

# Ten Principles of Mediation Ethics

By David A. Hoffman

An important subject for mediators is how to distill from the various codes of mediation ethics the essential principles that these codes have in common. Such codes -- each with somewhat differing provisions -- have been developed by the Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the American Bar Association, among others. The ten principles outlined below are a compilation of what I believe are commonly accepted principles of mediation ethics.

This list, of necessity, over-simplifies the subject; a brief article cannot capture all of the nuances of ethical principles. Also, this list borrows heavily from many writing in the field -- indeed, the point of such a list is not originality but an attempt to discern the principles on which there is consensus. Finally, this list is a work in process; principles and standards are evolving as the field of mediation matures. For the moment, however, the following seem to be the basic principles of mediation ethics.

1. Conflict of interest. Mediators must avoid serving in cases where they have a direct personal, professional, or financial interest in the outcome of the dispute. This duty becomes more complicated where the mediator's interest is indirect -- e.g., she works in a firm with someone who has an interest in the outcome, or she is related to someone who has such an interest. In those cases, the question is *how* indirect is the interest? Is it simply a matter of disclosure or does it preclude serving in the case? Mediators should also avoid an appearance of a conflict -- Prof. Frank Sander talks about applying the "headline test": how would you feel about the potential conflict appearing on the front page of the newspaper? Mediators should err on the side of disclosure. If the disclosure is made well in advance of the mediation, so that the parties have the opportunity to choose another mediator, their acceptance of the mediator -- after full disclosure -- generally resolves the potential conflict. In some cases, however, the mediator should decline the case if the conflict is so severe that even waiver does not cure it, or the appearance of impropriety is so strong that it cannot be resolved by full disclosure.

2. Competence/professional role boundaries. Mediators have a duty to know the limits of their ability; to avoid taking on assignments they are not equipped to handle; and to communicate candidly with the parties about their background and experience. Sometimes the parties want a mediator with subject matter expertise (such as divorce), or a particular set of process skills (such as multiparty public policy negotiations). We must defer to their judgment about these matters by disclosing our degree of competence and letting them decide. Sometimes we get chosen to handle an assignment where we may lack

competence; it is our duty to turn it down, even if the parties, having heard our protestations, want us anyway. Observing professional role boundaries is the corollary of this duty. As mediators, we must avoid providing other types of professional service, even if we are licensed to provide it. Mediators who are engineers, therapists, lawyers or what have you, should leave the parties' engineering, therapy and law-related needs to others. Even though we may be competent to provide those services, we compromise our effectiveness as mediators when we wear two hats.

3. Impartiality. Mediation requires engagement, and it is difficult to engage the parties without developing some feelings about them. The duty to remain impartial throughout the mediation – from beginning to end -- does not require us to withdraw from the case if we become aware of such feelings, but instead to act in such a way that those feelings (whatever they may be) are kept to ourselves. Our words, manner, affect, body language, and process management must reflect an even-handed approach. If our feelings about the parties are such that we can no longer be even-handed in our dealings with them, we must withdraw from the case.

4. Voluntariness. Although some parties come to mediation because they are required to do so (e.g., ordered by a judge, or compelled to mediate under a dispute resolution clause in a contract), they must have the right at a certain point to walk away from the table. In other words, even in a mandatory mediation setting, the parties' duty is to participate in good faith and make an effort to negotiate a resolution. However, mediators should remind the parties that any agreement they reach must be a product of their own free will, and therefore they may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative – i.e., continuation of the dispute or resolution of it in some other manner.

5. Confidentiality. There are two aspects of the duty of confidentiality. First, mediators must safeguard the privacy and confidentiality of the mediation process vis-a-vis third parties – i.e., those outside the mediation. Second, when a mediator meets separately with one of the parties, she must maintain the confidentiality of anything said in that private session which that party does not want the other party or parties to know. In addition, mediators have a duty to inform the parties of any relevant limits of confidentiality, such as mandated reporting of child abuse or the planned commission of a crime.

6. Do no harm. This familiar principle (borrowed from the Hippocratic Oath) requires mediators to avoid conducting the process in a manner that harms the participants or worsens the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically; some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a

way that inflames the parties' antagonism toward each other rather than resolving it. We should modify the process (e.g., meet separately with the parties, or meet only with counsel) where necessary, and withdraw from the mediation if it becomes apparent that, even as modified, mediation is inappropriate or harmful. In a word, we must avoid adding fuel to the fire. To be sure, there are circumstances in mediation (as in medicine) where the problem may have to get worse before it can get better; venting emotions can be a painful process. Before employing this technique, however, the mediator must be confident that she has the skill and experience to avoid making matters worse.

7. Self-determination. Party autonomy is one of the guiding principles of mediation. Supporting and encouraging the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others, is fundamental to the process. Mediators are frequently asked by the parties: What would you do? What do you think is fair? What do the courts usually do in cases of this kind? Our job is to help the parties find their own answers – i.e., arrive at a resolution that meets their tests of fairness rather than our own. Mediators should also prevent one party from dominating the other parties in the mediation in a manner that prevents them from being able to make their own decisions.

8. Informed consent. A voluntary, self-determined resolution of a dispute will serve the parties' interests only if it is an informed choice. Although the mediator need not be (and usually should not be) the source of the parties' information, mediators should make sure that the parties have enough data to assess their options for settlement and their alternatives to settlement. If the parties lack this information, the mediator should talk to them about how they might obtain it.

9. Duties to third parties. Just as the mediator should do no harm to the parties, she should also consider whether a proposed settlement might harm others who are not participating in the mediation. This is particularly important when the third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or infirm). In some cases, the affected third parties might be the general public – e.g., in a case involving allegations of faulty construction of a public project, such as a bridge or highway. Since third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others and encourage them to bring the interests of one or more third parties to bear on the discussions in the mediation.

10. Honesty. For mediators, the duty of honesty means, among other things, full and fair disclosure of (a) their qualifications and prior experience, (b) any fees that the parties will be charged for the mediation, and (c) any other aspect of the mediation which may affect their willingness to participate in the process.

Honesty also means telling the truth when meeting separately with the parties. For example, if Party A confidentially discloses his “bottom line,” and Party B asks the mediator if she knows the opponent’s bottom line, saying “no” would be dishonest. (Instead, the mediator might say that she has discussed a number of things with the Party A on a confidential basis and therefore is not at liberty to respond to the question, just as she would be precluded from disclosing certain things she learned from Party B.) When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position; she must not abuse the trust the parties place in her even if she believes that bending the truth will further the cause of settlement.

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