Ethical Conduct For Mediations:

A Quality Management Approach

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1 Conflicting Interpretations of the Ethical Process

In a relatively new and alternative paradigm advanced by Field and Crowe (Field), a mediator's behaviour is necessarily elastic and should ebb and flow depending on the circumstances and desires of the parties in conflict. This, they say, is justified because the parties entering into mediation do so because it is a self-determined process that they control. Field and Crowe say that the " traditional ethic of neutrality or impartiality is not only theoretically unsound but also unrealistic because it does not help mediators understand or negotiate the kinds of ethical dilemmas that frequently arrive in practice." [1]

The trajectory of their arguments is that a mediator is there to support the parties to achieve a genuine, self-determined outcome. They consider a party-determined approach to ethical behaviour more tenable than a rules-based approach. In support of this new paradigm, they state that "mediation ethics is best understood as an evolving body of standards emerging by process of consensus and dialogue, rather than a set of rules imposed on mediators from above."[2] They would allow the parties to decide how much neutrality the mediation would have. As an example of their desire to allow the parties to determine the role of the mediator, Field and Crowe go as far as to say that some parties may desire and would receive legal advice from the mediator[3]. They admit

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1 Field, R., and Crowe J., (2020) ch 1 at 3.
2 Ibid, ch 1 at 7.
3 Ibid, *Party Self-Determination and the Mediation Language Game- Recognizing the realities of mediation practice, ch 7 at 159.*

that would be controversial but state that party self-determination would allow it. They discuss the rules-based or Regulatory Model with its enforcement provisions and the Practice Model based on evolving expertise[4]. Leaning toward the Practice Model, they address the necessary snap judgements of ethical decision-making by saying that those judgements are intuitive and shaped and reshaped by interaction with peers on the topic of ethics[5]. They also note that while codes and standards of practice may arise from those discussions, the codes will remain subservient to the underlying discourse[6]. While Canadian and American codes of conduct for mediation BOTH acknowledge that the parties must understand and consent to a process for their mediation and the freedom to establish the workings of the process, they do not go as far as to have the parties determine what constitutes ethical conduct.

In this paper, I offer an argument for a more-structured model consistent with successful practice models in other professions. I look to quality management theory as a guide for establishing a more-structured process. The Quality Management Model would not determine the ethicality of a mediator's actions by post-mediation deconstruction. However, it would require reflection on the practitioner's actions and adjustment to maintain consistency with practice norms. I suggest that a structured approach is necessary for a growing and socially-conscious field of practice. Moreover, that social conscience would be the basis on which mediators would not only select the mediations they perform but would also be the basis on which they would plan for

4 Ibid, *Ethics and the Mediation Profession*, ch 8 at 168-174.
5 Ibid at 173.
6 Ibid at 174.

eventualities, develop and demonstrate confidence in their processes, manage bias, and reflect and adjust their mediation practices accordingly.

2 The Quality Management System Model for Ethical Mediation

The structured approach to the mediation of disputes would benefit from a form of life-cycle assessment of a mediator's participation from engagement to reflection. This paper proposes various mediator actions and responsibilities through four stages of mediation and considers ethical conduct at each stage in that cycle. MacFarlane, Mayer, and Menkel-Meadow, all of whom are cited in this paper, advise that a mediator's moral values and interpretation of the application of the codes of conduct would predominate and would be influenced by the dynamics of the moment. However, in a structured process, those real-time decisions would consider written standards of practice and codes of conduct.

2.1 Ethical Conduct in Current Written Contexts

Many Canadian mediators are lawyers or other professionals subject to governance by statutes and regulations that include rules of conduct. For mandatory mediation in Ontario, a commonly applied standard is The CBAO (Canadian Bar Association Ontario) Model Code of Conduct, published by the Ministry of the Attorney General. It requires lawyers to follow Rule 24.1 of the Rules of Civil Procedure (Government of Ontario)[7]. For non-mandatory mediation, the unregulated ADRIC (ADR Institute of Canada) qualification can be adopted along with their rules of conduct. There are also unique procedures for administrative tribunals and for labour

[7] O.Reg. 453/98, s. 1, *Rule 24.1 Mandatory Mediation.*

negotiations. As an ADRIC-qualified mediator focusing on non-mandatory mediation, I will refer to the more general ADRIC rules and code of ethics.

2.2 Defining Ethics

The term "ethics" can be interpreted in many ways. Velasquez et al.[8] (Velasquez) define ethics as follows: "Ethics is based on well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues." The main element of that interpretation is that ethical practice includes "a standard of right and wrong" and what humans "ought to do." It does not say "must do," and with that phrasing, the notion of 'standards that ought to be followed' seems to be self-contradictory. Are they standards or not? Interpretation of what is appropriate would vary from person to person and situation to situation. Moreover, a standard for doing what is right in real-time may differ from a committee's theoretical assessment of ethical behaviour.

The Canadian Law Dictionary[9] (Sodhi), describes ethics as:

> *The basic principles of right action. "ethics of a profession" means the general body of rules, written or unwritten relative to the conduct of the members of the profession intended to guide them in maintaining certain basic standards of behaviour.*

So, it appears that the essence of ethical behaviour involves doing what is right through applying basic written or unwritten standards of practice, in which application is provided through a person's conduct in support of certain benefits and values. That still seems somewhat nebulous.

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[8] Velasquez, et al., *What is Ethics, Ethics IIE N1* (1987). <https://www.scu/ethics/ethics-resources/ethical-decision-making/what-is-ethics>.

[9] Sodhi, Datinder S., *The Canadian Law Dictionary*. Law and Business Publications, 1980.

Since this paper is about mediator ethics, perhaps a more focused view is needed. Bernard Mayer (Mayer, The Dynamics of Conflict: A Guide to Engagement and Intervention) stated, "Maybe the most important things mediators bring to a conflict are their values and ethical standards." The inference is that the mediator embodies and displays integrity and appropriate behaviour, which the disputants mirror. That puts a heavy onus on the mediator to continuously act with integrity and behave appropriately in real-time. However, in a growing profession without a uniform standard, there is no means to quantify ethical practice. We could be contributing to a wild-west of mediator practices. Some standard, some form of rulebook, would benefit those trying to find their way in this new field.

2.3 Precedents for Rules-Based Practices

Other professions use practice manuals that provide comprehensive processes along with the rationale. For example, schools of architecture teach the history, theory, concepts, and essential elements of design. Those schools do not show budding architects how to conduct themselves in practice. The Canadian Handbook of Practice for Architects, or CHOP manual, initially published by the RAIC (The Royal Architectural Institute of Canada) in 1974 and most recently updated in 2009, is a three-volume set including the essential stages of each project along with management advice, forms and checklists, and a compendium of resource materials. Rather than advising on how to design, it advises on how to practice. It also has a section devoted to professional conduct

and ethics[10]. By following that manual, an architect will have taken all the steps necessary to act ethically.

Perhaps mediation is still too young a practice to have a comprehensive practice manual. Perhaps resolving ethical practice into a list of rules would be seen as too restrictive and inhibiting of the art of mediation. Perhaps successful and experienced mediators would be unwilling to follow a new playbook. Field and Crowe would likely say that a rulebook inhibits party self-determination. Nonetheless, mediation is a developing practice, and development without structure can result in a chaotic situation. A framework for ethical practice would be a positive step forward for upcoming generations of mediators.

Since my background is in engineering and management system structure, I will use that experience to develop my model. My practice integrated a Quality Management System [QMS] similar to a process management model into every assignment[11]. From engagement to deliverables, the project leadership reflected on how each stage achieved or did not achieve its purpose. Aside from profitability, the review would assess resource adequacy, communication effectiveness, investment in relationships, added value, advancement of career paths, and how those yardsticks should impact future assignments. Because it was activity and process-oriented, a QMS review did not talk directly about "ethical behaviour." It was the steps taken that provided ethical behaviour. Moreover, ethical practice is rooted in the engineers' mandate to protect the public and

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10 RAIC, *CHOP, Professional Conduct and Ethics*, ch 1.1.3, at 1-6.

11 The QMS procedure I developed uses principles from the course *Customer-Driven Quality Management*, Queens University in 1992.

advance their opinion about the profession. Mediation could look for a similar mandate to best describe its function in society and use that as a touchstone for a practice manual.

2.4 Why use a QMS Practice Model in Mediation

Julie Macfarlane's 2002 paper[12] (MacFarlane) on the limits of codes of conduct in mediation raised two broad issues that are, in my estimation, still troublesome today. Those are ethical decision-making and the relative newness of the practice. The degree of preparation, preferred approaches, past successes, party predispositions, personal biases, and the impact of results are among the many pressures on a mediator's moral compass as they move through the mediation process. Without a comprehensive guide to ethical practice, how do those pressures influence the boundaries of ethical practice? How do the standards of the many tributary professions impact the ethical landscape? How do the varying forms and sophistication of training influence practice decisions?

In answer to these sorts of questions, at least partially, Macfarlane noted that the choices a mediator makes are inherently value-based and go well beyond the available codes of conduct[13]. In some instances, I acknowledge that rules will not serve the purpose. For example, in mediating the case involving a short payment on a drug deal, MacFarlane recounted how she experienced a conflict between her role and her belief structure[14]. That is undoubtedly an example ripe for personal value bias and too specific for even a comprehensive rulebook to cover.

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12 MacFarlane, J., *Mediating Ethically: The Limits of Codes of Conduct and Potential of a Reflective Practice Model*, (2002) 40 Osgood Hall LJ 49, at 50-68.
13 MacFarlane (2002), *Conclusions*, at 70-87.
14 Ibid, *Case Two: The Drug Deal*, at 81-82.

3 Elements of the QMS Mediation Model: Research, Rehearse, React, and Reflect

Under a QMS model, mediation has four stages. Figure 1 borrows from the QMS PDCA Deming cycle[15]. It is similar to the Deming cycle map included in "Music, Leadership and Conflict: The Art of Ensemble Negotiation and Problem Solving" by Linda Ippolito (Ippolito). In addition to labelling the four stages, the QMS model shows questions that I suggested a mediator could ask themselves at each stage to verify that they are working ethically[16].

Figure 1. The QMS Cycle of Mediation Activities.

[15] The Deming Wheel, Deming Cycle, or PDCA (Plan, Do, Check, Act) wheel was derived from electrical engineer, William Edwards Deming who advanced statistical process control work by Walter Shewhart done in the 1930s. A Deming cycle shows the stages necessary for continuous improvement in any repeated production process. It has become a cornerstone of quality management systems. I have adapted the Deming cycle for QMS in mediation.

[16] Ippolito, L.M. "*Music, Leadership and Conflict, The Art of Ensemble Negotiation and Problem Solving",* Palgrave MacMillan (2019) ch 4 at 125.

The cycle begins with the Research stage, which is given too little attention in practice (based on my own experience and anecdotal accounts of others in the legal profession). That stage is the gatekeeper for acting as a mediator. Using more than availability and broad stroke experience criteria, the mediator decides if this is a case to take on. Once accepted, the next stage is Rehearsal involving forecasting what could happen and how to deal with various scenarios. Then the case moves into the Reaction stage on mediation day, where the mediator works in real time and actions are spontaneous and in response to the predictable and unpredictable actions of the parties. The last stage is Reflection involving a self-review of the whole process. Reflection in practice is a mandatory stage in a QMS program. Donald A. Shon (Shon), a professor of Urban Studies and Education at the Massachusetts Institute of Technology, in examining five technical professions, said this of reflection-in-practice[17]:

> *A practitioner's reflection can serve as a corrective to overlearning. Through reflection, he can surface and criticize the tacit understandings that have grown up around the repetitive experience of a specialized practice and can make new sense of the situations of uncertainty or uniqueness which he may allow himself to experience.*

Overlearning is the act of practicing a skill past the point of mastery. The risk is that the activities become autonomic rather than a deliberate learning process. The effect is described by Curtiss and Warren (Warren) in 1974 as unconscious competency[18] in which actions are taken without deliberately performing them. Thus, reflecting on the activities is vital in the four-stage QMS process to reduce the effect of spontaneous reactions. The four stages are discussed in greater detail below.

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[17] Shon, D. *From Technical Rationality to Reflection-in-Action*, ch 2 at 61.

[18] Curtiss, Paul R.; Warren, Phillip W. *The Dynamics Of Life Skills Coaching.* Life skills series. Prince Albert, Saskatchewan: Training Research and Development Station, Dept. of Manpower and Immigration(1973), p. 89. OCLC 4489629.

3.1 Research

Figure 2: Research stage of QMS for mediation.

The four stages begin with research, the intent being to learn as much as possible about the matter, the parties, the foundation for each disputed item, and the desired outcome. Mayer 2002[19] said that "effective intervention requires a willingness to wade into a conflict knowing that […] we are becoming part of a complex and unpredictable system."

While I agree that remaining nimble is critical to success, thorough advanced preparation is essential. A mediator should not jump in as a conflict neutral with the attitude that they will "play it by ear." This stage in the QMS model requires a critical examination of the fit between the mediator and the dispute. The questions in Figure 2 should help a mediator decide if they are competent to act. Points to consider follow.

3.1.1 Subject-Matter Expertise

A mediation brief is often the source of basic information about the claim, issues, and positions. As a practitioner in construction and professional negligence of parties, I am a proponent of mediators having subject-matter expertise. While, as Mayer puts it, "a legal background is very valuable for mediators […] law is only one of many professional backgrounds that can help prepare

[19] Mayer, B. ch 5 at 138.

one for conflict work"[20]. I agree. The Ministry of the Attorney General in Ontario has mandated mediation. That triggered the CBAO Model Code of Conduct for mandatory mediation, which stipulates, "Mediators shall ensure that they are competent to render mediation services having regard to the nature of the dispute." [21]

Thus, lawyer mediators must be "competent" to render the services. How competency is determined is not given.

The term subject-matter expertise is interpreted in several ways. Lawyer mediators or retired members of the judiciary may consider that it means that they have practiced in that area of law. I would further suggest that mediation of disputes requires not only knowledge of the legal framework involved but also knowledge of the technical subject matter. Without both, the mediator may not have sufficient competence to know if a party is bluffing about the strength of their claim. Also, the mediator may inadvertently become complicit in that bluffing.

3.1.2 Party History

Mediators should also attempt to understand the association between the disputants from more than a simple contractual relationship. Have they worked together in the past, for how long, how successfully? The need to maintain a relationship damaged by a perceived breach of trust (in the common rather than legal sense) may be at the root of the dispute. Have the controlling business interests changed recently, and thus, changed the dynamic between the disputing parties?

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[20] Mayer, B. ch 5 at 151.
[21] CBAO Model Code of Conduct, Additional Requirements under the Mandatory Mediation Program, Item 3.

3.1.3 Other Background

The mediation must first assess if mediation is the appropriate means of intervening[22] (Mayer, Facilitative Mediation, Divorce and Family Mediation). Once decided that mediation is appropriate, are there cultural nuances to be considered? Are the parties willing to settle, or is it simply done to satisfy a regulatory mandate? Does the dispute arise from a one-time occurrence, or has a series of compounding events culminated in the dispute? The answers to these questions may cause a mediator to refuse to act or, at least, alter their approach.

3.1.4 Poor Practices

Regrettably, some seasoned mediators admit that they have no interest in the facts in dispute, the history of the relationship, the background of the disputants, or whether they feel they are qualified. They typically use fear as their most potent lever to move parties. They simply try to persuade parties that untenable time, costs, and anxiety make settlement the best option. Fortunately, some mediators who wish to understand the technical evidence take time to understand the parties, their relationship, and their desire to settle. They use this knowledge to help them better manage a dispute rather than using fear alone.

3.1.5 Options for Gaining Subject-Matter Expertise

The absence of in-depth technical knowledge does not necessarily preclude a mediator from gaining enough knowledge to act. A mediator could elicit technical information by questioning competing experts (on a without prejudice basis). Sometimes known as “hot-tubbing”

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[22] Bernard Mayer, *Facilitative Mediation* in Jay Folberg, Ann L Milne & Peter Salem, eds, Divorce and Family Mediation: Models, Techniques, and Applications (New York: Guilford Press, 2004) 29 at 40-47

the experts, The process can facilitate common thinking on issues. It can also efficiently arm a mediator with a basic understanding of the source, rationale, impact, and potential remedies to a breach of contract or professional negligence claim. It also gives the mediator insight into which expert may be a better witness in court should mediation fail. While ethically in a grey zone, that information could leverage settlement through caucus discussions involving the well-known battle of the experts. In the absence of guidance from the ADRIC Code of Ethics, that decision remains up to the mediator.

3.1.6 ADRIC Guidance

Currently, the ADRIC National Mediation Rules Code of Conduct for Mediators (ADR Institute of Canada)[23] provides what can be described as "guiding principles." Those primarily focus on the mediator's clearing of conflicts and process disclosure prior to and during the mediation. No attention is given to the need for assessing if they feel technically competent, let alone sufficiently familiar with the relationship and personal dynamics between the parties, to take on the mediation. As Macfarlane points out as a general theme and, in her comment on Shon's reflection paradigm[24], the codes of conduct are by their general nature limited, and individual mediators must apply personal ethics as individual situations arise. I recommend that the codes of conduct be written to provide a better-structured practice. That fulsome description will help direct ethical practice.

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[23] ADR Institute of Canada, *National Mediation Rules & Code of Conduct for Mediators, © As Amended August 15, 2011*¸ publication of the ADR Institute of Canada, Code of Conduct for Mediators, Section 1, at 16.

[24] MacFarlane, (2002) *supra*, note 12, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model, New Ways to Talk and Think About Mediation Ethics,* 40 Osgoode Hall LJ 49 (2002) 49 at 70-87.

3.2 Rehearse

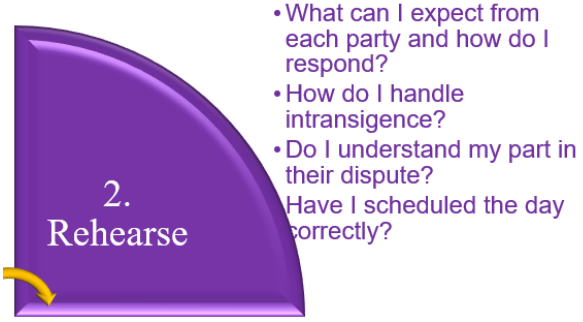

Figure 3: Rehearse stage of QMS for mediation.

The second stage of the mediator's involvement is to prepare for eventualities by thoroughly rehearsing scenarios. More than just a review of an agreed agenda, the mediator should become armed with the various strategies to manage impediments to moving a mediation forward. Cases with complex issues require a SWOT analysis[25] (Richard Puyt). At the very least, it is more than reading the mediation brief. Figure 3 illustrates the Rehearsal stage.

A thorough mediation brief should capture the factual data. It is not necessary to revisit that evidence except where the interpretation differs. Instead, the mediator should imagine sticking points and ways to move the process forward. Macfarlane said, "The practical utility of promoting agreed professional approaches within a code of conduct seems dependent mainly on the extent to which particular ethical dilemmas, and the circumstances under which they arise, can be accurately predicted." [26]

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[25] The empirical basis for SWOT (Strengths Weaknesses Opportunities & Threats) started in 1952 within the Lockheed corporate development planning department. One of its pioneers is Robert Franklin Stewart who became head of the theory and practice of planning group at Stanford Research Institute in 1962. Source: https.journals.aom.org/doi/abs/10.5465/AMBPP.2020.132.

[26] Macfarlane (2002), *supra*, note 23, 4. *Codes of Conduct and ethical decision-making in mediation: Part A. A Right/Wrong Paradigm of Action*.

3.2.1 What can I expect from each party, and how do I respond?

Predicting those scenarios cannot happen without good forecasting skills. While mediators must remain nimble, with proper research into the parties' points of view, supported by the rehearsal of "what-if" scenarios, the mediator's skill at moving from issue-to-issue, from issue-to-process, and process-to-results, can end with a satisfactory result without the use of aggressive techniques.

3.2.2 How do I handle intransigence?

Suppose the mediator has researched the personalities beforehand and knows one will be intransigent. In that case, they may wish to play out ways to move the stubborn party away from a fixed position. Perhaps there is an attribution of deceitful behaviour and, thus, a loss of trust. Knowing more than the parties' mediation briefs can assist a mediator in preparing to build trust in each other and the process. Gary Furlong noted that moving a party away from distrust of another party and onto the mediation structure reinforces trust in the mediator's process, which could lead to a satisfactory outcome[27] (Furlong, 2020).

3.2.3 Do I understand my part in their dispute?

A mediator can run afoul of ethical conduct if, in the absence of sufficient scenario exploration, they substitute bias or personal values. Working through a scenario before facing the disputants in active mediation would help a mediator recognize and plan to adapt the process to a more even-handed, process-focused response.

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[27] Furlong, Gary. *The Conflict Resolution Toolbox*. Second Edition. Hoboken: John Wiley & Sons Inc., (2020) at 108 - 109.

3.2.4 Have I scheduled the day correctly?

Rehearsals provide a dry run to test timing and interactions. Float time should be included.

3.3 Reaction

Even with the best rehearsal, unforeseen events may lead to surprises during mediation. Figure 4 shows the points to consider in the fourth stage, Reaction. In her 2002 essay [28] on mediating ethically, MacFarlane stated:

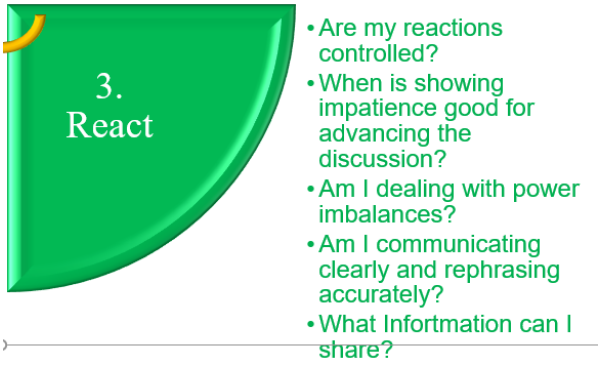

Figure 4: Reaction stage of QMS for mediation.

> *Codes of Conduct quite reasonably assume that ethical dilemmas can often be avoided by planning for issues that can be readily anticipated. However, while there are important preliminary questions about the mediator, the process and the preparedness of the parties, ethical dilemmas also emerge during a mediation despite careful attention to set up; only so much can be predicted in advance of the actual mediation session.*

Carrying the intransigent participant example further, how a mediator reacts to stubbornness can benefit from practiced self-control accompanied by thorough (albeit imperfect) planning. Lack and Bogacz[29] (Lack) provided a neurophysiology assessment of how involuntary responses can be sorted and prioritized in the part of the brain known as the amygdala. The amygdala can regulate those responses. Training your mind to manage responses would aid in developing an even response to unforeseen situations.

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[28] MacFarlane, J., *supra*, note 12, passage 4. *Codes of Conduct and ethical decision-making in mediation. Part B. Standard-Setting "Snapshots"*.

[29] Jeremy Lack and Francois Bogacz are co-founders of Neuroawareness Consulting Services Inc. The referenced article was prepared for the American Bar Association's 14th Annual Section of Dispute Resolution Spring Conference to later be published in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011.

As Mayer noted, "[…] there is often no 'right' way to intervene […]"[30]. An overly rehearsed response to an action in mediation may look contrived. Alternative processes may become necessary in real-time. While, as Mayer said, there may be no right way to intervene, that does not suggest that there are no wrong ways, and those may cross into ethical misconduct. I suggest that the mediator monitor their actions and reactions.

3.3.1 Controlling Reactions

As noted, some mediators pressure parties to settle. That may come from the mediator's concern about the commercial consequences of a failure of the mediation. Sometimes it was their only tool. Since many mediation education programs exist, it is becoming a heavily populated and competitive field[31]. Success rate becomes the measure of competency and commercial success. Additionally, a high success rate can translate into a feeling of power over the parties, giving them the self-imposed authority to force agreement.

Exerting power may take the form of forcing the parties to imagine a future where no agreement has occurred. This can include directly or indirectly addressing parties' concerns about future costs, time, and anxiety. Even as rhetorical questions, these fear-inducing tactics can be powerful. Whether they are ethical is not formalized. Nowhere in the ADRIC Rules of Code of Conduct is there mention of, either for or against, such methods. Field and Crowe would have it left to the parties to decide. In contemporary Canadian practice, it is left as a matter of personal

[30] Mayer (2012) at 138.
[31] Mayer, B., (2012), at 151.

conscience and style for each mediator to determine if they can resort to what some parties may see as threats, if not ultimatums.

3.3.2 Showing Impatience

There may be times when intervention through impatience is necessary to move past a sticky point. That can include reminding parties of the agreed agenda. If a party is unwilling to move off a particular issue until it is resolved, the mediator could assure that the sticky issue will not be lost if temporarily parked and other issues are dealt with before circling back. The degree of a mediator's "impatience" must be carefully dispensed and should, as much as possible, focus on the management of the process rather than on the individuals. Cooperativeness to move on can be seen as confirmation of willingness to settle and may engender reciprocating stages moving forward[32].

3.3.3 Power Imbalances

Mediators should prepare for any significant party power imbalance over the other party or the process. In cases involving unrepresented litigants, a mediator could attempt to intervene by assuring that no party tries to dominate the process, issue ultimatums, or behave in a way that disrespects the other party or the process. As noted by Martha Simmons in cases having legal representation, "it is not the mediator's role to balance power". That is the representing counsel's job (Simmons)[33]. She stated that if both parties have capable lawyers present, the issue should not arise. That has not been my experience. Some parties, represented by counsel or not, may require

[32] Furlong (2020), *supra*, note 26, at 130-134.
[33] Simmons, (2016), Ch 8 at 160.

more attention to either encourage greater participation from a reserved participant or to politely restrict the time of a dominant and talkative participant. Allowing one party to dominate another is not explicitly against the ADRIC Code of Conduct. However, neither is it generally considered good practice to allow a party to dominate the proceedings.

The mediator may also impose their power on the outcome. If the mediator is of a rights-based mind, they may default to stating whose rights under the applicable law seem to be best supported by the available facts. Worse, parties could view a rights-based reaction as the mediator having given up and unable to facilitate agreement. Alternatively, using the threat of increased, potentially unrecoverable costs to advance a claim to an uncertain finding at trial, a mediator may promote settlement for less than the probable at a rights-based assessment. Again, that approach signals a mediator's lack of confidence that an agreement can be reached. Do either of these tactics breach ethics? It is not clear from the ADRIC Codes of Conduct or Ethics. I believe intimidation is a grey area of conduct that requires clarification.

3.3.4 Mediator's Communication

ADRIC also does not deal with the issue of communication. Mediators will use rephrasing of issues to serve multiple purposes. Firstly, the mediator must be sure that they understand the issue and, if permitted, can accurately communicate it to the other parties so that they understand it and can offer practical proposals to deal with it. Secondly, rephrasing promotes positive engagement with the party having the issue.

3.3.5 Sharing Information

Based on the ADRIC Code of Ethics, a breach occurs if expressly confidential information is released to another party. It is worth noting that the objective of the disclosure is not relevant. A mediator taking a consequentialist or the-end-justifies-the-means-approach to the disclosure of

the information would, therefore, be acting outside the boundaries of ADRIC ethical norms. The end does not justify the means. Imagine an aggressive mediator at the end of a long negotiation and nearing an agreement. Faced with finishing or failure, they might be tempted to use a more utilitarian approach. They might ask that parties imagine a hypothetical scenario such as, "imagine what your colleagues would think about you if you lost at trial when you had the chance to settle this today?' If that does not cross an ethical practice boundary, it should be a point of later reflection. Thus, a mediator must remain vigilant when closing in on an agreement.

3.4 Reflection

After the mediation is over, the mediator should think about what was done during each phase and how it met the mediator's plan. Figure 5 illustrates the considerations in the reflection stage. There will likely be an overlap in the points for reflection.

Figure 5: Reflection stage of QMS for mediation.

The ADRIC Code of Conduct (ADR Institute of Canada) states the following concerning the Code's main objectives[34]:

> *"1.1 The Code's main objectives are:*
>
> *(a) to provide guiding principles for the conduct of Mediators;*
>
> *(b) to promote confidence in Mediation as a process for resolving disputes; and*

[34] ADRIC, Section 1, at 16.

(c) to provide protection for members of the public who use Mediators who are members of the Institute."

Nothing in ADRIC's Code of Conduct would lead a mediator to consider full-cycle reflection. An opportunity exists to incorporate reflection questions into common practice.

3.4.1 Did I properly clear all conflicts?

If promoting confidence in mediation is an objective of ADRIC, subject-matter expertise should be an element of prequalification. The ADRIC Rules and Code of Conduct cite only independence and impartiality[35], disclosure and potential disqualification[36], waiver of potential disqualification[37], and potential disqualification[38]. These each involve a conflict of interest; however, the Code of Conduct does not establish the parameters that would define a potential conflict of interest. Clarity on this point is needed.

3.4.2 Did I prepare everyone adequately?

As in all things done well, even if the mediator believed themselves qualified, sufficient preparation will provide a superior result. However, a mediator accustomed to successful results may give less attention to preparation. A mediator should reflect upon how they managed the unique demands of the parties, if they had sufficient expertise, if they considered the appropriate form of the mediation and content of damages briefs. They should determine if their advising parties on the process, venue for the mediation and commercial terms resulted in any problems.

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35 ADRIC, Rules, 6.1(c), Independence and Impartiality, at 6.
36 ADRIC 7.1, Rules, Disclosure of Potential Disqualification, at 6.
37 ADRIC 8, Rules, Waiver of Potential Disqualification, at 6.
38 ADRIC, Code of Conduct, 5.2, Potential Disqualification, at 17.

The ADRIC Code of Conduct does not speak to the quality or form of mediation briefs. Neither does it speak to expert evidence except that a mediator may request their own expert. Process and venue are to be discussed. The ADRIC Code of Conduct does require mediators to "[…] make reasonable efforts before mediation is initiated or at least at the start of the Mediation to ensure that the parties understand the process. […]"[39].

3.4.3 What unexpected outcomes occurred?

The mediator should assess how they dealt with unforeseen occurrences. Looking rattled during a mediation would affect party confidence in the mediator and the process. As previously noted, a specific objective of the ADRIC Code of Conduct is to promote confidence in mediation as a process for resolving disputes. Perhaps a mediator that does not avail themselves of all pertinent data to build that confidence is at variance with the ADRIC Code of Conduct.

3.4.4 Was the outcome fair and acceptable?

While a mediator does not establish the fairness of the outcome, they could reflect on their behaviour in promoting a fair outcome. That could mean just either adhering to the agreed process or also working to obtain the fair result that all parties wanted going into mediation.

3.4.5 Was my behaviour to the parties fair?

Suppose the mediator responds to surprising revelations in real-time at mediation and chooses to vary from the pre-agreed process. In that case, parties may deem the agreed process to have been breached, possibly making it unfair. In their confusion, distrust for the process may

[39] ADRIC, Rules, 7. Quality of the Process, at pages 17 and 18.

arise, and they may choose to terminate the mediation. While the mediator would likely ask the parties if they would be open to a change in process, switching paths could erode confidence and become a distraction to settlement. Doing otherwise would seem unethical as the mediator would have led the parties in one direction only to shift tactics without adequately preparing the parties. On reflection, a mediator should consider if they adequately described the alternative paths they might recommend to the parties and the circumstances that would trigger that recommendation. In a more-obvious example, a mediator may prefer the position of one party or the other based on available evidence, personal values, or personalities and telegraph that preference through uneven and unfair treatment.

4 Closing Comments

While I promote that a structured process will generally improve a mediator's skills, I am not suggesting it is a substitute for appropriate and approved education. But education provides the fundamentals. Practice provides the expertise. In his discussion of the technical rationality to reflection-in-action, Donald Shon[40] warned that professional practitioners risk developing a "parochial narrowness of vision" through the very repetitive actions that made them specialists. He stated:

> *A practitioner's reflection can serve as a corrective to overlearning. Through reflection, he can surface and criticize the tacit understandings that have grown up around the repetitive experiences of a specialized practice, and make new sense of the situations of uncertainty or uniqueness which he may allow himself to experience.*

[40] Shon (1983) *supra*, note 17, ch 2 at 60-61.

In the same discussion regarding reflection, he stated, "They may do this in a mood of idle speculation, or in a deliberate effort to prepare themselves for future cases." I would suggest the latter is appropriate. The objective is to integrate lessons learned into their processes to improve their ability to serve their clientele.

MacFarlane stated that the evolution of codes of conduct would likely not "have a long-term impact on either the ethics or the competence of the profession as a whole."[41] Certainly, as the ADRIC codes are currently written, I would agree. What about others' code of conduct? Carrie Menkel-Meadow described the American model rules for professional conduct (of legally-trained persons, including lawyers and judges) and stated that those rules deal primarily with pre-mediation threshold activities, such as conflict of interest (Menkel-Meadow). Concerning mediation processes and lawyers acting as mediators, she stated[42]:

> *Legal training provides special expertise and opportunities for these functions to be performed by a law-trained person; however, legal education does not necessarily train lawyers for alternative roles, and conventional ethics rules do not provide guidance for good practices.*

She also pointed to the absence of rules about mediator ethics, stating:

> *The Model Rules do not tackle such complex issues of mediator ethics; however, mediator ethics are handled in a variety of special ethical codes. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n, Am. Bar Ass'n, & Soc'y of Prof in Dispute Resolution 1994).*

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41 Macfarlane (2002) *supra*, note 12, 4. *Codes of Conduct and ethical decision-making in mediation. New Ways to Look and Think About Mediation*, (2002) at 70-87.

42 Carrie Menkel-Meadow, *The Lawyer As Consensus Builder: Ethics For a New Practice*, Georgetown Law, The Scholarly Commons. 70 Tenn. L.Rev.63-117 (2002) at 73.

In the Scholarly Commons of Georgetown Law, she advised that those existing rules seem limited to the issue of conflict of interest (CPR Georgetown)[43]. As such, the lack of formalized ethical conduct during mediation appears to be a common problem.

Given the general absence of rules related to behaviour during mediation, the mediator's real-time reaction risks breaching the broad definition of ethics, including the duty to do what is right for society. Velasquez[44] suggested that ethics is what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, and specific virtues and personal values. If giving over conduct during mediation to the parties' discretion in the name of self-determination became the norm as suggested by Field and Crowe, those global ethical considerations could be lost.

The current approach to ethical choices lets the mediator apply their personal values. This approach can be inconsistent, even within the same mediation process. It is also insufficient in the growth of a developing profession. A common understanding of values, processes, and behaviours would give guidance to the profession. As Macfarlane stated[45]:

> *Recognizing that choices between alternative courses of action in mediation are inherently value-based is critical to the development of a professional culture of ethical behaviours; regarding such decision-making as technical, mundane or "merely" intuitive (and thereby failing to examine it) seriously underestimates the complexity and nuance of decisions over interventions, and their responsiveness to context.*

In the same paragraph, she goes on to state, "Understanding ethical decision-making in mediation from this perspective places great store on the personal discretion of the mediator."

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43 Menkel-Meadow, CPR-Georgetown, *Rule 4.5 for The Lawyer as Third-Party Neutral R. 4.5.3(a)(2) (Final Draft)*, (1994).

44 Velasquez, *supra*, note 8,

45 MacFarlane (2002) *supra*, note 12, *New Ways to Talk and Think About Mediation Rules – Conclusions* at 70-87.

Available Rules for Mediation Conduct in Canada (and the USA) do not sufficiently guide ethical practice. Besides overt bias and conflict of interest, ethical conduct is left to the mediator's discretion. However, just accepting individual discretion, intuition, or even allowing the parties to establish what is and is not ethical is an unsatisfactory beginning for an expanding profession. Mature professional practices and manufacturing processes have adopted the well-documented and proven plan-do-check-act processes under the auspices of quality management. To look at mediation from a process management perspective would be a good starting point to developing a comprehensive guide to ethical practice in mediation. That a comprehensive guide does not exist should not stop us from developing that document now.

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