ETHICS IN MEDIATION: WHICH RULES? WHOSE RULES?

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Introduction

As the Ken Murray debacle has painfully shown, questions about ethical standards for lawyers may be complex even with respect to "traditional" lawyering. Increasingly, however, lawyers are engaged in the less traditional setting of mediation, both as representatives of clients and as mediators. This development has raised fresh issues about ethics in the mediation context. Should the ethical standards governing lawyers engaged in mediation on behalf of their clients, in their conduct with respect to their own clients, to the mediator and to the other parties, differ from those which apply in the traditional adversarial context and if so, how? should mediators be governed by a code of ethics and if so, promulgated by whom? what ethical standards govern the mediator? to whom are the obligations owed? and does it matter whether the mediator is a lawyer?

These questions, particularly those about lawyer-mediators, have been the subject of vigorous debate in the American academic literature. My intention here is to provide a quick "Canadian take" on some of these issues.[1] I first consider the lawyer as representative and then the lawyer as mediator, the latter of which appears to raise the most debate. Modifying the usual rules to accommodate the lawyer's representative role is perhaps more easily accomplished than is the identification of the appropriate ethical obligations of the lawyer-mediator and the proper governing authority.

The Lawyer as "Advocate" in Mediation

I use the term "advocate" here because regardless of the differences between the principles underlying mediation and those underlying traditional litigation, the principle that the lawyer is her or his client's advocate does not change. It is how

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[1] This is hardly a new discussion: see A.J. Pirie, "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?" (1985) 63 C.B.R. 378. But I suggest the issue has become more urgent as a result of the rapid spread of both voluntary and mandatory mediation.

the principle is realized which compels us to consider whether the traditional rules are a good "fit" with the lawyer's representative role in mediation. Of course, lawyers have always been involved in representing their clients in settlement contexts, particularly negotiation or court-sponsored settlement conferences. Until relatively recently, however, most lawyers viewed the basic approach they should adopt in these situations as little different from that which they take in the courtroom. This remains perhaps more true of negotiation than of mediation which is premised on very different principles. The realization of mediation's potential as a distinct form of dispute resolution requires a "mind-set" in lawyers which differs from that which they are accustomed to exercising in the courtroom.

Thus in mediation lawyers are expected to take a co-operative rather than adversarial stance and a mutual problem-solving approach rather than one focussing more completely on their own client's position. Nevertheless, mediation is very much part of the lawyer's advocacy function on behalf of a particular client or clients. Indeed, rules of professional conduct for lawyers may now go beyond the traditional general admonition to encourage settlement in the same breath as avoiding frivolous or otherwise inappropriate litigation,[2] to requiring lawyers to consider and, where appropriate, propose to their clients various forms of "ADR."[3]

There is probably no disagreement that advocates representing individual clients in mediation, ought to be subject to the codes of conduct governing lawyers. The issue is whether, given the different approach mediation anticipates, they ought to be subject to different ethical expectations or at least to a clearer statement of how the existing rules apply to the mediation context. I suggest that we need to think more carefully about how the current rules apply to this different way of "doing law."

Some codes of conduct, such as Alberta's, explicitly establish that the same rules apply in negotiation as in other representational contexts. The commentary to

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[2] Chapter 3, Rule 6 of Saskatchewan's Code of Professional Conduct is typical: "The lawyer should advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis and should discourage the client from commencing or continuing useless proceedings."

[3] See, for example, Rule 10.2A of the Nova Scotia Barristers' Society Legal Ethics and Professional Conduct Handbook which requires lawyers to "consider the appropriateness of alternate dispute resolution (ADR) to the resolution of issues in every case and, if appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options." Rule 2.01 of the Rules of Professional Conduct of the Law Society of Upper Canada define the "competent lawyer" as one who, in part, considers the applicability of alternate dispute resolution to the client's case.

Chapter 11 of Alberta's Code of Professional Conduct ("The Lawyer as Negotiator") states, "[e]thical rules relating to honesty and integrity are as applicable to negotiation as to any other aspect of a lawyer's practice." There should be no suggestion that ethical requirements such as honesty do not apply or that the standards of application are lower in non-traditional than in traditional representation. Other rules may not be as easily transferable, however. Take as one example, Rule 4.01 of Ontario's rules which provides that in representing their clients, lawyers are required to try to obtain for the client every remedy or defence authorized by law. This "zealous representation" rule, typical of those found in other law societies' rules, may not be literally applied even in adversarial proceedings; its literal wording, though, is inconsistent with the mind-set with which lawyers are encouraged to engage in mediation. It is necessary to temper these absolute statements of adversarial practice with provisions that recognize that in mediation the objective may be legitimately problem-solving and if so, that the lawyer's advice and approach might be different than if the client were in a win-lose adversarial situation.

To whatever extent the existing rules should be modified to acknowledge the function of advocacy in the distinct mediation context, even more so do we need to consider whether law society rules suit the governance of lawyer-mediators. This, and the related issues of who constitutes the client and the nature of the mediator's obligation, constitute the more pressing questions about ethics in mediation.

The Lawyer as Mediator

While some commentators resist the articulation of standards for mediators out of concern that codes of conduct will restrict the kind of approach mediation may take, it seems clear that the outcome of this debate has been decided: standards are being developed, albeit on an *ad hoc* basis for the most part in Canada. Nevertheless, if there must be codes there remains the opportunity to ensure that they are not restrictive of style or approach and that, therefore, the choice of governing authority reflects a recognition of diverse mediator styles.

Why do these issues even arise? The answer lies primarily in the tendency to characterize "evaluative" mediation as the practice of law and therefore as governed by legal practice codes. Accordingly, if non-lawyer mediators practice evaluative

mediation, they will be engaged in the unauthorized practice of law.[4] It also stems from the apparently conflicting desires to impose on mediators responsibility for the fairness not only of process, but also of any agreement reached by the parties. On the one hand, it has been argued that mediators have an obligation to protect the parties' interests (to ensure that they are relatively equal in bargaining power or that the agreement that they reach is fair or consistent with legal standards, for example).[5] On the other hand, when mediators are too active, it is argued that they are not mediators at all or, at least, that they are engaged in the practice of law.[6]

In my view, these conclusions reflect an inappropriate understanding of so-called "evaluative" mediation, as well as the imposition of an inappropriate obligation on the mediator to "police" the parties' agreements.

Let me first very briefly outline the problem as I see it. Traditionally, mediators, often non-lawyers, but increasingly lawyers, have used a variety of approaches to assist the parties to resolve their disputes, including a style called "muscle mediation." "Muscle mediators" were and are aggressive, generally have a good idea about what the "right" outcome is, are not shy about giving their opinion about

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[4] Menkel-Meadow has argued that mediator activities ranging from "information giving, to advice, prediction and eventually, evaluation, suggestion (of solutions) or decisions (usually non-binding in evaluative mediation)... clearly implicates the practice of law:" C. Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities" (May 1997) 38:2 S. Texas L. Rev. 407 at 424. Even so, she maintains that law society rules do not always "fit" the mediator context: *Ibid.* at 426. Also see A. Smiley, "Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation" (Summer 1993) Georgetown J. of Legal Ethics 213 who suggests that the American Model Rules of Professional Conduct [for lawyers] should be amended to recognize the neutral lawyer-mediator. She argues that this approach gives legitimacy to the lawyer-mediator.

[5] See, for example, the discussion of the Model Standards of Conduct for Mediators developed by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution by J.W. Cooley in "Mediator and Advocates Ethics" (February 2000) Disp. Res. J. 73. Also see D. T. Weckstein, "In Praise of Party Empowerment – and of Mediator Activism" (Summer 1997) 33:3 Willamette L. J. 501. Weckstein argues that mediation activism contributes to the parties' informed consent and thus to the achievement of one of the "fundamental principles" of mediation, party self-determination.

[6] See, for example, J.R. Schwartz, "Laymen cannot Lawyer, but is Mediation the Practice of Law?" (May-July1999) 20:5-6 Cardozo L. Rev. 1715. Schwartz concludes that non-lawyers can engage in facilitative mediation, but that "evaluative" mediation must be reserved for lawyers. L. P. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate," (1996) 24 Fla. St. U. L. Rev. 937. Weckstein acknowledges that "in some situations, mediator activism could interfere with party-determination and mediator neutrality, and may even constitute the practice of law," but that this potential problem can be dealt with by "appropriate safeguards:" *ibid.* at 504.

what a judge might decide and are not hesitant about pushing the parties to reach a pre-determined outcome. In fact, muscle mediators have always been considered a good choice in cases where lawyers could not convince their clients to be "reasonable." In that sense, then, some might think that this approach helps lawyers, not clients. Yet it must be said, sometimes what clients want – or refuse to accept – is simply not reasonable. Better to settle the matter, even with a little bullying, this argument goes, than go to court and have one recalcitrant client vindicated at the expense of another recalcitrant client.

"Muscle" mediation or something like it called "evaluative" mediation today lies at the heart of the debate about the governance of mediators, as well as who should be permitted to mediate. Evaluative mediators, it is said, "give advice, assess arguments, and express their own opinions about the disputing parties' claims;" they "assist disputants in reaching agreements by making predictions about likely court outcomes and proposing equitable resolutions to the issues in dispute."[7] The facilitative mediator, on the other hand, "neither doles out legal advice nor voices a personal opinion regarding the parties' opposing arguments" and does not counsel the parties individually,[8] although he or she may provide legal information[9] and may ask properly framed questions designed to persuade the parties to find out how the law might apply to them.[10] Thus the facilitative mediator might "advise" the parties that certain legal guidelines might apply to their dispute (that is, the mediator would give the parties this legal information), but "would not provide an opinion regarding a disputed issue involving interpretation of such guidelines." Although it is popular today to treat so-called "evaluative" mediation as an aberration and facilitative mediation as the genuine article, I disagree that the current debate over these approaches "has no precedent" and that "mediation was viewed as a wholly facilitative process separate and distinct from adjudication."[11] In my experience,

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[7] Schwartz, *supra* note 6 at 1733-34.

[8] *Ibid.* at 1731.

[9] *Ibid.* at 1737.

[10] For examples under Virginia's Rules of Professional Conduct, referred to below, see J.W. Cooley, "Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of Mediation" (August/October 2000) Disp. Res. J. 72 at 74.

[11] M.E. Laflin, "Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators" (2000) Notre Dame J. of Law, Ethics and Public Policy 479 at 484. It is equally misleading to say that as a general development "mediation as a practice has moved further and further from the facilitative ideal, looking at times no different from neutral case evaluation or settlement conferencing:" *ibid.* at 484-85.

these have always been two of the several styles employed by mediators, sometimes in the same mediation. Furthermore, an aggressive mediator using her or his opinions to press the parties towards agreement is not transformed into an adjudicator.[12]

Yet particularly since they were defined as analytically distinct categories by Leonard Riskin,[13] the facilitative and evaluative styles have been held up as "good" and "bad" forms of mediation, respectively. Subsequent commentators have either criticized Riskin's analysis and argued that mediation should be viewed along a spectrum moving from less to more activist conduct by the mediator[14] or have maintained that "evaluative" mediation should not be called mediation at all.[15] Someone's attitude towards "evaluative mediation" is bound to be related to views about the nature of the lawyer-mediator's role and the proper authority to establish and govern ethical standards of lawyer-mediators in their professional capacity. (The reference to professional capacity is required because the "conduct unbecoming" provisions of law society codes of conduct govern members in their private and personal capacities and thus would govern members whose professional activity is mediation rather than lawyering.)

The options available for governing lawyer-mediator ethics are the law societies, mediator organizations which would govern all mediators, and a separate organization or set of rules for lawyer-mediators because their activities constitute the "cross-practice" of law and mediation.[16] Proponents of the third option believe

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[12] I should add, however, that there is a difference between an aggressive mediator with strong opinions and the dispute resolution process known as "neutral evaluation," the purpose of which is reflected in its structure: a third-party neutral hears from the parties' lawyers and gives an opinion about the likely outcome of the case. In my view, it is unfortunate that the term of "evaluative" has been given to mediation because of the inevitable blurring of these processes.

[13] L.L. Riskin, "Mediator Orientations, Strategies and Techniques" (1994) 12 Alternatives to High Cost Litig. 111.

[14] For example, see J.B. Stulberg, "Facilitative versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock" (1996) 24 Fla. St. U. L. Rev 985.

[15] See Laflin, *supra,* note 11 at 487-498 for a concise summary of these different assessments. While Laflin concludes at 499 that "[a]ctivist, evaluative approaches to mediation . . . do pose a significant threat to the continued existence of mediation as a separate and distinct form of ADR," she recognizes that it is not realistic to try to treat these approaches as in fact distinct; rather, she says, the focus should be on whether the approach taken by the mediator interferes with "the two basic premises of mediation: participant self-determination and mediator impartiality:" *ibid.* at 525.

[16] See *ibid.* for a discussion of this approach.

that lawyer-mediators are likely not only to use their legal skills but also to try to control the mediation process and the parties. Assuming the eventuality of official regulation of mediation, my current inclination is to recognize that mediation has its own diversity of structure and dynamic and among these options, organizations governing mediators as a group is preferable. I would be least inclined to support law society regulation because of what this choice says about the nature of mediation. My purpose here, however, is not to be definitive about this question, but rather to raise some points for consideration as we work towards the appropriate answers to questions about mediator regulation. We need to avoid a situation where the current tendency goes too far to turn back.

Law societies in Canada and the United States have begun to articulate rules governing lawyer mediators. Probably one of the most advanced is the state of Virginia where recently promulgated rules require mediators to advise parties who ask them to use evaluative techniques that such techniques might interfere with the parties' self-determination; permit mediators to use them only if all parties agree; and allow them only as a supplement to other forms of mediation.[17] This approach somewhat resembles that of the Law Society of New Brunswick which (under Part 5 of the *Law Society Act, 1996* which constitutes the Rules of the Society) has assumed authority to "regulate members in their practice as mediators and arbitrators." British Columbia has also taken jurisdiction over lawyer mediators. In fact, to date, the Law Society of New Brunswick has only made it clear that non-member mediators, as well as member mediators, may offer legal advice as long as it is merely "a corollary" to their mediation services. (I note that "giving legal advice" is explicitly included as an aspect of the "practice of law" in New Brunswick's *Law Society Act.*)

British Columbia's Law Society has imposed certain qualifications and minimum process requirements on lawyer-mediators engaged in family law mediation. These provisions are found in the Professional Conduct Handbook which defines "family law mediation" in part as "advising the participants of a court's probable disposition of the issue" or "giving any other legal advice." In contrast, the Commentary to the Rule "Lawyers as Mediators" under the Code of Professional Conduct of the Law Society of Manitoba states that "the lawyer [acting as mediator] shall not give legal advice, as opposed to legal information, to the parties to the

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[17] C.H. Oates and M. Summerlin Hamm, "A New Twist for an Olde Code: Examining Virginia's New Rules of Professional Conduct" (2000-2001) Regent U. L. Rev. 65 at 87. Virginia's Rule 2.10 is headed "Third Party Neutral" but there is a separate rule for mediators (Rule 2:11, Mediator). Also see Laflin, *supra* note 11 at 521-522 who is sympathetic to Rule 2.11 and Cooley who is not: *supra* note 10.

mediation process." Ontario Rule 4.07 serves to distinguish the role of the lawyer-mediator from the lawyer-advocate by requiring a lawyer-mediator to make it clear that he or she is not acting as a lawyer for either party and that the parties' relationship with the mediator is not governed by solicitor-client privilege. The Commentary to the Rule suggests that the lawyer-mediator "should not" give legal advice and (in common with other provinces' rules) should advise the parties to seek independent legal advice before and during the mediation and in the event that the lawyer-mediator prepares a draft contract.

Much of the debate in the United States has centred on two activities which have been identified as aspects of the "practice of law": the application of the law to the facts of a party's dispute and the drafting of complex agreements or contracts. This is why a number of American commentators have argued that "evaluative" mediation which might involve both activities constitutes "the practice of law." By and large, the Canadian law societies have been more restrained, appropriately so in my view, and recognize that giving legal opinions and drafting contracts might be a legitimate part of the mediator's role. Much of the emphasis (although not exclusively so) has been on distinguishing the lawyer-advocate's role from that of the lawyer-mediator, thereby highlighting the mediator's role. This is as it should be.

The lawyer acting as a mediator is not engaged as an advocate for a particular client. Rather the mediator works together with the parties in a common endeavour, with the objective of benefitting all participants, even though this may be accomplished by pointing out the strengths and weaknesses of the individual parties' cases. The following questions help illuminate the mediator's role:

> Where is the representative relationship? Where is the duty of loyalty? What is the fiduciary duty owed by whom and to whom? Where is the understanding of a party that the mediator is protecting that party's interests? How can the mediator receive confidential information from two parties with adverse interests and be practicing [*sic*] law with respect to either of them – or both of them? How can a mediator accept a service fee from two people with adverse interests, yet be practicing law with respect to both of them?[18]

Answering these questions helps to identify the distinct nature of the mediator's relationship with the parties and to clarify both the nature of the mediator's ethical obligations and to whom they are owed. The mediator is not answerable or responsible to one party, but to all the parties (and I add here, without further, that

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[18] Cooley, *supra* note 10 at 73.

the obligation of a mediator in a mandatory mediation program should be to the parties rather than to the body which establishes mandatory mediation). The agreement he or she facilitates or even promotes (because he or she has assessed that it is one to which both parties will agree) is meant to be in the interests of all the parties, not one party. The mediator has no interest in the substantive outcome, and I say this even of so-called evaluative mediators, except to the extent that a particular outcome might attract the agreement of all the parties. These aspects of mediation separate the mediator from the lawyers representing clients in the mediation who, regardless of their shift in mind set to address the problem as a mutual activity, nevertheless are still – and should be – representing *their* clients' interests.

This is not to say that mediators do not have ethical obligations to the parties. They do, in my view, have such obligations both to the parties and to the integrity of the mediation process. For example, a mediator's readiness to make substantive suggestions or assess the parties' proposals should be guided by the extent of the mediator's substantive knowledge or understanding of the dispute. Among other responsibilities, mediators must ensure that they are not in a conflict of interest, that they treat the parties with respect and that the parties treat each other with respect.

If mediators should be permitted to be activist in orientation and technique without raising ethical red flags, as I argue that they should be, what about the related question of how protective the mediator must be in order to minimize running afoul of ethical standards? To what extent should mediators intervene to offset an imbalance in bargaining power or to ensure that an agreement reached by the parties is consistent with a pre-determined standard? The short answer to these questions – inadequate to be sure, but nevertheless sufficient to indicate the scope of the mediator's role as I see it – is that the process requires as equal a bargaining power in each party as possible, but at the end of the day, the parties must take responsibility for their own agreement. This combination is most consistent with the notion of mediation as a process by which parties voluntarily work towards a settlement of their dispute satisfactory to them both or towards a transformation of their relationship, if that is their goal (as it would be in transformative mediation). Effective mediators have tools at their disposal by which they can offset certain kinds of imbalances of bargaining power without becoming the advocate of any particular party and by which they can assist the parties in assessing any agreement they reach for its fairness, enforceability, and other qualities without taking

responsibility for the content of the agreement.[19]

From this perspective, law society rules are far more unsuited to govern the mediator's role than they are to regulate lawyers acting as advocates in mediation. The direction taken in the American literature has obscured the more important elements which distinguish the mediation dynamic. For example, the emphasis on the mediator's application of the law to the facts of the parties' dispute ignores the reality that this activity is engaged in by any number of actors who are not considered to be practising law, whether they are lawyers or not *because of the context in which the activity takes place.* These actors include paralegals under limited circumstances (although this is a controversial area), arbitrators (although they too have been threatened with governance by the law societies and, as indicated, have been explicitly taken under the wing of the New Brunswick Law Society), investigators and adjudicators at tribunals, union representatives, and even some judges. These people are not always required to be lawyers, although there may well be reasons why being a lawyer is a requirement of the job in any given case. Even so, they may be governed by some other body better suited to their particular responsibilities. We need to consider carefully whether this is the case with lawyer-mediators.

Conclusion

Mediation ethics must be based on the distinct dynamic which characterizes mediation as a practice based on diverse styles and techniques which have implications for both the lawyer, who serves as a party's advocate, and for the mediator, including the lawyer-mediator. On the one hand, while lawyers as advocates are properly governed by law society rules, it may be time to consider whether these rules need to be adapted to the mediation context. On the other hand, given the increase in mediation and the development of mandatory mediation, lawyers who act as mediators are engaged in a distinct practice which may well require regulation since they have ethical obligations to both the parties and the process. The distinct nature of mediation, however, suggests that the law societies

[19] I acknowledge that mandatory mediation and a mediator who is highly activist in encouraging parties to reach a particular agreement might raise some issues here but not to the extent that they change the basic principle. In my view, one of the most important things a mediator can do is advise parties to obtain independent legal advice even if the lawyers are not themselves involved in the actual mediation. Mediators' suggestions, however forcefully put, can be assessed by the parties' own lawyers. If a party cannot afford a lawyer, a mediator needs to take care not to become that party's advocate or champion and not to take advantage of the fact that the party may be more susceptible to her or his suggestions.

are not the appropriate body to govern mediation ethics. Those concerned with ensuring that the full benefits of mediation are realized need to address these questions before they are answered by default.