PROMOTING ETHICAL PRACTICE IN THE MEDIATION COMMUNITY

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Introduction

Mediators frequently face ethical dilemmas in the course of practice. This paper considers the fundamental question of what the true end of mediation is. This sets the context to the discussion about mediation ethics because the objectives of mediation inevitably influence and colour what is considered acceptable or objectionable behaviour. It also considers how the mediation community and individual mediators can promote the ethical practice of mediation.

What is the end of mediation?

There is an amazing diversity of mediation practices worldwide. In traditional, intimate social contexts, mediators are often respected community elders who are known to the parties through kinship or close social networks[1]. The socially connected mediator commands the respect and trust of the parties. In such a context, the mediator is expected to use his social capital and power to influence the behaviour of the parties and the outcome of the mediation. This includes even imposing a solution to maintain the peace when no agreement can be reached. The end of such forms of mediation is the greater good of the community and a peaceful resolution of conflicts in a small tightly knit social group. These goals are the priority rather than party autonomy, which is one of the key values of the modern mediation movement that began in developed societies where individuals live and work in relatively anonymous environments.

The modern mediation movement had its roots in the dissatisfaction with the adversarial system of resolving conflicts through the courts. This was articulated by Professor Frank Sander at the Pound Conference of 1976[2], a major milestone of the development of mediation. The proponents of mediation saw it as an alternative mode of dispute resolution to litigation. Mediation was seen as a way to allow disputants to decide how they want to resolve their own conflicts instead of being bound by a judicial decision. Given this historical background, the primary end of mediation was conceived as using a neutral to help parties come to their own decision on how they want to resolve their dispute. A high premium is placed on promoting party autonomy. Consequently, development of mediation theories and practice include the emphasis of a facilitative instead of an evaluative approach towards mediation; a cautious attitude towards the use of a mediator's influence to shape settlement terms or even options; and a flattening of hierarchy where a mediator is seen as a fellow problem-solver and not a figure of authority. Current mediation training and codes of ethics continue to emphasise the importance of party autonomy. Consequently, many mediators treat promotion of party autonomy in conflict resolution *per se* as the end of mediation, or at least mentally assent to such a goal.

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[1] Brian Jarrett, The Future of Mediation: A Sociological Perspective, J. Disp. Resol 49 at 61-63 (2009)

[2] Frank Sander, Varieties of Dispute Processing, Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1076) in 70 F.R.D. 111, 133-34 (1976)

Yet, the mediation field is increasingly diverging from its counterculture roots. The very success of early mediation initiatives led many courts to embrace it as a tool to improve the delivery of justice. The triple influences of institutionalisation, diversification of mediation practice and pull of the sector towards the legal field brought about other voices that treat the early settlement of cases as an important or even primary goal of mediation. As mediators build their practices and mediation programmes strive to demonstrate success, the most visible and accessible indicators are settlements and settlement rates. Settlement rates are to be the proxy for other goals of mediation, i.e. how lives are impacted, the quality of conflict resolution, etc. However, the easy access to settlement rates inevitably made it the primary focus of mediators as courts, paying clients and even mediators seek to measure the benefit of mediation as a commodity.

In Singapore, the development of mediation practice mirrors the brief sketch in the preceding paragraphs. In the earlier days, as a traditional society in South East Asia, disputants expect mediators, who were community elders, to wisely guide the parties towards settlement and where necessary to decide what was right to do[3]. With increased modernisation, disputants turned towards the courts to resolve conflicts instead of these traditional modes of conflict resolution. In the early 1990s, the judiciary embraced mediation. Then Chief Justice Yong Pung How explained the reason for promoting mediation is that it is a non-confrontational way of resolving disputes that preserves relationships that is consistent with our "Asian" roots, and not as a means of clearing backlogs[4]. Nevertheless, the potential of court-annexed mediation to clear cases more efficiently and optimise limited court resources particularly for lower value cases was not overlooked. Court-annexed mediation programmes run by judges were set up and now form an integral part of the mediation landscape. As with trends elsewhere, there was an early emphasis on measurable results, i.e. settlements and settlement rates.

Amidst such diversity of mediation practices and history, what is the ultimate end of mediation? How shall the mediation community, and indeed a mediator himself, prioritise the various objectives of mediation, including preserving relationships, promoting party autonomy and obtaining efficient settlements? Both in Singapore and elsewhere, it will come as no surprise that there is room for disagreement, even about this fundamental question. This ambiguity is at the root of many an ethical dilemma that the mediation community and individual mediator faces in practice. In this context, I turn to consider how the mediation profession should promote ethical practice amongst its members.

[3] Lawrence Boulle and Teh Hwee Hwee, Mediation – Principles, Process, Practice (Butterworths Asia, 2000) at 187-197

[4] See for instance Chief Justice Yong Pung, speech at the Official Opening of the Singapore Mediation Centre (16 August 1997) <http://www.mediation.com.sg/speech_1.htm>. See also Chief Justice Yong Pung, speech at the Opening of the Legal Year 1996, in Hoo Sheau Peng et al, Speeches and Judgments of Chief Justice Yong Pung *How* (FT Law & Tax Asia Pacific, 1996) at 212-213, where CJ Yong stated that the backlog problem in the courts had been eliminated, but there was still a keen awareness that alternative means of dispute resolution may be more desirable than litigation for the litigant, "especially in the context of an Asian society which stresses harmony and cohesiveness".

Tools to Promote Ethical Practice of Mediation

The Limitations of Ethical Codes

As mediation establishes itself as a distinct area of practice and is increasingly institutionalised, the profession has been developing rules of ethical conduct. These rules attempt to clarify what is expected of mediators with respect to ethical practice. In doing so, they provide consumers of mediation with information as to what to expect from the process, promote the expertise of mediators and the reputation of mediation. Whereas traditional forms of mediation relied on the personal prestige, status and moral authority of the mediator himself, modern mediators, lacking in such relationships to the disputants, rely on rules and codes of conduct, as an alternative, albeit professional, source of authority.

Most jurisdictions with a relatively developed modern mediation scene have some form of code of ethics. This is particularly because there is awareness amongst mediation practitioners that the lack of formality, lack of procedural rules; the absence of effective legal monitoring of the work of mediators may lead to abuse of the process. Unchecked abuses would certainly be detrimental to the continued success and development of the field. These codes are all the more important in court-annexed mediation program to avoid complaints of unethical behaviour by court-appointed mediators or judge-mediators that may diminish public trust and confidence in the entire judicial process of which mediation is a part of.

However, drafting a code of ethics is a complex task particularly as there is no clear agreement among the mediation community on the ultimate end of mediation. There is also therefore no consensus on the right or best mediation style and hence acceptable or unacceptable practices except in extreme cases, e.g. a mediator should not lie to achieve a settlement. A survey of the available codes of ethics in the field of mediation shows that such codes tend to be general, drafted in abstract language. This is to balance the need to provide flexibility for the mediator to perform his role in diverse situations and yet provide sufficient direction as to mediator behaviour. In addition, it is not possible for the code to deal fully with all the ethical dilemmas which a mediator may face. In practice, this means that a certain degree of ambiguity is unavoidable and a wide discretion remains with the mediator in both interpreting and applying the rules to specific contexts. These are the limitations of any ethical code of conduct.

As an illustration of the difficulties that mediators may face in using rules to determine ethical dilemmas, I turn to a piece of research done by Larry Lempert and Peter Reilly regarding how lawyers would apply the rule against using deception to secure a negotiated agreement. In two surveys conducted in 1988 and 2008 respectively, four ethically challenging questions were posed to the survey participants who were legally trained. I extract two of the situations and the results[5]:

[5] Peter Reilly, Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help, 24 Ohio St. J. on Disp. Resol. 481 at 516-524 (2009)

Situation 1

Your clients, the defendants, have told you that you are authorised to pay $750,000 to settle the case. In settlement negotiations after your offer of $650,000, the plaintiff's counsel asks "Are you authorised to settle for $750,000". Can you say, "No, I am not"?

1988: Yes (47%), No (40%), Qualified (13%)
2008: Yes (27%), No (60%), Qualified (13%)

Situation 2

You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?

1998: Yes (7%), No (93%), Qualified (0%)
2008: Yes (20%), No (67%), Qualified (13%)

The results of these simple surveys show that although the rule against use of deception is clear, its application is beset with difficulties. There are strong differences of opinion in how it should be applied. There is confusion regarding truthfulness standards even when the ethical situations presented are not particularly elaborate or complicated.

In response, some argue for greater details, commentary and regulation to bolster the codes of ethics. While attempts at greater clarity in codes should be encouraged, the inherent difficulty in obtaining agreement on acceptable conduct makes it challenging to go into great specifics in ethical codes. In addition, enforcing even a simple rule against deception presents a thorny problem. Many view only "material" deception leading to a settlement as objectionable but what is material is itself constantly changing as the mediation proceeds, because mediation itself consists of dynamic experiences where what is important may change from moment to moment. Reilley himself concluded that raising the ethical bar for lawyer-negotiator through codes was likely to fail and concentrated his efforts on discussing techniques to minimise its negative impact on negotiators instead.

Promote Ethical Mediation Practice as a Mediation Community

Without doubt, there are many difficulties in using codes to develop and promote ethical mediation practice. However, given these limitations, what can be done by mediation practitioners and enthusiasts to guard against abuses that may taint the entire industry? It is submitted that as with any change of culture, *a strong leadership that prioritises ethical practice is the most fundamental.* Other tools, in order of effectiveness and priority that should be used by the mediation community are:

(a) Clarifying the end of mediation and emphasising that it is a calling;
(b) Strengthening the learning of mediation ethics; and
(c) Strengthening the code of ethics and its enforcement.

(a) Exemplary Leadership

As long as mediation ethics is merely given token acknowledgement by decision makers, programme coordinators, trainers and other leaders of the field, the development of ethical mediation practice will remain stunted. The work to develop the mediation sector throws up many operational issues that occupy the time and minds of practice leaders. Programme coordinators and leaders of mediation practices will have to concern themselves with how many cases are referred, how the cases are managed and disposed of, manpower issues, setting up and maintaining the infrastructure needed for mediations, etc. Trainers typically have limited time to transfer mediation skills and need to prioritise what should be taught. Mediators too can be caught up in the busyness of mediating many cases that ethical issues are also placed on the backburner. With such a crowded agenda, the value of putting time and priority in developing mediation ethics can be easily lost. In the pursuit of operational objectives, clarifying ethical issues may seem like a luxury that we cannot afford until a later stage of development. The extent to which our ethical codes are discussed and engaged in the course of our practice reveals the true priority that we place on ethical behaviour.

Raising the bar of ethical practice in mediation requires the mediation community, particularly leaders, to prioritise, commit to and model ethical practice. This must be an active choice in the midst of other priorities. It is admittedly a difficult one in the face of other more tangible objectives. Yet, its importance cannot be understated. Practice and thought leaders can influence the mediation community to understand the calling and role of mediators, to ask questions and seek answers to the true goal of mediation practice, to see the importance of ethical practice and to provide workable tools to assist mediators in navigating through the myriad of ethical dilemmas[6].

(b) Emphasising Mediation as a Calling and Clarifying the End of Mediation

The personal example of leaders of the mediation community, their active support for mediators of strong integrity and the value of ethical practice is a powerful way to shape the norms of the mediation community. Apart from rules and standards, other powerful factors can influence change in one's conduct, in particular, the impact of the community on the individual. Noting that ethics exist within organisations, some experts contend that the organisation itself, its culture and its members, have a great amount of influence upon the conduct of each individual. Culture and its surroundings may have more influence upon actual conduct than the existence of rules[7]. Simply put, the best ethical codes will not be worth the paper it is written on if the community, in particular, its leaders choose to measure success in terms of settlement rates only.

What kind of culture should the mediation community have to promote ethical practice? I submit that there are two key features. First, that to be *a mediator is a noble calling.* A peacemaker is who a person is and not just what he does. It is not just a profession but a significant role assumed by people of integrity. Secondly and consequently, the true end of mediation is *to guide parties to resolve disputes amicably for the better good of*

[6] See, generally, for example, Wayne D. Brazil, Hosting Mediations as a Representative of the System of Civil Justice, 22 OHIO ST. J. ON DISP. RES. 227 (2007) and Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities, 38 S. Tex. L. Rev. 407 (1997)

[7] Kimberly Kovach, The Intersection (Collision) of Ethics, Law and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way, 49 S. Tex. L. Rev 789 at 815-816 (2008)

both the disputants and the community. Settlements themselves are not the primary goal. These two features are found in traditional forms of mediation because the integrity and personal character of the mediator qualifies him for the office. Such mediators approach their role as a calling and an honour as parties gave them authority to guide them in the resolution of their conflicts. As a result, there was little need for formal roles and codes of ethics. Instead, mediators, by culture, were expected to behave with integrity. This expectation and understanding of their role guided their behaviour towards high standards of ethics. Currently, there are diverse reasons for people to practice mediation and this reduces the emphasis on mediation as a calling. Where mediators conceive of mediation as a professional job only, there is often disconnection between mediation practice and ethics. To address this issue, Alfini has called for mediation standards of conduct to be revised to offer mediators a broader sense of purpose – a calling[8].

Such reform is by no means easy as Alfini also recognised. Apart from putting inspirational language into codes of practice, other practical steps may be considered. The mediation community itself can be strengthened if there is cross-sector learning between practitioners of traditional forms of mediation and the modern professional equivalent. In shaping the narratives of the community, particularly in Asia, we may borrow from our traditional past to emphasise the role of a mediator as a community elder who has influence because of personal character, the prestige of the office and re-establish the first and foremost qualification of a mediator as a worthy peacemaker.

Next, in shaping the norms of the community, *suitable role models* and exemplary leaders should be identified. Their motivations to mediate, the way they practice and how they handle ethical dilemmas should also be the subject of publication or discussion amongst mediators. We should find better ways to tap on the richness of their experiences in dealing with ethical tensions through mentorship programmes, co-mediations and roundtable discussions. Live examples can supplement the details and texture that codes cannot provide. More importantly, such modelling inspires mediators to higher standards and motivations. They also attract the like-minded to create a stronger community of members who see mediation as a calling rather than a job. The more fans of mediation we have, the more they will collectively assert pressure on the community to have higher personal standards of conduct. Mediators taking personal responsibility for ethical behaviour because of their understanding of their calling provide a more effective way to guide behaviour than external rules-base codes alone.

Those who have the power to select, recruit and qualify mediators may consider what steps can be taken to recruit persons of repute into the ranks of the mediation community. This need not mean that only people of high status should be admitted but our selection process should also be a clear demonstration that the mediation community wants mediators who are worthy.

[8] James Alfini, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practice of Lawyer Mediators, 49 S. Tex. L. Rev 829 at 837-840 (2008)

(c) Strengthening the Learning of Mediation Ethics

Apart from strong leadership and emphasizing mediation as a calling, another important tool to shape behaviour is *education of mediation ethics*. In this segment, I consider how mediation ethics can be taught.

One of the most common ethical charges against mediators is that they provided improper advice or unduly pressurised one or both parties towards settlement. A second source of complaints involves particularly long mediation sessions during which parties felt they did not receive adequate breaks. An understanding of the major sources of complaints should inform training of mediators to avoid common pitfalls. There is some empirical data supporting the following strategies in mediator training to reduce instances of unethical mediator behaviour[9]:

(a) Highlighting common sources of complaint of unethical behaviour;
(b) Educating mediators as to the ethical and professional dangers inherent in giving improper advice, recommending particular settlements, coercing the parties in any way, making decisions for the parties or carrying on mediation sessions beyond the time when reasonable party capacity will be diminished;
(c) Using interactive methods of teaching instead of lectures;
(d) Using small-group discussion exercises or role plays to apply ethical rules to realistic situations;
(e) Teaching ethics earlier in the course when participants are more fresh and attentive; and
(f) Participants may be asked to pass an ethics test based on their knowledge of the ethics code before accreditation.

Realistically, however, the time constraints in any mediation training programme which limits the amount of time which trainers can spend on mediation ethics. The provision of avenues for continual learning and engagement of ethical issues as mediators gain practical experience is a necessary complement to mediation ethics training in formal training programmes. Discussing issues of quality practice tends to be more fruitful when mediators can bring actual ethical dilemmas faced as a means of seeking the community's consensus on how to apply ethical principles in specific cases.

For example, the Primary Dispute Resolution Centre of the Subordinate Courts of Singapore provides several avenues of continued learning and engagement on ethical issues in mediation practice[10]. This includes, first, facilitating *monthly learning sessions* for mediators to share their experience in applying the code of ethics and any ethical dilemmas faced. Such sessions are useful to understand how the broad ethical principles referred to in the codes could be applied in real life situations encountered by mediators.

Secondly, to participate more effectively in such sessions, mediators are also encouraged to be more *reflective*, sensitive and self-aware about the techniques they use in mediations to spot potential ethical issues as they arise in practice. Promoting a

[9] Susan Raines, Timothy Hedeen and Ansley Boyd Barton, Best Practices for Mediation Training and Regulation: Preliminary Findings, 48 Fam. Ct. Rev 541 at 549-550 (2010)
[10] Some of these ideas were also discussed in Andrea Yang, Ethical Codes for Mediator Conduct: Necessary but Still Insufficient, 22 Geo J. Legal Ethics 1229 at 1242-1244 (2009)

culture of self-awareness and reflection amongst mediators is fundamental to developing ethical practice. If mediators are not aware of the impact of their interventions as the mediation develops and its dynamics change, no amount of knowledge of ethical rules will be effective.

Lastly, the centre uses *co-mediation* as an avenue for mediators to learn from one another. They minimises the risk of continued solo mediation practice, i.e. that mediators can become blind-sided as to the impact of their interventions on the process due to lack of feedback. For example, a standard principle found in many codes of ethics is that a mediator should not coerce a party to settle. In the application of such a principle, it is necessary for a mediator to be able to understand the impact of the words he uses on the specific parties and the dynamics of the mediation. What may be perceived by a party to be strong language stepping beyond the boundaries of persuasion may be received by another well as part and parcel of the process. Co-mediators can provide valuable immediate feedback to each other about the effect of their interventions and help a mediator become more conscious about his practice to conform it to broader ethical principles.

(d) Strengthening the Codes and Enforcement of Standards

Finally, while there are limitations to the use of rules to promote ethics, this should not preclude the mediation community from engaging in the task of producing the strongest and clearest possible code of conduct to guide mediators. The drafting a code itself should be a collaborative effort by the community and provide an avenue for members to discuss and obtain agreement on certain fundamental principles. This exercise itself can be harnessed as an opportunity for mediators to focus their attention on mediation ethics by broadening the participation of the process to as many diverse groups of mediators as possible. The end product ought to serve as the community's collective expression of ethical norms in practice and shape conduct.

Others have written about what features a strong ethical code should have[11]. It is not in the ambit of this paper to delve deeply into the issue or to provide contents to such ethical codes. However, a short summary of the salient features may be useful. First, codes should be sufficiently *detailed*. E.g. instead of using only broad principles such as "a conflict of interest can arise from involvement by a mediator…from any relationship between a mediator and any mediation participant, whether past or present, personal or profession"[12] the code could specifically elaborate on what a mediator must disclose to the parties such as "any pecuniary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process"[13].

Secondly, *appropriate illustrations or commentary* can provide further guidance to mediators. For example, on the standard of impartiality, the Georgia's mediator standards add the following commentary: "Helping a party to present his or her needs and interest in a way that can be heard by the other side is not a breach of neutrality, but is, rather, an important part of the mediator's role. When the mediator helps each

[11] *ibid,* at 1236-1240
[12] 2005 Model Standards Standard III
[13] Alabama Code of Ethics for Mediators Standard 5 (1997)

side…communicate effectively, the mediator is assisting the parties in establishing common ground which a solid agreement can be based".

Thirdly, there should be some attempt to create a *hierarchy of ethical concerns* to guide mediators in resolving frequent ethical tensions arising in mediation due to clashes in core values. For example, the standard of self-determination and informed consent may pull a mediator towards helping a party who is ignorant of the relief afforded by the law and based on such a misunderstanding, settles a claim. However, under the standard of impartiality, the mediator cannot intervene and appear to favour the plaintiff over the defendant. Merely providing absolute principles for mediators to uphold simultaneously does not provide sufficient guidance.

The strength of any ethical code is also influenced by *how well it is enforced and aligned to organisational goals*. The community can make use of soft power through the influence of the culture of mediation organisations and education to increase compliance with its ethical codes as mentioned above. In addition, the *assessment of mediators* ought to be clearly linked to standards in the ethical codes. This means a movement away from simplistic measurement of success as the settlement rates of mediators to broaden performance indicators. These should include survey forms to be filled up by parties and counsel involved in the mediation that measure the extent to which the mediator has complied with ethical standards. For example, survey participants could be asked to indicate on a scale whether they thought that the mediator behaved even-handedly towards the parties. Negative feedback received may form the basis for discussion with the mediator to see if any adjustment of interventions may be useful. The broadening of success indicators to measure the behaviour of mediators will also incentivise mediators to demonstrate ethical practices. Lastly, *complaints* received against mediators ought to be properly reviewed and accounted for so that mediators know that there is strong enforcement of these rules.

Exercising Personal Responsibility

In the preceding paragraphs, I focused on what the mediation community as a whole can do to promote ethical conduct. In this section, I consider how a mediator can exercise personal responsibility towards the ethical quality of his practice.

In this regard, the key question that we have to ask ourselves is: *what are our own motivations for mediating*? The ethical tensions we face are often as a result of our own mixed desires for multiple ends in mediation. We may want to settle the case to obtain a tangible result, whether for the personal satisfaction of helping parties reconcile or for a sense of professional achievement. At the same time, we may subscribe to values of self-determination. We may want to influence the parties to a more ideal settlement, yet we wish to also respect party autonomy. We may understand the need for impartiality but our inner sense of justice may prompt us to take steps to ameliorate obvious power imbalances. As mediators, we have to deal with ourselves even as we seek to facilitate a resolution of the conflict. It is, however, not easy to know our true motivations and even more so, to pay attention to our actual motives in the heat of mediations. As it is written, "[T]he heart is deceitful above all things, and desperately wicked, who can know it?"[14] A commitment to ethical practice will require us to continually ask hard questions of ourselves to determine our own motives for mediating and to know our own weak spots.

[14] Jeremiah 17.9, New King James Version, Bible

Additionally, we can spend more time *improving our skill and knowledge* level as mediators. As we build experience, we should gain an increased sensitivity towards the power and influence we have in mediation and learn to use it wisely. Putting priority in improving our skill level also helps us to know the effects of our interventions better on the parties during any given mediation and calibrate our approaches better, avoiding the use of questionable practices to obtain results. Whenever we encounter grey areas or ethical dilemmas, we should take proactive steps to seek counsel and discuss with other mediators.

Finally, I submit that for a mediator to truly be free to commit to ethical practice, we must be prepared to let go of certain *fears*. These are the fear of failure measured by a lack of settlement, the fear of having wasted our time or losing momentum in mediation and being overly fearful of misusing the power we have such that we are paralysed from providing good guidance to the parties who need it.

Conclusion

The topic of mediation ethics touches upon a serious issue. What is mediation truly about? Why are we practicing mediation? How can we, individually and as a community, promote ethical practice? The development of ethical mediation practice is by no means easy but a worthy endeavour for all of us who are interested to see the strong and sustained growth of quality mediation that impact the lives of disputants who entrust us to facilitate the resolution of their conflicts.