy is that factors necessary for trust are acknowledged to be lacking, blame is owned, and out of this type of honesty a new form of trust is built, albeit procedural and perhaps not interpersonal.[21]

A mediator can also build in features to the ongoing process to promote the evolution of trust. For example, divorcing partners may

17. H.C. Kelman, "Building Trust Among Enemies: The Central Challenge for International Conflict Resolution" (2005), 29 *International Journal of Intercultural Relations* 639 at 644-646 ("*Building Trust Among Enemies*").
18. *The Conflict Resolution Tool Box*, *supra*, footnote 6 at 144.
19. *Trust in Mediation*, *supra*, footnote 11.
20. G.W. Adams Q.C., *Mediating Justice: Legal Dispute Negotiations* 2nd ed. (Toronto: CCH Canadian Limited, 2011) at 14.
21. *Ibid.* at 91-95.

be required to exchange T4s after the first negotiation, which will help frame a true financial picture and save guesswork, skepticism and mistrust. In a situation lacking in any trust, perhaps an agreement can be signed or a court order issued. This way, the parties are given marching orders in ink. Over time, the performance of the terms of agreement build up a new bank of reputational capital and trust among the parties.[22]

The Science: Can You Synthetically Manufacture Trust?

Acknowledging the true benefits of trust and accepting that distrust can be self-perpetuating, the natural progression is to explore the ability to manufacture trust. Here we can look to scientific research ranging from game theory, neuroscience, the animal kingdom and beyond.

A study by Kiyonari et al. analyzed a series of simulations and experiments on American and Japanese negotiators. Research was conducted through negotiation games, concluding that "trust does not beget trust". Specifically, they found that when a game participant knew that he was trusted, this did not necessarily result in that person exuding more trustworthy behaviour.[23]

One might go further still and try to synthetically manufacture trust. Neuroscience is an area given noteworthy attention in the world of conflict resolution. Factors like the softness of the chair and visual factors in the room are said to have an effect on a person's mind, emotions, and willingness to concede and be generous. Soft chairs and a warm environment are said to produce better results.

The presence of oxytocin in the room is purported to create feelings of trust. "Oxytocin is widely believed to be responsible for prompting empathy, compassion, trust, generosity, altruism, parent-child bonding, and monogamy in many species, including human beings."[24] Of course, providing chemical enhancements like oxytocin to participants of a mediation would be an interesting logistical and ethical challenge.

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22. N.H. Rogers *et al*., *Designing Systems and Processes For Managing Disputes* (New York: Wolters Kluwer Law & Business New York, 2013) at 242 ("*Designing Systems*").
23. T. Kiyonari et al., "Does Trust Beget Trustworthiness? Trust and Trustworthiness in Two Games and Two Cultures: A Research Note" (2006), 69 Social Psychology Q. 270 at 278-280.
24. K. Cloke, "Bringing Oxytocin into the Room: Notes on the Neurophysiology of Conflict" in *The Dance of Opposites: Explorations in Mediation, Dialogue, and Conflict Resolution Systems Design* (Dallas: Goodmedia, 2013).

In the animal kingdom, we learn that animals who gaze directly at each other are said to have a higher degree of trust. Lessons may be drawn, like the importance of having parties face each other at some point during the mediation rather than relying too heavily on caucusing. It also speaks to seating design and begs the question whether it is harmful or effective to have parties sit directly across from each other to have the chance to look into the other's eyes. Perhaps, seating can be changed at certain points. In some situations, parties may benefit from having distrusting parties sit side by side to lessen the adversarial vibe. Later, they may be repositioned for a meal or coffee break, for example, to allow eye contact.[25]

Trust in the Mediation Process-Common Dimensions

In contrasting a number of varying evaluations for dispute design processes, Bussin highlights that the key is to start by asking what the *raison d'être* was for the mediation and then work backwards to figure out if the design was effective.[26] This idea of context is critical when understanding how trust fits into mediation design process.

In fashioning a conflict resolution model for a particular dispute, a designer must first consider the reason for the process. Is the matter highly sensitive and personal? Is it seemingly more clinical and economic based, if even on the surface? Perhaps, it is an institutional issue required to service a large number of people in an organization and necessitates a one-size-fits-all standardized set of procedures.[27] In all of these situations, there will be unique reasons for the process, a unique design, and a unique set of stakeholders.

Knowing that differences will always exist, commonalities for design should be understood as the underpinning to any process. Trust, itself, as a concept, is multi-dimensional in its applicability to the design of a mediation. Designers and stakeholders must have trust for at least three critical elements in any mediation process:

1) *The Mediator* - Are the parties trusting of the mediator? Do they come with pre-conceived notions or expectations of the mediator's knowledge or role? Are these expectations perhaps culturally based (culture including ethnicity

25. A. Bayliss and S. Tipper, "Predictive Gaze Cues and Personality Judgments: Should Eye Trust You?" (2006), 17 *Psychological Science* at 514-520.
26. N. Bussin, "Evaluating ADR Programs: The Ends Determine the Means" (2000), 22 Adv. Q. 460.
27. D.B. Lipsky, R.L. Seeber and R. Fincher, *Emerging Systems For Managing Workplace Conflict: Lessons From American Corporations For Managers and Dispute Resolution Professionals* (San Francisco: Jossey-Bass, 2003).

or industry)? Is the mediator able to build trust? How long will it take? Do the parties trust the mediator to be the designer and facilitator of the process?

2) *The Process* - Do parties understand the reason for the process, the steps, and potential outcomes? Are they comfortable with the inherent expectations of the process, be they emotional, informational (confidentiality concerns), or physical (how parties are situated *i.e.*, together in one space or in caucus rooms, seating when together, breaks, food etc.)?

3) *The Parties* - Are the parties trusting of each other or is a breakdown of trust the core reason for the conflict? Are some of the stakeholder parties less critical to the trust building process than others? For example, whether the plaintiff's lawyer is trusting of the defendant's lawyer could be less critical than if the plaintiff and defendant trust each other. This may not be the case if the lawyers' egos overtake the situation, and perhaps hijack the process.

If trust was present among the parties and then lost, is it possible to rebuild a level of lost trust? How much time will it take? If it is not possible, can a process be built around accepting lack of trust among the parties, focusing on procedural trust? Are there cultural issues at play? Are there third parties (or "ghosts at the table"[28]) tangential to the core problem that have helped spin the core issue out of control? If so, can they be managed as stakeholders?[29]

As an expansion of these ideas, opportunities and challenges specific to each element are fleshed out below, working through the three example types of processes mentioned: large-scale; litigation (commercial or largely financial in nature); and interpersonal dispute (litigation or otherwise):

Trust for the Mediator

Reputation of the mediator is key to earning trust. The mediator may be associated with an organization or association that has reputational capital, as an excellent starting point. Even more important, a mediator's individual reputation is key. Culture plays a

28. An expression to denote the influence of others not present in the mediation room but potentially powerful to the outcome.

29. R.S. Burt and M. Knez, "Kinds of Third-Party Effects on Trust" (1997), 7 *Rationality and Society* 255-292.

role in this piece. In North America, the preference tends to be to have a neutral mediator, fair, not conflicted, effective at facilitating the mediation and then terminating the relationship at the end of the mediation. This person is valued as an objective outsider.

Conversely, in other parts of the world or within certain cultures, people prefer mediators to be someone historically connected to both sides. This person can help smooth feelings and build bridges between the parties, leveraging off an innate trust that pre-dates the mediation process. The relationship is enduring, not ending when the mediation session is terminated. Moore refers to this as "social network mediators".[30]

Reputation is also related to the mediator's experience. What brought the mediator to the table? It may be one's experience and technical knowledge of the issue that help to build credibility and trust, if the parties are seeking an advisory or evaluative mediation. Conversely, perception of impartiality from lack of specific knowledge may be important to the parties fostering a sense of equal treatment. The mediator's credentials can be declared at the outset to ensure full information to all involved and avoid future misunderstandings.

Behaviour of the mediator is also critical. Effective mediators tread very carefully, gauging what seems to be working and which tactics seem counterproductive. Once a mediator loses the trust of the parties, it is hard to recover.[31] A best practices guide written as an instructive source for training court-connected mediators in Florida suggests that a combination of candour, creativity, flexibility, calm, humour and use of "soft language" can help a mediator build trust. These traits are noted as the hallmark signs of a successful mediator, whether or not, as the authors note, this is truly something able to be taught or somewhat innate to the individual.[32]

The mediator should position herself as a "third-party repository of trust", building that trust slowly by pursuing light exploratory discussion with a low level of commitment until the parties comfort level increases.[33]

There are some instances when people meet and instantly feel a sense of trust, through feeling respected and sharing common values

30. C. Moore, *The Mediation Process* (San Francisco: Jossey-Bass, 1996) at 42.
31. *Trust in Mediation*, *supra*, footnote 11.
32. S. Raines, T. Hedeen and A.B. Barton, "Best Practices for Mediation Training and Regulation: Preliminary Findings" (2010), 48 Family Ct. Rev. 541 at 542.
33. *Building Trust Among Enemies*, *supra*, footnote 17 at 644-646; *The Conflict Resolution Toolbox*, *supra*, footnote 6 at 144.

with the other. Generally, deep trust is best built over time. As such, I would expand upon the definitions of trust above by adding the element of "time".

$$\frac{\text{Positive Expectations + Risk + Interdependence } x \textit{ TIME}}{} = \text{T R U S T}$$

To overcome a lack of long durations of time, Martin Teplitsky describes the "burning bush" strategy for mediators. A mediator/arbitrator once explained to him that just as the Israelites were persuaded that Moses was a true prophet based on the biblical story of the burning bush, so too do stakeholders need to believe in the magic of the mediator. Teplitsky recommends speaking with each party before the mediation, at which point at least one low-lying fruit or easy access point will often reveal itself. Specifically, this might be a misunderstanding or something both sides would concede. He suggests working hard and immediately to resolve that issue. By showing the parties at the outset that you have already found a solution to a seemingly intractable issue, some level of instant trust can often be built.[34]

For different types of processes, the *modus operendi* and demeanor of the mediator will naturally be different. In a large-scale, institutional-type process, the mediator may have the goals of the organization as a factor to balance with a set of personal and legally binding ethics. The mediator will have to take special care to guard against conflict in this regard. For example, working for an organization overrun with a high volume of complaints, the mediator may be mandated to operate in the interests of time. She must then strike a balance between her integrity to mediate properly and to complete assignments expeditiously.

In a mediation struck as part of a litigation process, the mediator may or may not have particular experience in that area of law. A mediator is free to choose a facilitative or directive style. If already trained in an area of law, there may be a propensity toward being too directive and steering the parties towards her view of "justice". On the other hand, not having experience in the area of the law in question may make the mediator's job more difficult in terms of building trust among the lawyers.

In a highly sensitive interpersonal dispute, a mediator will need to pay close attention to minding personal feelings of the parties, without appearing to be selecting one over the other. Small changes in tone or choice of wording can be disruptive to the flow of the trust building process. For example, parties may mistakenly perceive bias

34. M. Teplitsky, *Making a Deal: The Art of Negotiating* (Toronto: Lancaster House, 1992) at 72-73.

if the mediator goes around the table in a plenary session exploring ideas and responds with "Okay" to most people's comments and "Excellent!" to others. Each party must be given sufficient "air time" to speak.[35]

All of this said, Stimec and Poitras[36] point out that trust for the mediator is only one element of DSD and it is possible that too much time can be spent on this consideration. Their empirical research concludes that building trust for the mediator is key to success at the outset of the mediation process. However, there is a threshold, at which point a basic level of trust has been reached and the mediator can shift focus back to the key issues of the dispute. The correlation between success of the mediation and trust for the mediator plateaus or becomes less relevant.

i) Trust for the Process

More often than not, the mediator will be both the designer and facilitator of the process. To effectively build trust for the process, the mediator must ask herself why the process was created and how to effectively communicate that mandate to the parties. She must contemplate sensitivities, potential gaps in knowledge, and even appropriate tone of voice to deliver the message effectively.

Consideration starts with the issue in dispute, the possible stakeholders and the history of the relationship among the stakeholders. The agenda and flow of the day must be set out, contemplating emotional and physical comfort. The situation may necessitate shuttle diplomacy, face-to-face negotiations or a hybrid of both. Breakout rooms may be needed. Food and drink, timing, rules of engagement, and breaks are all factors. As noted above, science tells us that soft chairs and a warm environment may be helpful to trust building, but the individual personalities of the stakeholders and issue at hand will inform the extent to which certain settings would be appropriate.[37]

Structurally, the process may demand more than just mediation, as in the case of med-arb. It may be a mediation that begins as facilitative and ends evaluative. As another possibility, it may begin as a direct negotiation with a silent mediator sitting in the corner of the room before facilitation occurs. The possibilities are endless.

35. *Designing Systems*, *supra*, footnote 22 at 371.
36. J. Poitras and A. Stimec, "Building Trust With Parties: Are Mediators Overdoing It?" (2009), 26 Conflict Resolution Q. 317-331.
37. D. Gollan, "Variations in Mediation: How-and Why-Legal Mediators Change Styles in the Course of a Case" (2000), *Journal of Dispute Resolution* 41 at 41; *Designing Systems*, *supra*, footnote 22 at 373.

The *raison d'etre* comes into play again. For example, building trust for a large-scale institutional process has a long list of implications. The cookie-cutter methods used are often intended to build trust and consistency but can also backfire and have the opposite effect. By creating a transparent process there should be more certainty for the way that events will unfold. However, the impersonal nature of any large-scale model often robs the parties of a sense of personal investment by the other stakeholders involved.

Building trust for this model will entail explaining the rationale behind the system. The mediator may give generic examples of situations in which positive results were achieved through the process, own the disadvantages, and explain how the mediator will manage around the challenges. For example, a stakeholder's concern about becoming "a number in the system" can be managed by taking time to build a personal rapport, and keeping notes of personal conversations to reflect back to at the next touch point in the process.

A fairly standard litigation, with a primarily financial focus, poses its own set of challenges in building trust for the process. Mediators may have had numerous experiences dealing with a similar type of dispute, *i.e.*, dealing with any one of Canada's large investment dealers in wrongful dismissal claims or mediating between insured parties and claims adjusters in personal injury matters. Naturally, the mediator and perhaps the lawyers may go into the mediation with an expectation of the process. All of the 100-plus mediations they attended prior to that one may have settled at around the same place and they may know that one of the stakeholders usually walks in and announces the bottom line or tends to go three rounds before settling, for example. The design is somewhat predetermined through habitual behaviour.

The plaintiff may be new to the process and hope for feelings and interests to be shared in caucus, plenary sessions, etc. To meet this interest, the mediator may choose to start afresh and fashion a new process to be communicated to all parties. Alternatively, she may have to educate the plaintiff on the historical patterns, *i.e.*, at some point the defendant will get instructions for a final number, at which point the defendant might leave as they historically have. Strategies can be designed to expect and/or manage around that possibility. The mediator will need to explain the process and build trust in the events that are likely to unfold without tainting the explanation or opportunity with biases from prior experience. At the same time, sharing as much experiential knowledge as possible to manage the

parties' expectations can positively advance the process of building trust.

In the case of a sensitive interpersonal dispute, the mediator must pay careful attention to explaining the process as voluntary, neutral and confidential. Of course, these are essential ingredients to any mediation but ones that may need to be repeated a number of times in a personal litigation where strong emotions are at play. A set of rules, whether explicit or implied, will need to be adhered to throughout the process so that neither party feels the other is favoured in any way.

ii) Trust Among the Parties

The greatest design challenge is to build trust between or among the parties, the reason being that the task is actually to *re-build* trust. Chances are that some level of trust brought the parties together in the first place and that trust was corroded, or perhaps destroyed, causing or as a result of the dispute. The optimist's view of this conundrum is that some level of trust was there and built over time, so if the mediator can strike the right chord she may be able to convince the parties that they are deserving of each other's trust again. Once trust exists, a huge part of the dispute is unlocked and resolution may be within reach.[38]

The pessimist's view is that, once lost, trust is very hard to regain. When designing a process, the mediator would have to consider the history very carefully and consider the best way to tease out the first delicate layer of trust and build on that. Mediators can influence parties positively or negatively about each other, often using the caucus process as an effective tool.[39]

Looking at the process, the mediator may decide to caucus or meet all parties together but consciously keep discussion light and away from stressful or conflictual topics. Deciding to seat parties adverse in interest side-by-side or face-to-face may be a good strategy in some situations, while inappropriate in others. The mediator will have to consider the specific dynamics in a more personal situation to assess whether having people sit in another room or "safe zone" for introductions might work best.

In most designs, caucus will be essential in building trust; the mediator is able to show empathy while also maintaining impartiality and the perception of impartiality.[40] The mediator

38. *Trust in Mediation, supra*, footnote 11.
39. M. Khachaturova and D. Poimanova,"The Role of Mediation Strategies in Solving Interpersonal Conflicts" (2015), 33 Conflict Resolution Q. 35 at 48.

will first need to spend time ensuring trust for her and the process and then slowly tease out the underlying tension and cause of mistrust between the two parties. She may want to deliberately try to encourage at least one positive sentiment about the other party and ask for permission to take that one message back to the other side. This would be in line with Kelman's suggestion of a symbolic gesture. It may be unrelated to the contentious issue. It might be a gesture rather than a sentiment, like agreeing to eat in the same room.

Salem outlines helpful ideas for mediators to build trust among parties:

> In considering how to gain the trust of the parties, it may help to reflect upon the qualities and behaviors of the people you trust the most. For example, I find it easiest to trust people who (a) treat me with dignity and respect; (b) are like me; (c) behave as though they like and care about me; (d) don't hurt me and protect me from being hurt by myself or others; (e) have no interests that conflict with mine; (f) listen to and understand me; (g) help me solve my problems when I ask them to do so and (j) are reliable and do what they promise to do in a timely manner. Applying some of these principles to mediation, some mediators can earn trust in several key ways:
>
> - Treat the parties equally, with respect and dignity at all times.
> - Create an environment that makes the parties feel comfortable and safe.
> - Let each party know the mediator is listening to them, understands their problem and how they feel about it, cares about their problem, and can serve as a resource to help them resolve that problem.
> - Show that the mediator has no stake in the outcome of the dispute that will prevent the parties from reaching an agreement that serves each of their interests.
> - Never fix blame, put down, or judge the parties, or tell them what they must do.
> - Ask non-threatening, open-ended questions.[41]

Again, looking at the different design models, there will be variances in how these ideas are carried out. Large-scale institutional type mediation and most litigation mediation will require attention to professionalism, fairness and even-handed dealing with parties and *perception* of fairness. Administratively, the job will include ensuring a clear understanding of both parties' interests and perhaps record keeping, especially in a large-scale situation. Careful

40. J. Poitras, "The strategic use of caucus to facilitate parties' trust in mediators" (2013), 24 *International Journal of Conflict Management* at 23-39.
41. *Trust in Mediation*, *supra*, footnote 11.

attention must be paid to true stakeholders and people tangential or perhaps disruptive to the process.

In the instance of interpersonal mediation, all of the above factors apply, with a layering of extra sensitivity for the raw emotions involved at a depth much greater than most. Particular attention must be paid to history, relationship breakdown and any threads of consensus or common goals. Truthful sentiments, though hurtful, may need to be exchanged among the parties to allow them to build back trust.[42]

Of course, with all of this in mind, there is also the element of culture. Ting-Toomey suggest that some cultures (*i.e.*, some Asian and Arab cultures) value hierarchy and family status to build trust, whereas others view people as equal and are more influenced by charisma and personal credibility (*i.e.*, Australian and Danish cultures). The former tend to be less conversational and find the latter too wordy.[43] Of course, these are generalizations and, it must be remembered, communication styles and preferences vary by individual across cultural lines as well. My own contention is that culture is not at all restricted to ethnic diversity or place of origin but rather equally, if not more, informed by upbringing and life circumstance.

Nevertheless, the mediator will need to consider these variables and the interplay of culture among the parties. It may be that the parties are from different cultural backgrounds and a key to building back trust is to teach each side to respect the other's differences. On the other hand, the mediator may have a different culture to the parties and will need to tread carefully in managing the people in the room in accordance with their cultural norms.

Conclusion

In designing an effective mediation process, mediators must make a conscious effort to build trust for the mediator, the process and amongst the parties. This task necessitates an understanding of the meaning of trust being related to positive expectations, a level of risk, and interdependence, strengthened over time. Trust may be able to be manufactured, whether scientifically or through sensitive attention to the issues in conflict, stakeholders and personalities. If building trust proves difficult, mediation is possible in its absence

42. M. Minow, "Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission" (1998), 14 Negotiation J. 319 at 334.
43. S. Ting-Tooney, *Communicating Across Cultures* (New York: Guilford Press, 1999) at 223.

with the goal of slowly building trust through clinical, procedural strategies, not expecting interpersonal trust prematurely.

Designers must carefully assess the parties' needs and histories, looking for a fitting process, and the right mediator for the role. Process demands will be different depending on the size and shape of mediation, ranging from large scale to the other end of the spectrum being a small interpersonal dispute. Each mediation is like a snowflake having a different shape, size and requiring a delicate touch in its handling. The designer's role is to remain cognizant of de-escalation strategies while ensuring each process is designed bespoke to the user's needs and desired outcomes. Building trust helps to de-escalate conflict and must be carefully considered in any design.

PROACTIVE AVOIDANCE OF MEDIATION DYSTOPIA: SETTING MANDATORY ETHICAL STANDARDS FOR MEDIATORS

Shannon Moldaver[*]

INTRODUCTION

Mediation lies at a crossroads. Compelling studies and arguments abound on the negative effects of regulating ethics in mediation.[1]

* M.A., LL.B., LL.M. (ADR). **[Add a word or two about your current position?]**

1. J. Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002), 40 Osgoode Hall L.J. 49 at 50-60; B. Wilson, "Mediator ethics: what does the ADR literature say?"

However, the field is bourgeoning and will ultimately reach a tipping point, whether it be in months or, more likely, several years from now. A time will come for more robust regulation. This time will come not necessarily because mediators will somehow slacken in their morality but simply because consumer traffic will necessitate insight. Litigation standard practices may ultimately erode the mediation model. If money is to be made in the practice, there is always a possibility of attracting a contingent of mediators, too self-serving for the greater good and ultimately their own good.

Hesitation about disrupting the well-intended flexibility of the mediation model is perfectly understandable. Loss of the opportunity to advance a purist model is somewhat tragic. At first blush, delay appears to be the best solution. However, thinking into the future, and given the rapidity of growth, a proactive, albeit moderate regulatory solution may be a better path forward.

There is a long list of ethical considerations for mediation. Given the limited scope of this paper, I have chosen to focus on what I consider the three most contentious: 1) impartiality, 2) truth, and 3) confidentiality.

The majority of public complaints about mediators may ultimately reside in conflict of interest issues. Conflict of interest is intimately related to impartiality but often distinguished by the flow of some form of recognizable benefit to the mediator. For example, a party may surmise that a mediator is biased in favour of the other party because opposing counsel will continue to send the mediator business if the outcome is favourable.

Conflict of interest is perhaps the most serious type of ethical issue but, not given detailed analysis within this, only because the issue of conflict is so exhaustively dealt with in other professions like law and medicine, with easily transferrable lessons. Essentially, if the mediator stands to receive a personal, professional or financial benefit, she must recuse herself unless there is unanimous consent of all parties. With this in mind, the paper explores the more subtle nuances of impartiality, specifically highlighting the debate about evaluative versus facilitative mediation.

The issues I have landed on are delicate in that they teeter on the border between values important to our Western adjudicative system and the intentionally flexible *modus operandi* unique to alternative dispute resolution models. Yes, mediators should be impartial, but can they always appear impartial when working hard to help parties forge a deal? Yes, mediators should encourage truth

(2003), SSRN 1 at 3; B. Honoroff and S. Opotow, "Mediation ethics: A grounded approach" (2007), 23:2 Negot. J. 155 at 157.

and honesty, but are they supposed to be gatekeepers of integrity and finders-of-fact? Yes, mediation is meant to be a strictly confidential process, but can that promise of confidentiality always be guaranteed?

Regulation may not solve these questions and may also be a long way off. A vision for its implementation will be discussed, but the key focus of this paper will be immediate guidance for Ontario mediators, especially those new to practice. Reams of excellent, scholarly literature exist on whether or not to regulate or introduce codes of conduct, but leave room to wonder what one should actually do when walking into a room as mediator. Current best practice checklists are needed for practicality purposes. Advancement of knowledge and innovation often lies in the simplicity of distilling the complex into a well-defined road map.

In his book, "The Checklist Manifesto", Atul Gwande, a successful American surgeon, chronicles historical successes attributed to nothing more than the power of a simple checklist. The book surveys stories from industries spanning medicine, law, military, aeronautics, finance, architecture and construction. Embroidering Gwande's ideas with ethical considerations in mediation is of interest to me. Like ethical situations, no emergency situation for an airline pilot will be identical but requires a tailor-made solution. However, having a guiding checklist may help get the pilot to the point needed to safely manage the best outcome. Distilling best practices into a manageable checklist could offer an immediate solution to bridge the gap until such time as a workable regulatory system is in place.[2]

Mediators span several professional backgrounds: medical, spiritual, education, legal, etc. This paper will primarily focus on mediators in Ontario, with special emphasis on mediators who are lawyers. The interesting overlay of professional obligations for lawyers and its intersection with a largely unregulated and ill-defined non-lawyer mediation community sets up challenges for lawyers worthy of exploration.

The concept of "trust" will be a theme woven throughout this paper. Trust has roots in legal concepts but also in social psychology, another field that offers important, innovative lessons to mediators. Loss of trust is an escalator of conflict. Re-building of trust is a de-escalator of conflict. Successful mediators use conscious process design to build trust. Part of this process design naturally incorporates ethical decisions. A sense of fairness and certainty of

2. A. Gwande, *The Checklist Manifesto: How to Get Things Right* (New York: Henry Holt and Company, 2009).

process breeds trust among parties, ultimately opening pathways to settlement. Assurance of ethical practices fosters trust.

As a roadmap on this journey of understanding ethics in mediation, the backdrop to the problem will first be set out, reviewing overarching theoretical challenges, key terms, a review of the literature and the general legal/regulatory framework. Next, the areas of impartiality, confidentiality and truth will be explored in turn. Each section will provide an analysis of specific laws and codes, a discussion of the inherent issues for each, recommendations for the present and a set of best practices to utilize at this point in time.

Finally, a vision for the future will be offered with critical evaluation of the possible challenges. Focus will be on creating some form of accountability infrastructure in tandem with a purposeful education plan.[3]

WHY IS THIS SO COMPLICATED?

Framing the Problem of Regulating Ethics in Mediation: A Theoretical Backdrop

The issue of ethics in mediation is nothing short of a labyrinth. One can start with the following premise: members of the public who are consumers of the mediation process deserve protection and a process built upon integrity. The logical first step would be to draft a law or regulatory code to apply to all mediators. This seems simple enough until the drafter realizes that there are two distinct categories of mediators: legal professionals and non-legal professionals. The legal professionals are already regulated, albeit in a very limited way. The non-legal professionals are not. There is no binding legislation that applies to both categories. So, the first problem is an ill-defined community to govern for the purposes of ensuring code applicability and quality.

What if all people practising mediation were somehow mandated through formal regulation to follow one code? Pause for another consideration. Codes breed rigidity of process. We already have rigidity in our current Western adjudicative justice system. Mediation is designed to provide an alternative model and greater access to justice. Mediation is meant to be an open, flexible process, helping to resolve disputes perhaps outside of the legal system or within the legal system. If it is within a legal process, mediation is

3. I have relied on my own previous work for part of the section on truth, specifically my paper entitled "Does Truth Matter in Mediation?" (November 24, 2015). **[Where is this available?]**

meant to be without prejudice or harm to any legal outcome. Should mediation fail and parties decide to jump back into a legal action, they must be able to do so seamlessly. Therefore, the next problem is that codes do not easily integrate with the mediation model.

What if we were just to assume that somehow, well-drafted, selectively chosen rules for a defined group would help? Who would define these rules? Government or voluntary associations with their own culture and inherent moral biases perhaps, thus exposing the challenge of finding the appropriate drafters. A legal regulator could draft codes but they would only apply to lawyers who are mediators, meaning half of the community would be held to stricter obligations.

Enter voluntary associations. A group of dispute resolution professionals team up and agree on a set of rules. In fact, they all agree to abide by them. The problem then is that not everyone in the mediation community is required to join. Let's assume for reputational purposes, everyone in the dispute resolution community does join. Rules work only when they are enforced. Voluntary organizations can draft a sanction regime but not much beyond expulsion from the voluntary community in a confidential fashion could work without attracting other legal actions. Would the threat of expulsion effectively deter unethical behaviour, however defined by this group?

Needless to say, the stage is set for a challenge. There is no quick-fix solution available. A core issue is simply defining what is meant by ethics before defining what a proper set of ethics should look like.

Key Terms: The Difference between Law, Rules, Ethics, Morality, Values and Principles

Before digging into any analysis in terms of ethics, it is important to tease out the differences between overlapping concepts: laws, morals, and ethics, rules, values and principles. Of course, this exercise alone could consume at least a thousand pages of writing.

Oxford dictionary provides the following definitions:

> **Ethics**: "Moral principles that govern a person's behaviour or the conducting of an activity."
>
> **Morality:** "Principles concerning the distinction between right and wrong or good and bad behaviour: A particular system of values d principles of conduct: '*a bourgeois morality*'."
>
> **Values:** "Principles or standards of behaviour; one's judgement of what is important in life."
>
> **Principles:** "A rule or belief governing one's behaviour: Morally correct behaviour and attitudes."

> **Rule:** "One of a set of explicit or understood regulations or principles governing conduct or procedure within a particular area of activity."
>
> **Law**: "The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties."[4]

Clearly all of the concepts overlap, but ethics and morality should be highlighted. To keep it simple, morals are what we consider "right or wrong". Morals are personal, subjective ways of behaving, often socially constructed and influenced by culture and religion.[5] Values appear similar to morals except that they assign a level or priority.

Ethics are one's complete set of morals that govern behaviour. Principles, laws and rules are shaped by our collective ethics. Deciphering any mutually exclusive definitions is beyond the scope of this paper and an exercise in tautology. The main point to highlight is that principles, rules and laws are shaped by our ethics. When codes are written, they naturally reflect the morality and ethics of the drafters.

On ethics specific to mediators, Barbara Wilson writes:

> The word ethics . . . indicates customary virtuous behaviour in society, or the rules of conduct recognised in respect of a particular class of human action or group. The word morality indicates rights or wrongs of an action. I suggest that values include a set of principles which inform and guide our actions – although these values may not carry equal moral weight.

Wilson lists accepted values for Alternative Dispute Resolution (ADR) practitioners as including "fairness, equality, predictability, consistency and symmetry".[6]

For the purposes of this paper, reference will most often be made to "ethics" as a set of defined standards for mediators. However, understanding of the other definitions will be useful in navigating existing codes and laws.

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4. *Oxford Dictionary*, online: https://en.oxforddictionaries.com/definition, accessed on January 11, 2017.
5. G.C. Jr. Hazard, "Law, Morals, and Ethics" online: (1994), 19 South Illinois Univ. L.J., at http://heinonline.org/HOL/Page?handle=hein.journals/siulj19&id=477&div=31&collection=journals.
6. Wilson, *supra*, footnote 1 at 3.

SURVEY OF THE LITERATURE - SCHOLARLY DISDAIN FOR CODIFICATION AND REGULATION

With a few exceptions, scholars generally take the position that codification or regulation of mediation ethics simply does not fit the complexity of the mediation model. Consumers of the process are attracted to the informality that does not lend itself to stringent rules.[7]

Macfarlane notes that mediators must retain creative discretion over the process to make the exercise worthwhile. They must design the process and assess individual situations accordingly, choosing the role of directive, suggestive or facilitative intervener. The type of role chosen will affect the mediator's handling of ethical issues. In this creative alternative process, ethical decisions are often intuitive, whereas codes are often value-based and binary. Codes borrow from the adjudicative process focussing on the final outcome rather than moments in the process or "snapshots". She notes that each moment in time may be an opportunity for a "lightbulb to go on" in a party's head about the other side's perspective, perhaps not resolving all issues but bringing adversaries one step closer together. We are accustomed to rationalizing dispute resolution in the sense of a person either liking or disliking the adjudicative outcome, but always understanding that they received a fair process. While the process is not as predictable, she reminds that mediation is meant to be voluntarily sought "justice" with a self-determined result, fitting for the context.[8]

Honoroff also highlights that ethics must be contextual. Issues and stakeholders must be evaluated on a case-by-case basis. For example, disclosure can be particularly paramount in family law. Intervention by the mediator may be necessary, possibly offending a purist's approach to impartiality, confidentiality and issues surrounding truth. Codes also remain silent about parties who are not at the table but may have an important stake. He suggests that there is an ethical responsibility to acknowledge greater social injustices that are being ignored.[9]

Wilson contends the problem with codes is that they tell us little about the underlying belief system of the drafters. Culture and religion may have indirectly or directly influenced the final product.[10] She suggests that codes can usually be characterized as a top-down

7. Macfarlane, *supra*, footnote 1 at 50-60.
8. *Ibid.*
9. Honoroff and Optow, *supra*, footnote 1 at 159-169.
10. Wilson, *supra*, footnote 1 at 2-18.

approach, concerned only with the mediator's perspective, virtually ignoring the parties' self-determination piece.[11]

The personal belief system of the mediator may be a key consideration for ethics more than codes.[12] Bowling and Hoffman place great emphasis on the impact of the mediator's personal qualities and ethics on the course of mediation, rather than written rules.[13] Boulie suggests that successful mediators are "empathetic; non-judgmental; patient; persuasive; optimistic; persistent; trustworthy; intelligent; creative; flexible; and that they have a good sense of humor and common sense".[14]

Well-intended language in codes often conflicts with the pragmatic reality of getting anything done at the mediation table, if a successful mediator does need to draw on attributes like those suggested by Boulie. For example, "non-judgmental" implies neutral. Neutrality and impartiality are key players in codes of conduct borrowing from the values of our Western adjudication system. How then can one be effectively empathetic, without a slight lessening of neutrality? Macfarlane explains this tension as the "strange loop" of the mediation process. For example, mediators want to be committed to neutrality but also promote meaningful dialogue. The latter may cause the mediator to intervene to persuade one party, perhaps weakening the principle of neutrality.[15]

Put simply, steering away from codification is not a strategy to dodge rules. On the contrary, most mediators strive for an ethical practice. However, danger lies in writing codes too constrictively when each ethical obligation lies on a spectrum.[16] The issues involved in the dispute themselves may cause the mediator to steer off the course of what would be considered acceptable in a traditional justice system. Consider the case when mental capacity issues arise or when, for example, parties are quarrelling over something that transpired as a result of an outcome of a crime.

Macfarlane describes an experience she had mediating between two parties who had a dispute arising out of a drug deal. Wrestling with the ethics, she ultimately decided it was better to help two willing parties resolve a dispute through mediation rather than

11. Honoroff and Opotow, *supra*, footnote 1 at 157.
12. Wilson, *supra*, footnote 1 at 2-18.
13. D. Bowling and D. Hoffman, "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation" (2000), 16 Negot. J. 5 at 8-9.
14. B. Boulie, *Mediation: Principle, Process, Practice* (London: Butterworth, 1996) at 84-85.
15. Macfarlane, *supra*, footnote 1 at 50-60.
16. *Ibid.*

abstain and possibly inadvertently encourage a violent resolution to the problem.[17] She highlights that mediators confronting ethical issues look for the "best" course of action more than the one deemed "right".[18] Unless there are serious capacity issues at stake, a mediator ought to give deference to the parties.[19]

While scholars clearly lean away from regulation and codification, at times, the same writers do see the benefit of some new form of code or regulatory system. Macfarlane does concede some benefit in the uniformity of expectation and procedure along with the fact that codes have "trappings of respectability and credibility for a group seeking professional status".[20]

In addition, Schuwerk points out that, as consumer appetite grows for mediation and negotiation, there is increased concern about ethics in the private sphere and the need to avoid an onslaught of coercive settlements. While there are challenges as outlined above, sufficient public accountability for third-party neutrals is needed to guard against inequities and monitor quality decisions. He says criticism of codes is warranted, but proposes further innovation in terms of finding ways to enforce codes, not bothered by the lawyer/non-lawyer division, suggesting enforcement should apply to both equally.[21]

Schuwerk goes on to point out that the existence of non-lawyer mediators is a good thing because of price competition and the inclusion of non-legal biased standards of success. He is not concerned about non-lawyers mediating because most often parties are represented. If they are not, he contends, the world of disputes could benefit from looking through lenses, other than those of lawyers. However, he suggests that expecting a degree of competence is warranted and should be the focus of any codification, highlighting the importance of future innovative educational initiatives.[22]

Needless to say, consensus is lacking about any form of regulation. The desire for professional standing, quality and respect remains. Problematically, the mediation model is ill-fitted to the rigidity of regulation as we currently know it.

17. *Ibid.* at 77-85.
18. *Ibid.* at 58-65.
19. *Ibid.* at 68-80.
20. *Ibid.* at 55.
21. R.P. Schuwerk, "Reflections on Ethics and Mediation" (1997), 38 South Texas L. Rev. 757 at 758-764.
22. *Ibid.*

What Rules Do Exist? A General Overview of Existing Laws and Codes of Ethics

Given the commonly held position that cumbersome codes would detract from the inherent creativity intended, the law remains relatively silent on many of the ethical issues which may arise in the course of mediation. In a nutshell, apart from codes drafted by voluntary associations for mediators, very few formally enforced rules exist beyond a handful of common law cases pertinent to specific issues, and The Rules of Professional Conduct which only apply to lawyers in Ontario. In fact, those Rules too are thin in direction, by design.

The Rules of Professional Conduct are mandated by the Law Society of Upper Canada (the governing body for lawyers and paralegals in Ontario). These Rules contain direction for lawyers as professionals and as members of society. Once called to the Bar of Ontario, lawyers are part of a defined professional community until withdrawal and are expected to conform to this codified set of ethics determined by the morality of its drafters.

Expectations are laid out with respect to legal practice matters including proper ways of communicating or not communicating with a witness, handling one's self professionally before the courts and the handling of client documents and confidential information.[23] Lawyers are expected to be civil and conduct themselves respectfully both in a professional and personal capacity, as part of what courts have defined as the "privilege" of professional membership.[24]

Rule 5.7 of The Rules of Professional Conduct is one of the leanest rules in terms of wording. It applies to lawyers in the role of mediator. With the addition of some commentary about refraining from acting as a lawyer rather than a mediator to clients, the Rule states:

> **5.7-1** A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that
>
> (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

23. Ontario Rules of Professional Conduct, at www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159.
24. *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, 1 Admin. L.R. (6th) 175 (Ont. C.A.), leave to appeal allowed 2017 Carswell-Ont 1199, [2016] S.C.C.A. No. 310 (S.C.C.) (hereinafter *Groia*).

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

The extent of Rule 5.7 is noticeably limited compared to the detail of the other rules. More is said about lawyers acting as representatives to clients in mediation. Lawyers who are mediators are warned to ensure parties understand the mediators are not providing legal representation. Flowing from that, solicitor-client privilege will not apply. There is indirect reference to settlement discussions attracting other forms of privilege, most likely referring to litigation privilege and settlement privilege.[25]

This additional layer of professional responsibility does not apply to non-lawyer mediators and therefore can be constructed both positively and negatively. On the one hand, lawyers' affiliation with a defined profession and its mandated expectations can attract a greater sense of credibility. On the other hand, the creativity useful to successful mediated outcomes could be potentially viewed as stymied by the limitations inherent in such professional affiliation.

Mandatory to Ontario roster mediators, Rule 24.1 of the Rules of Civil Procedure addresses Mandatory Mediation for cases travelling through legal processes in Ontario, if in the City of Toronto, the City of Ottawa or the County of Essex. With some exceptions, civil cases travelling through the Ontario justice system must include a mediation within 180 days after the first defence has been filed. Mediators can be selected from a roster of names approved by Local Mediation Committees (LMCs).[26] Rostered mediators are *not* required to be lawyers. LMCs are appointed by the Attorney General of Ontario. These mediators are subject to removal and are bound by a code of conduct created by the Canadian Bar Association (CBAO), called "The CBAO Model Code of Conduct".[27]

The main objectives of the Code are:

a. to provide guiding principles for mediators' conduct
b. to provide a means of protection for the public
c. to promote confidence in mediation as a process for resolving disputes.[28]

Interestingly the word "principles" is used, giving the sense of a rule, which is not necessarily legally binding. However, roster

25. Ontario Rules of Professional Conduct, rule 5.7.
26. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194.
27. CBAO Model Code of Conduct, at www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.asp.
28. *Ibid.*

mediators are held to this Code and LMCs do have the authority to remove roster mediators from the list under Rule 24.1.[29] There is certainly incentive for many mediators to be on this list, at least initially in their careers, with the hope that the roster affiliation could potentially provide a pipeline for future business.

As a companion to Rule 24.1, the CBAO Model Code includes principles standard to most mediation codes including confidentiality, self-determination of the parties, impartiality, conflict of interest, advertising, fees, quality of the process, agreement to mediate and termination or suspension of mediation. While this Code is obligatory for those on the roster, it is essentially a voluntary association, in that one does not have to apply unless one desires to be on the Mandatory Mediation Roster.[30]

Generally, outside of the Rules of Professional Conduct for lawyers, mediators (lawyers and non-lawyers) are otherwise left to imagine "best practices" or follow broad guidelines offered in codes of conduct implemented by voluntary associations. While many voluntary associations exist, well-known voluntary membership associations for Ontario mediators include: the ADR Institute of Canada (ADRIC) or its provincial affiliates like ADR Institute of Ontario (ADRIO), The Association for Conflict Resolution (ACR) which subsumed the Society of Professionals in Dispute Resolution (SPiDR), International Mediation Institute (IMI) or the Ontario or Canadian Bar Association (OBA or CBAO) (even if not on the Mandatory Mediation Roster). Naturally, breaches of voluntary association codes cannot result in any desperately awful sanction other than a warning letter or at worst expulsion from the association on a confidential basis.[31]

That said, many people continue to affiliate with voluntary organizations for status, credibility, business development, mentorship, and perhaps a desire to elevate the community of mediators to a recognized professional status. To that end, associations have provided excellent guidance.

ADRIO, as an offshoot of ADRIC posts on its site a Code of Ethics (a simplified list of member obligations), the ADRIC National ADR Mediation Rules, and the ADRIC Code of Conduct for Mediators, the latter two being very similar and almost identical in parts to the CBAO Model Code of Conduct. Some differences

29. Rules of Civil Procedure, Rule 24.1.1.
30. CBAO Model Code of Conduct, *supra*, footnote 27.
31. ADR Institute of Canada Complaints and Discipline Policy, at http://adric.ca/rules-codes/complaints-discipline-policy.

include exceptions to rules around impartiality and advocacy if consented to by all of the parties, to be further discussed.[32]

SPiDR adopts the IMI Code of Professional Conduct (IMI Code). The IMI Code commences with a noteworthy message from the president promoting the need for integrity in mediation and the nexus between trust and ethics:

> Trust underpins the mediation process. If the parties do not trust a mediator's integrity in terms of competence diligence, neutrality, independence, impartiality, fairness and the ability to respect confidences, mediation is unlikely to succeed.[33]

The emphasis on competence is important and not seen as directly in other Codes. Also, the promotion of ethics is done on the basis of mediation success and, as an extension, implied career success rather than simply a utilitarian goal for the greater good.

Worth mentioning are other practice-specific bodies like the Family Dispute Resolution Institute of Ontario (FDRIO) for family law mediators.[34] Given that different practice areas naturally have different inherent challenges, specific direction is meaningful. In family law, for example, issues of disclosure often weigh heavily. Under s. 56.4 of the *Family Law Act* (Ontario), for example, a separation agreement can be set aside if proper disclosure was not made by both parties.[35]

Of course, in addition to statutory or voluntary principles, there is always the potential for common law principles to apply. A few key cases specific to confidentiality and honest negotiations will be discussed later in the paper. However, Schulz writes on the potential for mediator liability in negligence suggesting it may not be far off, drawing comparison to recent historical problems of accountability concerning chiropractors and alternative medicine practitioners. In order to hold a mediator liable in negligence, the plaintiff must establish elements of the tort in negligence: 1) existence of a duty of care; 2) breach of that duty by breaching the relevant standard of care; and 3) and damages resulting from that breach. Without an established standard of care, it is difficult to determine whether a

32. ADR Institute of Canada Code of Conduct, at www.adrontario.ca/media/code_conduct_2005_06_13.pdf; ADR Institute of Canada National Mediation Rules, at www.adrontario.ca/media/code_conduct_2005_06_13.pdf; Code of Ethics: www.adrontario.ca/media/code_conduct_2005_06_13.pdf.
33. International Mediation Institute Code of Conduct, at https://imimediation.org/imi-code-of-professional-conduct.
34. Family Dispute Resolution Institute of Ontario Standards of Practice for Professionals, at https://www.fdrio.ca/find-an-fdr-professional.
35. *Family Law Act*, R.S.O. 1990, c. F.3, s. 56(4).

mediator has fallen below it. Lack of recognition as a profession makes it particularly difficult to establish a standard of care.[36] Most of the time, those who act in accordance with general practice of their trade or profession would be exonerated from liability.[37] So, while the incidence of mediators being successfully sued in tort or contract may still be unlikely,[38] some would suggest it is not far off.

Theories aside, the proof may be found in insurance policies and practices. While the Law Society of Upper Canada may tend to lean out of mediator regulation, the lawyers' professional indemnity insurer, LAWPRO, seems to suggest liability may be possible. For coverage to exist, lawyers must provide "professional services". According to LAWPRO policy, "professional services" can arise out of activities acting as a mediator or arbitrator.[39]

Some mediators and arbitrators withdraw from the practice of law and therefore may fall under an exemption to this possibility of liability. To meet this test, mediators would have to hold themselves out as a mediator only, rather than a lawyer providing mediation services. Such services must not be held out in affiliation with a law firm and the mediator must not attract business "based on the lawyer's history as a well-known practitioner in the area of law".[40]

According to an article written by LAWPRO counsel, allegations of bias and impartiality form a large source of complaints against mediators. Risk management tips from LAWPRO include being mindful of conflict and when to recuse one's self, being careful about liability pertaining to foreign laws in international disputes where coverage may not apply and ensuring whichever insurance policy is relied upon is adequate in terms of coverage of any large monetary claims.[41] The fact that insurance policies exist outside of LAWPRO for non-lawyer mediators, lends to the argument that mediator liability is here or at least on the horizon.

In short, there are virtually no rules but rather many principles for voluntary consumption, perhaps more heavily saddling lawyers who

36. J.L. Schulz, "Mediator Liability: Using Custom to Determine Standards of Care" (2002), 65 Sask. L.J. 1-17.
37. A.M. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 179.
38. S. Blake et al., *The Jackson ADR Handbook* (Oxford, U.K.: Oxford Univ. Press, 2013) at 151.
39. LAWPRO 2017 Professional Liability Insurance for Lawyers and Related Insureds-Insurance Policy No. 2017-001, online: https://www.lawpro.ca/insurance/pdf/LAWPRO_Policy2017.pdf.
40. V. Crewe-Nelson, "Consider liability coverage when doing ADR", *The Lawyers Weekly* (February 10, 2017) at 11.
41. *Ibid.*

are mediators. Liability actions may be part of the future without a clear picture of professional standards expected of mediators.

IMPARTIALITY

A. Existing Laws and Codes

When ink is spilled on the subject of mediation ethics in codes, the concept of impartiality is often deliberately separated from a discussion of conflict of interest. This is an interesting division since impartiality often leads to conflict of interest at some level, or potentially appearance of conflict of interest. For mediation purposes, conflict of interest seems to be characterized by a mediator's subjective desire to help parties or one particular party to achieve some self-serving benefit, either financial or personal. Impartiality, on the other hand, is the principle that mediators remain neutral, objective and independent in the process. Again, given the limited scope of this paper, I will address only impartiality rather than conflict of interest. Impartiality is more difficult to interpret but, nonetheless, it is important to recognize the potential relationship to conflict.

In terms of enforceable rules, Rule 5.7 of the Rules of Professional Conduct implies impartiality only by emphasizing the need to tell the parties that the mediator is not representing or advocating for either party.[42] All other Codes mentioned above directly note that mediators are to remain neutral and impartial. For Mandatory Mediation, Rule 24.1.02 promises neutrality of the mediator but again defaults to the ethical standards of the CBAO Model Code of Conduct.[43] In the Model Code of Conduct, impartial means "being and being seen as unbiased toward parties to a dispute, toward their interests and toward the options they present for settlement" and mandates that mediators shall serve in matters only where then "can remain impartial . . . throughout the course of the mediation process ... and . . . shall immediately withdraw" if that is not possible.[44]

Other voluntary codes are also clear on the importance of impartiality. In the IMI Code, section 2.2.3 states: "Mediators will always act in an independent, neutral and impartial way".[45] Section 6.1 of the ADRIC/ADRIO Mediation Rules and Section 4.1 of the ADRIC/ADRIO Code of Conduct provides a bit of an escape valve where there is consent of all parties requiring that:

42. Ontario, Rules of Professional Conduct, Rule 5.7.
43. Ontario Rules of Civil Procedure, Rule 24.1.02.
44. CBAO Model Code of Conduct, *supra*, footnote 27.
45. International Mediation Institute Code of Conduct, *supra*, footnote 33.

> . . . unless otherwise agreed to by the parties after full disclosure . . . the Mediator shall not act as an advocate for any party to the Mediation and shall be and shall remain at all times during the Mediation: (a) wholly independent; (b) wholly impartial; and (c) free of any personal interest or other conflict of interest in respect of the Mediation.[46]

Generally, the Codes of conduct are streamlined in their promotion of impartiality. However, little commentary is provided on the practicalities of this broad normative expectation. Lack of clarity creates different practices. Different practices evolve into different mediation models, which in turn spark debate and uncertainty.

B. The Issues: Is Impartiality Possible? Is an Evaluative or a Facilitative Model Better?

Dispute resolution theory tells us that mediation is meant to be voluntary with outcomes self-determined by the parties. Our Western justice system values tell us that impartiality of the mediator must be "right" morally; however, that is not always the case practically. There is a great debate among ethics writers and mediators as to the parameters of impartiality. Scholars have long argued that neutrality in mediation is actually impossible to achieve as mediators are not immune from societal influences and biases, albeit unconscious ones. The key is to avoid partiality or the appearance of partiality and act in a reasonable manner when facilitating negotiations.[47]

Conversely, some purport a "tacit acceptance of mediator non-neutrality".[48] Neutrality is defined as impartiality or a state of not supporting either side, so I will use them interchangeably. Impartiality means treating all parties equally.[49] Pure impartiality or appearance of partiality may not be possible if the mediator is to inspire any movement in the negotiation by pushing an issue forward.[50] The debate really centers around evaluative versus facilitative mediation models.

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46. ADR Institute of Canada Code of Conduct, *supra*, footnote 32 at section 4.1; The ADR Institute of Canada National Mediation Rules *supra*, footnote 32 at section 6.1.
47. O. Shapira, *A Theory of Mediators' Ethics* (Cambridge, UK: Cambridge University Press, 2016) at 208-209.
48. C. Harper, "Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation" (2006), J. Disp. Resol. 595 at 602.
49. *Oxford Dictionary*, *supra*, footnote 4.
50. D.T. Weckstein, "In Praise of Party Empowerment – And of Mediator Activism" (1997), 33 *Willamette Law Review* 501 at 510.

Evaluative and facilitative mediation and the concept of impartiality fall on a spectrum. On one far end, extreme evaluative might mean a directive, rent-a-judge style mediation. On the other end of the spectrum, extreme facilitative may mean that the mediator is a glorified messenger shuttling offers or positions between parties. If the mediator says, "I have read your briefs and you should each get $100,000", then that is clearly evaluative, but is it wrong if that is what the parties wanted? Whereas, in a courtroom, a judge may be limited to making empathetic eye contact with a witness thanking them for their testimony, a mediator can dig into the emotional details. In caucus, a mediator can say things like, "I completely understand you must have felt anger and rage about Tom's choice. Given that unfortunate circumstance and knowing that you want to put this issue to rest, how best can we move forward?"

Of course, this is simply an empathy technique to demonstrate that the party complaining is being heard and perhaps this may make him more willing to entertain the idea of building consensus. Does this type of comment show impartiality? The example may seem ridiculous but the parameters of the expectation are unclear. What if the parties settle and Tom decides he does not like the deal and later finds out that the mediator made the comment? He may wonder if lodging an impartiality complaint may further his cause. Without a governing body to complain to, he and his counsel may pursue a complaint and relief through litigation, whether it is meritorious or not.

While values of our traditional justice system tell us that impartiality is the gold standard, the argument in favour of softening impartiality expectations has some compelling points. No one is in favour of corruption or a form of bias in favour of one party simply because the mediator happens to like qualities of one party over another, yet something less than perfectly impartial also has consumer appeal. The self-determination piece is that parties are exercising independence simply by choosing an alternative to adjudication and should have the ability to choose a mediator who will provide them direction. The parties retain the unique ability to reject that direction. In some cases, a mediator's subject matter expertise can be an asset.[51]

Consumers of mediation have tended toward evaluative mediators, in recent years. Baruch Bush points out this may not be a rejection of principles of mediation, but a rejection of the evolution of arbitration. Trials are expensive, take years, and often result in a

51. C. Honeyman, "On Evaluating Mediators" (1990), Negotiation J. 23 at 30.

person quite unfamiliar with the nuances of the matter making life-changing decisions. Having someone with relevant knowledge to get the parties in a room to "bang heads" has some appeal.[52]

People want to receive a determinative decision while retaining the ability to back out. Arbitration was popular in the late 1980s, but as the process evolved and became more formalized and expensive, evaluative mediation became the preferred choice. Bush thinks evaluative and facilitative mediators should be recognized as different, held to different standards, and regulated separately.[53] He is effectively advocating to introduce another tier of dispute resolution specialists, perhaps: 1) mediators; 2) evaluative mediators/quasi-arbitrators; 3) arbitrators; or 4) adjudicators (judges).

Adding to this argument of giving mediation consumers what they want, Schuwerk contends that the debate should be decided in favour of *some* evaluative intervention. Otherwise, he says, mediators are essentially not needed because the process is really nothing more than the average "rough-and-tumble" negotiation. Mediation exists in a largely adversarial culture where many mediations are taking place in the shadow of the law. Often, the "adversarial zeal" undermines the goal of mediation. A solution, Schuwerk suggests, should be found in a paradigm shift from early stages of legal training by creating an extensive Dispute Resolution (DR) curriculum in law school. This would lessen the tendency toward "adversarial zeal" and highlight the benefits of a more facilitative mediation model.[54]

An altruistic justification may also exist beyond the consideration of consumer appetite. Professor Gunnning points to another benefit of activist mediation being the mediator's ability to help remedy power imbalances. The mediator can discard notions of neutrality in favour of intervention techniques to remedy disparity between parties thereby promoting "justice".[55]

On the flipside, efforts toward the highest level of neutrality and impartiality may produce better long-term results. A study conducted on whether evaluative or facilitative mediations produce better quality results for divorce cases concluded, "the mission of the divorce professional correlates significantly with the participants'

52. R.A. Baruch Bush, "Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field" (2002), 3 Pepperdine Dispute Resolut. L.J. 111 at 114-130.
53. *Ibid.*
54. Schuwerk, *supra*, footnote 21 at 764-765.
55. Sturn and Gadlin, "Confidentiality – A Guide for Mediators", at https://www.cedr.com/articles/?item=Confidentiality-a-guide-for-mediators.

satisfaction with their divorce agreements". Comparing litigation to mediation, parties of mediation were more satisfied. Then comparing participants of evaluative mediation to facilitative mediation, parties of the latter were more satisfied. The authors of the study highlight that facilitative traits are difficult to master but mediators can benefit from self-awareness in their practice. Further, they say, family mediators are often reluctant to label themselves as evaluative despite how they may operate.[56]

Love also writes ardently against evaluative mediation. She contends that mediators are to urge parties to weigh their own values and priorities to build an optimal outcome and that there are insufficient protections in place for the public in terms of mediators giving wrong opinions. The goal should not be to foster the advancement of rent-a-judge paradigms, but instead provide alternative paths to solutions. "If we allow mediation to slip into the comfortable (because it is the norm) adversarial mind-set of evaluation, we kill the turbo-thrust of the jet engine of idea generation." Love contends that when mediators provide opinions within a mediation it can stop the negotiation process and creative flow of ideas.[57] Along these same lines, Harper points out that, voicing evaluative opinions also foists the mediator's narrative upon a party.[58]

Further, arguments in favour of facilitative mediation are bolstered by the social-psychological therapy community. In a study conducted through interviewing divorce therapists, there was an overwhelming insistence on the importance of impartiality and the conveyance of a sense of even-handedness to the parties. Therapists noted the importance of a joint session at the beginning of any process to recite their intentions of neutrality in the presence of all parties, noting that the parties' original goal is often first to convince the therapist that the opposing spouse is "wrong". Interestingly, note was made of the fact that impartiality does not mean not showing a point of view but rather not trying to influence parties to accept your point of view.[59]

Despite arguments about the merits of models at either end of the spectrum, again we are constrained by the nuances. As Honoroff

56. R Baitar et al., "Toward High-Quality Divorce Agreements: The Influence of Facilitative Professionals Outcome-Based Studies" (2012), Negot. J. 453 at 470.
57. L. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997), 24 Florida State Univ. L. Rev. 937 at 939-945.
58. Harper, *supra*, footnote 48 at 605.
59. K. Kressel and M. Deutsch, "Divorce Therapy: An In-Depth Survey of Therapists' Views The Context of Intervention" (1977), 16 Fam. Proc. 1 at 12-14.

points out, it is hard to say whether passing judgment is tantamount to impartiality.[60] One may not be favouring the outcome of one side but simply expressing a viewpoint. Macfarlane notes that mediators have so much discretion that they are constantly making ethical calls that could get them into hot water. Is impartiality at play if one party is chronically late without sanction for it or if one party is permitted to launch into a lengthy monologue taking away from another party's air time? Ethical judgment is often intuitive and part of the mediator's discretion.[61]

Goldberg conducted a survey among mediators to identify keys for success. Seventy-five per cent of mediators surveyed from all different practice areas agreed that the #1 key to success is the ability to build a rapport with the parties, facilitated by the ability to show a genuine sense of caring for the parties. This harkens back to the "strange loop" phenomenon. The intention might be impartiality, but if building rapport involves showing empathy in caucus, that may be unintentionally misconstrued as impartiality. Building a rapport helps build trust for the mediator, which in turn helps settle disputes thus highlighting again the tension between ethics and practicality.[62]

A purist version of neutrality may not be achievable, but a better goal may be to strive for some acceptable level of admitted non-neutrality without promoting biases or conflicts of interest. Harper points out that Indigenous leaders and religious leaders have historically taken an active role in mediation. "A mediator necessarily makes many strategic, normative, and procedural decisions during a mediation, any of which can (and almost certainly do) affect the substantive outcome of the mediation."[63] In the same vein, Moore reminds that mediators control the agenda, communication, physical setting, timing, and "associational influence" (meaning who is sitting at the bargaining table), all factors which may be influential to the outcome.[64]

Clearly, the issue of impartiality is far from simple to navigate. Best intentions to help parties through empathy or direction can quickly put the mediator offside. With no mandatory regulation

60. Honoroff, *supra*, footnote 1 at 157.
61. Macfarlane, *supra*, footnote 1 at 58 and 59.
62. Stephen B. Goldberg, "The Secrets of Successful Mediators" (2005), 365 Negot. J. at 365-373.
63. Harper, *supra*, footnote 48 at 602-611.
64. C.W. Moore, *The Mediation Process* (San Francisco: Jossey-Bass, 1996) at 602-603.

other than lawyers being warned against giving legal advice, practice standards may be wide-ranging.

C. Best Practices

The trend toward evaluative mediation may be driven by consumer appetite combined with insufficient training in the mediation community. Baruch Bush's idea resonates. It is the rejection of regulated arbitration in favour of the option to purchase directive solutions, with an escape valve. On the other hand, part of the problem is that mediation is the "flavour of the month". Whether in response to backlogged courts or new business opportunity, many people, often lawyers, hang out a shingle proclaiming to be mediators without formal training. These mediators recognize that mediation is meant to be voluntary, but lack a rich understanding on the collaborative, facilitative piece. Their competitive advantage that they bring to the table may be practice knowledge and the ability to give a legal opinion.

Sometimes the mediator may have a combination of formal dispute resolution training and years of legal experience in a particular practice area. Resolutely intending to be impartial, he may stumble when he perceives the potential for injustice, as a naïve party appears interested in signing a deal which would award far less than any adjudicated result would yield. The complexity of this situation may challenge the mediator. Justice may mean balancing inequities but subtly discouraging the party from signing. On the other hand, the self-determination principle would encourage the mediator to abstain from intervention.

Again, impartiality is fundamental to our Western adjudicative justice system and separates us from regimes that may turn a blind eye to the potential for corruption. The problem is there is a consumer appetite for mediation which is often something less than impartial in its purest form.

None of this is wrong, but simply the reality. Most codes do not jive with this tendency. One solution would be to keep the status quo, hoping impartiality prevails. Another likely better one would be to accept the change and introduce mandatory codes encouraging impartiality unless consent is expressly provided, similar to what ADRIC/ADRIO has in place. Until that time comes, the key is self-awareness and reasonable decision making. The goal is to build parties' trust for the mediator through transparency. Best practice can be summed up with one word: "transparency". One must be transparent to the parties but also self-aware.

D. Best Practices Checklist

1. Prior to the mediation, mindfully review the matter in dispute and reflect on your personal thoughts and first impressions. If you are conflicted, abstain or inform the parties. Likely, you are feeling some level of subconscious partiality to one position from reading the materials. Analyze your concerns so that you are conscious of them going in rather than allowing your subconscious to prevail. If you still feel meaningfully conflicted, declare it and seek consent if appropriate or withdraw.
2. Consult with the parties and ask them what they want from this mediation. Explain that trust for you and the process are your main goals as trust forms an integral part of any successful mediation.
3. If it is an opinion which they seek and you are qualified, explain that this will require you to appear less than impartial. You will require written consent in the mediation agreement to provide the requested opinion.
4. Whether or not the choice is facilitative or evaluative, explain your intentions to treat parties even-handedly by giving examples of how that can be misconstrued *i.e.*, showing empathy, giving parties longer to speak, pointing out weaknesses of both sides, persuading parties to acquiesce to certain points, etc. Ensure parties are made aware that they are invited and encouraged to address any concerns with you.
5. Consciously check in with yourself throughout the mediation. If you become aware of any feelings of partiality emerging, you can consciously recognize, explore and park those feelings or name them. Self-analysis may put you back on the right track. Perhaps best to speak to the lawyers in confidence if you feel your opinion must be addressed, deciding together whether you need to withdraw.
6. Put things in perspective. At the end of the day, the parties must leave with a sense of a self-determined, voluntary outcome, whether or not you agree with it. That said, to promote the success of the future of mediation, you want to encourage robust agreements built upon integrity which may mean sharing viewpoints, NOT passing judgment, and this is always best done with consent.

CONFIDENTIALITY

A. Existing Law and Codes

Leading up to my decision to write this paper, I discussed my ideas with various lawyers and mediators. When I mentioned that I would explore confidentiality, I was always met with an interesting response. It was something like, "Oh, well that's an easy one. Confidentiality is a given for mediation." The reason for the self-assuredness in these comments is more than justified but, unfortunately, in reality it is not as black and white.

Unlike other issues of ethics in mediation, common law offers the richest source of guidance in terms of confidentiality. Confidentiality in mediation was dealt with in a unanimous decision by the Supreme Court of Canada in 2014 in *Bombardier inc. v. Union Carbide Canada inc.*,[65] which primarily addressed common law settlement privilege. The scope of the case did not allow the court to address all aspects of confidentiality in mediation, but certainly provided lots of colour.

Settlement privilege affords parties the right to speak freely in negotiations to promote settlement, also known as the "without prejudice" privilege. However, there are some exceptions to settlement privilege, which include proving the existence of settlement or to enforce settlement.

This case arose out of litigation between Bombardier Inc. (Bombardier) and Dow Chemical (Dow). Bombardier sued Dow to recover losses owing to allegedly faulty gas tanks which Dow sold to Bombardier, and which Bombardier used in turn in its Sea-Doo personal watercraft products. Bombardier's claim against Dow was for approximately $30 million. After years of litigation, both parties agreed to mediate the dispute using a Montreal lawyer-mediator. He provided his standard form contract thread read:

> 2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:
>
> (a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;
> (b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;

65. 2014 SCC 35, [2014] 1 S.C.R. 800, 373 D.L.R. (4th) 626 (S.C.C.).

> (c) The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding.[66]

Bombardier agreed to a settlement of approximately $7 million to be paid by Dow. The settlement terms were not signed at the mediation, but instead Dow made an offer that was left open for 30 days, which Bombardier accepted. Subsequently, a dispute broke out about the scope of the settlement. Dow claimed to view the deal as a global settlement protecting against any future claims, whereas Bombardier claimed only to construe it as a settlement solely for the Montreal action.

Emails were exchanged and ultimately Bombardier decided to proceed with a motion for homologation for the court to authorize the settlement. Dow relied on settlement privilege. Dow claimed that the exception to settlement privilege to enforce the settlement did not apply because of the confidentiality clause that both parties signed.

Justice Wagner addressed two issues. The first is whether a confidentiality clause in a private mediation agreement can override the exception to the common law settlement privilege. This would enable parties to produce evidence of confidential communications for the purpose of proving the existence or scope of the settlement agreement. If the answer to the first question is "yes", then the second question that flows from it is whether the confidentiality clause used in this particular case displaces that exception.[67]

The court held that a confidentiality clause in the mediation agreement could, in fact, displace the common law exception but concluded on the facts that the boilerplate clause in this case was not enough.[68] Further, the court declared that clauses in the agreement must be "watertight", in order to displace the exception, which is not necessarily an easy benchmark to reach, and no examples were provided.[69] The analysis relied on Quebec law for interpretation of the contract.[70] The decision left the door open for parties to contract out of the exception to settlement privilege. Justice Wagner underlined the need for confidentiality to promote settlement and noted common law privilege is essentially evidentiary to be distinguished from contract law enabling parties to contract out.

66. *Supra*, at paras. 9-10.
67. *Supra*, at para. 27.
68. *Supra*, at para. 58.
69. Langlois Lawyers, "Is Your Mediation Confidentiality Clause Watertight?", at http://langlois.ca/is-your-mediation-confidentiality-clause-watertight.
70. *Union Carbide*, *supra*, footnote 65 at para. 68.

Justice Wagner noted that he intentionally did not address other exceptions to the common law privilege such as when there are fraudulent or unlawful communications. He further noted that he would not address whether a mediator could be compelled to testify.[71]

With respect to this particular case and mediation agreement, the court concluded that the existence of the mediation itself was not meant to be confidential. Therefore, the parties were entitled to argue proof of settlement. At para. 65, Justice Wagner wrote:

> [65] It is my opinion that the parties entered into this mediation process with the intention of settling their dispute and that they had no reason to assume that they were signing away their ability to prove a settlement if necessary. There is no evidence that they had any expectation for this mediation other than that it might help them settle the dispute . . . Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical.

Apart from common law, Rule 24.1 of the Ontario Rules of Civil Procedure speaks to the necessity of confidentiality in mandatory mediation (with application to lawyers and non-lawyers). Obviously, for this purpose, the existence of the mediation itself is not confidential since it is monitored by the courts. The information exchanged is to remain confidential. Mediators are to report non-compliance under the Rule which is one small allowance for the mediator to report on something within the confines of the mediation.

For lawyers, Rule 5.7 of the Ontario Rules of Professional Conduct provides nothing more on confidentiality than the instruction that mediators must ensure parties know that the mediation will not fall within solicitor-client privilege. The Rule suggests that some other form of common law privilege may attach. No specific guidelines are given but the implication is common law settlement privilege.

Other codes set out similar principles. ADRIC/ADRO and the CBAO provide that mediators "shall inform parties of the confidential nature of the mediation".[72] The mandatory expression of the codes speaks to the need to inform, but does not specifically say the parties may not consent to an alternate arrangement. Mediators are

71. *Supra*, at para. 55.
72. CBAO Model Code of Conduct for Mediators, *supra*, footnote 27 at VI; ADRIC Code of Conduct, *supra* footnote 32, section 6.1.

instructed not to disclose information or documents unless permitted by a list of exceptions which include written consent, court order, actual or potential threat to human life, part of a report required of the mediator, or if for statistical, research, education, accreditation purposes as long as the information is non-identifiable.[73] Mediators are mandated to maintain confidentiality in storage or disposal of mediation notes and records. However, without addressing it directly, discretion seems somewhat left to the mediator over limits to confidentiality in caucus.

The IMI notes similar principles with a few small additions. The Institute provides advisors to help mediators to deal with ethical dilemmas. If ethical advice is sought, then confidential issues may be discussed if necessary, thus catching the advisor ("reviewer") in the net of confidentiality. Confidentiality obligations can also be relaxed if the information discussed is already in the public domain.[74] Mediators are advised to inform all parties of pre-mediation communication and make parties aware that they will have equal opportunity to raise issues.[75]

The exception for breaching confidentiality in the face of illegality is taken one step further. In addition to physical harm mentioned in other codes, the IMI notes illegal acts, in general. There is also a further suggestion, *not* an obligation, to try to get parties to disclose the information first:

> 4.3 Before using or disclosing such information, if not otherwise required to be disclosed by law, Mediators must, if they consider it appropriate, make a good faith effort to persuade the party and/or the party's counsel or other advisers, to act in such a way that would remedy the situation.

What is clear from the laws, rules and codes surrounding confidentiality in mediation is that the intention is to offer and preserve a confidential method of settling disputes. Easing or tightening of the parameters surrounding confidentiality is something to be left to the self-determined parties, voluntarily subscribing to the process.

There is always the possibility that information may be compelled by the court or another tribunal. In *Law Society of Upper Canada v. Ernest Guiste*,[76] the discipline tribunal looked behind the veil of mediation confidentiality in determining a matter of discipline, where a lawyer acting as a representative displayed allegedly overly

73. *Ibid.*
74. International Mediation Institute Code of Conduct, *supra*, footnote 33 at section 4.
75. *Ibid.* section 3.2.
76. 2011 ONLSHP 0024 (hereinafter *Guiste*).

aggressive and abusive behaviour in the course of mediation. Well-drafted mediation agreements can certainly help to minimize this possibility. The courts may still order the mediator to testify but the odds of this taking place will be lessened. Some more aggressive drafting strategies include stating that the mediator will not be a witness and if subpoenaed the mediator will move to quash the subpoena. Further, one could include that the parties will be responsible for any associated costs, responsible to pay an hourly rate for the mediator's time.[77]

The European Union (EU) has addressed the issue of compellability head on. The EU Mediation Directive states that mediators shall not be called to give evidence except where necessary for public policy reasons. Examples cited include child protection or protection from physical or psychological harm.[78]

B. The Issues: Is the Mediation Process Strictly Confidential or Not? Should it be?

Can anyone resolutely suggest that mediation is confidential? Should it be? If mediation is analogized with a box of goods, the contents of the box are *likely* strictly confidential for two reasons, one being the protection afforded by the common law settlement privilege, and the other being the existence of a confidentiality clause if offered by the mediator and signed by the parties. Often the contents of the box enjoy that double protection.

However, the confidentiality afforded to the existence of the box, itself, is less clear. The Supreme Court of Canada deemed through contract it is possible to make that confidentiality of the existence of that box "watertight", but does not go as far as to give an example of what those terms would look like. A standard mediation contract confidentiality clause as in the *Union Carbide Inc. v. Bombardier Inc.* case did not meet that benchmark. Parties must expressly turn their attention to the scope of confidentiality in each case,[79] perhaps something like "The parties agree that the existence and scope of this mediation must remain confidential", followed by a binding arbitration clause to remedy any dispute on interpretation that may arise.

77. *Mediation Sample Agreement*, at http://adrchambers.com/ca/mediation/sample-agreement.
78. H. Allen, "Confidentiality – A Guide for Mediators: How Significant is Mediation Confidentiality in Practice?" *ADR Times*, at https://www.cedr.com/articles/?item=Confidentiality-a-guide-for-mediators.
79. *Union Carbide Inc. v. Bombardier Inc.*, *supra*, footnote 65.

All of this said, other avenues for loss of confidentiality remain. Essentially, in some unique situations, the contents of the box may be at risk of exposure. In *Bombardier*, the court purposely neither addressed situations of mediator compellability, when a court may order a mediator to testify, nor instances when mediators may report concerns of bodily harm or fraud.

Despite loopholes, contract and evidentiary considerations, it must be emphasized that the principle of confidentiality is fundamental to mediation. As Justice Wagner noted, confidentiality is often included in the definition of mediation. For instance, Glaholt and Rotterdam defined mediation as "a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute".[80]

Confidentiality is often a key attribute of the process that attracts people to mediation and should be respected.[81] There is a sense of safety in discussing issues that are not subject to public scrutiny. The situation is, of course, different for litigation. Once a matter is litigated before the courts, the court documents are a matter of public record and therefore open to public consumption.

Parties can also test out theories or discuss vulnerabilities that may assist in finding a mutually attractive solution, without fear of loss or scrutiny of the courts. As Sturn and Gadlin note, confidentiality is particularly key in certain types of disputes such as workplace conflict. People need to work together on an ongoing basis and the confidentiality factor preserves the possibility of good future relations despite current tensions.[82]

Despite all of this, the paradox of confidentiality in mediation is that in order to make any real headway in settlement discussions, one side must ultimately show their hand at some level.[83] Perhaps it is a bid of a dollar amount intended as a global offer for settlement. It may not reveal the full range, opinion of specific liability, or any areas of weakness. However, it does give a ballpark idea of something in their range of settlement. So, while confidentiality is important, in many instances it is the mediator's ability to tease the parties out of protecting some of that confidential information that

80. D.W. Glaholt and M. Rotterdam, *The Law of ADR in Canada: An Introductory Guide* (Markham, Ont.: LexisNexis, 2011) at 10.
81. M.P. Silver and P.G. Barton, *Mediation and Negotiation: Representing Your Clients* (Butterworths, 2001), at 82; M. Erdle, "Confidentiality of Mediation and Arbitration", at www.slaw.ca/2015/01/15/confidentiality-of-mediation-and-arbitration.
82. Sturn and Gadlin, *supra*, footnote 55 at 61.
83. *Ibid.*

fosters a successful outcome. This involves a high level of integrity and skill as mediator to be considered the repository of trust.[84]

Whether or not the law protects mediation confidentiality, the mediator and parties, themselves, may pose a risk. The mediator must be mindful of parties who disrespect the confidentiality principle to seek some advantage by taking the matter public, even if well intended. Journalist Jan Wong suffered financial loss after she referred to some of the issues around her settlement with The Globe & Mail Inc., and was required to return the settlement funds and pay costs. Mediators, themselves, must also be wary not to give in to the temptation to boast about personal successes citing high profile parties to boost their own reputation.[85] In the field of psychotherapy, studies show the importance of building interpersonal trust through the promise of confidentiality. Subjects are much more willing to share information when confidentiality is part of the process,[86] helping to assist parties as a stand-in for trust. The dispute, in many cases, has destroyed trust. By offering parties the ability to communicate freely and confidently without fear of reprisal or judgment, the confidential aspect of discussion can help mediators create building blocks toward trust.[87] Mediators must therefore jealously guard this trust by working to preserve confidentiality.

C. Best Practices

As a first step, mediators ought to protect themselves with carefully drafted mediation agreements. Next, mediators should mindfully design a process that breeds a sense of security, assessing the level of confidentiality on a case-by-case basis. Giving consideration to factors unique to that situation, they ought to discuss the parameters of confidentiality pre-meditation and on the day of the mediation.

What then can be compelled by the court is essentially out of the mediator's hands, so the next focus should be on what the mediator can control, which is the design of the process. Perhaps the most important process consideration for confidentiality purposes is the caucus process. Many mediators, of course, solely rely on caucuses and simply shuttle between the parties. Others use a hybrid of

84. Allen, *supra*, footnote 78.
85. Erdle, *supra*, footnote 81.
86. K.J. Corcoran, "The Relationship of Interpersonal Trust to Self-Disclosure When Confidentiality is Assured", [1987] *The Journal of Psychology* at 193-195.
87. K.L. Brown, "Confidentiality in Mediation: Status and Implications" (1991), J. Disp. Resol. 307.

plenary and caucus sessions. As suggested by the IMI, parties should be assured that they will be treated equally to build confidence in the process.[88]

Caucus design can include mediator instructions such as, "Nothing is confidential unless you say otherwise", to the more standard, "Everything is confidential unless you say otherwise". Care must be taken with the latter, especially in multi-party negotiations where bulk information is being exchanged among a number of parties and it becomes challenging to remember who said what to whom without careful note-taking. Movement in negotiations requires some slackening of confidentiality so that someone makes the first move. The art of creating comfort around that is in the hands of the mediator asking parties whether they can transmit one small piece of information, asking for the parties to trust the mediator that the small gesture of trust will go a long way. Successful negotiations are only bolstered by trust.[89] Dispute resolution scholars and practitioners report that acts of reciprocity and kindness spawn feelings of trust.[90]

D. Best Practices Checklist

1. Discuss confidentiality terms with the parties prior to and at the outset of the mediation to ensure no surprises once the mediation is underway. Remind parties of the terms again at the conclusion of the mediation.
2. Orally review and have all stakeholders sign a robust, carefully-drafted mediation agreement with a confidentiality provision to be adjusted by you with the parties as appropriate.

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88. International Mediation Institute Code of Conduct, *supra*, footnote 33 at section 3.2.
89. M. Teplitsky, *Making a Deal: The Art of Negotiating* (Toronto: Lancaster House, 1992) at 87.
90. H. Raiffa, *The Art and Science of Negotiation* (Massachusetts: Harvard University Press, 1982) at 344; G.R. Williams, *Legal Negotiation & Settlement* (St. Paul: West Publishing Co., 1983) at 91; H.C. Kelman, "Overcoming the Psychological Barrier: An Analysis of the Egyptian-Israeli Peace Process" (1985), 1 Negotiation J. 213 at 217; D. Landau and S. Landau, "Confidence-Building Measures in Mediation" (1997), 15 *Mediation Quarterly* 97 at 99; H.C. Kelman, "Building Trust Among Enemies: The Central Challenge for International Conflict Resolution" (2005), 29 *International Journal of Intercultural Relations* 639 at 644-646 (*Building Trust Among Enemies*).

3. Educate the parties. Explain that discussions and document exchange within the mediation are meant to be confidential under common law settlement privilege but can attract extra protection with a well-drafted confidentiality clause within a mediation agreement. Protect yourself and the parties by saying that even though the law seems fairly settled on this point, there is always the possibility that the courts may compel information for some reason unforeseeable at this point.
4. Ensure your caucus rules are well set out and understood by all stakeholders.
5. Refrain from discussing the mediation with anyone outside the parties unless expressly allowed by the parties in writing, court ordered, if severe bodily harm might result, or if non-identifiable for the purposes of research, statistics or education.
6. Take care to highlight all of the benefits that can flow from the level of confidentiality unique to the mediation process.

TRUTH

A. Existing Laws and Codes

Impartiality, conflict of interest and confidentiality are often addressed in mediator codes, while issues of honesty or truthfulness are virtually absent.[91] Are mediators expected to mandate honesty of the parties to a facilitated negotiation? Lawyers are expected to act honestly and in good faith. This sentiment is carefully woven throughout regulation, codes, legislation and jurisprudence. Lawyers must not knowingly assist clients in lying about facts, though the law is careful not to mandate the absence of some puffery in negotiations. In cases traveling through the adjudicative system, discovery of dishonesty by a lawyer ranging from bad faith to fraud often draws resolute censure.

Having said this, as noted, not all mediators are lawyers. The absence of rules could be construed as liberating for some mediators, free to negotiate creatively without moral constraints. However, the tricky issue here is the intersection between mediation practices and professional obligations for lawyer/mediators. Therefore, while

91. K. Kovach, "Musings on Ideals in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education"(2005), 21 Ohio State L. Rev. 123 at 129.

there are lessons relevant to all mediators about the role of truth in mediation, this section is particularly germane to lawyer/mediators.

Laws covering this issue of truth in mediation are few in number. Rule 24.1 of the Rules of Civil Procedure is silent on a mediator's role with respect to encouraging honesty, fact finding, etc. The wording offered in the Rules of Professional Conduct certainly discourages lawyers from any involvement in dishonest negotiations in the role of representative advocate, but remains virtually silent on the role of the mediator, in this regard.[92]

Conversely, truth is given more attention for the lawyer in the role of representative in a mediation. In the definition section, "Tribunal" for the purposes of the Rules is said to include mediation. Under Rule 2.1-1, lawyers are reminded to act with integrity in discharging their duties including before a tribunal. Rule 5.1-1 states that, when acting as an advocate, the representative lawyer in a mediation (not the mediator) must represent the client honourably, "treating the tribunal with candour, fairness, courtesy and respect". The commentary at 5.1-1 states:

> The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged . . . to assist an adversary or advance matters harmful to a client's case.[93]

Rule 5.1-2 mandates that a lawyer, acting as an advocate, must not knowingly attempt to deceive a tribunal by presenting false evidence, misleading facts, etc., again leaving the mediator out. Specifically, rule 5.1-2(b) states:

> When acting as an advocate, a lawyer shall not . . . knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable.

Rule 5.1-4 states:

> A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rules and who discovers it, shall, subject to the rules in section 3.3 (Confidentiality), disclose the error or omission and do all that can be reasonably done in the circumstances to rectify it.

So where does this leave the lawyer who acts as the mediator, *not* the representative? Rule 5.1-5 on courtesy reminds *all lawyers*, not just when advocating, to be courteous and act in good faith, without

92. Ontario, Rules of Professional Conduct, rule 5.7, online: www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159 (hereinafter Rules of Professional Conduct).
93. Rule 5.1-1.

specifically mentioning honesty. Rule 1.1 addresses all lawyers, under "Conduct Unbecoming", reminding lawyers not to engage in conduct involving dishonesty, which undermines the administration of justice. Query whether this means conduct specific to the role of the mediator/lawyer, or whether this extends to the mediator having a level of responsibility for all parties, though likely not.

> **"Conduct unbecoming a barrister or solicitor"** means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession including, for example,
> (a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,
> (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
> (c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;[94]

This might be *it* as for the sections that legally obligate lawyer/mediators to ensure truth and honesty in negotiations. Needless to say, the direction is somewhat vague and far-reaching, not denying its value and critical importance as part of our Code of ethics.

The Law Society of Upper Canada is governed by *The Law Society Act*,[95] which states:

> In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.

Again, the underlying tone is that mediators who are lawyers are always lawyers and therefore must behave with integrity and in the public interest. One could argue that public interest includes access to justice, which is promoted through mediation, "flaws" and all, where strategies to find settlement opportunities and avoid complex litigation are involved.

The CBAO code directs mediators to encourage parties to act in good faith, but does not mandate honesty or demand withdrawal in situations where dishonesty surfaces. The Code does not provide any sanction for deviation from the truth. In the definition section, mediators' responsibilities include, "to assist and encourage parties

94. Rule 1.1.
95. R.S.O. 1990, c. L.8, s. 4.2.

to a dispute to communicate and negotiate in good faith with each other".[96]

Under Section XI, "Termination or Suspension of Mediation", permission is given to mediators to call an end to the process in certain situations. One example is that a mediator "may" suspend if "the process is likely to prejudice one or more of the parties" or one or more of the parties is "using the process inappropriately" . . . or "it appears that a party is not acting in good faith". Clearly, this is a permissive suggestion rather than a mandatory requirement".[97]

The ADRIC/ADRIO code makes no mention of the ethical obligation to insist upon honesty other than in s. 7.5.

> 7.5 A Mediator who considers that a Mediation in which he or she is involved may raise ethical concerns (including, without limitation, the furtherance of a crime or a deliberate deception) may take appropriate action, which may include adjourning or terminating the process.[98]

Without addressing honesty directly, the IMI code encourages mediators to take reasonable steps to prevent any misconduct. Section 3.3.2 notes that "Mediators may withdraw . . . if a negotiation among parties assumes a character that to the Mediator appears unconscionable or illegal". The impact of lies or omissions seems therefore left to the mediator's discretion in terms of unconscionability.[99]

The rules of our neighbours south of the border seem somewhat ambiguous too, and permit a level of puffery in negotiations.[100] In most of the United States, with the exception of California, which has its own code of conduct, lawyers are to adhere to the American Bar Association's Model Rules of Professional Conduct. These Model Rules prescribe that, in representing clients, lawyers "shall not knowingly . . . make false statement of material fact or law" or "fail to disclose a material fact".[101] At one time, the American Bar Association's (ABA) rules were intended to extend further to impose a responsibility of fair dealing in negotiations with other lawyers under a proposed section 4.2.; however, the controversial section was never adopted.[102]

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96. CBAO Model Code of Conduct, *supra*, footnote 27.
97. *Ibid.* at Section XI.
98. ADR Institute of Canada, Code of Conduct for Mediators, *supra*, footnote 32.
99. International Mediation Institute Code of Conduct, *supra*, footnote 32 at ss. 3.2.3 and 3.3.2.
100. Raiffa, *supra*, footnote 92 at 127-130.
101. Macfarlane, *supra*, footnote 1 at 239-240.

To expect mediators to be the guardians of good faith in their processes would necessitate a societal 'buy in' on the "right" ethics for negotiation, in general. As noted in the theory section above, there are still many pervasive schools of thought championing the notion that some element of deception is fitting within "the art of negotiation".

That said, recent Canadian jurisprudence may give us cause to wonder if we are steering toward heightened ethical and legal obligations in negotiation. In the 2014 decision of *Bhasin v. Hrynew*, the Supreme Court of Canada weighed in on the topic of honesty and good faith in contract, specifically contractual performance. Writing for the court, Justice Cromwell recognized that good faith is "an organizing principle" in the honest performance of contractual obligations. The court did not provide a definition of good faith aside from an "organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily".[103]

Some speculate that, while at present this duty of good faith seems related only to contractual performance, it may not be long before it is extended to contractual negotiations.[104] In *Antunes v. Limen Structures Ltd.*,[105] Justice Carole Brown extended the interpretation of *Bhasin* to include negotiations. In this wrongful dismissal case, the plaintiff was employed in construction by a relative through marriage. In negotiations, prior to accepting the job offer, the plaintiff was promised a certain graduated salary and a percentage of company shares. The defendant allegedly verbally noted at the time of hire that the company value was $10 million. On that basis, the plaintiff accepted the offer, learning after termination that the value of the company was actually much less.

At paras. 65 and 66 of the decision, Justice Brown commented:

> [65] I am of the view that the defendant did not deal with the plaintiff honestly in the contractual negotiations. There were misrepresentations made, upon which the plaintiff relied in accepting employment with the

102. J.E. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980), 921 A.B.A. Research J. at 937-938.

103. *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, 4 Alta. L.R. (6th) 219 (S.C.C.) at para. 63 (*Bhasin*).

104. B. Berg and M. Maodus, "Duty of Honesty in Contractual Performance" (Paper presented to the Law Society of Upper Canada for The Twelve-Minute Civil Litigator Conference, 2015) at 7.

105. 2015 ONSC 2163, 2015 CarswellOnt 7985, [2015] O.J. No. 2770 (Ont. S.C.J.), affirmed 2016 ONCA 509, 2016 CarswellOnt 10238 (Ont. C.A.) (*Antunes*).

> defendant . . . It was Mr. Atunes' evidence that he relied on these representations in accepting employment with the defendant.
>
> [66] There was no evidence to refute this. Based on all of the evidence before me, I am satisfied that the defendant failed to act honestly in its contractual performance *vis-à-vis* the plaintiff, both in negotiations entering into the contract of employment and at the time of termination.

Some jurisdictions in North America have allowed mediators to impose sanctions on parties.[106] This would allow mediators control of the process and a greater likelihood of garnering good faith negotiations, but at what expense for the integrity of the mediation process?

On balance, the spirit of the law seems to be that honesty and good faith belong in negotiations. Lawyer/mediators, as a subset community, may be somewhat more, though not explicitly, bound to encouraging the truth in mediation.

B. The Issues-Does Truth Matter in Mediation? What are the Mediator's Duties?

Would mandatory promotion of honesty fit within the mediation model? On balance, the answer is no, yet a debate persists given the importance of the integrity of the process. Mediators are not meant to be finders-of-fact like judges. The first problem is the challenge of actually defining what trust means, which is something of an age-old quest.[107] The art of negotiation has different standards than an adjudicative process.

Oxford Dictionary defines truth, and related terms, as follows:[108]

> **Truth:** "That which is true or in accordance with fact or reality".
> **Honest**: "free of deceit; truthful and sincere".
> **Good Faith** (a term often used in the context of honesty): "The intention to be honest and helpful".

Many writers focus on the idea of "context". Macfarlane draws on the feminist theory of "truth" as "contextual and therefore forever fluid, pointing out as well the difficulty pinpointing a definition.[109] She offers the explanation that definitions of truth can evolve within communities, citing the example of implicit standards or rules of

106. Macfarlane, *supra*, footnote 1 at 212.
107. R.J. Lewicki, B. Barry and D.M. Saunders, *Negotiation*, 6th ed. (New York: McGraw-Hill/Irwin, 2010), at 265-266 and 276-279.
108. *Oxford Dictionary*, *supra*, footnote 4.
109. J. Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002), 40 Osgoode Hall L.J. 50-87 at 71.

good faith spawning in small legal communities with their own established culture.[110]

Whatever the definition of truth, perhaps it does not matter simply because, as some would contend, it should not be the focus of the negotiation. There is no weighing of evidence required but rather facilitation of the discussion between parties striving to achieve a mutually acceptable agreement. Menkel-Meadow suggests the focus should be on issues of substantive fairness in negotiated outcomes.[111] Hardball-type negotiation style is often expected and rarely leads to professional misconduct sanctions for lawyers representing parties,[112] with the possible exception of *Guiste*, but the "hardball" negotiation tactics centered around abusive remarks rather than honest negotiations.[113]

In certain negotiations, dishonesty is expected. In collective bargaining, for example, "false demands" are used as a standard tool, with parties intentionally providing a list of demands including some that are unimportant to them.[114] Negotiation is often analogized to a game.[115] Some deception is implicit as part of the rules of the game, whether or not spelled out to every player.[116] An example of this would be an open market in the Middle East, where bargaining is expected.

Not surprisingly, like everyone else weighing in on the topic of the role of honesty in negotiations, judges seem to have varying opinions. "Between the two extremes of 'don't lie' and 'permissible self-interest' lays a wide range of obligations, rights and responsibilities."[117] Some judges may be prepared to accept the game theory notion of negotiations, while others are resolute about protecting honesty and good faith.

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110. J. Macfarlane, *The New Lawyer* (Vancouver: UBC Press, 2008) at 213-214.
111. C. Menkel-Meadow, "Ethics, Morality and Professional Responsibility in Negotiation" in P. Bernard and B. Garth, *Dispute Resolution Ethics: A Comprehensive Guide* (Washington, DC: American Bar Association Section of Dispute Resolution, 2002) at 120.
112. *Ibid.* at 138.
113. *Guiste*, *supra*, footnote 76.
114. White, *supra*, footnote 102 at 926-929.
115. H. Raiffa, "Ethical and Moral Issues" in C. Hanycz, T.C.W.Farrow and F.H. Zemans, eds., *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery Publications Ltd., 2008) 114-116.
116. A.Z. Carr, "Is Business Bluffing Ethical" (1968), 46 Harvard Bus. Rev. 143 at 143.
117. Berg and Maodus, *supra*, footnote 104.

C. Best Practices

Rather than play fact-finder, the better approach is to understand why people lie and explore their barriers to telling the truth, as a way of discovering new settlement opportunities. No further regulation is needed for lawyers but a mandatory code encompassing all mediators should incorporate similar language as used for lawyers and existing voluntary codes. The aim is to promote honesty and good faith, with discretion to call an end to negotiations where the parties are operating in bad faith to the extent that the mediator is aware of a potential injustice.

Mediators ought to be educated on best practices to bring integrity to the mediation and build trust toward a positive outcome. Mediators must first embrace the notion that lying is often retaliatory with no greater purpose. People rationalize lying, expecting their adversary must also be lying.[118]

Truth and trust go hand in hand. Truth builds trust. Trust moves parties toward resolution. Conversely, lying erodes trust and is therefore in no one's best interest, including the mediator's. Once trust is lost, it is very hard to regain.[119] Kelman suggests that a mediator's role is simply a "third party repository of trust".[120]

Puffery and posturing in negotiations are unlikely to ever disappear.[121] Parties should be encouraged to protect their reputations by being honest, or at least admitting to areas where they intentionally wish to withhold information and solve for it through other concessions. For example, a party may wish not to disclose key corporate information for other reasons but be willing to offer an abatement or sweetener in another aspect of negotiation.[122]

Psychologists tell us that when parties are granted self-determination and encouraged to take responsibility for their actions they are less likely to lie.[123] Lying suggests that there is some obstacle in the way, whether financial, emotional, social, political or mythical, that makes people believe not telling the truth will be easier.[124] In

118. Lewicki et al., *supra*, footnote 107 at 265-266 and 276-279.
119. R. Salem, "Trust in Mediation" (2011) *ADR Times*, at www.adrtimes.com/library/2011/7/22/trust-in-mediation.html .
120. Kelman, *supra*, footnote 90 at 644-646.
121. D. Anschell and B. Morrow, "Dealing with Ethical Issues for Counsel During Mediation" (Ontario Bar Association Continuing Professional Development Program, "Mediation Boot Camp", June 4, 2012) at 6.
122. G.W. Adams Q.C., *Mediating Justice: Legal Dispute Negotiations*, 2nd ed. (Toronto: CCH Canadian Ltd., 2011) at 14.
123. J. Bureau and G.A. Mageau, "Parental autonomy support and honesty: The mediating role of identification with the honesty value and perceived costs and benefits of honesty" (2014), 37 *Journal of Adolescence* at 225-236.

some circumstances, people have been found more willing to tell the truth if they understand that their adversary will suffer as a result of their deception, suggesting guilt might be a factor.[125]

Mediators must also be mindful of the objectives of the parties. Some will use mediation simply as a step in the litigation process to seek more disclosure with every expectation of continuing down the litigation path. The mediation may be mandatory or simply strategic but not intended as a sincere attempt to settle.[126]

If a mediator is able to step back from the role of fact-finder and issues of evidence and credibility, as she should, the process can be successful. In caucus, light, exploratory discussions including risk assessment exercises might draw out the truth and reveal underlying interests and psychological barriers of the parties. Schneider points out that communicative, accommodating, flexible and caring attitudes can promote similar behaviour and that more adversarial behaviour is actually of greater risk and less effective.[127]

In a safe environment, the mediator can then weigh the pros and cons of lying or omission and encourage the parties to share some if not all of the information as a way to build trust in an effort to find a resolution. In this way, the practice of mediation may lend itself to greater success at achieving "justice" when self-determined parties are brought around to seeing what might be the upside of honest collaboration. Arguably facing the harsh truth, working with it and moving forward also creates more durable solutions in the long run. If parties refuse to be honest to the point of prejudice or meaningful harm, a wise practice would be to adopt the principle noted in the Ontario Family Mediation Code, which states that the mediator has a duty to minimize harm or prejudice to the parties and therefore should suspend or terminate the mediation when necessary.[128]

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124. T. Levine, R. Kim and L.M. Hamel, "People lie for a reason: Three experiments documenting the principle of veracity" (2010), 27:4 *Communication Research Reports* at 271-285.
125. R. López-Pérez and E. Spiegelman, "Why do people tell the truth? Experimental evidence for pure lie aversion" (2013), 16.3 *Experimental Economics* 233-247.
126. I. Hull and S. Popovic-Montag, "When to Say No and Walk Away" (Prepared for an Ontario Bar Association Continuing Professional Development Program, "Negotiation Skills", March 9, 2016) at Tab 3, p. 11.
127. A.K. Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style" (2002), 7 Harv. Negot. L. Rev. 143 at 167, 175 and 185.
128. Ontario Association for Family Mediation Code of Professional Conduct (2013), at https://www.oafm.on.ca/membership/policies/standards-of-practice.

D. Best Practices Checklist

1. Encourage honesty and respect for all parties and the administration of justice as key priorities.
2. Focus on building trust for the mediator and the mediation process.
3. Underscore the self-determination element of mediation.
4. Make a mental note of inconsistent information and discuss the inconsistencies with the parties in caucus.
5. Highlight the potential impact of dishonesty to others and on the validity of any agreement reached.
6. Explore the dishonest party's underlying interests or barriers to honesty, and facilitate a search for creative, yet truthful solutions.
7. Be confident in your own morality and feel confident to act on your instinct to terminate the mediation if your view is that the conduct is unconscionable or could cause harm.
8. Remember your goal is to help facilitate a mutually acceptable and voluntary solution, but failure to reach settlement does not necessarily mean the mediation process lacked value in moving the matter forward.

THE PATH FORWARD FOR MEDIATION ETHICS: BEST PRACTICES, BETTER EDUCATION, REGULATORY PREPAREDNESS

It was not the original intention for this paper to promote the regulation of mediators. The idea was to advance knowledge by simply collating all of the theories, codes and ideas to create one relatively easy set of best practices. Along the way, two things became clear. First, mediation is best left untouched by regulation and left to the discretionary creativity of talented, facilitative individuals who may steer, guide and persuade but never judge or dictate. Second, so long as the field continues to grow in the absence of any uniform educational platform or collective recognition of accountability, the first point may not be achievable.

If mediation was still the "alternative", it could exist in the shadow of the law, allowing people to play with different models. With a desperate access to justice issue and a growing recognition that the existing Western adjudicative legal system is lacking in multi-dimensional perspectives and methods, mediation is growing in popularity and approaching mainstream. In addition, existing codes

are often derivatives of the traditional justice system. They are most often voluntary and do not fit seamlessly within the realities of mediation, so they are often overlooked.

The creation of a mediation "profession" would be a happy circumstance but not necessary just for the sake of recognition and respect. However, it would be of assistance in terms of defining one uniform community for ethical accountability. The ill-defined community is a growing problem having the effect of creating two different sets of practices and norms. Even within the two separate communities of lawyers and non-lawyers, there are those trained in mediation and others of the view that mediation is either a convenient point in time to try a quick negotiation, or an opportunity to arbitrate without binding consequences.

Two approaches can be taken. The first is a "wait and see" strategy, hoping time will evolve the process into a set of expected practices and widely understood acceptable standards, openly known to mediators and public consumers of the process. If complaints start to mount in the way they did with paralegals practising in the absence of regulation in Ontario until 2008,[129] the government will need to address the situation. By the time paralegals were regulated by the Law Society of Upper Canada, there were unhappy members of the public, many of whom were unaware that paralegals were not regulated.[130] The problem with this approach is that the public should not be required to gamble on the quality of a process which may materially affect their lives.[131]

The second approach is proactive. It involves stepping back and assessing not only how mediators are respecting or not respecting current codes but temporarily wiping the slate clean and asking what would work best going forward. The public will ultimately crave some procedural fairness. For example, to simply say that all mediators must remain impartial at all times is simply not viable. The better solution is to adopt the idea already integrated in some codes, which promotes impartiality, recognizing that in certain situations parties may expressly consent otherwise.

If parties have agreed to engage a retired judge as mediator, chances are they are doing so because they want a safe way to test the waters. These mediators may tend to be more evaluative.[132] Rather

129. Paralegal Licensing Frequently Asked Questions, online at www.lsuc.on.ca/licensingprocessparalegal.aspx?id=2147491230#s2q1.

130. The Law Society Task Force on Paralegal Regulation, *Regulating Paralegals: A Proposed Approach*, May 2004.

131. H. Brown and A. Marriott, *ADR: Principles and Practice* (London: Sweet & Maxwell, 2011) at 612-615.

than hide it, the mediation agreement should address the fact that while the mediator will remain impartial in the sense of not favouring either party, or offering legal advice, she will provide evaluative direction when asked. This, in turn, may require a tweak to the Rules of Professional Conduct. Direction will be required on the difference between legal advice (as in retaining someone to advocate on your behalf or provide a researched legal opinion) versus gentle guidance or offering of possible approaches given experience. Of course, it will be key to ensure independent legal advice (ILA) or independent legal representation (ILR).

Promotion of truth should not be mandated but encouraged, if only to build trust and promote settlement. Mediators should not become finders-of-fact. The principle of keeping safe the hidden truths of each side goes hand-in-hand with confidentiality. Codes should mandate mediators to address confidentiality but, like impartiality, parties should have the ability to expressly waive or bolster the parameters around it. For now, best practices should prevail. I would suggest the ones listed above with appropriate modifications for each mediator.

A. Proposed Regulatory Infrastructure

If regulation is to occur, what should regulation look like? Regulation cannot function as a rigid group of rules with companion stringent sanctions because the benefits of mediation will become hamstrung by a regulatory bureaucracy. A simple Ontario registry, to be distinguished from the Mandatory Mediation Roster, should be implemented with a companion code of best practices, similar in tone to many of the existing codes of voluntary organizations, with a few tweaks reflecting the ideas I have suggested in the above paragraph. The operation should be kept minimal and not cost prohibitive, and mandating registration and easily accessible education, managing complaints, while shying away from ongoing major investigations and discipline bureaucracy.

Governing regulation should borrow from the IMI preamble on the integral principle of trust as a backbone demonstrating that the purpose of mediation is to promote access to justice and by its very nature promote discretion and creativity. Such regulation will provide mediators a set of consistent standards to anchor practices and move toward a professional status. Consistency promotes

132. J. Folberg and D. Golann, *Lawyer Negotiation: Theory, Practice, and Law*, 3rd ed. (New York: Wolters Kluwer, 2016) at 276.

community standards. Aristotle instructed on the need for community to establish ethical expectations.[133]

As an extension of the idea of codification, American scholars have also written about the advantages and disadvantages of credentialing. Supporters praise the idea for the potential to advance quality access to justice and avoid "arbitrary, improvident systems" which will develop over time. Opponents argue that credentialing will do little to advance quality and rob the system of creativity. Unqualified people will have the opportunity to meet a few requirements and proclaim themselves as experts.[134]

There is a key difference between licensure and credentialing. Licensing of mediators has not been yet established because this would require government to designate minimum standards of qualifications, which is difficult in a developing field. Licenses provide protection but also invite malpractice. Pou suggests a useful credentialing method that focuses more on mentoring, supervision, and training. Constructive feedback and idea generation from learning from other mediators would be more beneficial than a pass/fail testing system, which risks watering down the integrity of the intended innovative and creative dispute resolution model. She opines that promotion should be on quality assurance and accountability rather than a rigid following of arbitrary competencies.[135] A fine line must be walked in the discussion of regulation between quality assurance and government overreach.

In 1998, Reeve wrote an article predicting that court rostered mediation would ultimately promote accountability, as mediators would be attracted to the affiliation of being accredited. She examined the advantages of licensure and certification, deciding that both would be difficult to administer and potentially detract from the inherent creativity of the mediation model. She argued that while court administered mediation should be regulated, private sector mediation could continue driven simply by market forces.[136] These are sensible arguments then and now but with the growing field they may not be eternally sustainable.

A middle ground may be required, somewhere closer to Pou's vision of quality assurance credentialing. To promote greater

133. V. McWilliams and A. Nahavandi, "Using live cases to teach ethics" (2006), 67:4 J. Bus. Ethics 421 at 477.

134. C. Pou, "Assuring Excellence, or Merely Reassuring – Policy and Practice in Promoting Mediator Quality" (2004), Disput. Resolut. J. Disp. Resol. 303 at 304.

135. *Ibid.* at 330 and 352-353.

136. C. Reeve, "The Quandary of Setting Standards for Mediators: Where are We Headed?" (1998), 23 Queen's L.J. 441.

consistency, a certain number of hours of annual education should be mandated. In Ontario, the Law Society of Upper Canada requires 12 hours of continuing professional development annually for lawyers and paralegals. Perhaps even three hours annually would be a good starting point, with such courses counting toward the 12 hours required for lawyers and paralegals. Educational options could range in complexity and be low cost or sometimes free of charge, and provided by a number of providers accredited by the government. If the government provided low cost options, the monitoring system could be run on a cost-recovery basis.

Voluntary certification alone will not be enough long term, as consumers simply don't know to ask for certified mediators unless guided by legal professionals and others. Family Mediators Canada (FMC) has a highly lauded certification and education regime. The reasons cited for certification are to advance professional development, "stay ahead of government standards/ requirements", provide a competitive edge, allow a higher fee structure and award personal satisfaction.[137] These are all exceptional reasons but not likely to be enough long-term.[138]

The regulatory regime, if addressed in a timely manner, need not be extremely cumbersome, but could simply set some manageable guidelines to build education platforms around. A registry administered by the provincial government would be separate from the Mandatory Mediation Roster, which serves a different purpose. Save spiritual leaders and physicians who perform mediation work as part of their existing professional designation, anyone who holds themselves out as selling mediation services would be part of the list. Severe sanctions and rigid accountability should definitely not form the end goal. However, some form of accountability checkpoint would arguably benefit all stakeholders.

B. Augmented Early Education Plan

If the end goal is to offer high quality mediation to the public, the remedy seems to be early education, not meaning pre-school but law school and in any mediation courses offered or accredited by the

137. Family Mediation Canada, online: www.fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Certification%20Brochure.pdf.

138. Some American states do have court rostered mediators and regulation in place similar in nature to the Ontario Mandatory Mediation Roster. Interestingly, the Family Mediation Canada (FMC) association has been noted in American journals as promoting one of the highest levels of education. However, again, family law mediators are encouraged to seek accreditation but accreditation is not mandatory. Pou, *supra*, footnote 134 at 330.

proposed governing body. The public must be educated on the benefits of mediation, and lawyer-representatives must learn to step outside of their litigious roles and promote their clients' self-determination. Finally, mediators must understand what is expected of them and effectively communicate their intentions to the parties. For the scope of this paper, I will only address teaching ethics to mediators.

The key is to make the learning personally relevant.[139] Answers to ethical problems are never simple, but require moral complexity and practice working through difficult situations. The best lessons often involve students designing the problem, perhaps a role play. The class may then play out the scenario and engage in follow-up debate.[140]

A creative ethics instructor of science and engineering in the U.K. had students work on a group project designing a building. They were required to make a series of ethical choices along the way. Once the fictitious building was erected, they were given an additional letter saying that the building was destroyed in a weather incident and it was the only building destroyed in the area. They were then held to account for the incident and asked to prepare a statement for the press. This type of make-yourself-accountable-after-the-fact learning allows students to analyze and justify behaviour and think on their feet.[141] For mediation, the students could be told as mediator, post-mediation, they received a complaint from a regulator or a claim was issued against them.

To properly enforce the need for confidentiality, a multi-layered approach could be best. First, student should have a debate as to whether or not all aspects of mediation should be confidential. Second, they should try their hand at drafting a confidentiality agreement to be discussed and challenged in class. Third, there should be an opportunity for role-play in a multi-party negotiation wherein the mediator has to shuttle back-and-forth with information, guarding confidentiality accordingly.

Impartiality would be best taught through role-plays and "what if" interactive question-and-answer sessions. For example, "What if you knew that by signing the deal before you one of the parties would

139. S. Williams and T. Dewett, "Yes, You Can Teach Business Ethics: A Review and Research Agenda" (2005) 12:2 J. Leadersh & Org. Stud. 109 at 116.

140. Catherine Beaton, "Creative ways to teach ethics and assess learning", online: (2009) IEEE XPLORE LEARNING http://ieeexplore.ieee.org/document/5350654.

141. Peter Lloyd and Ibo Van De Poel, "Designing games to teach ethics" (2008), 14:3 Sci. Eng. Ethics 433.

likely lose at least $10, $100, $1000, $1,000,000?" and "Would your answer change if you knew one of the parties was desperately impoverished? What if one of the parties before you lacked sophistication and needed more nurturing guidance? Do you tell the other party you will be spending more time with her? Do you need to? What if the other party complains?"

The issue of truth in negotiation would be best dealt with by giving the students the challenge to be negotiators in a real negotiation over something like a stash of candy. Teams should be given instructions on the expected range of settlement on the amount of candy to be acquired: for example, the whole stash would be best but 20 pieces would be acceptable. In a real bargaining situation, students would appreciate the bluffing often involved. In a class debrief, students would then be asked to come up with situations where bluffing would not be acceptable and consider how to manage them.

CONCLUSION

Without regulation, a distorted mediation model could easily emerge. Litigators without mediation training will likely continue to gravitate to the process as a path to access to justice and increased business. Pillars of impartiality could cave to the allure of evaluative mediation. Evaluative mediation will likely be construed as a toe-dipping exercise with an escape valve, therefore more attractive than arbitration. The idea of confidentiality being sacrosanct could corrode as litigators try to pry open agreements after-the-fact, dissecting the mediation process like a trial. Ill-intentioned parties may start using mediation as a litigation refuge where "truth does not matter" and agreements can be stitched together based on falsehoods. This sounds like the dystopia of alternative dispute resolution but could be the reality.

On a happier note, with growing access to justice issues, the benefits of mediation are plentiful and promising. To that end, the model of mediation that promotes self-determination and integrity deserves protection to ensure a positive future. The solution seems to lie in some form of regulation, short of licensure but perhaps credentialing through a provincial registry and education requirements. At this time, the short-term solution is to understand the existing laws and codes and work to find individually suited, defendable best practices protocols.

Law Society of Ontario | Barreau de l'Ontario

TAB 2

How to Be Effective as Counsel at Mediation

Pre-Mediation Conference: Checklist for Counsel

Pre-Mediation Questions for Client: Exploring Underlying Interests and Value-Creating Settlement Terms

Jennifer Egsgard
Egsgard Mediation

January 18, 2024

cpd

Pre-Mediation Conference: Checklist for Counsel

A pre-mediation conference is a meeting between the mediator, counsel and sometimes parties, in which number of practical matters concerning the mediation are addressed, with a view to making settlement more likely. A mediator may address some of the following issues during a pre-mediation conference depending on the nature of the case; if a pre-mediation conference is not available it may be helpful to discuss some of these issues directly with opposing counsel:

☐☐ **Discovery**
- Is more discovery required before mediation? If so, can parties agree on a schedule?
- Must any discovery disputes be resolved prior to mediation and if so, how?
- Can mediator assist in information exchange?

☐☐ **Status of litigation**
- Are there any dates for motions, pre-trial conferences, trial?

☐☐ What **settlement offers** have been made to date?

☐☐ **Parameters of dispute**
- Does dispute involve others not party to the litigation?
- Are there related proceedings?

☐☐ **Insurance**
- To what extent are insurers involved, and what are limits?
- Have all relevant insurers been notified of and involved in the claim?
- What is the nature of any insurance-related dispute?

☐☐ **Attendees**
- Who/how many should attend mediation from each party?
- Is there anyone that should not attend?
- Should experts attend mediation including to present opposing viewpoints, a joint report, hot-tub, or to assist mediator's understanding?

☐☐ **Authority to settle**
- Determine who has authority to settle on behalf of each party, confirm their attendance at mediation; and
- Where a party is comprised of multiple stakeholders it should be determined in advance how authority to settle will be bestowed, for instance upon an accountable entity such as a committee or individual.

☐☐ **BATNA analysis**

- The mediator can remind parties of need, before mediation, to consider best alternatives to a negotiated agreement by analyzing: likelihood of success at trial based on strengths and weaknesses of law and evidence for each claim and defence; probability of recovery from other parties; legal costs involved in going to trial; risk of adverse cost awards; and risks arising from partial settlements between some parties.

☐☐ **Issues and process design**

- What are primary issues in dispute and can they be narrowed?
  - Do parties agree on any issues?
  - Should one or more issues be subject to a different form of dispute resolution, such as arbitration, prior to mediation?
    - Issues which might be arbitrated in advance include threshold legal issues (for instance: subrogation disputes; contract validity or enforceability) or disputes respecting relative contributions.
- Should all issues be addressed globally at the mediation or should process be divided to deal with issues in isolation?
- Should issues be addressed in a particular sequence?
- Should mediation take place on consecutive days or is there value to providing a break between sessions?
- Should joint sessions be used and if so who should speak?
- Must all parties attend entire mediation?

☐☐ **Scheduling mediation**

- How many days should be set aside for the mediation; where should it take place?
- How many rooms are required? This will be dictated by a determination of which if any parties may remain in the same room during the mediation.

☐☐ **Exchange of information for mediation**

- Mediation briefs
  - What issues should be addressed, and which documents should be included?
  - On what dates should briefs be exchanged?
- Would exchange of any other information facilitate settlement, such as joint or individual expert reports, evaluations, opinions? How should these be used?

☐☐ **Impasse protocols**

- Should parties agree in advance to steps that will be taken in the event of an impasse such as adjournment, use of a mediator's proposal, or arbitration?

☐☐ **Settlement documents**

- Parties should bring draft minutes of settlement and releases to mediation that can be edited and executed by all parties before leaving, if settlement is reached.

EGSGARD
MEDIATION

Pre-Mediation Questions for Client:

Exploring Underlying Interests & Value-Creating Settlement Terms

As a lawyer preparing for mediation, you are an expert on the law. Your client, however, is the expert on how the conflict impacts their business/life, and the risks and opportunities that a settlement might present.

Here are some questions you can ask your client during mediation preparation to better understand their goals outside of simply winning the dispute. Discussing these issues will help you and your client better devise and evaluate settlement options, including considering creative value-enhancing settlement terms:

1. What are your top priorities in resolving this dispute?
2. What are business and/or personal goals? How is dispute affecting those goals?
3. What do you know about the other side's business or personal goals?
4. What do you think might concern the other side about this dispute?
5. What would you like your future relationship to be with the opposing party/parties?
6. What impact does this litigation have on you/your organization? For instance:
    a. Are any existing or desired transactions affected by the existence of the dispute?
    b. Does the litigation affect your personal or professional reputation?
    c. Does the litigation impact the reputation of your organization, for instance as an employer, regulated entity, manufacturer or retailer concerned with impact on sales/market share?
    d. Is there an opportunity cost to being involved in this litigation? For instance, are key employees tied up and prevented from performing critical functions?
    e. How does the litigation impact you on a personal level? Some people find litigation exciting, for others it may produce extreme anxiety.
    f. What effect does the litigation have on those around you?
7. Are there any external factors or contraints that we should consider? For example:

a. Is the timing of settlement payment important to you? For plaintiffs, can you wait for a larger payment later, or is receipt of at least some funds important now? For defendants, are more funds available for settlement if a staggered or delayed payment is arranged?

b. Will you be able to continue paying legal fees if settlement is not reached?

8. How do you feel about the risks involved in litigation versus settling?

9. Other than the possible exchange of funds, is there anything else you would like to achieve from this dispute? For instance:

    a. maintain confidentiality;
    b. obtain publicity;
    c. change other side's future behaviour toward you and/or others;
    d. set legal precedent;
    e. policy change;
    f. emotional well-being;
    g. quick resolution.

10. Other than exchange of settlement funds, is there anything you and the other side can offer one another to address your respective goals/concerns? This will be very fact dependant, for instance:

    a. Discussion of new business deal between parties;
    b. In employment case:
        i. Legally allowable favourable tax treatment of some portion of settlement funds;
        ii. Letter of reference;
        iii. Flexibility with benefits ;
        iv. Outplacement services;
        v. Shares;
        vi. Agree to cooperate in any future ongoing lawsuits if relevant.

    c. In a tort case against an organization, creative terms could be aimed at preventing future harm:

        i. Adoption of new policy;
        ii. Address by plaintiff to organization to share impact of harm;

iii. Training of employees;
iv. Implementation of a complaint procedure;
v. Agreement to better investigate future claims;
vi. Discipline or termination for employees engaging in future similar conduct;
vii. Costs of counseling or rehabilitation for injured persons;
viii. Donations to support organizations;
ix. Agreement on part of defendant to participate in counselling;
x. Apologies.

d. Value-creating settlement terms unrelated to the dispute - is there anything of higher value to plaintiff than defendant that could be included in settlement? For instance:

i. Products or services relating to the party's business (airline tickets, restaurant vouchers);
ii. Job;
iii. Charitable contribution by the defendant in plaintiff's name;
iv. Joint press release benefitting plaintiff's interests.

11. Some general catch-all questions:

a. What do you hope to achieve from the mediation?
b. Do you have any concerns about the mediation?
c. What are your expectations from me as your lawyer during the mediation?
d. Is there anything else you would like to discuss?
e. What else do I need to know?
f. How else can I help you?

Law Society of Ontario | Barreau de l'Ontario

TAB 3

How to Be Effective as Counsel at Mediation

Effective Mediation Counsel – Some Thoughts

David Steinberg
Steinberg Mediation

January 18, 2024

EFFECTIVE MEDIATION COUNSEL – SOME THOUGHTS

David Steinberg

§ An effective trial lawyer seeks to win. Effective mediation counsel collaborates with the mediator to find practical solutions to problems.

§ Not all conflicts can be resolved. Sometimes, they can only be brought to an end. Effective mediation counsel appreciates the difference and prepares her client accordingly.

§ Effective mediation counsel works at understanding what the parties – including his own client – really need to resolve or conclude a dispute, instead of presupposing what they want.

§ In their mediation briefs, effective mediation counsel weave together two stories: the first, about justice; the second, about settlement. Both matter. (A different way of saying this: Both justice and peace are values that guide mediation. Unlike the courtroom, where justice reigns supreme.)

§ Empathy does not mean giving in. It is about recognizing the humanity of the other. Effective mediation counsel knows when and how to communicate with empathy and thereby disarm their opponents.

§ Everyone sees the world through the prism of their own experiences and emotions. Effective mediation counsel understands this and communicates with that awareness.

§ For everything there is a time and place. Effective mediation counsel knows when to listen and when to speak, when to be accommodating and when to be forceful.

§ Effective mediation counsel looks forward and strives to find ways to maximize value. She understands that attaching fault to past actions does not generate high value solutions.

§ Effective mediation counsel is humble. He appreciates he could lose at trial and uses the mediation process to learn and explore ways to insure against the risk of loss.

§ Effective mediation counsel is also bold. She challenges her clients to look at their case from different perspectives and welcomes reality-testing without fear.