

ETHICAL STANDARDS FOR MEDIATORS:
THE UTILITY OF PROFESSIONAL CODES OF CONDUCT

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Over the past two decades, there has been significant growth in the acceptance of mediation as a means of resolving various types of disputes, including divorce and family conflicts, community disputes, civil personal injury and commercial claims. Mediation has been embraced not only in the private sphere but also in court annexed mediation programs across the country. A number of provinces have implemented various forms of mandatory mediation systems into their court processes including Alberta, Saskatchewan, Quebec and British Columbia. Most significantly, Ontario has developed and implemented the most comprehensive mandatory mediation program in the country.¹

The resulting emergence of mediation as a “profession” raises many issues. This paper addresses the debate surrounding ethical standards for mediators and, more specifically, whether formal codes of conduct are an appropriate response to the concerns raised in arguments for such ethical standards. In other words, do professional codes of conduct effectively serve the purposes for which they are intended? Further, do they appropriately address and assist mediators with ethical dilemmas?

This paper outlines the reasoning proposed for the promulgation of codes of conduct for mediators and examines the fundamental purposes and concerns sought to be addressed by such codes. In addition, a critical analysis and comparison of three substantive existing codes of conduct is undertaken. Finally, criticisms surrounding the use of codes of conduct to enforce ethical behaviors by mediators are set out and examined in this paper.

¹ P. Hughes, “Mandatory Mediation: Opportunity or Subversion?” (2001) 19 Windsor Y.B. Access Just. 161 at 167.

This paper concludes that although the issue of ethics in mediation is an important one, codes of conduct are not a suitable answer to ethical standards issues. They neither effectively nor appropriately serve their intended purposes. Nor do they, it is argued, provide adequate assistance and guidance to mediators when they find themselves in the most common of ethical dilemmas.

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INTRODUCTION

Mediation is rapidly coming to be seen as a profession in and of itself. This has raised a number of concerns and has sparked the raging of debates from within the profession around issues such as the training/education of mediators, certification of mediators, ethical standards, competency and the governance of mediators.

One of the most important but controversial issues to be addressed in developing ethical standards and guidelines for mediation practice is the conception of the mediator's role. It is difficult to formulate uniform standards without a basic, clear, consensual understanding of what the mediator's job or function is.²

² Baruch, Bush, R., "Efficiency and Protection, or Empowerment and Recognition? : The Mediator's Role and Ethical Standards in Mediation" (1989) 41 FLA. L. Rev. 253 at 254-258.

Mediation is not a monolithic process and thus there are various styles or models of practice of mediation. There is considerable debate, for example, around evaluative mediation versus facilitative mediation.

The role or function of an evaluative mediator is sometimes described as a “muscle mediator” who is said to give advice to parties, assess arguments and express his own opinion about the dispute, in effect, directing settlement between parties by making predictions about likely outcomes and proposing resolutions to the dispute.³

This practice type raises a number of red flags for some pure/classical mediators whose view of mediation is predominantly in a facilitative framework which can be described as non-prescriptive and communication oriented. Here the mediator’s role is clearly to be impartial and the self-determination of the parties is a core value in the process. A facilitative mediator is said to assist parties in evaluating their situations and developing their own solutions. Facilitative mediators aid communication between the parties, help them focus their understanding of their own and the other party’s interests and assist in creative problem solving to help parties devise their own agreement.⁴

³ P. Hughes, “Ethics and Mediation: Which Rules? Whose Rules?” (2001) 50 UNB LJ, 253 at 255.

⁴ D. Shaw, “Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators” (1998) 29 U.TOL. L. Rev. 327 at 330-332.

The difference in practice styles of facilitative compared to evaluative mediators evokes the concern that evaluative mediators are, in effect, practicing law and thus, assuming they are lawyers/judges, are they bound by their lawyers' Professional Codes of Conduct?⁵

It is argued that if such mediators are, in fact, practicing law that their own lawyers' Rules of Professional Conduct do not properly address this new/alternative role or function of the lawyer/mediator and, in fact, may conflict with the ethical obligations of mediators.⁶

There are, as well, a variety of other non-legal professionals who have become involved in mediation and who may or may not have their own rules of professional conduct.

From these concerns flow several questions. First, has the time now come to regulate the mediation field like other professions such as law? Second, are ethical codes of conduct necessary for mediators, separate and apart from other professional codes of conduct? In other words, should there be a universal mediator code of conduct that addresses the ethical standards and conduct related solely to the role and function of a mediator?⁷

⁵ C. Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 *South Texas L. Rev.* 407. (Where Menkel-Meadow is clearly of the opinion that lawyers are, in fact, practising law in mediation.).

⁶ M. Laflin, "Preserving the Integrity of Mediation Through the Adoption of Ethical Roles for Lawyers-Mediators" (2001) 14 *Notre Dame J. L. Ethics and Public Policy* 479 at 479.

⁷ "Ibid" at 479.

I. WHY CODES OF CONDUCT?

There is both internal and external pressures for ethical codes and standards for mediators. ADR practitioners themselves are seeking ethical guidance in dealing with complex ethical issues in these processes.⁸ Further, ADR professionals perceive that codes of conduct as well as the development of a standard of care for mediators lends a recognition of respectability and credibility to the mediation process and the perception of mediation as a profession.⁹

In addition, there is a perceived need for consumers to be able to identify well qualified mediators to help them solve disputes and if the ADR profession itself does not take the lead in defining such expectations, there is concern that the standards will be defined elsewhere.¹⁰

Consumer protection and quality assurance have become increasingly important given the proliferation of court annexed alternative dispute resolution. The maxim “caveat emptor” seems less relevant when we are dealing with situations where parties are mandated to attend a mediation by a court rostered mediator. It is argued that the lack of formal structure in mediation processes requires that at the very least, minimum expectations of ethical behavior are necessary.¹¹

⁸ C. Menkel-Meadow, “Ethics and Professionalism in Non-Adversarial Lawyering (1999) 27 *Fla. St. U.L. Rev.* 153 at 164.

⁹ 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 at 55.

¹⁰ H. M. Webne-Behrman, “Forum: The Emergence of Ethical Codes and Standards of Practice in Mediation. The Current State of Affairs” (1998) *WIS. L. Rev.* 1289 at 1296.

¹¹ *Supra* note 8 at 163-167.

It is further proposed that one of the many purposes of model standards/codes of conduct is to set out a general framework for the practice of mediation to encourage and ensure both substantive and procedural fairness to the parties within the mediation process and specifically address concerns relating to deceptive and unfair negotiating tactics, among other concerns.¹²

Overall, there are three generally accepted themes to arguments for the necessity of ethical codes of conduct for mediators: to provide guidelines for mediators themselves; to protect the parties/quality assurance by informing them of the conduct they have a right to expect, and the integrity of the profession and the promotion of public confidence in mediation as a process for resolving disputes.¹³

II ETHICAL DILEMMAS OF MEDIATORS

A study conducted for the National Institute of Dispute Resolution by Robert A Baruch-Bush based on interviews with approximately eighty mediators sought to identify the most common situations or types of ethical dilemmas faced by practicing mediators. In the study, Bush defined ethical dilemmas as those which cause some discomfort or ambiguity for practising mediators because choices or courses of action produce conflicting possibilities given potentially conflicting values.¹⁴

¹² M. Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge" (1998) 36 *Osgoode Hall L.J.* 625 at 641-646.

¹³ *Supra* note 1 at 11-12, "*supra*" note 9 at 50-57 and "*supra*" note 10 at 4-5.

¹⁴ R. Baruch Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications" (1994) 1 *Journal of Dispute Resolution* 1.

The primary purpose of the study was to identify the range of ethical dilemmas in which practicing mediators need guidance. The study found a range of categories or major types of dilemmas reported by practising mediators. Broadly speaking, they centre around dilemmas relating to competency, impartiality, confidentiality, consent, self-determination, non-directiveness, separating mediation from counseling and legal advice, avoiding party exposure to harm, preventing party abuse and conflicts of interest.¹⁵

It is important to state that Bush laid out many subdivisions and specific subtypes within each general category. It is beyond the scope of this paper, however, to discuss these subtypes. Of interest, though, is that Bush's findings strongly suggest the dilemmas of mediation practice are similar in all the fields of practice studied – community, divorce and civil mediation.¹⁶

One of the key conclusions arising from Bush's study is encouraging. He states that in order for parties in a mediation to realize the benefits while avoiding the risks of abuse inherent in an informal process such as mediation, "it is crucial that mediators themselves be sensitive to what the risks are and committed to avoiding them."¹⁷ Bush reports that the findings of his study strongly support the existence of such sensitivity on the part of mediators. He concludes that his study evidences that mediators are concerned about good practice, are sensitive to what the dilemmas are, and are anxious to resolve them responsibly.¹⁸ Given such findings, one wonders whether the concern/argument for codes relating to the protection of the public is really a valid concern and one that really needs to be addressed.

¹⁵ Ibid at 9-10.

¹⁶ Supra note 14 at 41.

¹⁷ Ibid note 14 at 43.

¹⁸ Ibid.

Bush further suggests that mediators' concerns relate not only to narrowly defined ethical dilemmas such as conflict of interest for example, but also include broader value dilemmas including conflicts between different values and objectives at stake in mediation.¹⁹

Thus, Bush concludes that many of the dilemmas described by the mediators go to the central question of what their functions or roles are as mediators, and what they should consider the primary purpose of the mediation process when different objectives clash.²⁰

III. CRITIQUE OF EXISTING CODES OF CONDUCT

A number of provincial Professional Codes of Conduct for lawyers deal with lawyers as mediators. For example, Ontario Rule 4.07 of the Rules of Professional Conduct governs lawyers in their role as mediators. However, where do non-lawyer mediators turn when seeking guidance on ethical issues? Also, what happens when lawyers' Professional Codes of Conduct conflict with fundamental values of the mediation process? Thus, in looking at the issue of model codes of conduct for mediators, this paper will critically analyze whether existing codes of conduct provide useful ethical guidance to mediators, whether lawyers or not, and whether they meet their intended purposes / objectives.

¹⁹ Ibid.

²⁰ Ibid at 42-45.

Three model codes of conduct will be examined. First, the CBA – Ontario ADR Section Model Code of Conduct for Mediators. (CBA-Model) ;²¹ Second, The Model Standards of Conduct for Mediators put forth by a joint committee of the American Arbitration Association (AAA), the American Bar Association Section on Dispute Resolution (ABA) and the Association for Conflict Resolution (ACR) (AAA/ABA ACR Standards) ²²; and third, The Code of Conduct for Mediators of the ADR Institute of Canada.(ADRIC Code)²³ .

These codes will be critically examined based on a number of criteria: (1) whether they meet the purposes/objectives laid out in their preambles; (2) whether they adequately address the three concerns set out earlier in this paper (to provide guidance to mediators, protection of the public/quality assurance and integrity of the profession and promotion of public confidence) and; (3) whether and how well they address the nine categories of ethical dilemmas laid out by Bush in his study.²⁴

²¹ Appendix A, Canadian Bar Association – Ontario ADR Section Model Code of Conduct for Mediators (1998).

²² Appendix B, The Model Standards of Conduct for Mediators developed by a joint committee of American Arbitration Association, the American Bar Association Section on Dispute Resolution and the Association for Conflict Resolution (2005).

²³ Appendix C, Code of Conduct for Mediators of the ADR Institute of Canada (2011).

²⁴ Supra note 14.

The CBA Model Code of Conduct for Mediators was adopted under the Mandatory Mediation program in Ontario and incorporated into Rule 24.7 of the Ontario Rules of Civil Procedure. The Model Code sets out the main objectives clearly at the very beginning of the Code. These objectives, namely: (a) to provide guiding principles for mediators' conduct; (b) to provide a means for protection of the public; and (c) to promote confidence in mediation as a process for resolving disputes are in keeping with the concerns to be addressed by codes as laid out earlier in this paper.

The CBA Code sets out a definition section which includes a brief description of the mediation process, the role of the mediator, impartiality and conflict of interest. The CBA Code lays out its eight guiding principles beginning with the (III) "Principle of Self-Determination" as a fundamental principle of mediation. It further sets out (IV)Impartiality, (V)Conflict of Interest, (VI)Confidentiality and (VII)Quality of the Process as the other main categories and then goes on to deal with practical issues related to the practicing of mediation such as (VIII)Advertising, (IX)Fees and key terms in the (X)Agreement to Mediate.²⁵

Although the foregoing principles set out in the CBA Code are quite general with not much detail or commentary to provide guidance, the Code is quite directive in its wording. (a mediator shall). Unlike the ADR Institute of Canada (ADRIC) Code, however, the CBA Code does not contain references to minimum standards or disciplinary matters if there are breaches of the Code.

The CBA Code specifically states mediators "shall not provide legal advice to the parties". Further, it lays out two reasons a mediator may withdraw services; if the mediator becomes aware of his lack of impartiality or if he has a conflict of interest.²⁶

²⁵ Supra note 21.

²⁶ Ibid.

Examining the CBA Code with respect to the categories set out in the Bush study,²⁷ there are a number of such areas addressed by the CBA Code. These include Bush's categories of self-determination, conflict of interest, confidentiality, impartiality and arguably competency (under Quality of The Process in the CBA Model Code). However, these areas are very generally addressed and there is insufficient specificity for them to effectively guide most practising mediators when faced with such dilemmas. For example, with regard to the issue of mediators' duty to ensure fairness, article VII of the CBA Code entitled "Quality of the Process" requires mediators to ensure that the process "encourages respect among the parties". The definition section in the CBA Code sets out under the role of the mediator that the mediator is to encourage the parties to negotiate in good faith with each other but is no more specific than that on the issue of fairness.²⁸

Arguably, the CBA Code may not provide adequate assistance to mediators due to its general nature but also due to its silence with respect to almost half of the areas/dilemmas set out in the Bush study.

Finally, it does not adequately address its own objectives laid out. Its lack of specificity and lack of comprehensiveness undermines its objective of providing guidance to mediators. Whether it provides a means of protection for the public and promotes confidence in mediation, it may, just by its existence, go some way towards achieving such objectives but not far enough. On the other hand, there is argument that broadly worded standards in codes allow mediators the necessary flexibility that is required given the various models and styles of mediation practice.²⁹

²⁷ Supra note 14.

²⁸ Supra note 12 at 642-643.

²⁹ Mills, Katherine, "Can a Simple Ethical Code Respond To All Models of Mediation?" (2005) Bond Dispute Resolution News, paper 21.

The AAA/ABA/ACR Model Standards of Conduct for Mediators is a more comprehensive and detailed document than the CBA Code. The preamble of the AAA/ABA/ACR Standards, similar to the CBA Code, specifies that the Standards are “designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts.” The primary goals are listed as follows: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”³⁰

The AAA/ABA/ACR Standards are organized into nine standards as follows: (I) Self-determination; (II) Impartiality; (III) Conflicts of Interest; (IV) Competence; (V) Confidentiality; (VI) Quality of the Process; (VII) Advertising and Solicitation; (VIII) Fees and Other Charges; and (IX) Advancement of Mediation Practice. Each standard is followed by one or more directives (“shall” and “should”) and is followed by commentary that elaborates the intention of the standard and thus provides further detail which may be helpful to mediators in particular circumstances. The Standards, after the preamble, provides a “Note on Construction” which includes clarification of the terms, “shall” and “should” .³¹

Similar to the CBA Model Code, the AAA/ABA/ACR Standards set out self-determination as the first and fundamental principle of mediation and stress that mediation relies upon the parties to reach a “voluntary uncoerced agreement”. The self-determination standard, however, is more detailed and clearly laid out than in the CBA Code.³²

³⁰ Supra note 22.

³¹ Ibid.

³² Ibid.

The AAA/ABA/ACR Standards Code differs, however, from both the CBA and the ADRIC Codes of Conduct in that it more narrowly defines the process and the role of mediator so as to make it clear it encompasses facilitative not evaluative mediation. The definition of mediation states – “mediation is a process in which an impartial third party a facilitates communication and negotiation and promotes voluntary decision making by the parties to a dispute. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”³³

In the AAA/ABA/ACR Standards, the concept of mediator impartiality is also central to the mediation process. The Standards speak strongly on this subject. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. Implicit in this standard is the mediator’s duty to avoid conduct that is partial or gives the appearance of partiality toward one of the parties.³⁴

Significant direction is provided under Standard IIII, Quality of the Process. This includes directives for mediator withdrawal when the mediator is incapable of serving, when unable to remain impartial, when the mediation is being used to further illegal conduct, or if the mediator is made aware of domestic abuse or violence among the parties.” Further, these Standards explicitly caution mediators against permitting their behavior to be guided by a desire for high settlement rates.³⁵

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

The AAA/ABA/ACR Standards Code is comprehensive and specific enough thus has some utility in providing guidance to mediators in the various dilemmas they may face. Further, its goal of serving as a “general framework” for the practice of mediation is more successfully addressed.

The three major objectives specified are also better addressed than in the other two Codes. Further, this Code does deal more substantively with the categories of ethical dilemmas set out in the Bush study than the other two Codes. It is important to recognize, however, that this Code appears to be limited in application to the facilitative model of mediation. Given that this Standards Code is not attempting to be all of things to all people, it is understandable that it more successfully addresses its objectives and mediator dilemmas.

The most recent of the codes examined is the Code of Conduct for Mediators implemented by the ADR Institute of Canada (ADRIC) for its members. ADRIC is a national association comprised of both ADR practitioners and users of ADR. ADRIC, along with its 7 regional affiliates, are involved in the training, certification, and practice standards for its practicing members. This new code is an amended version of ADRIC’s 2005 code for mediators.

Similar to the previous two codes examined, the ADRIC Code states its main objectives as a) to provide guiding principles for the conduct of mediators, b) to promote confidence in mediation as a process for resolving disputes, and c) to provide protection for members of the public who use mediators who are members of the institute.³⁶

³⁶ Supra 23.

The ADRIC Code differs from the other two codes, however, in that it is the only one which explicitly speaks to disciplinary matters for breaches of the Code. In its preamble, the Code speaks specifically to adherence to minimum standards and also indicates that an appointment as a mediator may be revoked for breaches of the Code.³⁷ The CBA Code, as indicated previously in this paper, was adopted as part of the Mandatory Mediation Program in Ontario. Thus, the CBA Code is a de-facto standard of conduct that mediators belonging to the OMPP Roster must adhere to.

The ADRIC Code, after defining mediation and mediator very generally, thus encompassing all mediation models, sets out its principles as follows:

3) Self-determination; 4) Independence and Impartiality; 5) Potential Disqualification; 6) Confidentiality; 7) Quality of the process; 8) Advertising; 9) Fees; 10) Agreement to Mediate; 11) Determination or Suspension of Mediation; 12) Other Conduct Obligations.

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Like the other codes, the principle of self-determination appears fundamental. The description of self-determination is similar to the description in the CBA Code and specifically prohibits the mediator from providing legal or professional advice but any, “express views or opinions on the matters at issue, may identify evaluative approaches, and where the mediator does so it shall not construed as either advocacy on behalf of the party or as legal or professional advice to party”.³⁹

The principle of impartiality is, again, similar to the CBA principle but unlike the CBA Code and the AAA/ABA/ACR Standards, the ADRIC Code does not direct mediator withdrawal.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

With respect to the principle of potential disqualification, ADRIC mediators are required to disclose in writing any circumstance that could potentially give rise to a reasonable apprehension of a lack of independence or impartiality and the parties may waive the right to object. There is no similar specific provision contained in the other two codes.⁴⁰

The termination or suspension of mediation principle in the ADRIC Code is very general and brief. It simply states that the mediator may suspend or terminate mediation if requested in writing by one or more parties or by written declaration by the mediator. Further, in regard to the quality of the process principle, its terms acquire the mediator to ensure that the parties to the process participate effectively and that the mediators require and maintain professional skills and abilities.⁴¹

In summary, the ADRIC code is general in nature like the CBA code aside from some of the foregoing specifics set out. As a result, it suffers from some of the same drawbacks of the CBC Code due to its lack of specificity. Further, the two Codes have internal inconsistencies that may be difficult for mediators to reconcile in particular situations. Although the ADRIC Code is more specific than its predecessors with respect to maintaining the integrity of the process, it still does not provide enough clarity in terms of providing guidance to mediators.⁴²

⁴⁰Ibid.

⁴¹Ibid.

⁴² Supra note 29 at 7.

IV. THE CRITICISM SURROUNDING CODES OF CONDUCT

- ARE CODES REALLY THE ANSWER?

There is vigorous debate and a huge variation of views as to the utility and appropriateness of codes of conduct for mediators. One of the many concerns expressed centres around the necessary flexibility and dynamic nature of the mediation process itself. It is argued that the abundance of styles and techniques reflective of mediators' personalities adjusted for the particular circumstances of the case are one of the many hallmarks of mediation (the freedom of the process) and thus the "standardization or the identification of legitimate mediation conduct" places strictures on the employment of mediation processes.⁴³

The concern has further been expressed that the delineation of standards for mediators involved in mandatory mediation programs, for example, "will effectively establish a minimum standard for all mediators."⁴⁴

One writer argues specifically that codified rules and standards may not only restrict the mediator but they also may direct the parties and the mediator to act in certain ways. Thus, they can effectively override the mediation and, in conjunction with that, also override the relationship between the mediator and the parties.⁴⁵

⁴³ Supra note 1 at 174.

⁴⁴ C. Reeve, "The Quandary of Setting Standards for Mediators: Where Are We Headed?" (1998) 23 *Queen's L.J.* 441 at 470.

⁴⁵ Supra note 1 at 176-176.

Thus, the intrusion into the mediation process itself as well as the inevitable limiting of the mediator's discretion are key concerns of many in the practice of mediation.

It is further argued that codes of conduct for mediators underestimate and oversimplify the complexities of what it means to mediate ethically. The ethical dilemmas which confront mediators are unique and complex and cannot be appropriately addressed by narrow benchmarks and perimeters for appropriate behaviors. In other words, the responsibility to mediate ethically goes well beyond that assumed by codes of conduct, which are not, either conceptually or structurally able to address the complex and unique moral dilemmas of practice.⁴⁶

Codes themselves are often criticized for providing a prescriptive list of do's and don'ts which quite often do not fit the particulars of an ethical dilemma. Further, codes tend to focus only on one dimension of the ethical problem, and as such, treating the situation as though the ethical problems in the dispute are the exclusive responsibility of the mediator to resolve alone without the parties.⁴⁷

Further, codes generally do not detail the ethical values on which they are founded and what is left are prescriptions of behaviors with little explanation of the reasons for such prescriptions. As well, codes of ethics are generally formulated in concise documents and give the incorrect impression that the creating organization has reached a unified consensus about mediation practice when, in fact, there is significant diversity of goals and values among mediators.

⁴⁶ Supra note 9 at 87.

⁴⁷ C. Morris, "The Nature of Discourse on Ethics in Mediation" in Julie MacFarlene, ed. *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publishers, 1997)301.

Codes of ethics, for example, inevitably reflect biases which may not be shared by all mediators in all context.⁴⁸

In addition, it is argued that codes, though broadly defined, cannot take into account every ethical dilemma. Further, there is criticism prescriptive codes of ethics may lead to widespread rote development of unexamined mediation practices. Thus, codes of ethics are not capable of providing a complete universal guide for the conduct of mediators.⁴⁹

Although Bush from his study⁵⁰ concludes that mediators need guidance, training, and standards, he too is critical of standards of practice developed to guide responses to the ethical dilemmas he sets out. He suggests that codes and standards promulgated thus far suffer from internal inconsistency. For example, where the mediator is confronted with an ethical dilemma and the need to choose between two values such as fairness and self-determination, the codes typically tell the mediator to choose both when the mediator cannot possibly do both.⁵¹

In addition, Bush opines that codes and standards are framed at a level of generality that is not responsive to the mediators need to know how to apply the principles in a specific situation. Thus he proposes that standards are a useful “beginning point” for developing a more detailed set of ethical considerations for mediators but not much more than that. They are too broad and ambiguous in areas which need rich detail

⁴⁸ Ibid at 318.

⁴⁹ Ibid at 339.

⁵⁰ Ibid at 14.

⁵¹ Supra note 14 at. 44-45.

and fail to give guidance on many of the issues in the field today.⁵² An example of this as seen earlier in this paper is in regard to the specific issue of mediators' obligations in relation to fairness and deceptive behavior.⁵³

CONCLUSION

Codes of conduct are behavioural rules that flow from ethical standards. Ethical standards are made up of fundamental or "core values" mediators hold. One drives the other. In other words, ethical standards drive behavioural codes of conduct. One of the main difficulties in formulating a universal code of conduct for mediators based on ethical standards is that there is no generally accepted set of ethical standards for mediators. Aside from perhaps neutrality and confidentiality, the core values of mediators are not universal and vary given the many types of mediation processes. In other words, the "fundamental values" of mediators are very much dependant on the style of mediation practiced.

As demonstrated in this paper by the examination of the three Model Codes, there are a number of fundamental values the Codes did not address. Further, an examination of the three Codes evidences that what we really have in these Codes is a "hodge-podge" of ethical standards mixed in with or intermingled with behavioral professional codes of conduct type statements or directives.

A more effective approach if we are to develop codes of accountability and ethical boundaries is to seek uniformity on the core values or foundation of ethical standards for mediators and first develop a code of ethics that defines the profession.

⁵² Ibid at 43-46.

⁵³ Supra 12 at 42.

From this, a behavioral code of conduct laying out specific and clear directives and policies on what mediators must and must not do can be developed. Unfortunately, as set out in this paper, this is a formidable task. Codes of conduct in the forms we have seen thus far, are not a suitable answer to ethical dilemmas. They provide a framework but that is all.

This, accordingly, begs the question: What are those engaged in the practice of mediation to do? Quite simply, it is important for practitioner mediators to have a network to consult with on ethical issues such as experienced colleagues, an ethicist, etc. Specifically, some type of consultation process with regard to such issues. This is, of course, in addition to being a reflective practitioner not only in regard to process and practice issues, but also in regard to ethical standards issues.

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