

Ellen Waldman

EDITOR



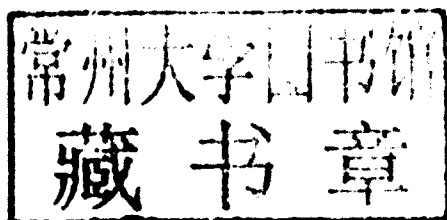
Mediation ETHICS

Cases and Commentaries

Ellen Waldman, Editor

— Mediation Ethics

Cases and Commentaries



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Mediation Ethics

To Seymour M. Waldman, a man of grace and virtue

Preface

I did not begin my legal career as a mediator or an academic. I started out as a litigator—filing complaints, writing motions, and pushing cases toward trial. However, early in my career, I had an interaction with opposing counsel that made me question if there wasn't a better alternative for resolving disputes. I was working on a personal injury case. My client, a seventeen-year-old girl, had suffered second-degree burns all over her body after the timer on a tanning bed malfunctioned. All parties agreed on the facts: the tanning bed had a timer; the timer had been set for fifteen minutes; the timer failed to go off; my client fell asleep and was exposed to the bed's ultraviolet lights for over an hour.

When the tanning bed manufacturer responded to our complaint and claimed they could not understand why they were being sued, I met with lawyers from the company to see if I could satisfy their concerns. My first meeting was with a lawyer who, like me, had been practicing for only a few years and had roughly my level of experience. The two of us had a reasonable conversation and were able to agree on some procedural points that would eliminate the need for a court hearing. On the second day of meetings, this younger attorney was accompanied by one of his senior, more grizzled colleagues. This more seasoned attorney drove the negotiation like a double-wide truck: he sideswiped the agreements his colleague and I had already reached and blocked any avenue for further negotiations. The result was an unnecessary court hearing, a waste of time and money for everyone involved.

The other young attorney and I were new to the law business. We adopted commonsense positions, took each other at our word, and made serious attempts to understand one another. We wanted to move things forward. We had impulses toward constructive collaboration. The more experienced lawyer, schooled in the art of escalation, took outrageous positions and seemed bent on sustaining discord.

My experience with this more senior lawyer made me wonder what becoming an experienced attorney would mean and what I would be like once my rookie reflexes were gone and I had begun to think and act like a pro. This episode taught me that garnering more experience as a litigator might blunt my native problem-solving skills—what I felt were my most valuable intuitions. This is not to say that all those in the legal profession practice scorched-earth litigation tactics incompatible with principled negotiation. Many attorneys practice in collaborative, problem-solving ways and mentor their younger colleagues in the usefulness of those methods. But it is true that some attorneys wander down side trails in order to push an aggressive agenda at all costs. The ethical imperative to be a counselor and help solve the client's problems can get lost.

The mediation field is similarly at risk. Intervening in other people's conflicts is an audacious act, its hubris justified only if the intervention is likely to make things better—or at least not make them worse. As a profession, the field seems to understand this. However, some mediators may find themselves practicing by rote, following well-worn wagon treads without reflection. My suspicion that some mediators operate on autopilot was confirmed when, a few years ago, I organized a dinner for local mediators to talk about ethics. I promised free food and wine. The only cost of admission was a description of the toughest ethical quandary each mediator had faced in practice. One veteran mediator accepted the invitation, but lamented that in his over-twenty-year career as a neutral, he had never seen anything resembling an ethical dilemma!

You'd think a field that self-consciously sees itself as "doing good" would have a well-developed literature on ethics, but ours does not. We are awash in texts that explain how to mediate effectively, profitably, spiritually, sensitively, and cross-culturally. But guidance in mediating ethically is in short supply.

I wrote this book to help conflict resolution professionals traverse the disorienting landscape of ethical decision making with greater clarity and deliberateness. In its case studies and commentaries, the book describes the often murky ethical terrain that mediators are likely to encounter and offers guidance on how to navigate it. This book is a trail guide; it will not always tell you where to go, but it will assess the allures and dangers of various off-road itineraries. After reading this book, it is unlikely you will suffer vertigo when facing a particularly precarious ridge or fork in the road ahead. You will

become more adept at spotting potential roadblocks and reasoning through your options. Even on those occasions when all options seem bad, this book will help you become more conscious and confident of your own mediation orientation and forge a path that honors the important values at stake.

In the following chapters, you will hear from both me and other professionals in the field. In Chapter One, I discuss the underlying values of mediation, its regulatory codes, and emerging models of practice. The subsequent chapters introduce various ethical dilemmas, exemplified by both easy and hard cases. Each hard case is followed by commentaries from leading mediation scholars who explain what they would do in the case and why. Each commentator approaches conflict resolution with a different philosophy and articulates his or her approach to the case with deliberate attention to how an understanding of ethical obligations informs his or her thinking about the case. In the discussions that follow, you will learn what each commentator values most in the mediation process and how his or her values determine certain outcomes and discourage others.

The commentators in this book demonstrate the vast diversity that characterizes the field today. Evaluative, facilitative, narrative, and transformative mediators are all represented. In reading their work, you will be struck by the heterogeneity of their philosophical commitments. But note how all authors identify the values they hold most dear and how the priorities they set determine the action plans they adopt.

Acknowledgments

Some books yearn themselves into existence. They are written in a flurry of necessity, the words tumbling onto the page. This was not one of those books.

This meditation on mediation ethics took shape slowly, endured a protracted gestational period, and moved glacially toward birth. I'm sure my publisher thought forceps would be necessary. I'd like to thank all those who participated in the Lamaze classes and provided friendship and support throughout.

In terms of conception, I owe many thanks to Charlie Pou, Timothy Hedeem, and Judy Cohen for brainstorming with me about the need for a mediation ethics text that showcased the heterogeneity of thinking in the field. Charlie was particularly helpful in thinking through many of the basic structural questions and ended up contributing an insightful commentary on disclosure, secrecy, and the limits to mediation confidentiality.

Alan Rinzler, executive editor at Jossey-Bass, was another important early catalyst. Alan heard me give a talk at a conference in which I bemoaned the paucity of case-based ethics texts in the mediation field. He approached me after the panel, threw his card down on the podium, and said, "We want to do that book." Although writing a book was nowhere on my to-do list, coming from Alan, it felt like a challenge—one that I was surprised to find myself accepting. Although I would later marvel at the gap between identifying a need and actually attempting to fill it, talk about the need for an ethics text would have remained just that were it not for Alan's confidence and enthusiasm.

Along the way, colleagues and friends in a number of disciplines gave generously of their ideas and insights. Some read early drafts, others helped me talk through case studies, and still others offered materials that they thought would be helpful. Many, though not all, of these individuals wrote commentaries for the book. I thank

Hal Abramson, Gregg Bloche, Dwight Golann, Art Hinshaw, Lela Love, Julie Macfarlane, Steve Semeraro, Lois Waldman, and David Waldman for their special help along the way.

Seth Schwartz, Alan Venable, and Beverly Miller—talented writers and editors from the Jossey-Bass team—helped smooth the manuscript's rough edges. And I acknowledge my huge debt to Chris Sove of Sove Publishing, a former student with a gift for language who was there as a research assistant at the beginning and provided crucial support toward the conclusion of the project.

Writing is something we do alone. This solitude is bearable when leavened with good fellowship and camaraderie. I am so lucky in this regard. My friends Betsy Anderson, Patrick Burke, Julie Greenberg, Martha Hall, Barbara Hart, Kay Henley, Marybeth Herald, Scott Landers, Nina Markov, Joelle Moreno, Marina Greenstein, Bruce Pardy, Allison Taylor, Ben Templin, and Kenneth Vandeveld all remind me that ethics is not simply a matter of the head, but of what we give and receive in the way of love, care, and concern.

And, speaking of love, I owe both thanks and apologies to the two bookends of my family: my mother, Lois Waldman, and my daughter, Aviva. Thanks to my mother for her unfailing, unending nurture and for modeling each day, year after year, what it means to be a loving and encouraging parent. To my daughter, thanks for your vital, electric presence and for the fun and wonder you bring to me. I apologize for both my occasional distractedness and those moments spent tapping at computer keys rather than playing two-square, wrestling, or buying you a dog.

With a project of this duration, it is no surprise that life at its end would look different than it did at the beginning. My father, Seymour Waldman, died while this book was in process. He was, for me, the embodiment of grace and fair-mindedness. I have never met anyone else whose judgment was so untainted by bias or self-interest, so utterly committed to doing what was right and decent. He was, in every sense, Aristotle's man of virtue. I dedicate this book to him.


Mediation Ethics

Contents

Preface	ix
Acknowledgments	xiii
1 Values, Models, and Codes	1
2 Autonomy and Diminished Capacity <i>Commentators: Carol B. Liebman and Mary Radford</i>	27
3 Autonomy and the Emotions <i>Commentators: Dorothy Della Noce and John Winslade</i>	55
4 Disputant Autonomy and Power Imbalance <i>Commentators: Forrest S. Mosten and Bill Eddy</i>	87
5 Tensions Between Disputant Autonomy and Substantive Fairness: The Misinformed Disputant <i>Commentators: Lela P. Love and Jacqueline Nolan-Haley</i>	113
6 Information, Autonomy, and the Unrepresented Party <i>Commentators: Michael Moffitt and Dan Dozier</i>	155
7 Mediating on the Wrong Side of the Law <i>Commentators: John Bickerman, Jeremy Lack, and Julie Macfarlane</i>	177
8 Mediating with Lies in the Room <i>Commentators: Dwight Golann and Melissa Brodrick</i>	199
9 Confidentiality <i>Commentators: Bruce Pardy and Charles Pou</i>	227
10 Confidentiality Continued: Attorney Misconduct or Child Abuse <i>Commentators: Art Hinshaw and Gregory Firestone</i>	255

11	Conflicts of Interest	277
	<i>Commentators: Bruce E. Meyerson, Wayne Thorpe, Roger Wolf, and Susan Nauss Exon</i>	
12	Mediating Multiculturally: Culture and the Ethical Mediator	305
	<i>Commentators: Carrie Menkel-Meadow and Harold Abramson</i>	
13	Ethics for ADR Provider Organizations	339
	<i>Commentators: Phyllis Bernard and Susan M. Yates</i>	
	Appendix: Model Standards of Conduct for Mediators	369
	Notes	381
	The Editor	419
	The Contributors	421
	Index	431

Values, Models, and Codes

 **E**thical decision making requires tough, sometimes tragic, choices. Difficult cases do not force us to choose between obviously right and obviously wrong paths. Rather, deciding which path to take is difficult precisely because there are compelling reasons to go in each direction. We want mediation to yield substantively good outcomes, and we want to honor disputants' rights to choose the best outcomes for themselves. In hard cases, it may not be possible to do both. We often can't pursue one value without forfeiting another.

Mediating ethically usually entails some loss. The difficult choices that professional mediators routinely make are often similar to the wrenching choices that faced the Greek hero Ulysses on his odyssey from Troy back home to Ithaca. At one point in the long journey, Ulysses was forced to steer his ship through a narrow strait of sea bordered on each side by ferocious monsters. On one side lurked Charybdis, whose yawning jaws sucked in and spewed out water three times a day, creating a whirlpool that destroyed any ship unlucky enough to drift too near. On the other side hovered Scylla, a six-headed beast with three rows of teeth in every mouth. No ship could pass within Scylla's reach without losing men to the monster's predations.

Ulysses' men were loyal soldiers and sailors, and he wanted to save them all, but he knew his whole ship would go down if he veered too close to Charybdis. However, sailing within Scylla's reach would mean the death of six oarsmen. With a heavy heart, Ulysses told his crew to row hard and give Charybdis's currents a wide berth. He stayed silent about Scylla for she was "a threat for which there was no remedy." Ulysses' men were easy targets for Scylla, who snatched the strongest and bravest among them. Ulysses' anguish is clear as he describes the sight: "When I turned to watch the swift ship and crew, already I could see their hands and feet, as Scylla carried them high overhead. They cried out and screamed, calling me by name one final time, their hearts in agony. . . . Of all things my eyes have witnessed in my journeying on pathways of the sea, the sight of them was the most piteous I've ever seen"¹

Fortunately for us, mediation rarely poses such difficult matters of life and death. Still, the lesson from the *Odyssey* is clear: Ulysses could not save his ship without ethical compromise. Optimally the captain of a ship is truthful with his crew and safeguards the safety of every sailor. Ulysses deceived his men about the true dangers they faced and sacrificed six of his crew. But doing the right thing almost never involves following one mandate unflinchingly. When we consider the dire choices Ulysses faced, can we say this captain acted unethically? He saved the vast majority of those on board—all who could be saved. Where does truth rate when brute honesty threatens to fatally immobilize the entire ship? And how does one protect sailors' safety when the only choice is how many will die?

On a less stark scale, mediation ethics poses similar questions and teaches similar lessons. This chapter continues to weave the lesson of Ulysses into a discussion of the underlying values of the mediation field and their articulation in formal ethics codes. It highlights the inconsistencies that exist among and within various code sections and suggests that those inconsistencies reflect tensions among mediation's underlying values: disputant autonomy, substantive fairness, and procedural fairness.² Ideally mediators would maximally advance each of these principles in every intervention. Often this is not possible, and mediators have to decide for themselves how to prioritize and weigh these values when they push in competing directions. Mediator philosophy and the models that emerge from this philosophy play a significant role in how these balancing acts occur.

A BASE OF UNDERLYING VALUES

In the following chapters, you will hear from commentators with diverse approaches and philosophies. You may be surprised at the range of responses, but all of them pay deliberate attention to three underlying values that shape their understanding of what is at stake and what is ethically required in any given case:

- *Disputant autonomy*: A disputant's right to make choices based on personal beliefs and values, free of coercion and constraint
- *Procedural fairness*: The fairness of the process used to reach the mediated result
- *Substantive fairness or a good-enough outcome*: The acceptability of the mediated result

In cases that require difficult ethical decision making, these three values will likely be in tension. When mediators confront such cases, they need to reflect on whether any one of these values trumps the others or whether it is appropriate to compromise one or more of these values in the face of more compelling mandates. However, before a discussion of how the tension between these underlying values will influence a mediator's ethical decision making, I explore and define each of these values.

Disputant Autonomy

"You're not the boss of me." Any adult who has tried to issue an order to a child has probably heard that rebuff. The child is asserting her autonomy in the baldest way possible.

Most simply, autonomy, frequently referred to as self-determination in mediation codes and texts, means self-rule. Mediation strives to vest maximal control and choice with the disputant—not with the mediator, the state, or another third party. Unlike litigation, in which lawyers frame disputes and judges decide them, mediation assumes that disputants should retain control over how their conflicts are presented, discussed, and resolved. In litigation, fairness is discovered by looking to existing law. In mediation, disputants are urged to look to their own personal norms of fairness. Legal rules, social conventions, and other standards that might interfere

with disputants' efforts to construct self-determining agreements are supposed to take a backseat.

Autonomous decisions express who we are—our preferences, desires, and priorities. They bear the imprint of our personality as it has developed over time. Determining whether decision making in mediation is truly autonomous requires a close look at internal and external conditions that threaten to influence or subvert our exercise of free will.

Internal threats inhere in the frailty of a disputant's mental or physical condition. If autonomous decision making reflects long-term values and an established pattern of belief and behavior, then illness, grief, or blinding rage may lead to decisions that subvert the values of a calmer, healthier self.

Situational threats arise from the dire, sometimes coercive, circumstances in which disputants find themselves. If you agree to hand me all your money because I put a gun to your head, can we say that you acted autonomously? If you haven't eaten in four days and agree to sign over the deed to your house in exchange for the rosemary-infused walnut baguette I'm waving under your nose, is that decision a true expression of free will? And if you agree to accept one thousand dollars from me for the broken elbow you suffered when I rear-ended you, ignorant that you could receive ten thousand dollars in court, how autonomous was your decision to settle?

Procedural Fairness

Procedural fairness examines the fairness of methods. When children are fighting in a nursery, a parent or caregiver may decide to handle all disputes about food by adopting a default procedural rule. That is, when, say, a cupcake is to be divided in half, one child gets to cut it and the other gets to choose the first piece. The adult has chosen not to dictate the size of the portions or who gets what. She is staying out of the substantive side of the dispute. Rather, she has decided to institute a procedure that encourages fair play in the division of limited sweets. The adult has made a decision, based on years of experience with children, that this rule, although imperfect, more likely than not creates fair results.

Long experience has taught mediation professionals that procedures such as preserving confidentiality and avoiding significant professional or personal relationships with clients facilitate settlements that are fairer and more satisfying to the disputants. In