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ETHICAL DILEMMAS IN MEDIATION PRACTICE:
A SINGAPORE PERSPECTIVE

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ABSTRACT

The focus of this study is on ethical dilemmas faced by mediation practitioners in Singapore. In this aspect, the writer attempts to first understand, and to have a clear grasp of the various types of ethical dilemmas in major fields of practice, both in commercial mediation and community mediation. This study also looks at how such dilemmas are handled by these practitioners, and where do they turn to for guidance and advice as they grapple with such dilemmas in their mediation practice.


Also of interesting focus in this study is the aspect of key factors which influence or affect these ethical dilemmas. Related to this is the question of adequacy of ethical standards of practice and guidance to these practitioners, and the extent of the need for such standards in mediation practice in Singapore. Recommendations are offered on how to overcome this in their daily practice.

It is also the intent of this study to allow mediation practitioners in Singapore to compare and contrast their ethical dilemmas faced by their counterparts outside of Singapore. The idea is to promote the sharing of best practices which would further enhance the overall standard of mediation practice, making it a more beneficial and effective alternative dispute resolution mechanism.

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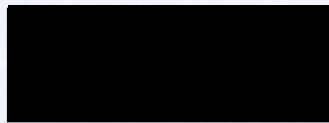
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Field of Study: **Alternative Dispute Resolution (Mediation)**

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INTRODUCTION

Introduction

This study aims to analyse the nature and extent of ethical dilemmas faced by mediation practitioners in Singapore. It focuses on two (2) major areas of practice, namely, commercial mediation and community mediation. Five (5) major research questions are raised for in-depth analysis and consideration. They are (1) the types of ethical dilemmas faced by mediation practitioners during mediation sessions; (2) how these practitioners handle such ethical dilemmas; (3) whether the ethical dilemmas faced by mediation practitioners in commercial mediation practice are different from those in community mediation practice; (4) the key factors which influence or affect such dilemmas; and (5) the adequacy of current ethical standards. Based on the results of this study, recommendations are made for the consideration and development of the future of mediation practice in Singapore.

RATIONALE OF RESEARCH

It is important for mediation practitioners to maintain high standards of practice in terms of the quality of service and ethical conduct as the quality of mediation depends heavily on the quality of practitioners. In the area of ethical conduct, very little is known about

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the mediation practitioner's role, especially on various ethical dilemmas faced by practitioners when conducting mediation sessions.

In this respect, the first research question on the types of ethical dilemmas will help to understand ethical dilemmas faced by Singapore mediation practitioners which may differ from those faced by their Western counterparts. Based on the current research on past studies conducted on ethical dilemmas in the United States of America¹, nine types of ethical dilemmas were identified. The intent of this study is to understand if any of the nine dilemmas are experienced by Singapore mediation practitioners, and whether, other types of ethical dilemmas which are unique or relevant in the local context, may be revealed in this study.

Once the types of ethical dilemmas are identified, it is pertinent to ask how these practitioners handle such dilemmas. The intent is to see if these dilemmas are handled differently as compared to their Western counterparts. If so, what are the reasons for doing so, and where do they turn to for guidance and advice as they grapple with such dilemmas?

The answer to the third research question attempts to see whether ethical dilemmas faced by practitioners in Singapore differ in commercial mediation practice from community

¹ Bush, R. A. B., "Symposium: The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," (1994) 1 *Journal of Dispute Resolution*, 1-55. First published as "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications", A Report on a Study for the National Institute for Dispute Resolution, 1992, Washington, D.C.: National Institute for Dispute Resolution, 1-36.

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mediation practice. If different, what are the reasons for such differences? Would practitioners handle these dilemmas differently, and reasons why for so doing?

The purpose behind the fourth research question is to examine key factors which influence or affect ethical dilemmas, such as professional training of these practitioners, and the cultural element. To what extent is such influence or effect on these practitioners?

Professional training here refers to disciplines in any of the professions such as therapy, legal, architecture, medical, accountancy, tax, construction and building, banking and finance, etc. One area of focus is to examine situations when these practitioners are faced with making ethical decisions and interpreting conflicting standards.

Another key factor under the fourth research question is whether there is any cultural influence in the way practitioners handle their ethical dilemmas, or in the way such dilemmas could have been created due to the influence of culture.

Lastly, the question concerning the adequacy of ethical standards when compared to the same as practised by their Western countries is based on the extent and the nature of the ethical dilemmas faced by Singapore mediation practitioners. The question of whether existing ethical standards are sufficiently adequate to cater for these practitioners remains a focus area in this study, and whether any recommendations could be derived from the findings of this study for further development and future of mediation practice in Singapore. Are the current guidelines and standards of codes of ethics in Singapore

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adequate? If not, what are the recommended areas of improvement and enhancement of ethical principles amongst Singapore practitioners?

SCOPE OF RESEARCH

As is evident from the foregoing paragraphs, this study is not concerned with the question of whether mediation is or ought to be an alternative dispute resolution to litigation. Nor does it attempt to establish and demonstrate the host of advantages of using mediation as the alternative dispute resolution to litigation and other forms of alternative dispute resolution mechanisms. In essence, this study does not attempt to focus on how mediation has become a popular alternative dispute resolution mechanism, and relevant factors affecting this state of affairs.

Its overriding objective is to determine the following areas:

1. Types of ethical dilemmas, that is, to understand if any of the nine (9) dilemmas² are experienced by Singapore mediation practitioners, and whether there are any other types of ethical dilemmas which may be unique or relevant in the local context;
2. Handling ethical dilemmas, that is, whether the Singapore mediation practitioners handle their situations differently, and if so, what are the reasons for doing so;

² *Supra*, at n.1.

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3. Commercial mediation versus community mediation, that is, if ethical dilemmas faced by practitioners in Singapore differ from commercial mediation practice from community mediation practice? And if so, what are the reasons for doing so?
4. Key factors which influence or affect ethical dilemmas, that is, from the aspects of professional training of these practitioners and how they interpret conflicting standards, and whether culture has any influence in the way these practitioners handle their ethical dilemmas, or in the way dilemmas could have been created due to the influence of culture.
5. Adequacy of ethical standards, that is, comparison of such adequacy of the same as practised by their Western counterparts, and whether any recommendations could be made as a result of the findings of this study for further development and future of mediation in Singapore.

Research Jurisdiction

This study was primarily conducted in Singapore. Singapore was founded as a British trading colony in 1819. It joined the Malaysian Federation in 1963 but separated two years later, and became independent. It subsequently became one of the world's most prosperous countries with strong international trade links.

Singapore is an island spanning over a total geographical area of 692.7 sq km³ with water occupying 10 sq km and land area of 682.7 sq km, slightly more than 3.5 times the size of Washington, DC. In terms of racial composition, it is a multi-racial society with the

³ Information adapted from the World Fact Book 2003 published by the Central Intelligence Agency of the US Government.

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Chinese race comprises the largest population of 76.7%, followed by the Malays 14.0%, Indians 7.9% and others 1.4%.⁴

It is a highly developed and successful free market economy, enjoys a remarkable open and corruption-free environment, stable prices, and one of the highest per capita GDPs in the world. The economy depends heavily on exports, particularly in electronics and manufacturing. It was hard hit in 2001-2002 by the global recession and the slump in the technology sector.

RESEARCH METHODOLOGY

Method of Data Gathering

For the purposes of this study, data and information were gathered using three (3) methods, namely, library research, Internet research and field research.

In library research, court libraries and university libraries in Selangor and Kuala Lumpur, Malaysia, and in Singapore were identified as sources of reference materials for this study. The only law library in Kuala Lumpur, Malaysia with sufficient and relevant reference materials was the Raja Azlan Shah Law Library, University Malaya. This library was found to contain key reference law books and law journals for information on mediation in the international front (United States of America, Australia, the United Kingdom, Canada and Singapore) required of this study.

⁴*Ibid.*

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The other law library, Perpustakaan Tun Sri Lanang in the National University of Malaysia, Bangi, Selangor was also used as a supplementary source of library research materials including non-local law journals, periodicals and seminar papers. These two (2) libraries provided various types of references ranging from law textbooks, legislation, articles, journals, seminar papers to dissertation works. In addition to this, several law libraries in Singapore were deemed as good sources of relevant reference materials for this study as the research was focused on the Singapore context.

The first library was the CJ Koh Law Library which is located at the National University of Singapore (NUS), Kent Ridge. This library was the key source of reference for this study. Due to the library's regulations for Malaysian students, only a limited number of times of visits by Malaysian students were allowed. Exceptions could not be granted even with the reference letter from the Law Faculty, University Malaya, Kuala Lumpur, Malaysia.

Owing to such restrictions, some of the reference materials had to be sourced from alternative libraries in Singapore. Court libraries were found to be very useful sources of reference. Those visited were the Singapore Subordinate Courts, Research and Resource Centre, Level 7, Havelock Road, and the Singapore Supreme Court Library which is located at the Ground Floor, City Hall. These libraries contain numerous reference materials on the local Singapore front, including writings and studies conducted by Singaporean researchers and authors.

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For more up-to-date and current materials from other countries besides Malaysia and Singapore, such as the United States of America and Australia, the Internet was a good source of reference. Common search engines such as google.com, yahoo.com, Find Law, and the like were heavily visited.

The last method of data gathering was field research which was conducted in the form of physical visits to several mediation institutions and organizations in Singapore. The following sites were visited for the purpose of this study:

1. the Singapore International Arbitration Centre (SIAC), Chamber 17 on Level 2 of City Hall;
2. the Singapore Mediation Centre (SMC)/Singapore Academy of Law, Level 3 of the City Hall building; and
3. the Community Mediation Centre (CMC) which is located at the Ground Floor of the Singapore Subordinate Courts, Havelock Road.

Besides government agencies, other similar organizations visited included private mediation practices such as Eagles Mediation & Counselling Centre, and The Arbitration Chambers Pte Ltd.

It was during these physical visits that face-to-face interviews were conducted on a one-on-one basis with relevant key officials from these organizations. Similar interviews were also conducted with a sample of mediation practitioners from the 110-member panel of

mediators from the SMC, and a similar sample from the 146-member panel of mediators from the CMC.

As it was a one-on-one interview-based process, this method of data gathering was time consuming. Each interview lasted for over an average duration of 60-90 minutes. In some cases, the mediation practitioners who were interviewed tended to deviate into other bits of chatter and had got carried away with their mediation experiences. Effort had to be made in a discreet manner to steer them back to course, and to focus on the key aspects of the interview.

Formation of Interview Questions

For the purpose of facilitating the gathering of data and information via field research, a structured set of interview questions was prepared⁵. These questions were not shown to the sampled mediation practitioners during the interview. This was not a self-administered set of survey questionnaire nor was this a set of survey questionnaire filled up by this researcher. Instead, these interview questions were used merely as a guide for this researcher during the interview.

There were three (3) questions which formed the basis of the one-on-one interview. They covered aspects of the five (5) research questions involving:

1. The types of ethical dilemmas which the sampled mediation practitioners faced in their mediation practice;

⁵ Please refer to Questionnaire on "Ethical Dilemmas in Mediation Practice: A Singapore Perspective" in Appendix F.

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2. How such ethical dilemmas were handled by them;
3. Differences, if any, in such ethical dilemmas in commercial mediation as compared to community mediation;
4. Key factors which influence or affect such ethical dilemmas; and
5. Whether existing ethical standards are sufficient to cater for these sampled mediation practitioners when faced with such ethical dilemmas.

Prior to the start of the interview, these sampled mediation practitioners were explained the concept of “ethical dilemma” which is the focus of this study. “Ethical dilemma” was defined to them in a broad sense as a situation in which they felt some serious concern about whether it was proper for them as mediation practitioners to take a certain course of action, that is, where they were unsure what was the right and proper thing for them as mediation practitioners to do.

It was important for this study to use a wide definition of “ethical dilemma” and to emphasize the central concept with clarity. This would allow the sampled mediation practitioners greater latitude when they described what they regarded as “ethical dilemma”.

It was important to ensure that these sampled mediation practitioners fully understood the difference between “skills dilemma” and “ethical dilemma”. “Skills dilemma” was explained to them as a situation where they as mediation practitioners were unsure of how to effectuate the intended course of action which they wished to pursue, while an

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“ethical dilemma” was where they knew how to effectuate the intended course of action but was unsure whether it was proper to do so or not.⁶

Besides the three (3) questions, the sampled mediation practitioners were also asked to provide some general information about their profession such as their area of mediation practice, number of years of practice, whether they were legally trained, and their current occupation. Due to the sensitivity of the identities of these practitioners, and on their requests, none of their names were recorded. Only relevant demographic information were obtained and kept in strict confidence.

The section, the General Information in the said Questionnaire⁷, was intended to obtain some background information on the sampled mediation practitioners before the three main questions were asked. The required information covered the following:

1. Area of mediation practice. The purpose of this question is to determine the various areas of mediation practice in both the commercial as well as community mediation areas.
2. Years in practice. This question is used to observe the level of experience in mediation practice of the sample.
3. Were they legally trained? This question is important to gauge if legal professional training has any influence in the way the affected sample handle their ethical dilemmas.

⁶ *Supra*, at n. 1.

⁷ *Supra*, at n. 5.

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4. Current occupation. Mediation practitioners hold various occupations in their practice, so the question was to gauge this specific demographic feature.

In Question 1, the sampled mediation practitioners were asked to describe in their own words situations which they encountered in mediation practice which presented some kind of ethical dilemma on what was the proper course of action for them to take as mediators. The purpose of this question was to explore the “universe” of situations involving ethical dilemmas which these practitioners experienced during their years of mediation practice. This was an attempt to “cast the net” as wide as possible in order to record as many such situations as possible.

As this was an open-ended question, these sampled mediation practitioners were prompted to recall major or significant or unique situations in their previous encounters in the course of their mediation practice. Key words used by these practitioners were noted, and followed up with subsequent questions to probe further or to ask further questions in an effort to fully capture the full essence of their experiences.

For this purpose, a set of notes called “Interviewer’s Notes”⁸ was prepared to be used by this researcher as a quick reference during the course of the interviews. The Notes basically contained the nine (9) dilemmas⁹ with concise descriptions. They were created to aid this researcher by providing “prompts” to ask follow up questions subsequent to the initial descriptions of the mediation practitioners’ experiences.

⁸ *Ibid.*

⁹ *Supra*, at n. 1.

Question 1 was also intended to further understand the types of ethical dilemmas raised by these practitioners, and to see if any of these were different from those faced by their Western counterparts.¹⁰ It is the intent of this study to see if there were any such ethical dilemmas which were unique in the Singaporean context, and under what circumstances did these unique experiences occur when they did.

Question 2 attempted to get these sampled mediation practitioners to share their views on why they considered or viewed those described situations in Question 1 as presenting dilemmas. The first thing which was tested was whether the sampled mediation practitioners fully understood what “ethical dilemma” meant, and why they had viewed them as such.

Next, this question was intended to explore their underlying interests and ethical values for forming such views, and whether culture had any influence in the way the practitioners viewed or considered these situations as ethical dilemmas. In order to garner complete voluntariness in their responses, these practitioners were given the liberty to provide responses in their own words at their own time.

Neither opinions nor comments were made by this researcher during the interview on the practitioners’ stories on why they had formed such views. However, further questions were asked to understand and to capture the full essence of the practitioners’ views and their ethical values in forming such views. These practitioners sometimes deviated to

¹⁰ *Ibid.*

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describe their underlying beliefs and values in general. In so doing, they had indirectly provided some insight into their personal background and upbringing, which had an influence, whether directly or indirectly over why they had handled the identified ethical dilemmas in the way they did.

Lastly, Question 3 touched on how the sampled mediation practitioners had handled those described situations. The purpose of this question was to explore the avenues which these practitioners had resorted to when faced with such dilemmas.

Depending on the extent and nature of such dilemmas, this question garnered responses on whether existing ethical standards are sufficiently adequate to cater to these practitioners. It is the intent of this study to see if their responses also touched on alternative sources of assistance and help which these practitioners had turned to in their attempt to handle such situations.

Sampling Methodology

Interviews were not conducted with every mediation practitioner in the panel of mediators from the SMC and the CMC. Instead, a sample of 44 mediation practitioners was used to represent the respective Centres, where 20 were from the SMC and 24 were sampled from the CMC. The sample was based on the availability and voluntariness of these mediation practitioners to be interviewed for this study.

Sample Selection

For the purpose of this study, a list of the 110-member panel¹¹ of mediation practitioners was first obtained from the website of SMC and the 146-member¹² panel of mediation practitioners from the CMC. These lists contain only names of these practitioners, and their current designations and/or occupations.

In working with the SMC and the CMC, it was made known by both organizations that they do not facilitate the communication with these panels of mediation practitioners for the interviews. These organizations could only confirm the currency of their respective panels of mediation practitioners at the time of this study, and would not, in any way, provide telephone contact numbers of these mediation practitioners nor recommend any of these members for purposes of this study.

Given the circumstances, as a starting point, a list of names and their respective designations/occupations had to be drawn up, and their telephone contact numbers and/or addresses of these members were looked up in the Singapore Yellow Pages telephone directory. A final list was later drawn up with names, contact telephone numbers, email addresses, designations (if any), and postal addresses.

Based on this compilation, contacts with each of these members were first made by telephone and subsequently, followed up with email, and depending on their availability and voluntariness to be interviewed, a third contact was made on details of the interviews

¹¹ As at time of this study.

¹² *Ibid.*

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such as date, time and venue. In cases where email addresses were not available, further telephone calls were required to confirm details of the interviews.

Sampling from the SMC Panel of Mediators

The panel of 110 mediation practitioners from the SMC were located in various parts of Singapore from the East Coast to the West Coast, concentrating in the commercial business district areas in the city centre. They comprise practitioners from various organizations in both the public and private sectors, such as:

1. private legal practice;
2. private mediation organizations;
3. private consulting organizations (majority in the building and construction industry);
4. others (comprised Government departments, the Academia, and the SMC organization).

The sampling methodology used was random sampling where the sample was heavily dependant on the availability of these members, their willingness to participate in this study, and eventually to be interviewed as a respondent in this study. The approach taken was to select samples which were representative from the various areas of mediation practice so as to obtain a true representation of the sample size to complete the information gathering for this study. In the sampling of the SMC panel of practitioners, 20 of its members consented to face-to-face interviews.

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Many were sceptical about consenting to such an interview. They felt uncomfortable to share and talk about their mediation experience from the ethical aspect, and were not willing to disclose the specifics of such ethical dilemmas¹³ especially in terms of how they had handled such dilemmas.

Sampling from the CMC Panel of Mediators

The panel of 146 mediation practitioners under the CMC was more evenly distributed across Singapore than were their counterparts from the SMC panel. The CMC panel representation is divided into three (3) key districts, namely Regional East, Central, and Regional North where the heaviest representation is evident in the Central district. The logical reason is that the Central district has relatively the highest population in Singapore.

In the CMC structure of panel mediation practitioners, there is a handful of Master Mediators who are recognised with such a title. These are mediators who have achieved a requisite level of expertise and experience in mediation.¹⁴ Master Mediators have been appointed at each of these three (3) districts with a total of 60 of them with such a title at the time of this study.

The sampling methodology of random sampling was also used in the sample selection of the CMC panel of mediation practitioners. A total of 24 practitioners were sampled from 60-member of Master Mediators, where a fair representation of such practitioners was

¹³ As discussed in Chapter 5.

¹⁴ See CMC's official website on <http://www.minlaw.gov.sg/cmc>

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selected from each of these districts – eight (8) from each location from Regional East, Central, and Regional North.

The final list of practitioners sampled was dependent on those who were willing to participate in this study, and who consented to the interviews. As with the SMC panel of mediation practitioners, these Master Mediators were equally uncomfortable to discuss and to share their mediation experience on ethical issues, and how they had handled such issues in their mediation practice.

Data Analysis

The data gathered in this study attempted to represent a collective view rather than the individual experience. This study attempted to present a “big picture” scenario, i.e. a panoramic view of the entire range of ethical dilemmas encountered by these sampled mediation practitioners in Singapore.

In the analysis of the data gathered from the 44 sampled mediation practitioners based on the Questionnaire¹⁵, the following steps were taken:

1. First, the types of ethical dilemmas revealed were categorised into major groups of dilemmas. At the same time, they were compared with the nine categories.¹⁶ Any other categories revealed were tagged accordingly.
2. Second, the methods and ways of handling such dilemmas were analysed from the aspects of whether professional training of this sampled practitioners, and

¹⁵ *Supra*, at n. 5.

¹⁶ *Supra*, at n. 1.

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whether culture had any influence in the way they handled their ethical dilemmas.

3. Third, the data on the ethical dilemmas captured were compared between those observed from practitioners in commercial mediation practice, and those in community mediation practice.
4. Lastly, their opinions on the extent of the adequacy of current ethical standards, and their ideas or suggestions to improve the situation better were listed down and categorised.

ORGANIZATION OF RESEARCH

Chapter 1 focuses on the research problem in terms of the purpose of this study and the rationale therein, and the five (5) research questions, and the scope of the research. The research methodology in terms of the method of data gathering, the sampling methodology, the formation of interview questions, and the method of data analysis is also covered in this Chapter.

Chapter 2 is devoted to the definition of concepts used in this study such as mediation, being ethical, ethical dilemma, confidentiality, impartiality versus neutrality, and the like. Also covered in this Chapter is the review of previous researches of similar research areas outside of Singapore. A total of five previous researches are included, namely, researches conducted by Professor Robert A Baruch Bush (1992), Cooks and Hale (1994), Grebe, Irvin and Lang (1989), Catherine Morris (1997) and Engram and Markowitz (1985).

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Chapter 3 provides a brief account on the background information about mediation, the history of mediation practice in Singapore, and the Singapore Mediation Centre, and the community mediation practice in Singapore.

Chapter 4, on the other hand, is devoted to the review of relevant theories for this study. Relevant theories highlighted are universalism versus relativism, consequentialism versus deontological theories, virtue theory, and professional ethics.

The research findings and implications are covered in Chapter 5 where all the above five (5) research questions would be dealt with in turn based on the data gathered from the sampled mediation practitioners during the interviews and from library researches conducted in the university libraries and the court libraries in Singapore and Malaysia.

Chapter 6 closes this study with the overall conclusion of this study, and discussions on recommendations/suggestions for the consideration and development of the future of mediation practice in Singapore.

CHAPTER 2

DEFINITION OF CONCEPTS

Mediation

Mediation is a process where parties come together with an end in mind – to reach a voluntary and mutually agreed settlement or solution over their dispute with the help of a neutral third party without any compulsion or fear.

Mediation has been defined by many authors in many versions. Professor Lon Fuller (1971)¹⁷ suggests that mediation is always directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the “social norms” relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another’s problem. Pirie (1985)¹⁸ sees mediation as a process of conflict resolution in which a neutral third party helps parties in dispute reach a voluntary agreement.

Kressel and Pruitt (1985)¹⁹ define mediation as “third party assistance to two or more disputing parties who are trying to reach agreement.” According to Moore (1986)²⁰,

¹⁷ Fuller, L. L., “Mediation – Its Forms and Functions”, (1971) 44 *Southern California Law Review*, 305.

¹⁸ Pirie, A.J., “The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?”, (1985) 63 *Canadian Bar Review*, 378.

¹⁹ Kressel, K. and D. G. Pruitt & Associates, *Mediation Research: The Process and Effectiveness of Third-Party Intervention*, San Francisco: Jossey-Bass Publishers, 1985.

²⁰ Moore, C. W., *The Mediation Process – Practical Strategies for Resolving Conflicts*, San Francisco: Jossey-Bass Publishers, 1986.

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mediation is “an intervention into a dispute or renegotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”

Coulson (1987)²¹, on the other hand, opines that mediation “is a process by which an impartial third person (sometimes more than one person) helps parties to resolve disputes through mutual concessions and face-to-face bargaining.” Laurence Boulle and Teh Hwee Hwee²² describe mediation as “a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties to reach an outcome to which each of them can assent.”

According to the American Bar Association (ABA)²³ definition of mediation, it is described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.

The Australian National Alternative Dispute Resolution Advisory Committee’s (NADRAC, 1997) definition of mediation is:

“Mediation is a process in which parties to a dispute, with the assistance of a neutral third party (the mediator), identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has

²¹ Coulson, R., *Business Mediation – What You Need to Know*, American Arbitration Association, 1987.

²² Boulle, L. & H. H. Teh, *Mediation: Principles Process Practice*, Singapore: Butterworths, 2000.

²³ American Bar Association, *Alternative Dispute Resolution: A Primer*, 1987.

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no advisory nor determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”²⁴

As summed up by Robert A. Goodwin (1999)²⁵, mediation is a structured negotiation presided over by a facilitator with the skill, training and experience necessary to help the parties reach a resolution of their dispute. It is a process that is confidential, non-binding and geared to assisting the parties in structuring a mutually acceptable resolution to whatever dispute has prompted the mediation.

Being Ethical

‘Ethical’ is defined as “conforming to accepted professional standards of conduct.”²⁶ The legal definition provides “of or relating to moral action, conduct, motive or characteristics conforming to professional standards of conduct.”²⁷ It is important to consider implicit underlying assumptions which are formed from individual or group world views associated with beliefs and values when discussing whether mediation practitioners are “ethical” or not.²⁸

The question then is: what does it mean to be ethical? Does it mean acting consistently with one’s own principles, one’s own ethical compass? If so, how does one know one’s compass is accurate? Are there different (but equally valid) ethical compasses for

²⁴ Policansky, S., “Workplace Conflict Resolution – Issues and Dilemmas for Practitioners”, (2001) *Asia Pacific Mediation Forum*, Papers and Reports: Workplace Mediation.

²⁵ Goodwin, R. A., “Mediation: An Overview of Alternative Dispute Resolution”, *Mediation and the Courts*, (December 1999) 4 *Issues of Democracy* 3, 13.

²⁶ Merriam Webster’s Collegiate Dictionary (10th ed.), 1993, 398.

²⁷ Black’s Law Dictionary (6th ed.), 1990, 553.

²⁸ Bush, R. A. B. and J. P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, San Francisco: Jossey-Bass, 1994, 229.

different people in different contexts and cultures? Are there some universal ethical principles that can guide discussions about ethics? Should moral decisions be made by autonomous individuals or should they be made in the context of shared community values, rights and responsibilities?²⁹

Ethical Dilemma

The term *ethics* refers to professional conduct – the rightness or wrongness of the practitioner's actions. A generic definition of 'ethics' is "the discipline of dealing with what is good and bad and with moral duty and obligation."³⁰ Habermas (1983)³¹ opines that what becomes important in the moral-practical view is not the determination of the "right" way to act (which excuses personal experiences in favour of what ought to occur) but rather the reasons given and the moral choices made in taking such actions.

According to Conrad's definition (1988),³² an ethical dilemma denotes either an ethical conflict or issue and "refers to a situation in which the practitioner is faced with a doubt about how to act in relation to personal and professional values, norms and obligations." Hence, what most often underlies ethical dilemmas is the need to choose between competing goods or rights.³³

²⁹ Morris, C., "The Trusted Mediator: Ethics and Interaction in Mediation," In *Rethinking Disputes: The Mediation Alternative*, (Ed. Julie Macfarlane), Toronto: Edmond Montgomery, and London, UK: Cavendish Publishing, 1997, 304.

³⁰ *Supra*, at n. 26.

³¹ Habermas, J., *Moral Consciousness and Communicative Action*, (C. Lenhardt and S.W. Nicholsen, trans.), Cambridge, Massachusetts: MIT Press, 1983, 50.

³² Grebe, S. C., K. Irvin, and M. Lang, "A Model for Ethical Making in Mediation", (Winter 1989) 7 *Mediation Quarterly* 2, 136.

³³ Lewis, H., "Ethical Assessment", (1984) 65 *Social Casework* 4, 203.

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The ethical dilemma becomes one of “professional” obligations (“Am I ensuring the rights and living up to the obligations of the standards of mediation?”) exercised in the context of attempting to make sense of individual stories while looking for joint (common) vocabularies and possibilities.³⁴

Morris³⁵ opines that the definition of an ethical dilemma is a difficult choice between two or more options which make seemingly equal ethical demands (or which seem equally difficult to support). She added that disputants typically do not share the same sentiments, instead they are polarised towards their respective option over the other.

The mediation practitioner, on the other hand, perceives the dispute as a whole, and often sees that the problem initially presents itself as a “dilemmic choice” between two or more “positions” or options for solution which, seen together, are (from the mediation practitioner’s perspective) framed as “best” and “worst” by the parties collectively.

According to Grebe, Irvin and Lang (1989)³⁶, a person may experience conflict between two or more areas, resulting in an ethical dilemma. He or she may experience this dilemma because of a conflict between two or more similar areas or between two or more different types of areas.

³⁴ Cooks, L. M., and C. L. Hale, “The Construction of Ethics in Mediation”, (Fall 1994) 12 *Mediation Quarterly* 1, 55.

³⁵ *Supra*, at n. 29.

³⁶ *Supra*, at n. 32.

Some examples of potential sources of conflict are a sense of duty; a sense of obligation; a sense of responsibility; adherence to a certain principle; something viewed as an absolute; particular beliefs; personal, professional, or societal values; rules that prescribe certain behaviour; rights felt to be self-evident; codes of behaviour, professional or otherwise; statutes that prescribe or proscribe certain behaviour; and company, government or agency policy.

Lim Lan Yuan (1997)³⁷ wrote that the exertion of substantive influence by the mediator presents many ethical concerns. According to him, the ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process, which is based on mediator neutrality, without letting the process be used to violate important interests of the community or of interested but unrepresented parties.

For the purpose of this study, ethical dilemma will be described to mediation practitioners as:

“...a situation in which you felt some serious concern about whether it was proper for you as a mediator to take a certain course of action, i.e., where you were unsure what was the right and proper thing for you as mediator to do.”³⁸

It is the intent of this study to provide a wide definition of “ethical dilemma” by emphasizing the central concept. This is to allow mediation practitioners greater latitude in describing what they regard as “ethical dilemma”.

³⁷ Lim, L.Y., *The Theory and Practice of Mediation*, Singapore: FT Law & Tax, Asia Pacific, 1997, 211.

³⁸ *Supra*, at n. 1.

The key purpose of providing a broad definition is to help shed light into the levels of training and standards of practice which mediation practitioners require. It is only with a broad definition such as this that this study will be able to capture the essence of the mediation practitioners' ethical dilemmas and to examine what kinds of guidance are needed to assist them in their practice. Any narrow or formal definitions will definitely restrict the freedom of these mediation practitioners to express the situations they encountered.

It is important to distinguish between a "skills dilemma" from an "ethical dilemma". "Skills dilemma" is described as a situation where the mediation practitioner is unsure of how to effectuate the intended course of action which he/she wishes to pursue, while an ethical dilemma" is where the mediation practitioner *knows* how to effectuate the intended course of action *but* is unsure whether it is proper to do so or not.³⁹

Another point to note is that where the mediation practitioners are asked to explain the nature of their ethical dilemmas, their explanations will follow a certain form and pattern, that is, the conflict between preserving some important value versus undermining another value. This is how a dilemma occurs in the first place. In essence, there is the inevitable value conflict in each of the situations they describe.

³⁹ *Ibid.*

Confidentiality

The word “confidential” is defined in the Oxford English Dictionary as “characterised by the communication of secrets or private matters” and “enjoying the confidence of another person; entrusted with secrets.”⁴⁰ The mediation practitioner relies on the confidential information disclosed by the parties during the private caucus session in order to get the parties to address their underlying interests.

Confidentiality of the mediation process is important to ensure that parties feel free to disclose all relevant information during the mediation session. This factor encourages parties to speak openly about their interests, concerns, and desires. It has been said that “lack of confidentiality will deter disputants from using the mediation process.”⁴¹

The key contention is that the mediation practitioner must be able to guarantee that he can keep whatever promises are made concerning confidentiality unless circumstances warrant exceptions to confidentiality. Such exceptions include situations where there is compellability by a court under guiding legislation, where there are people in need of protection, during caucusing with individual parties, and the need for public accountability.

There are two (2) levels of confidentiality in the mediation process. At the first level, parties need to develop a sense of trust in the mediation practitioner. Confidentiality is

⁴⁰ Clarendon Press, Oxford, Volume III, 2nd ed., 1989, 707.

⁴¹ Pirie, A. J., “The Lawyer as a Third Party Neutral: Promise and Problems”, In *Commercial Dispute Resolution: Alternatives to Litigation*, (Ed. D.P. Edmond), Aurora Ontario: Canada Law Book, Inc, 1989, 47.

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crucial to develop and maintain mediator trust especially when comments are made privately to a mediation practitioner in private caucuses.

Mediation practitioners must emphasize the fact that all information disclosed during separate caucuses will remain confidential unless the interested party authorizes the mediation practitioner to convey that knowledge to the other side or disclosure is required under a special statute pertaining to the particular circumstances involved.

The second level of confidentiality exists when statements and comments made by parties themselves in open mediation sessions or in private negotiating sessions are considered confidential. Both levels of confidentiality are important in order to promote settlement between parties.

In the legal context, confidentiality is understood to have two distinct meanings: exclusion and privilege. In terms of evidentiary exclusion, it only limits admissibility of information at a trial. Disclosures or testimony in other situations are possible. Exclusions, however, do prohibit all parties from testifying. The information is excluded, regardless of whose testimony is sought: the mediator, an attorney or a party.⁴²

Privilege, on the other hand, provides a broader scope of confidentiality. Privileges involve parties in a relationship and generally prohibit the disclosure by one party of information revealed by the other. A privilege may prevent disclosure for any purpose, and in the mediation context, this may even include the files and records of a mediation

⁴² Kovach, K. K., *Mediation: Principles and Practice*, Minnesota: West Publishing Co., 1994.

program.⁴³ If the mediation practitioner claims mediator-disputant privilege, the court may apply the Wigmore test.⁴⁴

Impartiality and Neutrality

The terms 'impartiality' and 'neutrality' have been intertwined conceptually, linguistically and practically.⁴⁵ Some definitions overlap whilst others are contradictory to one other.

Webster's dictionary defines 'impartial' as "not partial or biased" and "treating or affecting all equally." It is synonymous with "fair" which Webster's defines as "marked by impartiality or honesty: free from self-interest, prejudice, or favouritism."

'Impartiality' refers to the way in which mediation practitioners conduct the process and treat the parties.⁴⁶ 'Neutrality' refers to mediation practitioners' prior knowledge about or interest in the outcome of disputes.

The essential criterion for neutrality is that there must be no conflict of interest in any aspect of the third party relationship with the parties in a dispute.⁴⁷ Neutrality can be

⁴³ Rogers, N. H. and C. A. McEwen, *Mediation: Law, Policy and Practice*, Chapter 8, 1989 and Supp. 1993, 115.

⁴⁴ Wigmore, J.H. Evidence Section 2285 (McNaughton rev, 1961). The four-part Wigmore test requires that (1) communications must originate in confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would endure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

⁴⁵ *Supra*, at n. 29.

⁴⁶ *Supra*, at n. 37.

⁴⁷ *Ibid*.

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defined in two (2) ways. Impartiality denotes neutrality in that the *neutral* does not allow values, bias, or emotions to interfere with the process. It can also mean maintaining equidistance between the parties.⁴⁸

Yet another approach to defining neutrality can be seen in the Rifkin, Millen and Cobb (1991)⁴⁹ two-pronged definition of neutrality which incorporates two (2) concepts of impartiality and equidistance. They state that impartiality refers to “the ability of the mediator (interventionist) to maintain an unbiased relationship with the disputants.”

This means that the mediators “make it clear that they are present simply to listen and not to influence the disputants’ explication of the case.”⁵⁰ Here, the parties are given equal opportunities to speak. They also state that equidistance “identifies the ability of the mediator to assist the disputants in expressing their ‘side’ of the case.”

Hence, mediation practitioners will temporarily align themselves with parties to support each party in that equidistance involves actively supporting each party in a “symmetrical” way. Rifkin et al⁵¹ see impartiality and equidistance (symmetrical alignment with the parties) as fundamentally contradictory to one another.

⁴⁸ Rifkin, J., “*Rethinking Neutrality*”, Paper presented at the Annual Conference of the Academy of Family Mediators, Danvers, Massachusetts, July 1990.

⁴⁹ Rifkin, J., J. Millen, and S. Cobb, “Toward a New Discourse for Mediation: A Critique of Neutrality” (Winter 1991) 9 *Mediation Quarterly* 2, 151.

⁵⁰ *Id.* 154.

⁵¹ *Ibid.*

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Laue (1982)⁵² outlines that neutrality consists of four (4) elements: (1) low or no power over the parties, (2) high credibility with the parties, (3) focus on process rather than outcome, and (4) the importance of rationality and good information in achieving settlements.

However, according to Honeyman⁵³, perfect neutrality is unobtainable even under the best circumstances. Hence, if perfect neutrality can never be achieved, then it is essential for a mediation practitioner to be aware of the nature and extent of his or her bias or partiality. He identified three (3) forms of bias – personal bias, situational bias, and structural bias.

Zilinskas (1995)⁵⁴ cautions that while every mediation practitioner strives to remain neutral in the dispute, the reality is personal traits and the circumstances of the mediation effectively prevent a mediation practitioner from achieving this objective.

Yet another definition of neutrality refers to non-intervention. Webster's dictionary suggests "neutral" means "not engaged on either side; not siding with or assisting either of two contending parties." There are two (2) sets of meanings here.

One meaning connotes fairness to all parties ("not siding") whilst the other connotes non-intervention ("not assisting"). It is the second meaning which is attached to neutrality

⁵² Laue, J. H., "Ethical Considerations in Choosing Intervention Roles", (1982) 8 *Peace and Change: A Journal of Peace Research*, 31.

⁵³ Honeyman, C., "Bias and Mediators' Ethics", (April 1986) 2 *Negotiation Journal* 2, 175.

⁵⁴ Zilinskas, A., "The Training of Mediators – Is it Necessary?", (February 1995) 6 *Australian Dispute Resolution Journal* 1, 58.

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which can be interpreted as “a kind of passive objectivity – the idea of being inert, disengaged, colourless, bland, and even impotent and powerless.”⁵⁵

Essentially, there seems to be two (2) competing ethical considerations in this definition. On the one hand, the mediation practitioner’s duty is to be neutral, and his other obligation is to achieve a fair, fully informed settlement. There is a fine line which the mediation practitioner would find it difficult to cross.

According to Bush⁵⁶, once the mediation practitioner provides advice or information to a party, his role can be viewed as an advocate. On the other hand, if the mediation practitioner empowers the parties to exercise self-determination, then it would be the mediation practitioner’s duty to ensure that decisions are made with complete understanding and information which usually is in terms of the law. The question is whether the mediation practitioner should cross the line and provide this information? Would any such advice from the mediation practitioner deem him as non-neutral?

In some cases, the concept of fairness arises when the interests of third parties are affected, for example, children. According to Schneider⁵⁷, a mediation practitioner needs to “respect client autonomy and self-determination while balancing...responsibility to unrepresented third parties and society at large.” For example, in the Standards

⁵⁵ Scambler, C. M., “The Myth of Mediator Neutrality”, (1990) 2 *The Network: Interaction for Conflict Resolution* 1, Interaction, Kitchener, Ontario, 14.

⁵⁶ Bush, R.A.B., “Efficiency and Protection, or Empowerment and Recognition? : The Mediator’s Role and Ethical Standards in Mediation”, (1989) 41 *Florida Law Review* 253, 278.

⁵⁷ Schneider, C., “A Commentary on the Activity of Writing Codes of Ethics”, (1989) 19 *Mediation Quarterly* 83, 87.

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formulated by the ABA, it is stated that, as a specific consideration of impartiality, the mediation practitioner has “a duty to promote the best interests of the children”.

The extent to which mediation practitioners intervene to ensure a fair outcome depends largely on the context. Both commercial and community mediation practitioners tend to follow the example of labour mediators where they take a non-interventionist approach to the role of the mediation practitioner⁵⁸. They act on the principle that parties should be free to do as they please, provided they are fully informed of their options.

According to the Colorado Council of Mediation Organizations (CCMO, 1992)⁵⁹, National Association of Social Workers (NASW, 1991)⁶⁰, and Academy of Family Mediators (AFM, 1985)⁶¹ standards, ‘neutrality’ involves “the relationship of the mediator to the disputants or the issues, or both, involved in mediation, where mediators have no relationship with parties or vested interests in the substantive outcome that might interfere or appear to interfere with the ability to function in a fair, unbiased, and impartial manner.”⁶²

⁵⁸ *Supra*, at n. 29.

⁵⁹ Colorado Council of Mediation Organizations, “Code of Professional Conduct”, In *Dispute Resolution: Negotiation, Mediation and Other Processes*, (Eds. Goldberg, S.B., F.E.A. Sander, and N.H. Rogers) (2nd ed.), Boston: Little, Brown & Co, 1992.

⁶⁰ National Association of Social Workers, *Standards of Practice for Social Work Mediators*. Washington, D.C.: National Association of Social Workers, 1991.

⁶¹ Academy of Family Mediators, *Standards of Practice for Family and Divorce Mediation*. Eugene, Oregon: Academy of Family Mediators, 1985.

⁶² *Supra*, at n. 54.

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‘Impartiality’ can be distinguished from ‘neutrality’.⁶³ Impartiality refers to the attitude of the intervener and is an unbiased opinion or lack of preference in favour of one or more negotiators. Neutrality, on the other hand, refers to the behaviour or relationship between the intervener and the disputants. Moore (1986) even counsels mediators to tell disputing parties that they are “impartial”, that is, that they have “no preconceived bias toward any one solution or toward one (party) over the other.”⁶⁴

ABA (1984)⁶⁵ standards assert that “impartiality is not the same as neutrality. While the mediator must be impartial as between the mediation participants, the mediator practitioner should be concerned with fairness. The mediator has an obligation to avoid unreasonable result.” In other words, while a mediator has an obligation to be impartial, a mediator is also responsible to ensure that the final agreement is fair, even if non-neutrality is necessary to achieve that objective. This is in contradiction with other standards.

The AFM⁶⁶ also distinguishes between ‘impartiality’ and ‘neutrality’ in that ‘impartiality’ implies a commitment to aid all parties, as opposed to a single individual, in reaching a mutually satisfactory agreement. Impartiality means that a mediation practitioner will not play an adversarial role.

⁶³ *Supra*, at n. 20. Moore’s attempt to clarify the differences and connections between behaviour and attitude is useful.

⁶⁴ *Id.* 157.

⁶⁵ American Bar Association, “Standards of Practice for Family Mediators”, (1984) 17 *Family Law Quarterly*, 455.

⁶⁶ *Supra*, at n. 59.

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Neutrality, on the other hand, refers to the relationship that the mediation practitioner has with the disputing parties. If the mediation practitioner feels, or any one of the parties states, that the mediation practitioner's background or personal experiences would prejudice the mediation practitioner's performance, the mediation practitioner should withdraw from mediation unless all agree to proceed.

Yet a different view by Stulberg (1981)⁶⁷ is that of the mediation practitioner who must be neutral with regard to outcome. If the mediation practitioner is to be responsible for a particular outcome, and if he is not neutral, then in essence becomes an advocate or a judge.⁶⁸

Therefore, in order to determine possible benefits, the mediation practitioner must take a position. In this case, impartiality may be lost. Authors Rogers and Salem (1989)⁶⁹ are of the view that while mediation practitioners are generally viewed as neutral, there may be an underlying duty to be fair. In the attempt to be fair, neutrality may be lost.

Mediation UK Practice Standards⁷⁰ refer to the concept of non-partisan fairness as 'impartiality', which they define as "attending equally to the needs and interests of all parties with equal respect, without discrimination and without taking sides." These standards do not use the term 'neutrality', either synonymously with impartiality or independently.

⁶⁷ Stulberg, J. B., "The Theory and Practice of Mediation: A Reply to Professor Susskind", (1981) 6 *Vermont. Law Review* 85, 96.

⁶⁸ *Id.* 116.

⁶⁹ Rogers, N. H. and R. A. Salem, *A Student's Guide to Mediation and the Law*, Chapter 6, 1989.

⁷⁰ Mediation UK, *Mediation UK Practice Standards*, Summary, Article 20, Bristol: Mediation UK, 1993.

The Model Standards of Conduct for Mediators⁷¹ defines 'impartiality' as even-handedness and lack of "prejudice based on the parties' personal characteristics, background or performance at the mediation." The CCMO (1992), Society of Professionals in Dispute Resolution (SPIDR (1987)⁷², NASW (1991) and AFM (1985) standards all define 'impartiality' as involving freedom from favouritism and bias in either word or action.

Some variations in the definition continue to point out that "impartiality implies a commitment to aid all parties, as opposed to a single party, in reaching a mutually satisfactory agreement." Hence, in order to subscribe to this strictly, a mediation practitioner must refrain from acting as an advocate or assuming an adversarial role.

Self-Determination/Party Autonomy

The fact that parties are allowed to make their own decisions is what distinguishes the mediation process from virtually all other third party approaches to conflict resolution. The concept of self-determination is so crucial that it appears time and again as part of the mediation definition and as part of the guidelines for mediation practitioners. In

⁷¹ American Arbitration Association (AAA), American Bar Association (ABA) and Society of Professionals in Dispute Resolution (SPIDR), *Model Standards of Conduct for Mediators*, Article 1, Washington, DC: Society of Professionals in Dispute Resolution, 1995.

⁷² Society of Professionals in Dispute Resolution, "Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution", (Adopted June 2, 1986; readopted June 2, 1991). In *Dispute Resolution Forum*, (Ed. R.M. Jones), Washington, D.C.: National Institute for Dispute Resolution, 1987.

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almost every instance, mediation practitioners are reminded that the essence of mediation is embodied in party self-determination.⁷³

This concept is evident in provisions that encourage mediation practitioners to recommend independent legal counsel for disputing counsels, as well as in provisions that speak to the responsibility of a mediation practitioner to prevent himself or herself from, agreements that are “not fair”.

Informed Consent

Informed consent is the extent to which the parties in the mediation process are cognizant of and fully understand the choices available to them.⁷⁴ Mediation practitioners are cautioned about their responsibilities with respect to describing the process to the parties, ensuring that the parties understand what will (and will not) occur, and determining that the parties fully appreciate the nature and provisions of any agreements that are reached.

Culture

According to Lim Lan Yuan (1996)⁷⁵, culture refers to habits, behaviour and manners of a given people at a given period of development. It comprises a unique set of attributes relating to an aspect of social life which is acquired through acculturation or socialisation by the individuals from that society.

⁷³ *Supra*, at n. 34.

⁷⁴ *Ibid.*

⁷⁵ Lim, L.Y., “Impact of Cultural Differences on Dispute Resolution”, (1996) 7 *Australian Dispute Resolution Journal* 3, 197.

He also stresses that culture is, therefore, one component which a mediation practitioner should be aware of along with all the other personality and procedural influences that are part of the dynamics of any interaction process. Western cultures and Oriental cultures need to be distinguished. Oriental cultures are different from their Western perspectives from two areas, namely, how commercial relationships are structured, and the approach used to resolve disputes.

According to Street (1990)⁷⁶, in the Oriental culture, commercial relationships are structured by a philosophical approach with major emphasis on good faith, strong consensus, moral persuasion and balance or harmony in human relationships. However, in the Western culture, relationships are structured based on precision in documentation and the application of principled legality.

In terms of the approach to resolving disputes, a more adversarial approach is preferred in the Western culture.⁷⁷ In contrast, a friendly negotiation or consultation is the practice where the ideology behind the discouragement of litigation is deeply reinforced by the Confucian teachings of moral persuasion.⁷⁸

⁷⁶ Street, L., "The Court System and Alternative Dispute Resolution Procedures", (1990) 1 *Australian Dispute Resolution Journal*, 5.

⁷⁷ Sarat, A., "The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions", (1985) 37 *Rutgers Law Review*, 321.

⁷⁸ Kim, C., "The Modern Chinese Legal System", (1987) 61 *Tulane Law Review*, 1413.

REVIEW OF PREVIOUS RESEARCHES

Introduction

We have seen in the previous Chapter that the variety of ethical issues facing mediation practitioners is considerable. Mediation practitioners also face the difficulty of determining which issues to address in the numerous codes of ethics and professional standards of practice governing mediation practice and their respective professions.

As mediation practitioners tend to consider ethics most intensely when they are in a dilemma, ethical dilemmas faced by these practitioners is an interesting research area. It is no surprise, therefore, that numerous studies and researches have been conducted on this subject.

This Chapter focuses on five (5) major such studies conducted in the United States of America, namely:

1. The study conducted by Robert A. Baruch Bush, Professor of Law, Hofstra Law School, Florida, USA for the National Institute for Dispute Resolution in 1992.⁷⁹
2. The Cooks and Hale research in 1994 on the Hewlett seminar.⁸⁰
3. The Grebe, Irvin and Lang study and proposal on the Dilemma Framework in 1989.⁸¹

⁷⁹ Bush, R. A. B. (1992), *Loc. cit.*

⁸⁰ Cooks, L. M., and C. L. Hale, *Loc. cit.*

⁸¹ Grebe, S.C., K. Irvin, and M. Lang, *op. cit.*, 133-48.

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4. A similar concept called the Practical Framework as proposed by Catherine Morris in 1997.⁸²
5. An interesting observation by Engram and Markowitz who attempted to compare the ethical dilemma situations in divorce and labour mediation practices in 1985.⁸³

Professor Robert A. Baruch Bush (1992)

In 1992, Professor Bush attempted to determine what issues mediation practitioners face in practice in the State of Florida. He studied the ethical dilemmas faced by nearly 700 mediation practitioners in three major mediation fields, namely, community, divorce and civil, in both court-adjunct mediation programmes and private practice. In this study, he sampled over 80 mediation practitioners, both lawyers and non-lawyers where the mix was roughly 30 divorce, 35 community, and 15 civil mediators.⁸⁴

The method of gathering the required information was through interviews where these mediation practitioners were asked to describe situations which they had encountered in practice that presented some kind of ethical dilemma regarding the proper course of action to be taken as a mediator.

⁸² Morris, C., *Loc. cit.*

⁸³ Engram, P. S. and J. R. Markowitz, "Ethical Issues in Mediation: Divorce and Labor Compared", In "Making Ethical Decisions", (Ed. J.A. Lemmon), (June 1985) 8 *Mediation Quarterly*, 19-32.

⁸⁴ Bush, R. A. B. (1992), *op. cit.*, 5.

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They were then asked to explain why they viewed those situations as dilemmas, that is, mediation practitioners were asked to explain in their own words these situations from their own practice that involved encountering ethical dilemmas.⁸⁵

The definition of the term “ethical dilemma” used by Professor Bush was broad because his goal of the research was to identify the nature of mediation practitioners’ ethical concerns. He had defined “ethical dilemma” as “a situation in which you felt some serious concern about whether it was proper for you as a mediator to take a certain course of action, i.e. where you were unsure what was the right and proper thing for you as mediator to do.”⁸⁶

In order to avoid confusion and to maintain clarity for the mediation practitioners, Professor Bush distinguished between a “skills dilemma,” where he defined it as “where the mediator is unsure of how to effectuate the course of action he/she wants to pursue, and an ethical dilemma, where the mediator knows how to effectuate the course of action but is unsure of whether it is proper to do so at all.”⁸⁷

In other words, in Professor Bush’s study, he made a clear distinction of skills dilemma where the mediation practitioner *did not know* how to implement a chosen course of action, as compared to an ethical dilemma where the mediator *knew* how to implement his plan of action, except that he was not sure about the effect it might have, whether it was right and proper to do so, in the first place.

⁸⁵ Bush, R. A. B. (1992), *op. cit.*, 6.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

Therefore, his study was not about the competence of the mediation practitioner in carrying out their work. Instead, it was about whether the mediation practitioner felt what was proper and right to do as the parties' issues come to light during the mediation session.

His study tried to fill the gap in the contemporary research on mediation ethics because it focused on ethical dilemmas themselves rather than suggested or recommended answers to ethical problems. Professor Bush was not interested to find solutions to the identified ethical problems. Instead, he incorporated the opinions of a number of sampled mediation practitioners, and not looked at the experience of a single mediation practitioner.

Further, he identified a range of ethical dilemmas, including sub-sets of such a range, and not just one ethical concern. These dilemmas were grouped into categories which were based on similarities and differences of the shared opinions and experiences of the sampled mediation practitioners. Therefore, this study is of a more descriptive contribution, rather than an analytical one.

The range of ethical dilemmas which came to light in Professor Bush's study fell into nine types. Each of these dilemmas was further sub-divided into several different situations and was illustrated with an example as encountered by the mediation practitioners. Professor Bush made no attempt to provide definite solutions to each of these described situations.

Instead, he posed relevant questions, hypothetical situations, assumptions, and “what ifs” to challenge one’s ethics on what is the right and proper course of action to take. He also played the Devil’s advocate in trying to demonstrate the flip side of the coin, so to speak. So, for every described dilemma, there was a specific illustration used. These illustrations came from the experiences shared by the mediation practitioners during the interviews.

In his study, Professor Bush was able to articulate the following situations, namely:

1. the skills that the dispute demands go beyond the mediation practitioner’s training. The example cited was the mediation practitioner’s inability to identify signs of abuse or violence in a family mediation session; or that the mediation practitioner was not able to recognise a party’s inability to comprehend the situation at hand, etc.;
2. the mediation practitioner’s impartiality is challenged by prior relationships with the parties, or his or her emotional reactions to the parties’ behaviour during the mediation session such as sympathy, antipathy, etc.
3. maintenance of confidentiality in cases of possible illegal actions of the parties or a potential unfair settlement, or where disclosure will convince the party to accept the proposal;
4. the lack of informed consent between the parties due to coercion, mental disturbance or lack of information;

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5. tension between the mediation practitioner's impartiality and the temptation to give solutions or direct the process toward more fair solutions;
6. tension between the mediation practitioner staying neutral and providing necessary professional legal or therapeutic advice;
7. the possibility of harming the parties if an agreement is not reached because of the information disclosed or emotionality that the process caused (or agreement itself does not solve the parties' problems);
8. the use of mediation by the parties to gain information, win time, or intimidate the other party; and
9. conflict between the mediation practitioner's self interests and what is the proper process for the parties such as pressure from the court to complete the case fast, maintaining relationships with lawyers and other professional groups.

Professor Bush had used the data he had gathered on ethical dilemmas to help him identify the range of ethical dilemmas on which mediation practitioners needed guidance in terms of training and setting standards of practice. He was able to contribute to the need for ethical standards for mediation practitioners in Florida where he had made recommendations on the implementation of structural measures, training and standards to the current mediation policy in Florida.

The findings indicated concern about issues of confidentiality, conflicts of interest, competency, preserving impartiality, informed consent, preserving self-determination, provision of counselling and legal advice, and avoiding harm and abuse in the process. In

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essence, Professor Bush emphasized four (4) points in evaluating the findings in his study.

First, his study brings some new insights to the research on ethical issues in mediation, where they add new categories of dilemmas such as consent and exposure dilemmas; they also provide sub-categories of dilemmas within each category; they also provide the level of details on examples of dilemmas and their sub-categories, which give a greater basis for understanding the nature of these dilemmas.

His study also examines the value conflicts that are produced by the situations shared by the mediation practitioners in the interviews. In other words, the findings provide information about the understanding of the mediation practitioners of why each of these situations represents a dilemma, that is, what the problem really is.

Second, his study shows that the ethical dilemmas are similar in all three areas of mediation practice researched, namely, community, divorce, and civil mediation, where there is commonality across the board. Therefore, general standards of practice could be developed and enhanced consistently for this practice, which would be applicable to all mediation practitioners.

Third, the categories sometimes overlap each other, but categorization is often useful because it helps mediation practitioners to recognise the different types of situations more easily which they encounter and experience ethical dilemmas during mediation sessions.

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It also helps them to recognise the different categories of dilemmas that the same situation can present. Some of these categories reveal the opposing nature of the mediation practitioner's obligations and the necessity to establish a system of value preferences.

Lastly, most of the ethical dilemmas are caused by the mediation practitioner's concern about the parties' autonomy and their capacity for self-determination, which often competes with other values. Thus, one of the main values of the mediation process is for mediation practitioners to encourage, preserve and strengthen parties' self-determination. They have to remain vigilant in this respect all the time.

As Professor Bush had noted, the primary purpose of his study was to identify the range of ethical dilemmas on which mediation practitioners need guidance from training and standards of practice. The findings in his study clearly indicate that mediation practitioners in the three areas of mediation practice – community, divorce, and civil mediation – face numerous and intense dilemmas which they really feel the need for guidance.

Based on that observation, Professor Bush noted some key implications of his findings for policy. First, he observed that his findings provide both encouragement as well as caution regarding the use of mediation in a broad range of disputes.

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On the one hand, they show that mediation practitioners do care about the effect of the mediation process on the parties and that they are sensitive to what the risks are and are committed to avoiding such risks. Therefore, mediation practitioners themselves are describing the problems and asking for guidance on how to deal with such situations or dilemmas. This is cause for encouragement which is definitely not a picture of an irresponsible and abusive group of professionals.

On the other hand, Professor Bush's findings also raised the caution and concern which stem from the fact that mediation practitioners are left alone in dealing with ethical issues. They know that they need guidance on training, standards, supervision, etc.

There are no standard rules that would help them to choose the right direction or the proper direction between competing values and objectives. He observed that the current standards contain inconsistencies such as suggesting that mediation practitioners continue to pursue values even when they clash. These rules are also very general and do not provide specific examples of situations and specific responses.

The second policy implication noted by Professor Bush is on structural measures to be taken to assist mediation practitioners with addressing certain ethical dilemmas such as the temptation to act as counsellors and resource experts. The process is staged so that the parties get professional help from counsellors and experts before and after the mediation session. However, such measures do raise administrative and financial issues by incurring additional services and costs.

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The third area lies in training and standards which are answers to addressing dilemmas such as mediation practitioner's temptation to be directive cannot be resolved by structural measures. This is one area where the need for system of practical guidance cannot be overemphasized; also an area where it requires careful and systematic training of mediation practitioners in recognizing the existence and importance of ethical dilemmas and in generating responses to them in specific situations.

It should help mediation practitioners to understand why each situation presents a dilemma. Such training also allows the mediation practitioner to be familiar with the standards of practice, on what are appropriate and inappropriate, or proper and improper responses to ethical dilemmas, that is, give them a set of standards and guidelines to follow, including ongoing practice and supervision by building on previous efforts and curing any deficiencies along the way.

Hence, Professor Bush's findings are relevant because they suggest a structure containing concrete examples and possible responses. Further, they identify a range of broadly-defined ethical dilemmas that contain value conflicts at the core. Therefore, standards of practice should address these value conflicts, as well as establish priority of values.

In the light of the above observations, standards should be clear and coherent and should reflect a consistent commitment to the principle of self-determination of the parties. In

any case, these standards should be based on the values priority system which allows for clarity and coherency when principles and values conflict.

In concluding his study, Professor Bush opines that for mediation to keep its promise for the future, its benefits should be supported by the ranks of both the mediation practitioners and policy makers. As mediation practitioners could only do so much, it is time for policy makers to do more to provide the assistance and guidance to these practitioners.

Lastly, he proposed some “Standards of Practice for Mediators”⁸⁸ which is a tentative effort to formulate standards that would be responsive to the kinds of dilemmas presented in his findings, and consistent with the principle of self-determination which came out as the most significant and important principle to the mediation practitioners during the interviews.

Professor Bush’s effort is a beginning attempt to show how the concepts of “empowerment” and “recognition”, if accepted as guiding principles, would affect standards of practice. It should also be noted that the proposed standards focus specifically on categories of ethical dilemmas which cover areas of mediation practice that these practitioners seem to find most problematic.

⁸⁸ Bush, R.A. B. (1992) under “Appendix”, pp 34-36. The Standards as presented here are primarily original in form and content; but they are based in part on a draft version of the Florida Standards of Professional Conduct for Court Appointed Mediators.

In response to Professor Bush's study, there were at least two criticisms on his work on ethical dilemmas. Davis, A. M. (1994)⁸⁹ stressed on the qualitative aspects of Professor Bush's study, and that it had its weaknesses of not being an empirical quantitative study. Stulberg, J. B. (1994)⁹⁰ had made similar comments as Davis. Professor Bush had attempted to defend his 1992 study when he replied to these comments in 1994.⁹¹

Cooks and Hale (1994)

The Cook and Hale research was conducted in two (2) stages. In the first stage, the researchers examined five codes of conduct for mediation practitioners, that is, the "standards of practice for mediators" of five different groups. These five documents were those prepared or subscribed by the ABA (1984), NASW (1991), SPIDR (1987), Colorado Council of Mediation Organizations (1992), and AFM (1985). This last set of standards is also subscribed to by, among other groups, the Association of Family and Conciliation Courts (1989).

Essentially, these codes represent formalised efforts by various groups of the mediation community to describe and dictate appropriate behaviours for these mediation practitioners. Hence, these codes serve as a starting point in the researchers' attempt to describe the themes of ethical practice of mediation. In their attempt to identify these themes, particular situations or dilemmas that are common across these documents and the language used from other fields were introduced into the mediation practice.

⁸⁹ Davis, A. M., "Ethics: No One Said It Would be Easy: Bush's Contribution to Mediation Practice", (1994) *Journal of Dispute Resolution* 1, pp 75-79.

⁹⁰ Stulberg, J. B., "Bush on Mediator Dilemmas," (1994) 1 *Journal of Dispute Resolution*, pp 57-69.

⁹¹ Bush, R.A.B., "A Reply to the Commentators on the Ethical Dilemmas Study," (1994) 1 *Journal of Dispute Resolution*, pp 87-91.

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In these documents, the researchers looked at four themes which constitute cornerstones of the ethical practice of mediation, namely, party self-determination, informed consent, mediator impartiality, and mediator neutrality. The researchers attempted to develop an understanding of what is involved with each and the difficult challenges that each poses for a mediation practitioner.

In the second stage of the research, Cooks and Hale analysed two transcripts which were tape-recorded in the Hewlett seminar.⁹² This seminar dealt specifically with the concepts of fairness, ethical considerations for mediation practitioners, and social and procedural justice and responsibilities inherent to the mediation process.⁹³ Their interest was in the coherent sets of beliefs concerning conflict, justice, fairness, and mediation that were revealed within the stories that were told and the participants' reactions to these stories.

They were interested in the ways in which mediation practitioners defined these terms (conflict, justice, fairness, and mediation), apart from the context of mediation. They wanted to find out how the seminar participants' stories about the meanings of justice and fairness speak to their responsibilities as professionals, and their responsibilities, as mediation practitioners, to a profession?

The participants who took part in this three-week seminar comprised approximately 25 to 30 professionals in the social science and legal fields for the purposes of teaching and

⁹² Hewlett Socio-Legal Institute on Dispute Resolution is sponsored by the Center for Socio-Legal Studies at the Ohio State University College of Law.

⁹³ Cooks, L. M., and C. L. Hale, *op. cit.*, 60.

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researching mediation. These “students” were lawyers, mediation practitioners, law school and college professors, former judges, university administrators, graduate and law school students, and social services professionals.

All of the participants had some background in mediation though the levels of experience and areas of mediation practice varied greatly. Aged between 25 to 70 years, they held a variety of professional positions in areas such as social work, law, and communication, and had experience in teaching law to elementary school classes. The moderators for this seminar were leading researchers in the field of mediation, each having contributed, either directly or indirectly, to the various codes of standards and practices.

A video-taped mediation scenario involving a landlord-tenant dispute was shown to the participants and the contents analysed. The participants had to assess this scenario in terms of their hypothetical participation in this “ethical dilemma” and to construct a discourse on how this dilemma could be dealt with both procedurally and systematically.

The analysis of these discussions attempts to identify two areas, namely, the primary concerns that emerged as the seminar participants discussed their assessments of the video-taped mediation, and the “framing” of these concerns which emerged in the questions, comments, and summaries provided by the seminar moderators.

One of the themes which emerged from this research was the concern for freedom of expression that the party who was perceived as more powerful was not allowed to express

his emotions. The mediation practitioner's attempt to engage in a fair discussion meant that emotional outburst such as anger, offensive behaviour, etc must be controlled.

Ethical considerations in terms of the rights of individuals to be engaged in free and open discussions were raised. One of the concerns raised was the mediation practitioner's apparent loss of control or failure to exercise control with respect to the mediation process is seen to put the process in jeopardy.

Yet another area of concern was the settlement dilemma on equalizing content and procedure. In the video-taped scenario, the participants discussed the fairness of the proposed settlement in terms of the ethical choices made by the mediation practitioner. On the one hand, the issue of dependence is important to any ethical consideration in mediation where the complainant's story is the foundation on which all other stories must be built.

On the other hand, the ideas of neutrality and impartiality expressed in ethical codes establish a basis on which a mediation practitioner should be able to judge the "sense" of the differing realities for each party, where no one person's story should be privileged above all others.

In this situation, according to Cooks and Hale, the mediation practitioner can attempt to reconcile this dilemma by allowing each party ample time to tell his or her story. Although the mediation practitioner is obligated to be an impartial listener, rationality for

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the mediation practitioner ultimately lies in making sense of the stories told. Making sense means establishing coherence between the stories told and other stories about what is fair or ethical treatment in human relationships.

Ultimately, ethical considerations raised about the fairness of the mediation procedure lies in the ability of the mediation practitioner to maintain a balance of power. As inconsistent as it sounds, the mediation practitioner must remain impartial (unaffected by the parties' stories) while creating opportunities and situations for parties to express themselves fully.

It can be seen that the Cooks and Hale research does raise the "paradoxical loop"⁹⁴ in which mediation practitioners find themselves in. In fact, the lack of resolution of ethical dilemmas lies in this loop. Mediation practitioners recognise their obligation to uphold the ethical codes of their profession.

They begin their mediation sessions by telling parties that the role of the mediator is to serve as a neutral, impartial third party; yet in recognising such concerns as procedural fairness and protecting the balance of power and the self-expression of parties, mediation practitioners must contradict their earlier statements about neutrality and impartiality.

Therefore, in order to counterbalance the impact of their earlier assertions, mediation practitioners are seen to perform a few discursive acts such as summarising the parties'

⁹⁴ Rifkin, Millen and Cobb (1991) at p. 153 explained the "strange loop" concept to consist of four steps, each one logically leading to the next, where the fourth step returns directly to the first step.

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story and then allow for elaboration. It is here that mediation practitioners can be seen to explore the possibilities for resolving or restructuring them. It is at this point that they assert their impartiality again.

The loop back to the original statement of neutrality and impartiality allows the mediation practitioner to make “sense” out of the “nonsense” of this process, to achieve coherence between the discourse of the process and the structures that define it as mediation rather than arbitration or adjudication.⁹⁵

The purpose of these discussions was not to formalise a new code of ethics for mediation but rather to involve the seminar participants to explore where and when ethical dilemmas were present during the video-taped scenario. The researchers had successfully been able to achieve the purpose of providing a forum for raising questions about distinctions between the ideal of mediation, as portrayed and described in the various standards documents, and the subjective construction of ethics by mediation practitioners in actual mediation practice.

This research is similar to Bush’s (1992)⁹⁶ on the need to focus on ethical dilemmas as a foundation for formalised ethical standards. However, the difference lies in the argument by Cooks and Hale that the ways ethics are talked about and deliberated over will set the standards by which principles of fairness and justice are ascribed to the mediation process. It is about framing these ethical dilemmas.

⁹⁵ Cooks, L. M., and C. L. Hale, *op. cit.*, 73.

⁹⁶ Bush, R. A. B. (1992), *Loc. cit.*

Grebe, Irvin and Lang (1989)

The researchers recognise the fact that mediation practitioners are constantly faced with ethical dilemmas in their practice. Unfortunately, many of these mediation practitioners do not possess the relevant background in philosophy or the philosophy of ethics, nor do they engage in philosophically informed discussions of the dilemmas they experience or encounter in their mediation practice. In fact, they have not been trained in this area, nor is it part of the training for mediation practitioners, nor is it part of the training of their previous disciplines.

Be that as it may, these mediation practitioners are often uncomfortable about certain aspects of the cases they encounter, and are unsure about what should be proper and right thing to do. Often times, they would use their own wisdom which they had learned from their main professions, and their own personal biases and values in making their decisions.

In the light of this situation facing mediation practitioners today, the researchers developed a model for ethical decision making for a workshop to sensitise family mediation practitioners to ethical decision-making issues.⁹⁷ In addition to this, the model was developed to fill a basic need in family mediation, that is, the need for a format which mediation practitioners could easily follow where the necessary elements for making informed decisions would be incorporated, as well as tools which they already possess would be utilised.

⁹⁷ Grebe, S. C., K. Irvin and M. Lang, *op. cit.*, 136.

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According to the researchers, their main objectives of this ethical decision-making model are to enable mediation practitioners to perform the following tasks, namely:

1. to identify an ethical dilemma⁹⁸;
2. to understand how to apply a four-step problem-solving process already used as part of mediation to reach a decision regarding an ethical dilemma; and
3. to identify factors involved in reaching a particular decision concerning an ethical dilemma, that is, to be able to ask why.⁹⁹

In developing this model, the researchers recognise that the issues which are usually raised by mediation practitioners could be categorised into issues concerning confidentiality, power imbalances, and relationships with other professionals and professions, rights of children, a client's ability to mediate, dual relationships with clients, responsibilities to a funding source, quality of service, etc.

It should be noted that these mediation practitioners do not have a structured and organised manner in which resolutions are reached in the cases they mediate. Often times many of them feel that they do so in a haphazard way while others complain about the conflicting responsibilities to various professional codes, agency politics, clients, and their own personal values.

⁹⁸ *Supra*, at n. 32 on their definition of an ethical dilemma, and examples of potential sources of conflict.

⁹⁹ *Id.* 136.

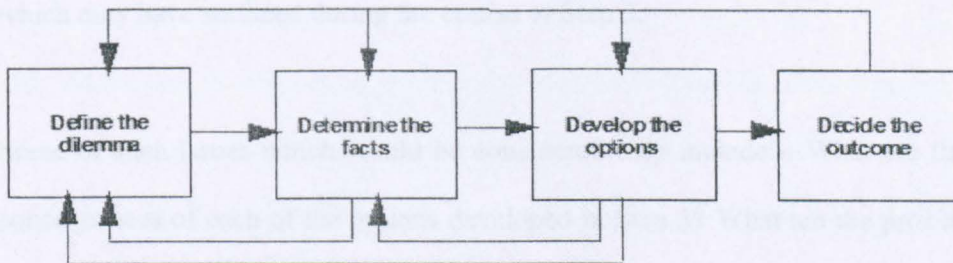
The researches also opined that the best codes of professional conduct could only provide partial direction and guide to mediation practitioners on how to grapple with ethical dilemmas. According to Levy (1976)¹⁰⁰, such codes are “preambular in nature, since they are unable to reflect the complexity of ethical issues found in professional practice.”

Hence, it is inevitable that mediation practitioners would have to reach their own decisions regarding how they manage their ethical dilemmas, even without the proper and appropriate guidance, and without an operational framework. The researchers believe that mediation practitioners must know how to solve this problem. It is the researchers’ contention that this problem-solving process could be adapted for use for mediation practitioners to solve their ethical dilemmas as well.

The problem-solving process introduced in this research which comprises four (4) key steps has been somewhat modified to suit the situations involving ethical dilemmas.

Figure 1 below presents the process flow from Step 1 to Step 4.¹⁰¹

Figure 1: Problem-Solving Model for Ethical Decision Making



¹⁰⁰ Levy, C. S., *Social Work Ethics*, New York: Human Sciences Press, 1976, as cited in Grebe, Irvin and Lang, p 138.

¹⁰¹ Grebe, S. C., K. Irvin and M. Lang, *op. cit.*, 139.

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The four (4) steps are:

1. Define the dilemma. What is the conflict? What two or more areas are in conflict?
2. Determine the facts. What are the facts of the situation, including the mediation practitioner's values, concerns and biases?
3. Develop the options (or resolutions). What are the courses of action open to the mediation practitioner?
4. Decide the outcome. How to resolve the situation from the options developed?

For each of these steps, the mediation practitioner would need to decide whether to proceed to the next step at each transition (between two steps), or return to the previous step, or to continue to work within the current step. Once Step 2 is satisfied, the mediation practitioner should then proceed to developing options for resolution, i.e. Step 3.

The researchers say that it is possible that as mediation practitioners generate various options in resolving ethical dilemmas in Step 3 that they realise that before moving to Step 4, they must first return to Step 2 to gather information about other considerations which may have surfaced during the course of Step 3.

Some of such issues which would be considered may include – What are the potential consequences of each of the options developed in Step 3? What are the pros and cons of each of these options? How would these options be prioritised? In prioritising these options, what other principles ought to be followed that outweighs the expected outcome?

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Does the mediation practitioner believe that the expected outcome is more important than a particular principle which may be violated? Would adherence to such principles be equally important as the expected outcome?

Once these answers are ready, the mediation practitioner may proceed to Step 3 again. By this time, the mediation practitioner may find that a particular option would be preferred. However, it is prudent to generate new options and streamline previous ones before moving to Step 4 to select the final option. It can be seen that this process flow allows the mediation practitioner to go through these steps in the decision-making loop in a cyclical manner until a final option is reached.

In their attempt to illustrate the application of this ethical decision making process, the researchers introduced an actual problem involving Mary and Bob who wish to mediate their separation¹⁰² on four major settlement areas – parenting (including custody of their three children), division of marital property, spousal support, and child support. The dilemma identified in this actual problem was the right to self-determination versus requirement for full financial disclosure and the right to financial security.

The researchers in concluding their study observe that mediation practitioners do often face difficult questions of appropriate behaviour with the parties. These questions do constitute ethical dilemmas which mediation practitioners need to grapple with. Various codes and standards of practice have not been able to provide the proper direction and definitive answers.

¹⁰² *Id.* 140.

Mediation practitioners have no choice but to resolve these dilemmas themselves. However, the recommended problem-solving model for ethical decision making should provide better insight to mediation practitioners for use in their practice.

Catherine Morris (1997)

Morris focused on the narrow and broad approaches to ethics in mediation. In the narrow approach on ethics, the emphasis is on the exclusive focus on the mediation practitioner whilst the broad approach on ethics emphasizes on the interaction between the mediation practitioner and the parties.

Basically, the narrow approach focuses exclusively on the mediation practitioner's role, that is, on the ethical dilemmas faced by the mediation practitioner. However, in the broad approach, the interaction between the mediation practitioner and the parties offers itself as a solution to overcoming the ethical dilemma faced by the mediation practitioner.

Essentially, the definition of an ethical dilemma is a difficult choice between two (2) or more options which make seemingly equal ethical demands (or which seem equally difficult to support). However, parties do not see the problem this way because each party sees one of the options as benefiting them.

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The mediation practitioner, however, perceives the dispute as a whole, and would see the problem initially posing itself as a choice with a dilemma, that is, when seen together is framed as “best” or “worst” by the parties collectively.

Hence, applying the broad approach, the mediation practitioner interacts with the parties in ways which help them recognise the reframed problem as a difficult jointly-held ethical dilemma in which both parties can help to resolve. This is the case which provides the opportunity to transform the nature of the ethical dilemma. However, this transformative role becomes complicated as the mediation practitioner’s own independent ethical perspectives interact, either explicitly or implicitly, with those of the parties.

Morris’ article also introduced some relevant questions in this study. What does it mean to be “ethical”? Does it mean acting consistently with one’s own principles, one’s own ethical compass? If so, how does one know whether one’s compass is accurate?

Are there different (but equally valid) ethical compasses for different mediation practitioners in different contexts? Are there some universal ethical principles that can guide discussions about ethics? Should ethical decisions be made by autonomous individuals? Or should they be made in the context of shared community values, rights and responsibilities?

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Morris' article has shed some light into the areas of recommendation in providing the right solutions to the problems at hand – how mediation practitioners grapple with ethical dilemmas professionally including a practical step-by-step framework for mediation practitioners to follow when making ethical decisions.

Another key area in this study is the protocols and ethical responsibilities for lawyers who may function as mediation practitioners. This does shed some light on whether professional training of these practitioners is a factor in creating any ethical dilemma amongst these practitioners. The basis of this research problem is that lawyers do possess their own legal professional code of conduct.

According to Pirie, AJ¹⁰³ “if he acts as a formal mediator in a dispute not involving present or past clients, there are few professional problems. He is required to clearly differentiate his role as a lawyer from that of a mediator.” As a mediation practitioner, he is not to give legal advice.

As long as the roles are kept separate, the lawyer may act as a mediation practitioner. However, the lawyer may find himself in a difficult situation when the lawyer seeks to mediate in a dispute which involves one of his clients. The issue of ethics then arises.

In Morris' study, she worked on the premise that no code of ethics could imagine and take into account every ethical dilemma encountered by mediation practitioners. Further,

¹⁰³ Pirie, A. J., *op. cit.*, 378.

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she opines that prescriptive codes of ethics could also backfire where the certain unexamined mediation practices may be encouraged.

This happens when the code of ethics do not indicate specific contexts in which they are intended to be used, or fail to acknowledge the values on which they are based. According to Morris, these are the reasons why codes of ethics are incapable of providing a complete and universal guide for conduct of mediation practitioners.

Morris agrees with Professor Bush¹⁰⁴ that conduct of guidelines are most useful when they articulate the desired purpose of mediation and their underlying assumptions whilst enabling mediation practitioners to work out the specific details in their practice.

However, the question remains – how can mediation practitioners work through practical tensions and dilemmas in their practice on a daily basis? It is in this context that Morris recommends a practical framework¹⁰⁵ for mediation practitioners for considering ethical issues in mediation.

According to Morris, the recommended framework could be used, developed, or modified by individual mediation practitioners, groups of mediation practitioners in a business or non-profit agency, boards of directors of mediation organizations who may be

¹⁰⁴ Bush, R. A. B. (1992), *Loc. cit.*

¹⁰⁵ Morris acknowledged sources of material for this framework from Bush, R. A. B., *Loc. cit.*; Barsky, A. E., "Issues in the Termination of Mediation Due to Abuse," (1995) *Mediation Quarterly* 13, 19-35; Callahan, J. C. and T. Grassey, "Appendix 2: Preparing Cases and Position Papers" in Callahan, J. C. (ed), *Ethical Issues in Professional Life*, 1988, New York: Oxford University Press, 465-76; Cooks, L. M., and C. L. Hale, *Loc. cit.*; Davis, A. M., *Loc. cit.*; Grebe, S. C., K. Irvin and M. Lang, *Loc. cit.*

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considering developing standards, or even by policy makers who may be considering establishing mediation legislation, regulations, or programmes, as they deem fit. This framework is also flexible to the extent that all or parts of this framework could be used during the mediation session to help mediation practitioners to work through their ethical dilemmas.

Another aspect of flexibility of this framework is that even though this is a step-by-step process, mediation practitioner could start from any step and move around backwards and forward depending on the situation which is in mediation. The cited example¹⁰⁶ of such a framework which mediation practitioners could develop to help them work through the ethical dilemmas they face in their day-to-day work is outlined below.

A. Know yourself

1. Understand your general ethical values. This is important as this will help anchor important decisions, and assists you to discern the relevance and value of advice you are given. Some pertinent questions which you could ask yourself are:
 - a. Do you believe in some ethical principles which you consider to be universally applicable?
 - b. Do you believe that some ethics are culturally or individually relative?

¹⁰⁶ Morris, C., *op. cit.*, 340-42.

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- c. Do you believe that ethics must be determined with each new situation? If so, on what basis do you decide what is ethical in each situation?
- d. Do you believe that “doing things right” is “right” regardless of foreseen consequences?
- e. What do you tend to emphasize: justice or caring; rights or responsibilities?
- f. What is your attitude to those who hold ethical values different from your own?

Guidance can be found through cultural traditions, religious teachings and sacred literature, mediation literature and codes of ethics.

2. Understand your (or your organization's) values concerning the practice of mediation. What are the quality goals of mediation, and your definitions of success?
 - a. Party autonomy
 - b. Party satisfaction
 - c. Community solidarity
 - d. Social justice
 - e. Social order
 - f. Personal, group or societal transformation
 - g. Cost/efficiency
 - h. Settlement rates
3. How do these goals mesh with your general ethical beliefs?

4. What are your (or your organization's) views concerning the following nine topics¹⁰⁷:

- a. Keeping within the limits of competency;
- b. Preserving impartiality;
- c. Maintaining confidentiality;
- d. Ensuring informed consent;
- e. Preserving self-determination/maintaining non-directiveness;
- f. Separating mediation from counselling and legal advice;¹⁰⁸
- g. Avoiding party exposure to harm as a result of mediation;
- h. Preventing party abuse of the mediation process;
- i. Handling conflicts of interest.

5. Analyse a variety of codes of ethics and read relevant literature.

6. Compare your ethical understandings with those of others engaged in the practice of mediation.

B. Understand the problem

1. Define the ethical problem in question.

- a. What are the issues?
- b. Outline all the relevant facts, including facts that would support any of the possible courses of action.

2. Define the moral principles and values involved in the particular issue or dilemma (for example, honesty, loyalty to family or friends, keeping promises).

¹⁰⁷ *Supra*, at n. 1. These nine topics are the nine categories of ethical dilemmas identified by Professor Bush in 1992.

¹⁰⁸ Davis, A. M., *op. cit.*, 75-9. Davis describes this as "role limitation".

CHAPTER 2 – DEFINITION OF CONCEPTS

- a. The dilemma is, by definition, a problem in which a choice must be made between two principles and it seems that one cannot do both.
 - b. Some dilemmas are not really dilemmas in that the “right” choice seems clear; the problem is that the “right” choice is not a palatable or easy choice.
3. Define the options.
- a. What are all the possible decisions that could be made?
 - b. What are the possible consequences to everyone of each possible decision?
 - c. How grave are the consequences?

C. Consider how to involve the parties

1. To the extent possible, discuss the ethical problem with the parties.
 - a. What is the parties’ understanding of the ethical dilemma of the problem?
 - b. In what ways could the problem be jointly framed by the parties?
 - c. What ideas do they have about how to resolve the dilemma?

D. Make decisions

1. To the extent possible, involve the parties in making the decision.
2. Make a tentative decision, reflect on it, and modify as necessary.
3. Communicate and implement the decision.
4. If appropriate, consider drafting clauses in mediation agreements to prevent future problems of a similar nature.

Engram and Markowitz (1985)

The approach taken by these researchers on the issue of ethical dilemmas faced by mediation practitioners is on a comparative manner. Two (2) fields of mediation practice were analysed – divorce mediation, being a new field was compared to labour mediation which is more established – under four (4) different ethical issues namely, neutrality, confidentiality, competence, and interface with other professionals.

The researchers feel that in divorce mediation situations, by using the comparative approach of comparing with labour mediation cases, they would be able to re-examine one's original background and training, and this can demonstrate the shared concerns all mediation practitioners have for ethics. A new perspective can also help to illuminate those fields from which it would be most useful to draw.

The example cited by the researchers was the benefits of looking to the therapists or to human service guidelines, rather than to labour negotiations, for divorce mediation dilemmas where child abuse could be an emotional element. Further, by discussing a cross-section of ethical principles, they could show the different kinds of ethical choices made in these two types of mediation practice.

On the issue of neutrality on the part of the mediation practitioner, the researchers raised three (3) areas of concerns facing the mediation practitioner. The first one is the question of how personal biases (for example, gender biasness) can be handled so as not to

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interfere with one's ability to maintain neutrality. The second issue circles around the importance of the mediation practitioner's previous relationship with the parties.

Lastly, the outcome of the negotiation seems to be a factor in evaluating neutrality. A comparison of labour and divorce mediation is helpful to reach a conclusion. In labour mediation, the mediation practitioner deals with people who are being paid to represent their clients, and therefore, does not need or want to evaluate an agreement.

In contrast, the divorce mediator usually deals directly with the spouses, and it could be assumed that they are not accustomed to being representatives. Hence, the divorce mediator must interpret the principle of neutrality more broadly than a labour mediator would.

On the issue of confidentiality, it presents less of a complex problem in labour mediation than in divorce mediation. The need to uphold confidentiality in divorce mediation goes further. Discussing the case, even with therapists or lawyers who are also involved with the case, also raises ethical dilemmas. The ethical dilemmas of confidentiality facing divorce mediators seem to be based on this key question – "To whom do I tell what?"

On the issue of interface with other professionals, divorce mediators often deals directly with the spouses, and not with their lawyers, although the parties may consult their lawyers during the mediation process. The reluctance of other professionals to interact with divorce mediators may be based on their own ethical dilemmas.

The same, however, cannot be said of labour mediators. These mediation practitioners usually interact with lawyers or non-lawyer representatives as a direct part of the negotiation process and should not bypass these representatives.

Hence, according to the researchers, divorce mediation could be viewed to a fair extent as a consumer movement where the client must be the focus of the process. The relationship between the mediation practitioner and lawyer representatives must revolve round the clients' needs, wishes and desires.

Thus, divorce mediation, in contrast to labour mediation, must afford clients the flexibility to choose whenever representatives are brought into the mediation process. There are ethical possibilities which exist for a mediation practitioner-representative relationship.

The researchers believe that as divorce mediation becomes a profession, a code of ethical practice will be developed in time to come. Their current research has only focused on four ethical issues, namely, neutrality, confidentiality, competence, and interface with other professionals.

However, they feel that there are other ethical questions such as setting of fees, responsibilities towards agencies or organizations, maintenance and enhancement of skills, and issues involving domestic violence, which have yet to be explored.

Other researchers

Other researchers such as Bernard, Folger, Weingarten & Zumeta (1984)¹⁰⁹ and Grebe (1989)¹¹⁰ were more focused in specific fields of mediation practice especially in family mediation in the area of divorce disputes. Professor Bush had also co-authored similar studies with others such as Cooks and Hale (1994) and Michael Lang (1990)¹¹¹ on the role of an ethical mediator, applications of ethical principles, and construction of ethics in mediation. Lim Lan Yuan,¹¹² on the other hand, has authored articles and studies on the theory and practice of mediation, and court mediation in Singapore.

¹⁰⁹ Bernard, S. E., J. P. Folger, H. R. Weingarten and Z. R. Zumeta, *Loc. cit.*

¹¹⁰ Grebe, S. C., *Loc. cit.*

¹¹¹ Bush, R. A. B. and M. Lang, "Ethics at Work: Case Applications," In American Bar Association, *Family Dispute Resolution: Options for All Ages*, 1990, 129.

¹¹² *Supra*, at n. 37.

CHAPTER 3

BACKGROUND

Philosophy of Mediation

Today we live in a competitive and litigious society where winning is everything, and where conflicts and differences are seen as “failures to communicate.” Frustrations with the process of the legal system and the expense in taking such conflicts and differences to court have led many to try mediation as an alternative dispute resolution mechanism.

Through mediation, those involved in a dispute can find a constructive and mutually satisfactory approach to managing and resolving their disagreements. The practice of mediation emphasizes on the preservation of the disputants’ relationship by using problem-solving skills rather than the “defeat” of an “opponent”.

After all, mediation is a process by which “the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual settlement that will accommodate their needs. Mediation is a process which emphasises the participants’ own responsibilities for making decisions that affect their lives.”¹¹³

¹¹³ Folberg J. and A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, San Francisco: Jossey-Bass Publishers, 1984.

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Mediation allows the neutral third person to learn the intimate facts from the disputing parties which they would never have shared with each other. It also allows the mediation practitioner to build trust from the disputing parties thereby allowing him to communicate freely with the parties and to share their concerns.

Based on the facts and information imparted by the parties, the mediation practitioner is able to help work out solutions, maximise the exploration of alternatives, educate the parties' underlying needs, and to provide a forum for settling disputes between them. But the parties retain control on the content of the outcome. The mediation practitioner does not make any decisions for the parties. The only binding outcome of mediation is one which the parties have mutually agreed to.

The flexibility of the mediation process, differences in the types of mediation services, and the variations in the requirements and credentials for mediation practitioners have led to the call for increased regulation and codes of conduct for mediation practitioners. The absence of any structure of procedural or substantive rules or laws presents the real danger of harm from inept or unethical mediation practitioners.¹¹⁴

Indeed, ethical concerns about the form, content, process of mediation, and the mediation practitioner's role have increased proportionately to the growing popularity of mediation and to the variety of services, including voluntary, court-appointed and mandatory mediation offered by mediation practitioners.¹¹⁵

¹¹⁴ *Supra*, at n. 1.

¹¹⁵ *Supra*, at n. 34.

The key underlying principle of mediation is party autonomy or self-determination¹¹⁶. The basic philosophy of mediation is to empower parties to take control of their own destiny and fate; where they are in total control of the outcome of the settlement of the dispute at hand. This is different from litigation and arbitration where parties are disempowered from such party autonomy and the judge or arbitrator makes a decision or hands down award as a form of settlement of the dispute.

Hence, it is a basic requirement for parties in mediation to take major responsibility for resolving their conflict with the help by a mediation practitioner who remains neutral and impartial at all times during the course of the mediation session. It is the parties themselves who are responsible for judging whether the outcome is just, appropriate and acceptable.

In mediation, parties are not required to choose the best possible solution. Neither would the parties be required to work towards a 50-50 compromise. The key principle is for the parties to arrive at a mutually agreeable solution on their own without fear or coercion from anyone during the mediation session.

History

Mediation, known as the “sleeping giant” of alternative dispute resolution, is one of the oldest and most common forms of conflict resolution. It has a long history in a variety of cultures and social context. In ancient China, mediation was the principal means of

¹¹⁶ *Supra*, at n. 1.

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dispute resolution which has been practised until today through the People's Conciliation Committees¹¹⁷.

Such conciliation services have also been seen in Japan even before the Second World War to assist people in resolving personal disputes¹¹⁸. In such oriental cultures, mediation has long been used as a means for resolving conflicts because of its emphasis on moral persuasion and maintaining harmony in human relationships. Over in the Southern Hemisphere in Africa, respected elders and notables are often called to mediate disputes between neighbours¹¹⁹.

Over the centuries, religious institutions have played a prominent part in resolving conflicts. For example, in the Western culture, churches have used mediation among members. For generations, the Quakers in the United States of America have dealt with disputes among their members via mediation.¹²⁰

The interest in mediation actually started as a result of the alternative dispute resolution movement which gained popularity in the United States of America in the 1970s. It started as "an alternative to criminal prosecution" to resolve minor interpersonal disputes between neighbours, acquaintances, co-workers and so on, that could lead to complaints

¹¹⁷ Du, Xichuan and Lingyuan, Zhang, *China's Legal System: A General Survey*, Beijing, China: New World Press, 1990.

¹¹⁸ Shimazu, I., *Japanese Perspectives on the Procedural Aspects of Marriage Dissolution*, Paper presented at Fourth World Conference of the International Society of Family Law, Cambridge, Massachusetts: Harvard Law School, June 1982.

¹¹⁹ Gibbs, W., "The Kpelle Moot: A Therapeutic Model for Informal Justice Settlement", (1963) 33 *Africa*, 1.

¹²⁰ Keltner, J. M. (Sam), *Mediation – Toward a Civilised System of Dispute Resolution*, ERIC Clearinghouse on Reading and Communication, 1987.

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to local law-enforcement agencies.¹²¹ It was also used as an alternative to civil litigation to resolve contested divorces, especially child custody, visitation and support issues.¹²²

By mid-1980s, child custody mediation was so popular and widespread that major states in the United States of America adopted legislation requiring the use of mediation in contested custody cases.¹²³ It rapidly gained popularity in the 1980s, and there were about 500 community programs operating in the early 1990s.¹²⁴ In the last few years, mediation has become increasingly popular in business and personal injury claims as an alternative to litigation.¹²⁵

In essence, the emergence of mediation as an alternative dispute resolution in the United States of America can be traced to the seminal work in negotiation theory propounded by Roger Fisher and William Ury of the Harvard Negotiation Project,¹²⁶ popularised in their 1981 book, *Getting to Yes*¹²⁷ which focused on the generation of creative solutions to meet the principled and mutually beneficial resolution of the conflict.

¹²¹ Goldberg, S.B., E. Green and F. Sander, *Teachers' Manual - Dispute Resolution*, Boston: Little, Brown & Co, 1985.

¹²² American Bar Association, *Alternative Means of Family Dispute Resolution*, 1982.

¹²³ Milne, J.P. and Folberg, "The Theory and Practice of Divorce Mediation" in Folberg, J.P. and Milne, (1988) *Divorce Mediation* 3.

¹²⁴ *Supra*, at n. 1.

¹²⁵ Singer, *Settling Disputes: Conflict Resolution in Business, Families and the Legal System*, 1990.

¹²⁶ *Supra*, at n. 25.

¹²⁷ Fisher, R. and W.R. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*. Rev. ed. New York: Viking Penguin, 1991. Cited the example of a librarian who acted as a mediator to two students in dispute over whether to keep the window open or shut, who generated an alternative solution by opening the window in the next room.

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In terms of mediation programmes developed, there are approximately 200 of them which deal with over 200,000 disputes a year in the United States of America.¹²⁸ In Canada, 152 delegates to a recent mediation conference reflected the growth and widespread of mediation developments.¹²⁹ Perhaps, the most visible mediation programme in Canada is the Windsor-Essex Mediation Centre, a project developed from a 1980 Canadian Bar Foundation study on delays in the courts.¹³⁰

It has since attracted considerable interest, wide application and academic research in Australia, the United Kingdom and now in Singapore. Modern mediation was introduced in Asia only recently because with the oriental culture where social harmony and consensus predominate, informal mediation has been the normal way of life with the reluctance for people to go to the courts to resolve their personal community conflicts. However, once introduced, mediation has taken a high profile and generated tremendous interest among the community and the legal profession.

There are many reasons why mediation has gained its popularity. Amongst others, increasing concerns over cost, delays, loss of management time, litigation time, including damage to commercial goodwill and relationship are some of the reasons that have encouraged the use and development of this new option for alternative dispute resolution.¹³¹

¹²⁸ McCarthy, J. J., "Dispute Resolution: Seeking Justice Outside the Courtroom", (1982) 8 *Corrections Magazine* 33.

¹²⁹ *Mediation. Training, Program Development, The Future*. A National Conference held in Toronto, Canada, June 15-17, 1984.

¹³⁰ Canadian Bar Foundation's Pilot Project Evaluation: The Windsor-Essex Mediation Centre, 1984.

¹³¹ Lim, L.Y., "ADR - A Case for Singapore", (1994) 6 *SAC LJ*.

Mediation in Singapore

In Singapore, formal mediation was first introduced in the Subordinate Courts in June 1994. Since then, mediation has expanded rapidly when the Court Mediation Centre was created in 1995 to merge, refine and define the various mediation services. The legal fraternity from lawyers to judges and the public have demonstrated positive support for court mediation as a useful technique for resolving disputes before going to trial.

In Singapore since its introduction by the Subordinate Courts, mediation has been seen to reduce caseloads and trial times besides being able to provide a consensual approach to resolving disputes. This development is in line with the Government of Singapore's objective to promote a harmonious and gracious society.

As Chief Justice Yong Pung How put it, "the justice system should anticipate changes and implement necessary mechanisms to accommodate changes in the economic and social fabric of the country."¹³² Therefore, mediation has been introduced as part of the Singapore judicial system in the dispensation of an efficient and responsive justice.

In March 1996, the Singapore Minister of Law, Prof S Jayakumar tasked an inter-agency Committee to explore how alternative dispute resolution processes, and in particular mediation, could be further promoted in Singapore. This led to the formation of the Committee on Alternative Dispute Resolution in May 1996.¹³³

¹³² Yong, P. H., Keynote Address at Asia Pacific Intermediate Courts Conference, Singapore, 20 July 1995.

¹³³ *Supra*, at n. 14.

The Committee comprised representatives from the Ministry of Law, Ministry of Community Development, Ministry of Home Affairs, the Courts, Attorney General's Chambers, the Academy of Law, the National University of Singapore, the Singapore International Arbitration Centre, the Law Society, and Members of Parliament.¹³⁴

In the 1996 budget debate on the Ministry of Law, Prof S Jayakumar said Singaporeans must move away from the view that settling disputes through the courts was the best and preferred way. While litigation was unavoidable in settling some disputes, he said it should only be the last resort.

In July 1997, the Committee submitted a Report recommending that in order to prevent Singaporeans becoming too litigious, less expensive and non-adversarial methods of dispute resolution should be introduced. These should cater to a wide range of social, community and commercial conflicts.¹³⁵

While noting that litigation would continue as the main process for resolving commercial and business disputes, the Committee recommended that mediation should be promoted to resolve social and community disputes. Mediation, in particular, should be promoted as reflecting aspects of our Asian tradition and culture that are worthy of preservation.¹³⁶

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

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The mediation movement in Singapore first started with the courts introducing mediation as part of the judiciary process. Commercial, community mediation and peer mediation were subsequently introduced. Within a short period of time, mediation has gradually become part of the social and community life in Singapore. A mediation culture is being developed in the process¹³⁷.

As a developed country, Singapore is fast evolving into a highly complex and affluent society. With the increase in the volume of commercial activities, and social interactions, litigation would be seen as the efficient means of settling disputes though it can be costly and time consuming. Hence, a less costly, faster, and more harmonious method like mediation is preferred in a cosmopolitan society which is still very deeply entrenched in its traditional and cultural roots.

Local surveys have indicated that Singaporeans generally less favour going to courts to settle family and community disputes¹³⁸. Notwithstanding this, Singaporeans would still seek alternative means of resolving their day-to-day problems if emotions get pent up and are beyond control. Further, mediation as an alternative dispute resolution mechanism would help Singapore develop into a more harmonious, tolerant and civic-minded society.

¹³⁷ In fact, the 2nd Asia Pacific Mediation Forum was held in Singapore from November 19-22, 2003 with the theme "Developing a Mediation Culture", organised by the SISV. See www.sisv.org/apmf/html.

¹³⁸ *Supra*, at n. 75.

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Mediation in Singapore has not grown at the same rate as in the United States of America and Australia. According to Peter Alder (1987),¹³⁹ if the American justice system was cleared of its delays and backlogs through yet-to-be invented management techniques, alternative dispute resolution mechanisms such as mediation would not continue to be as symbolically important in the United States of America.

Set against an Asian culture where strong traditions and relationships thrive, informal mediation has always been practised in Asia since time immemorial. This is also evident from local surveys that Singaporeans prefer to settle community and domestic disputes through informal mediation rather than litigation¹⁴⁰.

Hence, formal mediation is nothing alien to Singaporeans though this is more pronounced in the commercial sector. However, Singaporeans still prefer to settle their contractual and commercial disputes in court. This is largely attributed by the efficiency and accessibility of the judiciary system to the public in general.

Community Mediation

Mediation techniques have been used informally in Asian cultures for generations. *Kampung* communities have had the *ketua kampung*, the respected village elder, to act as Mediator. The mediation process is akin to the traditional *kampung* style approach of resolving problems through informal channels with the aid of respected third parties.

¹³⁹ Alder, P.S., "Is ADR a Social Movement?", (January 1987) 3 *Negotiation Journal* 1, 67.

¹⁴⁰ Lim, L.Y., "Public Perception of Dispute Resolution in Singapore", (1994) 1 *Commercial Dispute Resolution Journal*, 74.

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The *ketua kampung*, the elder in the village communities, performed a mediatory role between squabbling neighbours. In essence, the mediation concepts, principles and goals reveal features that mirror closely traditional Asian philosophy and practices.

Community elders and business leaders in Singapore have often been approached to mediate in personal as well as business disputes. This is nothing new for Singapore where the concept of cohesion, integration and community development is the way of life of Singaporeans.

Community mediation, in particular, reflects social and community values. Most mediation practitioners are also residents of the communities from which disputes arise, so the disputing parties feel at ease to express themselves, and to share their concerns before the mediation practitioner during a mediation session.

In Singapore, the Community Mediation Centre ("CMC")¹⁴¹ was set up to provide the public with an avenue for using mediation as a means of resolving conflicts they might have with their family, friends and neighbours. The CMC's mission is to provide an attractive, practical and convenient solution for social and community disputes in Singapore. Today, its panel of mediators stand at a 146-member team¹⁴².

¹⁴¹ *Supra*, at n. 14.

¹⁴² As at December 31, 2004.

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The Community Mediation Centres Act became law in 1998, providing for the establishment of CMCs under the Ministry of Law. Mediation sessions are conducted in a cordial and informal atmosphere, and as expeditiously as possible.

As the name implies, the CMC caters to “community” disputes as opposed to “commercial” ones, and handles disputes that are “relational” in nature. These encompass relational disputes encountered with one’s community and social sphere including neighbourhood disputes, family disputes (excluding family/domestic violence), disagreements between friends, stallholders/owners squabbles can be handled by the CMC. As its motto suggests, the work of the CMC seeks to “build bridges to reconciliation”.

To date, three CMCs have been established. The first, known as Community Mediation Centre (Regional East) commenced operation in January 1998. The second CMC, Community Mediation Centre (Central) was set up in April 1999, and the third Community Mediation Centre (Regional North) commenced operations in April 2001.

Over the years, satellite mediation venues have also been set up in cooperation with various other agencies. This is to provide disputing parties the additional convenience of having their disputes mediated at a central venue close to their homes.

Singapore Mediation Centre

The Singapore Mediation Centre (“SMC”) is the flagship mediation centre of Singapore. It was incorporated on August 8, 1997, and officially launched by the Honourable Chief Justice Yong Pung How on August 16, 1997.

The SMC is a non-profit and non-partisan organization and is linked institutionally with many professional and trade associations, and receives the support of the Supreme Court of Singapore, the Subordinate Courts of Singapore, and the Singapore Academy of Law. It is funded by the Singapore Government through the Ministry of Law and guaranteed by the Singapore Academy of Law. At its launch, the Honourable Chief Justice Yong Pung How indicated that mediation is a form of dispute resolution that is deeply embedded in the Asian culture.¹⁴³

It aims to create an environment where people can work together to find enduring solutions to conflicts and tensions created by human interactions. It contributes to the building of a harmonious society, and a thriving business community, by broadening awareness of, and providing access to, constructive means of dispute resolution and conflict management.¹⁴⁴

The SMC’s mission is to be engaged in:

- Providing mediation and other alternative dispute resolution (“ADR”) services;
- Providing training on negotiation, mediation and other ADR mechanisms;

¹⁴³ Ho, C. H. L., “Overview of Legal Systems in the Asia-Pacific Region: Singapore”, Cornell Law School LL.M Papers Series, Paper 3, Year 2004.

¹⁴⁴ See SMC’s official website on <http://www.mediation.com.sg>

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- Accrediting and maintaining a panel of mediation practitioners to ensure quality;
- Engaging in consultancy services for dispute avoidance, dispute management and ADR mechanisms; and
- Educating the next generation in methods of conflict avoidance and resolution.

Based on this mission statement, the SMC is committed to delivering services in the following six key areas, namely:¹⁴⁵

- The provision of Mediation and other ADR services such as Neutral Evaluation, Mediation-Arbitration (“Med-Arb”) and the Singapore Domain Name Dispute Resolution;
- The provision of online ADR services that may be accessed over the Internet¹⁴⁶;
- The provision of facilities for Negotiation, Mediation and Conflict Management;
- The accreditation and maintenance of a panel of ADR experts such as Mediators, Evaluators and Domain Name Dispute Resolution Panellists; and
- The provision of consultancy services for dispute prevention, dispute management and ADR mechanisms.

The SMC is headed by a Board of Directors, which is assisted by the SMC’s Board of Advisors, the Advisory Committee on Construction Mediation (“ACCOM”) and the Singapore Information Technology Dispute Resolution Advisory Committee

¹⁴⁵ *Ibid.*

¹⁴⁶ <http://www.disputemanager.com>.

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("SITDRAC"). ACCOM with a current team of 13 members was formed on November 22, 1997, and comprises major professional bodies and institutions in the construction industry.

Its most important functions are to promote the use of Mediation and Mediation training in the construction industry, besides providing the SMC with its expert knowledge of, and connections with, the construction industry.

SITDRAC, on the other hand, was formerly the Singapore Information Technology Mediation Centre ("SITMC"), and its eight-member team was set up on August 16, 1997. Its functions include referring information technology disputes to the SMC and providing the SMC with its expert knowledge of, and connections with, the information technology industries.

The group of people who are primarily responsible for these disputes and claims are members of people who are primarily responsible for these disputes and claims are members on the SMC Panel of Mediators and Neutrals. The SMC has a panel of accredited mediation practitioners and other neutrals that includes retired Supreme Court Judges, Members of Parliament, former Judicial Commissioners, Senior Counsel and leaders from different professions and industries.

All SMC neutrals have undergone formal mediation training and evaluation. They are accredited and appointed to the SMC panel only after they have been assessed to have the

necessary skills and appropriate temperament. There are currently 110 such mediation practitioners on the SMC panel at the time of this study.

The SMC has also established an international panel of mediation practitioners that consists of internationally renowned neutrals. A Code of Ethics has been issued to govern the conduct of mediation practitioners and mediation. Outside of the Courts, the Singapore Academy of Law provides facilities for non-court based mediation.

As of July 1, 2003, more than 1,000 disputes¹⁴⁷ were referred to the SMC. Of those mediated, 80% were settled. The types of cases include, and are not limited to, banking disputes, construction disputes, contractual disputes, corporate disputes, contested divorces and divorce ancillary matters, employment disputes, family disputes, information technology disputes, insurance disputes, negligence claims, partnership disputes, personal injury claims, shipping disputes and tenancy disputes.

The SMC's institutional partners and supporters have benefited from its services in the form of savings in costs and time. For example, the Supreme Court recorded savings of more than S\$14.2 million and 2,183 court days as at July 1, 2003¹⁴⁸. Individual disputants also benefited extensively. Data from the Supreme Court show that savings in legal costs for the parties are substantial. In High Court cases involving two parties, it is common for parties to save as much as S\$80,000 in total.

¹⁴⁷ *Supra*, at n. 140.

¹⁴⁸ *Ibid.*

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In a study conducted at the end of 2002¹⁴⁹, a total of 1,044 parties who mediated at the SMC and provided feedback, 84% reported cost savings, 88% reported time savings, and 94% would recommend the process to other persons with the same conflict situation. The feedback from 900 lawyers who represented their clients and provided feedback was similar – 84% reported savings in cost, 83% reported savings in time, and 97% of the lawyers indicated that they would recommend the process to others in similar situations. These data are consistent with the informal feedback which the SMC had been receiving from lawyers that mediation at the SMC has been a useful process.

¹⁴⁹ *Ibid.*

CHAPTER 4

REVIEW OF RELEVANT THEORIES

Introduction

The focus of this Chapter is on theories of ethics which would shed some light on the way mediation practitioners behave in practice, and the way they play their role effectively. These theories would also show how ethical terms such as right, wrong, good, bad, fair and unfair have been formulated.

Based on these theories, the remaining section of this Chapter discusses how such theories provide us a way to codify and defend the ethical intuitions of mediation practitioners. These theories are neither exhaustive nor exclusive; rather they stress on different criteria for selecting specific courses of action. Depending on the circumstances of the situation, varying behaviours of mediation practitioners would be evident in such circumstances.

THEORIES OF ETHICS

There are four major dominant theories of ethics which mediation practitioners seek to understand their own ethical underpinnings, namely:

1. Universalism versus relativism
2. Consequentialism (utilitarianism) versus deontological theories
3. Virtue theory

4. Professional ethics

Universalism versus relativism

The key contention under the concept of universalism is whether ethics is “universal”, that is, whether there are some principles of ethics that apply to all human beings regardless of culture or context. For example, in divorce mediation practice, universalism may be relevant in a dispute over parental responsibilities after divorce where there is an issue involving religious education.

Each parent struggles with the dilemma of what, if any, exposure to religious teaching is best for the children. In such a case, the mediation practitioner may face a dilemma when his or her own sense of ethics is offended by choices which the parents are wishing to make, if, for example, a parent’s religious choice is one which the mediation practitioner feels will not be in the best interests of the children.

In dispute resolution, the universal ethical principle may also be summarised as respect for the right of “autonomous informed consent of all those involved or affected” which is a familiar concept in mediation.

One of the shortfalls in the concept of universalism is that it is difficult to find any test to determine its universal “rightness”. Another problem is the conflict between two “universal” principles. For example¹⁵⁰, if there are two ethical maxims, namely, keeping promises and looking after aged parents, which of the two principles should prevail when

¹⁵⁰ Morris, C., *op. cit.*, 310.

one is faced with the dilemma of choosing between the two? It is quite evident in this illustration that ethical dilemmas may not be choices between right and wrong, but between two equally compelling (or equally undesirable) alternatives.

In contrast, ethical relativism provides that there are no universal ethical principles. This is well accepted as what is wrong for one person may well be right for the other. Hence, people's behaviour is judged by prevailing standards in a particular community, and is based on what is acceptable according to the prevailing community standards. In such a case, the only problem lies in the fact that not all communities are homogeneous.

The element of culture plays a key role in the concept of relativism. The difficulty which arises is that what is acceptable in one culture is genuinely right in that culture, regardless of whether it is considered right or wrong in another culture. This concept places high regard for self-determination which may blind one ethnic group from appreciating the value of another ethnic group, or even to allow a dominant group to impose on their moral values on non-dominant groups.

Consequentialism (utilitarianism) versus deontological theories

Utilitarianism is an example of teleological theory (Frankena, 1973¹⁵¹; Beauchamp, 1982¹⁵²). "Teleology" refers to outcome, and means that what is good, moral, or ethical is determined by the outcome.¹⁵³

¹⁵¹ Frankena, W. K., *Ethics*, Englewood Cliffs, New Jersey: Prentice Hall, 1973, as cited in Grebe, S. C., "Ethics and the Professional Family Mediator", (Winter 1992) 10 *Mediation Quarterly* 2, 155-65.

¹⁵² Beauchamp, T. L., *Philosophical Ethics: An Introduction to Moral Philosophy*, New York: McGraw-Hill, 1982, *Ibid*.

Grebe (1992)¹⁵⁴ explains that from the utilitarian point of view, all ethical decisions should be based on the principle of utility, that is, the idea of doing “the greatest good for the greatest number”. According to Gibson¹⁵⁵, the rightness or wrongness of an act, rather than the act itself, is gauged by its good or evil effects, where a right act is one in which one is able to maximise the good or minimise the bad.

This is a dominant theory which says that the ethical value of a choice is based on its outcome. John Stuart Mill, founder of this theory, argues that the “greatest happiness for the greatest number” is the most desirable outcome. According to him, an action is good if it is useful for promoting pleasure to the extent that the good of minorities might have to be sacrificed to the good of the majority.

However, the question remains – what is the “good” that is being maximised? How does one compare the quantities and qualities of “happiness”? Hence, modern versions of consequentialist theories have moved away from the belief that the good can be captured in terms of particular values such as pleasure or happiness. Instead, they have calculated maximum utility on the basis of what an individual would choose among available alternatives, such as, the good is thought of as an aggregate, that is, which maximises the satisfaction of personal preferences.

¹⁵³ Grebe, S. C., “Ethics and the Professional Family Mediator”, (Winter 1992) 10 *Mediation Quarterly* 2, 155-65.

¹⁵⁴ *Ibid.*

¹⁵⁵ Gibson, K., “The Ethical Basis of Mediation: Why Mediators Need Philosophers”, (Fall 1989) 7 *Mediation Quarterly* 1, 43.

Using this approach – preference utilitarianism – avoids the difficulty of formulating objective opinions that constitute the good for everyone, and allows subjective tastes and personal values to be considered. Therefore, it allows for an objective calculus that takes subjective opinions into account.¹⁵⁶

In essence, the concept of preference utilitarianism requires people to rank their preferences, and deems the best result to be that which satisfies the greatest number of preferences for the greatest number of people. As applied in mediation practice, it is important for mediation practitioners to stress the quest for maximising the satisfaction of the interests of the parties.

Hence, the promise of this theory is that it may be able to provide us with an empirical and objective way to settle ethical disputes. The only problem is that in situations where someone's preferences are irrational, immoral, unjust or perverse, it would not be proper to have them all satisfied.

In an example of family mediation, this theory of utilitarianism may be evident in cases where one parent asserts a better claim for custodial rights of children on the basis of being able to provide a more affluent lifestyle than the other parent.

In contrast, the deontological concept holds that certain actions are inherently right regardless of the outcome. Deontologists believe that the value of actions lies in the motives rather than the consequences. An act is right for the deontologist when it

¹⁵⁶ *Id.* 44.

conforms to a rule of conduct that is dictated by some account of duty. This theory considers persons as individuals capable of independent decisions and worthy of respect as persons, that is, we should “treat people as ends in themselves, rather than just as a means to an end.”¹⁵⁷

Deontological theory was originally promulgated by the 18th century German philosopher, Immanuel Kant. The word “deontology” comes from the Greek word “deon” which means “binding duty”.¹⁵⁸ The central issue of this theory is to identify the factor or principle that makes particular actions right or morally obligatory.

Kant and Rawls¹⁵⁹ currently appear to dominate this field. Rawls’ most significant contribution is an imaginative device in which one formulates an institutional arrangement which will benefit everyone impartially by imagining a social contract made in ignorance of one’s personal situation, i.e. “the veil of ignorance.” The idea here is that if one is ignorant of the social situation in which one might find oneself, one is more likely to act to set social policy that will be fair to one should one be in the position of less fortunate members of the society.

The Virtue Theory¹⁶⁰

This ethical approach focuses not on the actions or principles that guide moral actions as much as on the character of the individuals themselves. So, instead of looking at what we

¹⁵⁷ *Ibid.*

¹⁵⁸ Beauchamp, T. L., *Loc. cit.*

¹⁵⁹ Morris, C., *op. cit.*, 313.

¹⁶⁰ Gibson, K., *op. cit.*, 45.

do, this theory looks at who we are. This theory is called Virtue Ethics, and it looks at whether the person is praiseworthy or blameworthy, admirable or reprehensible, virtuous or vicious.

The theory does not suggest what ought to be done in any particular occasion but rather what sort of dispositions and habits we should inculcate for the benefit of all. An example would be to look at accomplishments of great men and women and follow the examples of saints and heroes.

However, there are some criticisms to this theory. Although a person may adopt virtue ethics as an overall guide, this approach may not be systematic or rationally persuasive in particular situations. Different people may adopt different heroes, choose various virtues, or rank virtues differently except in a homogeneous community. In essence, Virtue Ethics provides little guidance on new and different moral dilemmas or when values conflict over individual cases.

Professional Ethics

In professional ethics, the various obligations and standards of behaviour expected of the profession's members are usually based on a set of values that are shared by the profession at large or at least by its governing body. Most professional codes of ethics are based on the deontological theory as they outline a specific set of duties or obligations that derive from the relationship between the professional (in this case, the mediation practitioner) and his or her client (in this case, the parties) regardless of the outcome.

There are four (4) principles which are inherent in most professional ethics, namely – Autonomy, Beneficence, Non-maleficence, and Justice.¹⁶¹

1. Autonomy

Autonomy is defined by Boskey (1994)¹⁶² as the capacity to negotiate where the concept of mediator “pressure” is reframed as “encouragement”. He says that a party’s autonomy is compromised only in cases where the party has lost the capacity to make the decision to walk away from the agreement.

He goes on to state that that capacity is not lost because of economic pressures or because of encouragement by the mediation practitioner to agree, but is lost when the party’s basic ability to function as a negotiation has been compromised. In cases where that have occurred, he advises that it is the responsibility of the mediation practitioner to terminate the mediation process and to advise the parties of their other alternatives for reaching a solution to their problems.

Matz¹⁶³ sees a party’s autonomy “as a large, three-dimensional shape, malleable in part, rigid in part, and endowed with an internal structure and vitality. When pressure is applied, it may yield, resist, or push back. It may yield first and push back later, or it may push back first, and yield later. It is a dynamic picture.”

¹⁶¹ *Supra*, at n. 152.

¹⁶² Boskey, J.B. “The Proper Role of the Mediator: Rational Assessment, Not Pressure”, (October 1994) 10 *Negotiation Journal* 4, 367-72, as cited in Morris, C., *op. cit.*, 314.

¹⁶³ Matz, D., “Mediation Pressure and Party Autonomy: Are They Consistent with Each Other?” (October 1994) 10 *Negotiation Journal* 4, 359-65, at 363, *Ibid*.

In other words, Matz sees the nature of mediation as an interactive dynamism among the parties and the mediation practitioner. He acknowledges that dialogue within the mediation context is always set in a social and cultural context which is interactive, interdependent, and mutually influential.

Autonomy operates in four (4) hierarchical levels, namely:¹⁶⁴

- b. The first level, being the simplest, is the “*freedom from coercive restraint*” where choice is made in a voluntary, intentional way, without interference or invasion from others.
- c. The second level is the “*freedom to choose*” which is the “positive” condition in contrast to the first level which is the “negative” condition. Hence, this level allows for the means to implement one’s decision, and whether one is coerced into making it is not relevant at this level.
- d. The third level is regarded as the “*informed reasoned choice*” which focuses on the principle that choice must be reasoned and reasonable. In addition to that, choice must not only be rational, but the means of achieving it must be rational.
- e. The last level is the “*choice based on the recognition of moral value*” which is derived from the deontologist, Kant. Here, one has as much power to choose how to act, i.e. freedom to act, as anyone, and this is compatible with allowing others the same amount of freedom to do the same.

¹⁶⁴ Appelbaum, D. and S. V. Lawton, *Ethics and the Professions*, Englewood Cliffs, New Jersey: Prentice Hall, 1990, as cited in Grebe, S. C., *op. cit.*, 159.

2. Beneficence

Beneficence means the doing of good, being kind and charitable.¹⁶⁵ However, in ethical theory, beneficence is better understood as a directive to help others further their important and legitimate interests when we can do so with only minimal risk or inconvenience to ourselves.¹⁶⁶ According to Beauchamp (1982)¹⁶⁷ this directive often translates into the conviction that failure to increase the good of others when one is knowingly in a position to do so is morally wrong.

3. Non-maleficence

This is the opposite of beneficence, that is, to do no harm. In fact, the recognition of the duty or principle of non-maleficence is the first step to recognising that the duty of beneficence exists (Beauchamp)¹⁶⁸. This principle is derived from the basic values of respect for persons (which is deontological) and protection of individual freedom (which is primarily utilitarian).

Both principles of beneficence and non-maleficence form professional codes of ethics to shape ideas concerning professional care.¹⁶⁹ In the context of a profession, care refers to the range of duties performed by the professional in the service of both the client and the profession.

¹⁶⁵ Grebe, S. C., *op. cit.*, 157.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Supra*, at n. 151.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra*, at n. 163, at 158.

4. Justice

This is the last principle which is derived from the deontology of John Rawls. This concept denotes equality and is based on the idea that whatever principles, duties or actions are required of us must be equally required of everyone. There should be no selective application of principles or selective requirement of duties based on status, wealth, or position, or class.¹⁷⁰

Application to Mediation

To mediation practitioners, these ethical theories and their personal ethical presumptions will affect the way they talk about the process of mediation. Issues such as empowerment, impartiality and confidentiality are usually discussed in isolation from any of these underlying ethical presumptions.

Even though these philosophical theories do not provide an answer to these issues but will allow mediation practitioners to reframe the discussion in explicit terms so that rational, rather than intuitive, arguments can take place. As an example, on the issue of empowerment, a mediation practitioner may be tempted to coach the un-empowered party or to inform him or her of his or her true power. The question is whether such intervention by the mediation practitioner is either acceptable or advisable.

Under the utilitarian approach, this issue will be viewed in terms of the likely consequences of the act. If the result of such an intervention turns out to be beneficial to all parties concerned, then it would be justifiable for the mediation practitioner to

¹⁷⁰ *Supra*, at n. 151.

intervene. What if the greater number of less important interest are satisfied, the question is whether this is equivalent to satisfying fewer more important ones? In a multiparty mediation session, the least well represented may well have to suffer unequally, because the utilitarian approach allows the most satisfaction for the majority, not the minority.

In contrast, the deontologist approach is more concerned with the motives and obligations in dispute rather than the results. Hence, empowerment of one party may be justified on grounds that he or she lacks autonomy in his or her decision-making.

However, on the issue of neutrality and impartiality, the deontologist approach is more apt as these issues are looked at irrespective of their particular results; that is, one should be neutral and impartial because the issues are good in themselves, and one has a duty to behave in a good way. It would, therefore, be a mistake for one to analyze these questions in terms of results.

According to Gibson¹⁷¹, ethical theories need not be exclusive, nor do we have to adopt one at the cost of renouncing all others. But, the differences in approach do reflect differing intuitions and stresses in the way mediation practitioners judge moral acts. Such theories give a basis for arguing for or rationalizing certain behaviours.

Each approach will stress different aspects of the moral question and give different insights. Otherwise, in the absence of any theory, mediation practitioners would have to depend on their own intuitions.

¹⁷¹ Gibson, K., *op. cit.*, 45.

How directive a mediation practitioner should be can be understood in terms of the consequences of the act or in terms of the rights of the parties involved. If these issues are discussed without reference to an underlying theoretical base, then useful discourse is unlikely to occur. Hence, these theories allow mediation practitioners to debate ethical issues in two ways, namely, by questioning initial assumptions and then by argument within the framework of these assumptions.¹⁷²

Value Dilemmas

This area is concerned with the role of the mediation practitioner who must choose to act either as a neutral, facilitative third party, as a proponent of a just and fair resolution, as a protector of the weaker party, or some combination of these. Value issues arise as the mediation practitioner decides which role he or she should play in the mediation process.¹⁷³

Bernard et al¹⁷⁴ indicated that in divorce mediation, the mediation practitioner can act solely to facilitate the process of negotiation and those activities can influence the nature of the agreement. On the one extreme is the neutral role if the mediation practitioner intervenes only to facilitate the participant's decision making.

¹⁷² *Id.* 50.

¹⁷³ Bernard, S. E., J. P. Folger, H. R. Weingarten and Z. R. Zumeta, "The Neutral Mediator: Value Dilemmas in Divorce Mediation", (June 1984) 4 *Mediation Quarterly*, 62.

¹⁷⁴ *Id.* 67.

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According to Laue (1982)¹⁷⁵, labour mediation practitioners have outlined the elements required for mediator neutrality to include “(1) low or no power over the parties, (2) high credibility with the parties, (3) focus on the process rather than the outcome, and (4) the importance of rationality and good information in achieving settlements”.

The other extreme is the interventionist strategy, where the mediation practitioner actively shapes an agreement that is acceptable to both parties and to the mediation practitioner’s values of adequacy, fairness, and justice. Justifications which may be used by the interventionist mediation practitioners include:

1. the view that the protection of the weaker parties is necessary and this enhancement of their strength can be brought about through power balancing;
2. the view that sum-sum outcomes in which all the parties’ positions be improved beyond a simple division of possessions are desirable;
3. the view that, given the societal power imbalance that makes women ordinarily the weaker party in divorce, the mediation practitioner should always take an initial pro-woman position in power balancing until further review should show that this position is not justified; and
4. the view that the needs of children should always be the foremost consideration.¹⁷⁶

Between these two (2) extreme roles – neutralistic and interventionist - are two alternatives. The first alternative is the option-enhancing strategy where the mediation

¹⁷⁵ *Id.* 65.

¹⁷⁶ *Id.* 66.

practitioner directly suggests alternatives to the solutions proposed by the parties, and does not challenge a particular settlement nor challenge any agreement reached by the parties if it is based on their examination of all possibilities. Neither the mediation practitioner's values nor professional expertise are used to challenge a settlement reached by the parties. Values and expertise are used to suggest alternatives and to expand the parties' options.

The second alternative is the empowerment-through-information strategy, where the mediation practitioner provides various information, legal requirements, child development needs, and the experience of others in the divorce and divorce adjustment process. This information can increase the knowledge of the parties, suggest to them alternative settlements, and may even balance the power between the parties.

These mid-range strategies tend to provide negotiating resources to the parties by:

1. encouraging the parties to seek their own lawyers;
2. stressing a maximum of knowledge for each party; and
3. pre-structuring the mediation practitioner's intervention and thereby reducing the mediation practitioner's ability to influence a settlement by the timing and content of particular interventions.

Hence, the mediation practitioner's choice of what strategy to apply in trying to reach a settlement will be influenced by his or her values. The mediation practitioner can identify

and share with the parties his or her value preferences. In this way, the parties retain some control over the influence exerted by the mediation practitioner.

The values involved include:

1. Conflict versus Consensus. The mediation practitioner assumes that either social conflict is inevitable or that conflict is sometimes avoidable and should be replaced by consensus. Some social theorists¹⁷⁷ argue that conflicts of interests are inevitable because they are based on the underlying reality of unequal power and powerful self-interest. Yet there are others who argue that a consensus based on widely shared, common values is possible. In their view conflict may arise as a result of miscommunication, errors or failure to consider the long-term interests of the parties involved. Common values hold individuals, groups, and families together.
2. Championing Justice. This is the assumption that one is obliged to champion and protect the weaker party. However, the mediation practitioner recognizes that the courts almost always accept the parties' agreement. In contrast, Mnookin and Kornhauser (1979)¹⁷⁸ provide that parties in divorce negotiations bargain and exchange aspects of their common property, their past and their future relationships. They believe that divorce is a process of change and bargain is part of the process.
3. Self-Determination. The assumption is that fostering personal growth of parties is necessary in order to assure a sum-sum settlement or, the contrary assumption, that

¹⁷⁷ Crowfoot (1980); Lee (1982); Dahl (1956) as cited in Bernard, S. E., J. P. Folger, H. R. Weingarten and Z. R. Zumeta, op. cit., 67.

¹⁷⁸ *Supra*, at n. 172, at 68.

the mediation practitioner is required to accept any freely made decision if it is not illegal or overtly harmful. Interventionalist mediation practitioners may justify their strategy by its contribution to the increased maturity and independence of one or both parties. A mediation practitioner committed to self-determination as a key value may judge some choices to have been made with less than full human dignity or responsibility. In contrast, a neutralist mediation practitioner's position on self-determination is propounded by McDermott (1975)¹⁷⁹ who opines that only illegal or self-destructive behaviour can justify intervention.

4. Conceptions of the Family. Here the assumption is about moral relationships between family members where value positions such as whether the family is an interdependent system (a place to develop free and independent individuals) or it is a paternalistic setting where parents know best, or even an individualistic position which views the family as a place from which individuals move outward to achieve personal goals. Such value positions shape the mediator's strategy.

STANDARDS OF MEDIATION PRACTICE AND CODES OF ETHICS

Introduction

One of the key focus areas of this study is the adequacy of ethical standards of mediation practice and codes of ethics governing mediation practitioners in Singapore. It is also important to examine the various standards and codes which are applicable to practising lawyers who are also mediation practitioners, including those who no longer practise law

¹⁷⁹ *Id.* 69.

but practise mediation in Singapore today. Further, there are also professional regulations which govern mediation practitioners who are non-lawyers.

In addition to such standards and codes in Singapore, similar regulations governing groups of mediation practitioners in the United States of America and Australia were also examined. It is important to have a balanced view of how such groups of mediation practitioners are governed by similar standards and codes in these countries. A local view of the Singapore situation is also provided for purposes of comparison.

Standards and Ethics

Mediation is a flexible process, and that flexibility is one of mediation's key benefits. Yet, flexibility is not normally a component of ethics.¹⁸⁰ Hence, there is a real challenge of creating guidelines which are sufficiently specific in directing the conduct of mediation practitioners while simultaneously allowing for some flexibility in the process.

There is a distinction between standards and ethics. According to Folberg and Taylor (1984),¹⁸¹ “an ethical code is generally imposed on members of a professional group by its governing organization or as a condition of licensure or certification. Professional standards may exist outside an ethical code or in its absence and may be subscribed to by practitioners or looked to by the public and the courts as a set of expectations and minimally acceptable common practices for the service offered.

¹⁸⁰ Kovach, K. K., *op. cit.*, 190.

¹⁸¹ Folberg, J. P. and A. Taylor, *op cit.*, 250.

The standards protect those served from harm and assure the integrity of the process. Following the standards in a competent manner should also protect the practitioner from legal liability by clarifying the limits of “reasonable care,” as that term is used in the courts.”

There are at least over 100 various codes of mediator ethics today, many of which include broader considerations of standards of conduct. With a high number of codes in existence, it is difficult at any given time for the mediation practitioner to determine exactly which code of ethics should be followed. Moreover, codes of ethics tend to provide narrow answers to mediation practitioners when they are faced with problems of ethics. Morris¹⁸² outlines four reasons why this is so.

First, codes of ethics typically provide a prescriptive list of dos and don'ts which rarely fit the particulars of an ethical quandary. Second, codes of ethics focus only on one dimension of the ethical problem where it tends to treat the situation as though ethical problems in the dispute were the exclusive responsibility of the mediation practitioner to resolve alone and independently of the parties.

Third, codes of ethics usually do not detail the ethical values on which they are founded. The mediation practitioner is left with bare list of dos and don'ts with little explication of the reasons for the prescriptions. Lastly, codes of ethics give the illusion that the organizations of mediation practitioners who created them have reached a unified

¹⁸² Morris, C., *op. cit.*, 318.

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consensus about mediation practice when in reality this is far from the truth. There is considerable diversity of values and goals amongst mediation practitioners.

One key point is that because mediation is an interdisciplinary field, it is unlikely that any existing ethical guidelines or standards which govern the behaviour of another profession would be directly applicable in the mediation context. The ethical codes for each profession and their official interpretations serve as red flags for mediation practitioners from these professions.

Two (2) questions arise – whether mediation practitioners wear the specific hat of their primary profession during the mediation session, and whether the ethical considerations and guidelines of their primary professions have relevance in mediation. When applied to other professional practices, these guidelines can do little more than provide a warning of where a mediation practitioner can go wrong and where the dangers lie.

They do not provide detailed protocols for mediation. The existing professional codes transposed to mediation do not furnish criteria of what is expected as they inform mediation practitioners of what to avoid. For example, lawyers have specific duties premised on adversarial conduct. Social workers, on the other hand, are geared towards the therapeutic approach. The practice of mediation requires skills and behaviours which are different from other professions.

Consequently, many of the ethical standards of other professions are not suitable as standards for mediation practitioners. Moreover, many of the ethical considerations important in the other professions are in direct conflict with the role of the neutral mediator. Despite all these challenges, codes of ethics have been created for mediation practitioners.

United States of America

For many years, the conduct of most private mediation practitioners was virtually unregulated. Lawyer-mediators were minimally affected by the Code of Professional Responsibility or the more recent Model Rules of Professional Conduct. Neutral interveners from other professions and disciplines were governed by their respective professional codes of ethics.

States did not prescribe detailed standards that had to be satisfied by individuals who wished to function as neutral interveners. So long as the individuals were acceptable to parties, they could act as mediation practitioners. For those states with minimum prerequisites, only limited training was provided.

One of the earliest efforts has been by the Centre for Dispute Resolution (now CDR Associates)¹⁸³ in Boulder, Colorado, United States of America when they pioneered the Code of Professional Conduct for Mediators in 1982. The Code was intended to be

¹⁸³ The CPR Institute for Dispute Resolution is a non-profit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics in support of private alternatives to the high costs of litigation. Organized in 1997, CPR develops new methods to resolve business and public disputes by alternative dispute resolution (ADR).

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applicable to all types of mediation practitioners, and it was subsequently adopted by the Colorado Council of Mediators in 1982¹⁸⁴, and later by a number of similar organizations.

The Standards of Practice enunciated by the ABA in 1984 states in its preamble that mediation “is not a substitute for the benefit of independent legal counsel...requiring the mediator to inform the parties of the need to employ independent counsel for advice throughout the process.”¹⁸⁵ The need is so important that it is repeated under a separate heading (Section VI) which states that “the mediator has a continuing duty to advise each of the parties to obtain legal review prior to reaching any agreement.”

In 1985 the AFM adopted as its Standards of Practice¹⁸⁶ a document that was the collaborative effort among more than 40 national, state, and local family mediation groups at a meeting hosted by the Association of Family Conciliation Courts (AFCC).¹⁸⁷

The preamble states that mediation is based on certain principles which include fairness, privacy, confidentiality, self-determination, and the best interest of all family members. The AFM document requires mediation practitioners to advise the parties to mediation to obtain independent legal counsel prior to resolving certain issues.

¹⁸⁴ Moore, C. W., *op. cit.*, 299.

¹⁸⁵ *Supra*, at n. 62, Section 1, subsection G.

¹⁸⁶ *Supra*, at n. 61.

¹⁸⁷ Grebe, S. C., *op. cit.* 161.

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The SPIDR, a primary dispute resolution organization with a large number of mediation practitioner members from a vast array of professional backgrounds, has also enacted ethical standards. The code adopted by the SPIDR Board of Directors in 1986¹⁸⁸ purports to govern all neutrals, including mediation practitioners. The SPIDR ethical standards include standard provisions such as confidentiality and impartiality of the neutral.

In the same year the Supreme Court of Hawaii established guidelines for both private and public mediation practitioners, entitled Standards for Private and Public Mediators in the State of Hawaii.¹⁸⁹ In Texas, all 12 dispute resolution centres worked in conjunction with one another to ensure consistency among all centres in the state. However, the Texas efforts only govern volunteer mediation practitioners in the centres.

There are larger groups of mediation practitioners which have enacted ethical guidelines for mediation practitioners such as AFM and NASW. Though these organizations request their members to follow their code, there is no method of enquiry or determination of violation of an ethical guideline. Moreover, proving ethical violations is complicated by the confidential nature of mediation.

By the early 1990s, mediation practitioner regulation began to take a more serious approach. These mediation practitioners increasingly considered themselves part of a distinct profession, and they began to appreciate the need for separate professional

¹⁸⁸ *Supra*, at n. 72.

¹⁸⁹ *In the Matter of the Standards for Private and Public Mediators in the State of Hawaii*, (Order of the Supreme Court of Hawaii, 1986).

standards though they were unsure of how to go about it, especially with regards to the appropriate way to standardise behavioural and ethical rules.

In 1994, the American Arbitration Association (AAA), the ABA and the SPIDR adopted “The Standards of Conduct for Mediators” (Symposium 1995).¹⁹⁰ These regulations are meant to not only guide the conduct of AAA, ABA and SPIDR mediation practitioners, but also to establish guidelines for state regulators and other private organizations.

Four (4) organizations (ABA, AFM, AFCC, and Mediation Council of Illinois (MCI)) caution about proceeding with mediation if, at least, one party has been in therapy with the mediation practitioner. Each of these organizations has its own rules on role switching, which indicates uncertainty about what is correct and demonstrates that further discussion and clarification is warranted for this issue.

For instance, ABA prohibits role switching before, during, or after if either or both parties has previously been seen by the therapist-mediator. MCI recommends that, as a general rule, a therapist formerly involved with a party not act as a mediation practitioner for that party, but allows for the possibility if the prior involvement concerned issues completely distinct from those targeted for mediation. Even so, MCI dictates that clients be properly advised, and requires therapist-mediators to obtain a signed waiver from those affected.

¹⁹⁰ *Supra*, at n. 71.

AFM and AFCC, on the other hand, allow for the possibility of mediation if both parties have been in prior therapy with the therapist-mediator as long as therapy and mediation are clearly distinguished, and that the situation is clearly discussed with both parties prior to proceeding to mediation. These organizations advise the mediation practitioner to assess the emotional context in which the decision is made, especially in divorce mediation cases. Post-mediation contacts as therapist may compromise the mediation practitioner's ability to be neutral in the future, and therefore, are discouraged if future mediation is a possibility.

On October 23, 2000, the Judicial Council approved revisions to the Standards of Ethics and Professional Responsibility for Certified Mediators. The revisions took effect from January 1, 2001 and address the conventional "four legals" which require the mediation practitioner to inform the parties in writing of the following, prior to the commencement of mediation:¹⁹¹

- The mediator does not provide legal advice.
- Any mediated agreement will affect the legal rights of the parties.
- Each party to the mediation has the opportunity to consult with the independent legal counsel at any time and is encouraged to do so.
- Each party should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so.

¹⁹¹ Section D (2) (a) of the Standards of Ethics.

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The scope of the Standards of Ethics includes court-referred and privately-referred mediation conducted by certified mediation practitioners. In recent times, some mediation practitioners have expressed concerns that the four legals are less appropriate in many privately-referred cases. For example, in community mediation, providing parties with the four legals makes the mediation process more formal.

In some cases, mediation practitioners have found opportunities to mediate cases in the federal and international front. Most of these mediation programs do not include the language of the four legals in the Agreement to Mediate Forms, and some have refused to permit certified mediation practitioners to amend forms to provide parties with the four legals in writing. This has resulted in many certified mediation practitioners to experience an ethical dilemma on whether to comply with the Standards of Ethics or forgo new mediation opportunities.¹⁹²

The revisions include more flexibility to mediation practitioners in privately-referred cases where mediation practitioners may choose to provide the four legals either orally or in writing. In addition, the revisions also allow mediation practitioners to provide parties in private cases with the substance of the four legals as opposed to the four legals verbatim.

There are a number of widely distributed codes¹⁹³ identified as ethical in nature such as:

- SPIDR's Ethical Standards of Professional Conduct¹⁹⁴;

¹⁹² *Resolutions* is published quarterly by the Department of Dispute Resolution Services, Office of the Executive Secretary, Supreme Court of Virginia. See website www.courts.state.va.us.

¹⁹³ See Appendices.

- Association of Family & Conciliation Courts' Model Standards of Practice for Family and Divorce Mediation¹⁹⁵;
- Standards for Mediators in the State of Hawaii;
- Colorado Council of Mediators and Mediation Organizations' Code of Professional Conduct for Mediators¹⁹⁶;
- Texas Dispute Resolution Centre Directors Councils' Code of Ethics for Volunteer Mediators;
- Oregon Mediation Association's Standard of Mediation Practice;
- Standards of Professional Conduct for Certified and Court-Appointed Mediators in Florida; Law Society's Report on ADR (July 1991) – Mediation – Code of Practice.
- Model Standards of Conduct for Mediators¹⁹⁷

These codes cover a number of issues, and most are considered a code of conduct which incorporates ethical guidelines. The types of practice areas are consistently covered in these codes, ranging from issues of conflicts of interest, the mediation practitioner's role, impartiality, confidentiality, providing professional advice, fees, fairness of agreement, qualifications, training, advertising, and continuing education.

¹⁹⁴ *Supra*, at n. 72.

¹⁹⁵ *Supra*, at n. 61.

¹⁹⁶ *Supra*, at n. 59.

¹⁹⁷ American Arbitration Association and American Bar Association, Model Standards of Conduct for Mediators (1994). Compared to the Model Rule for the Lawyer as Third-Party Neutral (CPR Institute for Dispute Resolution 2002), the Model Rule appears to focus more on mediators' conduct than the Standards, but the Standards provide more guidance in the interactions between the mediator and the parties.

Other areas with some of these codes include the mediation practitioner's responsibility to the courts, self-determination of the parties, interests of outsiders and absent parties, separate caucuses, and the use of multiple procedures.¹⁹⁸

Australia

There are no legislative guidelines in Australia on the appropriate behaviour for mediation practitioners. As such, some codes of conduct have been formulated. These include guidelines developed by the New South Wales Law Society Dispute Resolution Committee and the Council of the Law Institute's Standards of Practice for Lawyer Mediators in Family Disputes.

"Guidelines for Solicitors Who Act as Mediators", as approved by the Council of the Law Society of New South Wales in May, 1988,¹⁹⁹ have been largely adopted by the Commercial Alternative Dispute Resolution Committee, Litigation Lawyers Section of the Law Institute of Victoria. The Council of the Law Institute of Victoria has also approved guidelines and standards of practice for lawyer mediators in family disputes and an agreement to mediate in a family dispute.²⁰⁰

In order to assist mediation practitioners in the resolution of dilemmas or to guide them on how they should behave in all situations that might arise during the mediation process, it has been suggested that codes or guidelines should cover two (2) separate categories of matters.

¹⁹⁸ Kovach, K. K., *op. cit.* 192-193.

¹⁹⁹ Reprinted in (1988) 26 *Law Society Journal* 29.

²⁰⁰ Reprinted in (1985) 59 *Law Institute Journal* 1163.

The first category pertains to “relatively objective and clearly definable dimensions of the mediation process”, for example, the requirement of confidentiality, costs and fee disclosure, informing parties about the nature of mediation and the role of the mediation practitioner, conflicts of interest and independent advice and counsel.²⁰¹ The other category covers “more subjective and less tangible” matters that relate to mediation practitioner behaviour, and key issues of mediation such as neutrality, fairness and impartiality.²⁰²

Singapore

Mediation practice has gradually grown into a profession since its inception in Singapore. As such, to ensure proper development of mediation and control of professional mediation, codes of practice and professional conduct are essential.²⁰³ In Singapore’s context, two categories of codes and guidelines have been developed – those relating to practices and standards expected of mediation practitioners, and those relating to ethical duties of mediation practitioners.

In terms of mediation practitioner standards and guidelines, a model standard of practice for court mediation practitioners has been established for court purposes.²⁰⁴ It covers specifics on the objective and role of court mediation, the types of mediation conducted

²⁰¹ Walker, G. B., “Training Mediators: Teaching About Ethical Obligations”, (Spring 1988) 19 *Mediation Quarterly*, 35.

²⁰² *Ibid.*

²⁰³ Lim, L. Y. and L. T. Liew, *Court Mediation in Singapore*, Singapore: FT Law & Tax Asia Pacific, 1997.

²⁰⁴ See Appendix C, *Id.* 208-210.

the nature of the mediation process with an emphasis on quality and training of court mediation.²⁰⁵

It is important for such guidelines to be established as they serve two objectives. Firstly, consistency and competence in practice could be maintained, thereby maintaining the quality of mediation. Secondly, they serve as criteria for performance of mediation practitioners and self-regulation of the mediation process.

A code of ethics has also been established for court mediation practitioners in Singapore²⁰⁶ where it covers the general responsibilities of mediation practitioners and their responsibilities to the parties concerned. It is important for mediation practitioners to comply with these ethical standards as they are privy to the intimacies and confidentiality of the dispute and can make various subjective judgments which could influence the outcome of the case.²⁰⁷

The relevant ethical standards in this code of ethics for court mediation practitioners include impartiality, neutrality, confidentiality, consensual decision making, and other ethical duties such as mediation practitioner's obligations not to engage in misleading and deceptive conduct, to make every effort to expedite the process and to exercise restraints in publicity and advertising.

²⁰⁵ Lim, L. Y. and L. T. Liew, *op. cit.*, 204.

²⁰⁶ See Appendix D, *Id.* 211-214.

²⁰⁷ *Supra*, at n. 198.

Regulations on Lawyers and Non-Lawyers

Practising Lawyers Who Mediate

Lawyers have been the most active professional group in raising ethical questions about mediation. Lawyers, in their zeal to preserve the adversary system and safeguard the complex checks and balances on which it rests, have attempted to impose regulations on both lawyers and non-lawyers who practise mediation.

There are numerous rules of professional responsibility for lawyers as mediation practitioners, all of which would not be covered in this review. Instead, only major ones would be highlighted to provide a focus on the approach of the legal profession.

In the United States of America, initial attempts were also made to modify the lawyer's code of ethics as most mediation practitioners were lawyers. The need for adopting rules for professional conduct was advocated by Henry St. George Tucker, President of the ABA and Chairman of its Committee on a Code of Professional Ethics²⁰⁸ where he said:

“The “thus it is written” of an American Bar Association code of ethics should prove a beacon of light on the mountain of high resolve to lead the young practitioner safely through the snares and pitfalls of his early practice up to and along the straight and narrow path of high and honourable professional achievement.”

The preamble to the 32 Canons of Ethics adopted by the ABA in 1908 also reflected the reason for these rules.²⁰⁹ The first major revision to the Canons did not come until a new

²⁰⁸ (1906), 29 A.B.A. Reports 600, as cited in Pirie, A.J., *op. cit.*, 385.

²⁰⁹ (1908), 33 A.B.A. Reports 575, *Ibid.*

Code of Professional Responsibility was adopted by the ABA in 1969.²¹⁰ Canon 5 especially prohibits representation of conflicting interests.

The 1969 Code was later replaced by the Model Rules of Professional Conduct in 1983 which was developed by the ABA Commission on Evaluation of Professional Standards (popularly referred to as the “Kutak Committee”).²¹¹ These new rules which provide more specific regulation of the lawyer as a mediation practitioner²¹² recognise the distinct function of a lawyer as a “counsellor”, as well as an “advocate”.

The Model Rules of Professional Conduct were looked at but there have not been any general changes so far though major changes have been seen in the family law area. This is because most lawyer mediation practitioners practised divorce law. In 1983 the Family Law Section of the ABA adopted in principle six standards of practice for family mediators,²¹³ and these were approved after modification by the ABA in August 1984.²¹⁴

The New York City Bar Association Committee on Professional and Judicial Ethics absolutely restricted lawyers from acting as mediation practitioners when the lawyer was

²¹⁰ The Code of Professional Responsibility was approved August 12, 1969 and became effective January 1, 1970.

²¹¹ (1982), 68 *A.B.A.J* 1411.

²¹² Rule 2.2 permits a lawyer to act as intermediary between clients under several conditions. It also requires the lawyer to provide full explanation on all matters to the clients so that they can make adequately informed decisions.

²¹³ *Supra*, at n. 61, n. 65.

²¹⁴ *Supra*, at n. 65, Standards of Practice for Lawyer Mediators in Family Disputes (1984), 18 *Family Law Quarterly* 363-68.

asked to exercise “professional legal judgement”. Its 1981 opinion stated that the Code “does not impose a per se bar to lawyers participating in divorce mediation activities”.²¹⁵

But it warned that “the lawyer may not participate in the divorce mediation process where it appears that the issues between the parties are of such complexity or difficulty that the parties cannot prudently reach a resolution without the advice of separate and independent legal counsel.”²¹⁶

The Association of the Bar of City of New York²¹⁷ allows the lawyer to participate with a therapist in a team approach to give impartial legal advice to the divorcing couple, and then to be the drafter of a written agreement.²¹⁸ The conditions to this rule include approval of dual representation lawyer on his advising parties of risks of the process, on advising parties only in their joint presence, on pointing out the advantages of individual legal representation and prohibiting any lawyer-mediator from representing either party in later divorce proceedings.

Model Rule 2.2²¹⁹ of the ABA Rules of Professional Conduct permits a lawyer to play a dual “intermediary” role in selected contexts. This rule mandates that the intermediary lawyer consult with each client regarding the “advantages and risks” of dual

²¹⁵ New York City Bar Association Committee on Professional and Judicial Ethics, Opinion No. 80-23, (1981) 7 *Family Law Report*, 3097, as cited in Murray, J. S., A. S. Rau, and E. F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, New York: Foundation Press, 1989.

²¹⁶ *Id.* 3099, *Ibid.*

²¹⁷ Commentary on Professional Ethics No. 80-23 (1980).

²¹⁸ Bruner and Craver, “The Nature of Mediation”, In *Alternative Dispute Resolution: The Advocates’ Perspective*, 1977.

²¹⁹ *Supra*, at n. 203.

representation and their impact on the attorney-client privilege. The Comments to this rule exclude its application to a lawyer who acts as an arbitrator or mediation practitioner.

Disciplinary Rule (DR) 5-106 allows the lawyer to be a mediation practitioner if his/her role is disclosed and the parties consent. The lawyer mediation practitioner can draft the mediation settlement agreement but should encourage the parties to seek independent legal advice before executing it. This rule effectively forbids acting for either party in court following the mediation.

Another major source of rules in the regulation of lawyers as mediation practitioners is the Model Standards for Practice: Family and Divorce Mediation which arose from a symposium organized by the Mediation Committee of the AFCC²²⁰. These Model Standards which are “intended to assist and guide public and private, voluntary and mandatory mediation”²²¹, are made up of 13 guidelines covering key areas which include impartiality and neutrality of the mediation practitioner, confidentiality and exchange of information, full disclosure of information, self-determination, professional advice matters, amongst others.

Of key importance to the lawyer are standards dealing with impartiality and independent legal advice as stipulated under Rule II, B (1). In addition to this, the Model Standards, in dealing with professional advice, which is another key area, make a clear distinction

²²⁰ Denver, Colorado, USA, May 22-23, 1984. The Standards approved at the symposium were adopted by the A.F.C.C at its mid-winter meeting in December 1984.

²²¹ Preamble to the Model Standards.

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between independent expert advice and independent legal advice.²²² The Colorado Council of Mediation Organizations maintains a code of conduct similar to that of the AFCC model standards.²²³

In contrast, the standards advanced by the Family Law Section of the ABA state that mediation practitioners have “a duty to be impartial” but also noted that “impartiality is not the same as neutrality. While the mediator must be impartial between the parties, the mediator should be concerned with fairness. The mediator has an obligation to avoid an unreasonable result”.²²⁴

The most recent development are the rules governing lawyers serving as divorce mediation practitioners but not representing either party which has earned the qualified approval of the Boston and Oregon Bar Ethics Committees.²²⁵ This model seems to offer the best possibilities for the appropriate use of the law and lawyers in mediation in that the lawyer mediation practitioner can attempt to provide impartial legal information while making clear the risks to the clients in doing so.

²²² Rule VII, A deals with independent expert advice whilst Rule VII, C deals with independent legal advice.

²²³ *Supra*, at n. 59. Moore, C. W., “Training Mediators for Family Dispute Resolution”, In *Successful Techniques for Family Break-up* (Ed. J. A. Lemmon), (1986) 2 *Mediation Quarterly*, as cited in Walker, G. B., *op. cit.*, 36.

²²⁴ *Supra*, at n. 65.

²²⁵ Boston Bar Associations, Opinions, No. 78-1 (1978); Oregon Bar Association, Opinions, No. 79-46 (Proposed 1980).

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The CPR-Georgetown Commission Model Rule for the Lawyers as Third-Party Neutral²²⁶ has two rules which are particularly relevant to the issue of unrepresented parties, namely, Rule 4.5.3 is the rule on impartiality, and Rule 4.5.6 is the rule on fairness and integrity of the process. Although ethical rules are incapable of guaranteeing that specific procedures or processes are fair, these rules are intended to require lawyer-neutrals to be attentive to the basic values and goals informing fair dispute resolution.

The ABA's Commission on Evaluation of the Rules of Professional Conduct, nicknamed Ethics 2000 reviewed the Model Rules of Professional Conduct and made recommendations that would address the issues of lawyers in mediation. One key recommendation is on role clarification which refers to the duty of the lawyer-neutral to make sure that parties in a dispute resolution process understand the lawyer-neutral's role in the process.²²⁷ The problem faced by the lawyer-neutral is that parties expect legal advice since the mediation practitioner is a neutral.

In the United States of America, some state provisions address mediation practitioner's responsibilities where there is an imbalance in bargaining power between the parties to

²²⁶ Model Rule for the Lawyer as Third-Party Neutral (CPR Institute for Dispute Resolution 2002) as cited in Nance, C. E., "Emerging Ethical Issues in ADR - The Ethical Issues Arising from Mediating with Unrepresented Parties" in the American Bar Association Annual Meeting, San Francisco, California on August 11, 2003. The CPR Institute for Dispute Resolution is a non-profit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics in support of private alternatives to the high costs of litigation. Organized in 1997, CPR develops new methods to resolve business and public disputes by alternative dispute resolution (ADR).

²²⁷ Yarn, D. H., "Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Applications", (2001) 54 *Arkansas Law Review*, 235, as cited in Nance, C. E., *Loc. cit.*

the dispute. Under the Oklahoma Supreme Court rules,²²⁸ for example, a mediation practitioner must avoid bargaining imbalances that occur when one party has legal or negotiating assistance while the other does not. In domestic relations mediation in Iowa, mediation practitioners must “assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiating techniques utilized by either of the participants”.²²⁹

Outside of the United States of America, similar regulations are evident. The Ontario Association for Family Mediation was responsible for preparing a draft code for family mediators in 1984.²³⁰ The Ontario Code, which has some similarities to the ABA Standards of Practice for Lawyer Mediators in Family Disputes²³¹, has rules dealing with key areas such as mediation practitioner competence, a duty of confidentiality, mediation practitioner impartiality, independent legal advice, a duty to ensure no harm or prejudice to participants, mediation practitioner’s duty to report breaches of the Code, and potential problems in mediation.

Two (2) key areas are worth noting. The first one deals with mediation practitioner impartiality where the Code prohibits a mediation practitioner from undertaking mediation “if the mediator is a lawyer who has represented one of the parties

²²⁸ Oklahoma Supreme Court Rules and Procedures for the Dispute Resolution Act, Rule 12; Code of Professional Conduct for Mediators, Oklahoma Supreme Court Rules and Procedures for the Dispute Resolution Act, app A, as cited in Brown, H. and A. Marriot, *ADR Principles and Practice*, London: Sweet & Maxwell, 1999.

²²⁹ Rules Governing Standards of Practice for Lawyer-Mediators in Family Disputes, adopted by the Iowa Supreme Court on December 21, 1986, as cited in *Ibid*.

²³⁰ Published in (1984), 2 *Ontario Association for Family Mediation Newsletter*.

²³¹ *Supra*, at n. 65.

beforehand.”²³² The second one deals with independent legal advice where the Code imposes clear requirements on the need for the mediation practitioner to advise clients “of the availability of independent legal advice for each spouse” and “the advisability of obtaining it from the outset of the mediation.”²³³

The Law Society of British Columbia has been the only legal governing body in Canada to formulate express rules for lawyers as mediation practitioners. The Professional Standards Committee of the Society recommended a draft ruling on Family Law Mediation to be added to the Professional Conduct Handbook²³⁴ and this was approved, with revisions, by the Benchers of the Law Society on July 29, 1984.

In Australia, the Law Society of New South Wales has published a code of behaviour for solicitors who act as mediation practitioners. It sets that the lawyers’ role is to ensure that the high standard of conduct required of a mediation practitioner as outlined in the Law Society Revised Guidelines for Solicitors who act as Mediators, is maintained.²³⁵ It is stated that it is not the mediation practitioner’s role to take sides; give advice or opinions; make suggestions which may disadvantage a party; propose or endorse possible outcomes; and support either party’s view.

Similarly, Clause 22 of the pro-forma mediation agreement for Settlement week conducted in Queensland, Australia in 1992 prevents a lawyer from acting for or advising

²³² *Supra*, at n. 229, Rule 5(c).

²³³ *Supra*, at n. 229, Rule 8.

²³⁴ Professional Conduct Handbook of the Law Society of British Columbia, Ruling G12.

²³⁵ Sordo, B., “The Lawyer’s Role in Mediation”, (February 1996) 7 *Australian Dispute Resolution Journal* 1, 20.

the parties, or even acting as arbitrator between the parties in relation to the disputes.²³⁶ A recent brochure published by the Queensland Law Society entitled “Alternative Dispute Resolution – Guidelines for Solicitors” provides that “a mediator is under a clear ethical obligation not to act for either party for a reasonable period of time after the dispute”.

The Council of the Law Institute of Victoria in its guidelines for lawyers acting as mediation practitioners in family disputes states that “...the lawyer’s task is to advise the client in relation to legal rights and to act in accordance with instructions to protect and further the clients’ interests...include advising the client about mediation procedure and alternatives to mediation...”²³⁷

Non-Practising Lawyers Who Mediate

A lawyer acting in another professional capacity can sometimes inadvertently create an attorney-client relationship. For example, when a person reasonably believes that a lawyer is acting as his attorney, relies on that belief and the lawyer does not refute that belief, an attorney-client relationship is created.²³⁸

In order to keep this concern in check, the ABA House of Delegates promulgated Model Rule 5.7 concerning ancillary services. This rule covers cases in which the lawyer is not practising law, but is engaged in activities so closely related to the practice of law that a third party might believe the lawyer is representing him or her. In such cases, the rule

²³⁶ Sammon, G., “The Ethical Duties of Lawyers Who Act for Parties to a Mediation”, (1993) 4 *Australian Dispute Resolution Journal* 3, 191.

²³⁷ *Id.* 192.

²³⁸ *In re Neville*, 147 Arizona 106, 708 P.2d 1297 (1985) as cited in Brunet and Craver., *op. cit.*, 257.

requires that lawyers follow the Rules of Professional Conduct which expressly identifies mediation as an ancillary service.

Non-Lawyers

A counsellor, psychologist, or other non-lawyer who serves as a divorce mediation practitioner is not governed by the lawyer's code of professional ethics. If the mediation practitioner is a member of another professional discipline, however, he or she will have to look at that profession's code of ethics. In offering mediation, non-lawyers run the risk of engaging in the unauthorized practice of law.

The North Carolina State Bar Association (1980), through its Unauthorized Practice of Law Committee, has ruled that a non-profit organization offering a divorce mediation service requiring participating couples to sign an agreement by which they would be required to submit unresolved disputes to binding arbitration was engaged in the unauthorized practice of law.²³⁹

The New York City Bar Committee (1981), in approving a mediation program undertaken by a non-profit mental health organization, assumed laymen could perform divorce mediation activities without exercising professional legal judgment and without engaging in an authorized practice of law.

²³⁹ Folberg, J. and A. Taylor, *op. cit.*, 257.

Other Ethical Issues

Several standards on mediation practice and codes of ethics particularly focus on ethical issues affecting mediation practice such as confidentiality, impartiality, neutrality, self-determination as these are essential elements to the mediation process.

For example, the Model Standards of Conduct for Mediators²⁴⁰, jointly drafted by the ABA, the ABA, and the SPIDR, incorporates party control in the area of confidentiality. The Model Rules of Professional Conduct adopted by the ABA in 1983 continue to require lawyers to preserve the confidences and secrets of a client with one principal exception to prevent criminal acts “likely to result in imminent death or substantial bodily harm.”²⁴¹

The Code of Professional Conduct for Labour Mediators (1971)²⁴², adopted jointly by the Federal Mediation and Conciliation Services and the several state agencies represented by the Association of Labour Mediation Agencies, recognises the importance of confidentiality.²⁴³ AFM (1982), as the leading organizations representing divorce mediators, has proposed standards that specify the mediation practitioner’s duty to protect the privacy and confidentiality of the mediation process. This duty is expressly limited by the mediation practitioner’s “inability to bind third parties in the absence of any absolute privilege”.²⁴⁴

²⁴⁰ *Supra*, at n. 71.

²⁴¹ American Bar Association, 1983, Section 1-6(b)(1).

²⁴² Folberg, J and A. Taylor, *op. cit.*, 267.

²⁴³ Code of Professional Conduct for Labour Mediators, 1971, Sections 4 and 5.

²⁴⁴ Academy of Family Mediators, Section 3(b).

Further, a second way to achieve mediation confidentiality is legislation. Numerous states in the United States of America provide a degree of confidentiality for the mediation process, namely:

- a. California Evidence Code - Section 1152.5(a)(1995);
- b. Colorado Revised Statutes – Section 13-22-307 (1987 and Supplement 1996);
- c. Ohio Revised Code Annex – Section 2317.02 (1994 and Supplement 1996);
- d. Oregon Revised Statutes – Section 36.205 (1995)
- e. Texas Civil Practice and Remedies Code Annex – Section 154.073 (Supplement 1997);
- f. Code of Virginia – Section 8.01-581.22 (1992).²⁴⁵

Challenges on the Use of Code of Ethics

There are numerous challenges in the creation as well as implementation of a code of ethics for mediation practitioners. The key challenge is the inherent flexibility of the mediation process which contributes to the wide applicability and effectiveness of its process in a variety of disputes.

The difficulty in defining the process and precisely how it works contributes to the complications in determining ethics and standards of practice for mediation practitioners. Further, if rigid standards are established, this would curb the mediation practitioner's flexibility in carrying out their roles.

²⁴⁵ *Supra*, at n. 211.

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Yet another challenge lies in the situation where mediation practitioners are bound to comply with their primary professional ethics. This may be due to their training, background, education and licensure prior to practising mediation. The question is how will a decision be made concerning which code of ethics controls?

It would also be a challenge to create a code of ethics to impact all mediation practitioners. This would be impossible as many mediation practitioners are volunteers and technically, they should not be overburdened by regulations. However, to establish a standard of ethics which exclude volunteers may send the wrong message on competency in mediation services.

The issue of enforcement of these codes of ethics remains a challenge. Some argue that the mere existence of ethical standards is in itself, sufficient enforcement. In essence, these should be more than just guidelines and reach the level of standards.²⁴⁶ The majority of current codes of ethics are established as guidelines for mediation practitioners. In reality, no sanctions exist for mediation practitioner violations. Hence, it is uncommon for the mediation practitioner to be prohibited from practising mediation with an entity²⁴⁷ which enacted the standards.

²⁴⁶ This is the position of at least one Associate Justice of the Florida Supreme Court. When the Florida Supreme Court was enacting certification procedures, it was deemed necessary to establish an enforcement body. The Supreme Court of Florida was the first entity to assume the role of a regulating authority for the mediator profession. More recently, the State of Utah has provided that the Division of Occupational and Professional Licensing is authorized to deny or revoke certification of a dispute resolution provider. Utah Code Ann. Section 58-391-6 (1993).

²⁴⁷ This entity could be an organization of mediators, a mediation program or a referring court or agency.

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Lastly, there is the question of how to introduce a code of ethics to new mediation practitioners, and even experienced ones as there is no training requirement for mediation practitioners. Training and educating mediation practitioners have not been standardized.

There is no consistency in terms of course content, and it is difficult to ascertain whether trainings actually include ethical components. Although some mediation practitioner membership organizations provide ethical guidelines for their members, it is difficult to determine whether mediation practitioners are familiar with them as there is no standard testing of mediation practitioners. Some new mediation practitioners may not even be aware of the existence of ethical guidelines and standards.

CHAPTER 5

RESEARCH FINDINGS AND IMPLICATIONS

Introduction

Based on the interviews conducted with the sampled mediation practitioners from the SMC and CMC panels, data and information were gathered as research findings. These data were then analysed from the composition of the sampled practitioners in terms of the following characteristics:

1. Current occupation (on the SMC panel);
2. Location (on the CMC panel);
3. Mediation experience (on both the SMC and CMC panels); and
4. Mediation practice areas (on both the SMC and CMC panels)

BACKGROUND OF SAMPLED MEDIATION PRACTITIONERS

Table 1: Composition of the SMC Panel and CMC Panel of Mediation Practitioners

SMC 110-Panel of Mediation Practitioners	CMC 146-Panel of Mediation Practitioners *
Private Legal Practice	Regional East
Private Mediation Organizations	Central
Private Consulting Organizations	Regional North
Others (Government departments, Academia, SMC)	

Table 1 above shows the composition of the SMC panel and the CMC panel of mediation practitioners which formed the sample universe for this study.

Table 2: SMC Panel Sample Composition by Current Employment

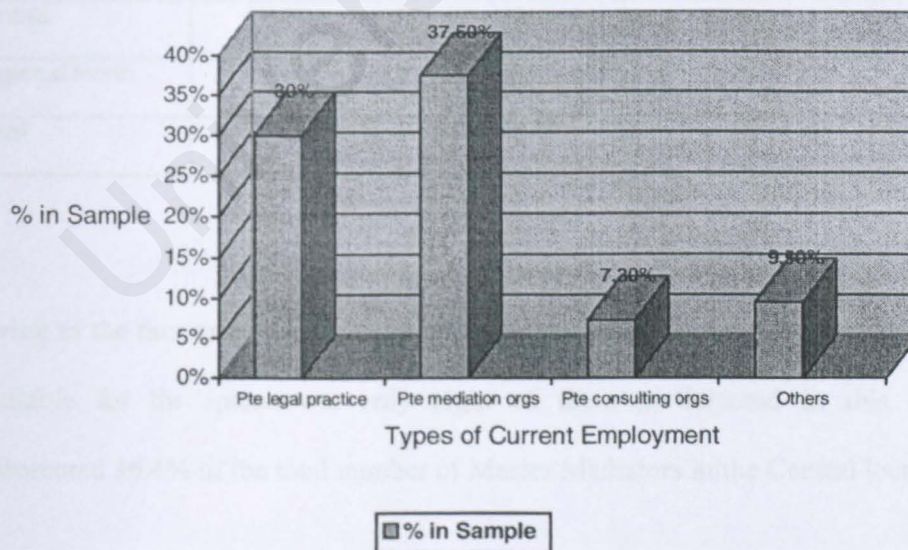
Current Employment	Table 2	N of SMC panel	% in Sample
Current employment			
Private legal practice	6	30	30%
Private mediation organizations	8	40	40%
Private consulting organizations	4	20	20%
Others (Government departments, the Academia, and the SMC organization)	2	10	10%

Of the four (4) categories, the highest % of sample was from private mediation organizations with 37.5%, followed by those in the private legal practice which comprised 30% of the sample. Table 2 shows that the majority of mediation practitioners are currently in private mediation organizations and in private legal practice.

Table 2: SMC Panel Sample Composition by Current Employment

Types of Current Employment	Total #	# in Sample	% in Sample
Private legal practice	40	12	30
Private mediation organizations	8	3	37.5
Private consulting organizations	41	3	7.3
Others (Government departments, Academia, SMC)	21	2	9.5
Total	110	20	18.2

Figure 2: SMC Panel Sample Composition by Current Employment



Location

The CMC panel of mediators was distributed in three (3) major locations across Singapore, namely Regional East, Central, and Regional North, with Central having the highest density, and with the largest number of Master Mediators, as depicted in Table 3. Master Mediators comprised about 41% of the total number of mediation practitioners from the CMC panel. According to the definition of the CMC, these are mediators who have achieved a requisite level of expertise and experience in mediation.²⁴⁸

Table 3: Sample of Master Mediators from CMC Panel by Location

Location	Total #	Total # of Master Mediators	# of Master Mediators in Sample	% of Master Mediators in Sample
Regional East	39	19	8	42.1
Central	61	22	8	36.4
Regional North	46	19	8	42.1
Total	146	60	24	40.0

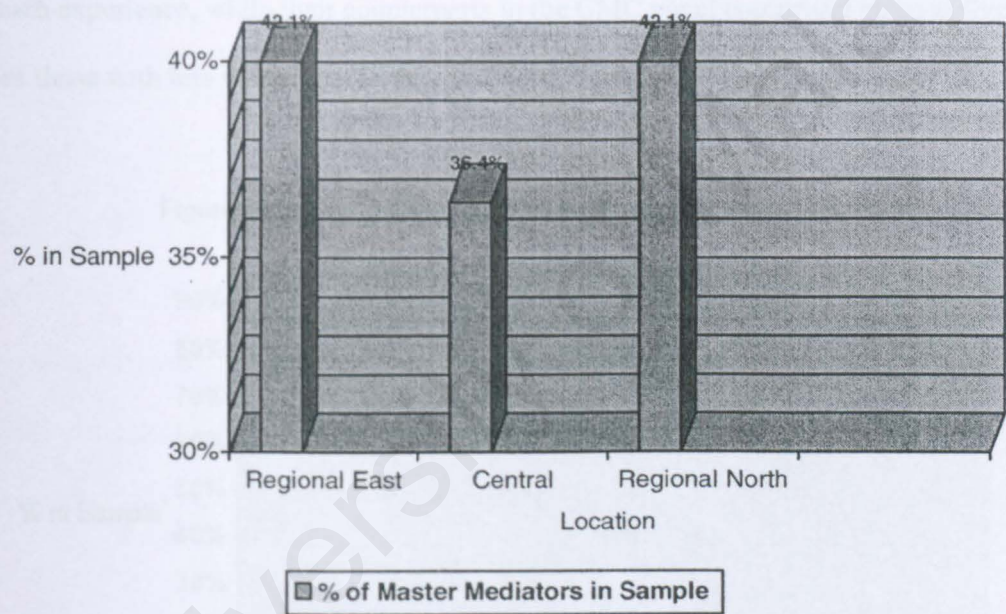
Owing to the fact that majority of the Master Mediators in the Central location were not available for the interviews, only eight of them participated in this study. This represented 36.4% of the total number of Master Mediators in the Central location.

The highest representations came from both the Regional East and Regional North locations where each represented 42.1% of their Master Mediators who were interviewed.

²⁴⁸ *Supra*, at n. 14.

40% of Master Mediators from the CMC panel were interviewed in this study. Figure 3 below show the distribution of the sampled Master Mediators from the CMC panel in the three (3) regions.

Figure 3: Sample of Master Mediators from CMC Panel by Location



Mediation experience

In both the SMC and CMC panel of mediation practitioners, there were a higher number of representations in those with more than five (5) years of mediation experience. 75% of them were from the SMC whilst 83.3% represented the CMC in this area as shown in Table 4 below. There were fewer mediation practitioners with less than five (5) years of mediation experience who were willing to participate in this study. Those with more than

five (5) years of mediation practice were more open and willing to share their experience in these interviews.

It can be seen in Figure 4 that from the SMC panel, those with more than five (5) years of mediation experience comprised about three (3) times those with less than five (5) years of such experience, while their counterparts in the CMC panel comprised close to five (5) times those with less than five (5) years.

Figure 4: SMC and CMC Samples by Mediation Experience

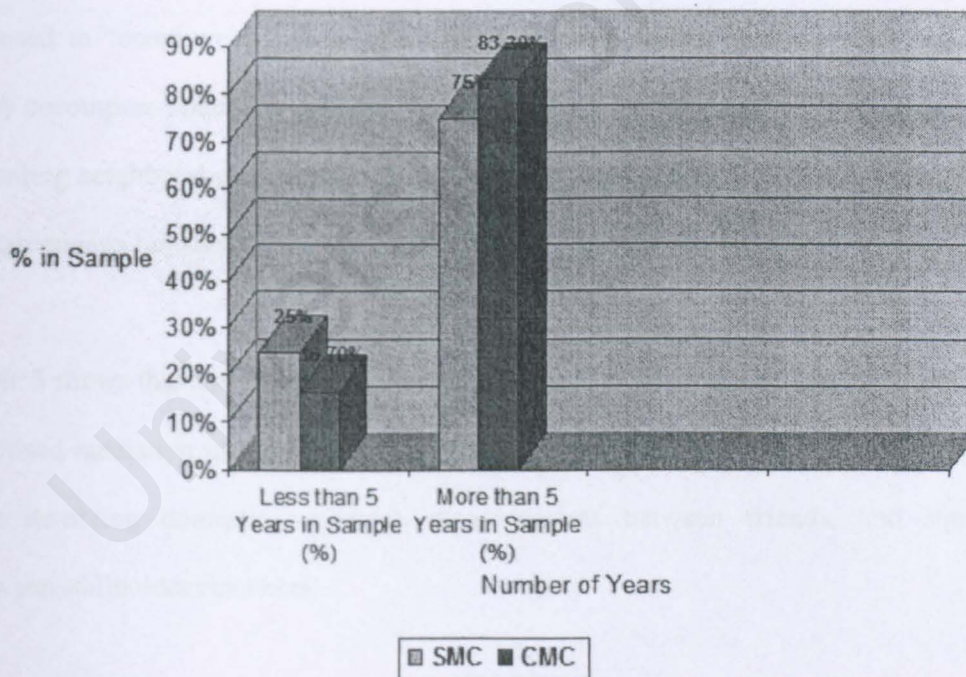


Table 4: SMC and CMC Samples by Mediation Experience

	Less than 5 years in Sample	% in Sample	More than 5 years in Sample	% in Sample
SMC	5	25	15	75
CMC	4	16.7	20	83.3
Total	9	20.5	35	79.5

Mediation practice areas

The mediation practice areas of the CMC panel of mediation practitioners focused on community disputes. As the name implies, the CMC caters to “community” disputes as opposed to “commercial” ones, and handles disputes which are “relational” in nature. They encompass relational disputes encountered with one’s community and social sphere including neighbourhood disputes, family disputes (excluding family/domestic violence), disagreements between friends, squabbles between stallholders/hawkers/owners.

Table 5 shows that almost all of the mediation practitioners sampled from the CMC panel practised mediation in the four (4) key areas – neighbourhood disputes, family disputes (not involving domestic violence), disagreements between friends, and squabbles between stallholders/hawkers.

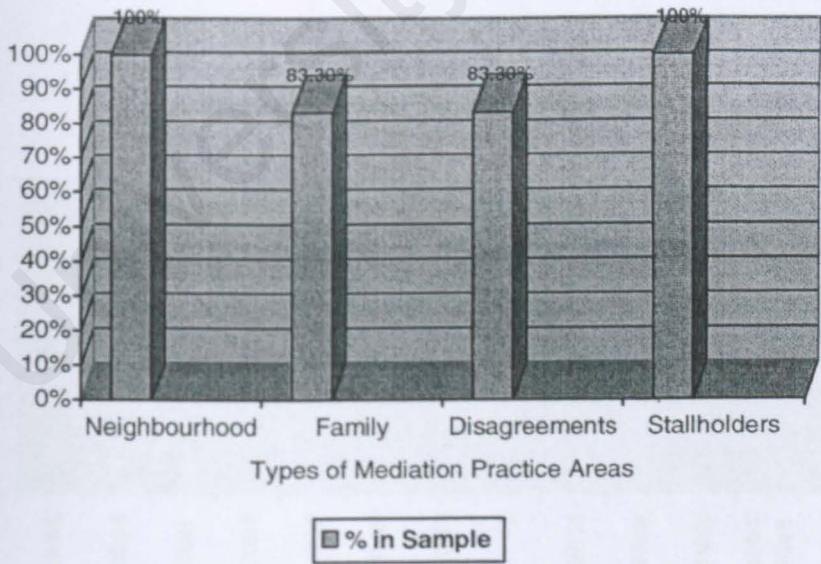
The two (2) most popular mediation areas involved neighbourhood disputes and stallholders/hawker squabbles where all of those sampled had practised mediation in these areas. More than 80% of those interviewed had practised mediation involving

family disputes (excluding family/domestic violence) and disagreements between friends, as seen in Figure 5 below.

Table 5: Mediation Practice Areas - CMC

Mediation Practice Area	# in Sample	% in Sample
Neighbourhood disputes	24	100
Family disputes (excluding family /domestic violence)	20	83.3
Disagreements between friends	20	83.3
Stallholders/Hawker/Owner squabbles/Landlord-tenants	24	100

Figure 5: Mediation Practice Areas - CMC



In contrast, the SMC panel of mediation practitioners focus on commercial types of disputes. They contribute to the building of a harmonious society, and a thriving business community by providing means of dispute resolution and conflict management in disputes in the areas of banking, construction, contractual, corporate, contested divorces and divorce ancillary matters, employment, family, information technology (IT), insurance, negligence, partnership, personal injury, shipping, and tenancy.

The not-so-popular practice areas were found in disputes involving information technology (IT), insurance, partnership, and personal injuries where only 10% of the sampled mediation practitioners had indicated these practice areas as seen in Figure 6 below.

Figure 6: Mediation Practice Areas - SMC

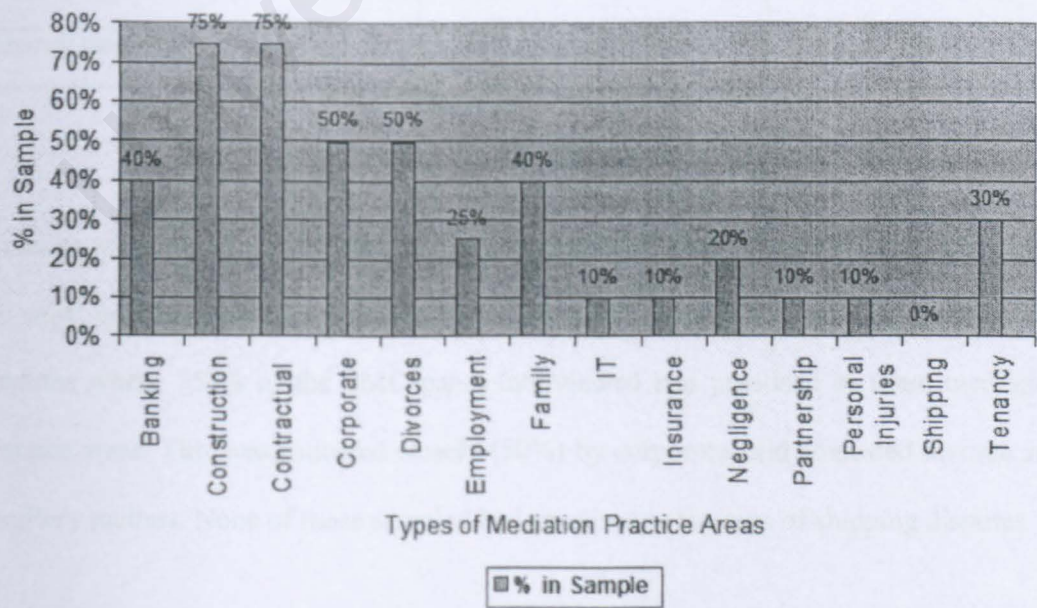


Table 6: Mediation Practice Areas - SMC

Mediation Practice Area	# in Sample	% in Sample
Banking disputes	8	40
Construction disputes	15	75
Contractual disputes	15	75
Corporate disputes	10	50
Contested divorces & divorce ancillary matters	10	50
Employment disputes	5	25
Family disputes	8	40
IT disputes	2	10
Insurance disputes	2	10
Negligence claims	4	20
Partnership disputes	2	10
Personal injury claims	2	10
Shipping disputes	0	0
Tenancy disputes	6	30

It can be seen from Table 6 that from the sampled SMC panel of mediation practitioners, the most popular mediation practice areas seemed to be in construction and contractual disputes where 75 % of the SMC panel interviewed had practised in these mediation practice areas. This was followed closely (50%) by corporate, and contested divorce and ancillary matters. None of those sampled had practised in the area of shipping disputes.

FINDINGS ON RESEARCH QUESTIONS

The scope of this study covered the following five (5) research questions involving:

1. Types of ethical dilemmas;
2. Handling ethical dilemmas;
3. Commercial mediation versus community mediation;
4. Key factors influencing or affecting ethical dilemmas; and
5. Adequacy of ethical standards

The specifics of each of these research questions were discussed based on the findings recorded in this study.

Types of Ethical Dilemmas

Essentially, from the interviews conducted with the sampled mediation practitioners, ten (10) types of ethical dilemmas were found to be prevalent amongst these practitioners in Singapore. To a large extent, some of these ethical dilemmas were culturally-driven from an Asian perspective.

In an attempt to illustrate these dilemmas better, some of the salient and significant situations shared during the interviews were also included in this study. Table 7 below summarises the ten (10) types of ethical dilemmas revealed by the sampled mediation practitioners in Singapore.

Table 7: Types of Ethical Dilemmas

The sampled mediation practitioners shared the following ethical dilemmas during the interview sessions:

Dilemma #1: Managing parties' expectations and perception.

- a. Parties' expectations that the mediation practitioner has all the answers to their problems and disputes.
- b. Parties' perception that the mediation practitioner is the final arbiter who "makes the final decision".

Dilemma #2: Managing mediator's body language, facial expression and voice.

- a. Difficulty to keep a "straight face" or "poker face" during the entire mediation session.
- b. Maintain a neutral "look and feel" during the entire mediation session.

Dilemma #3: Handling difficult parties.

- a. Parties who are illiterate.
- b. Parties who are ignorant and/or without legal representation.
- c. Parties who are dishonest or abusive of the mediation process.

Dilemma #4: Avoiding conflict of interest.

- a. Professional in nature – to refrain from providing legal advice or counselling to parties.
- b. Personal in nature – mediation practitioner has/had personal relationships with one party and/or their lawyers.

Dilemma #5: Preserving confidentiality.

- a. Temptation to disclose confidential information which would break impasse.
- b. Disclosure of confidential information which would reach unfair resolution.
- c. Disclosure of confidential information to non-parties.

Dilemma #6: Maintaining trust.

- a. With parties (particularly when one of the parties neither speaks nor understands the English language).
- b. With parties' legal counsels.

Dilemma #7: Maintaining impartiality.

- a. Temptation to provide personal views/opinions based on personal values and cultural influences.
- b. Tendency to develop empathy with parties' predicament or dilemma.

Dilemma #8: Preventing abuse of process.

- a. When a party lies.
- b. When a party plays delaying tactics.
- c. When a party withholds information.

Dilemma #9: Preserving self-determination.

- a. Temptation to offer a solution to parties.
- b. Temptation to “reject” or “oppose” to parties’ solution.

Dilemma #10: Ensuring informed consent.

- a. Where there is coercion or undue pressure or intimidation by one party and/or party’s legal counsel.
- b. Where there is power imbalance either due to party ignorance or party incapacity.

1. Dilemma #1: Managing parties’ expectations and perception.

There are two (2) aspects of this Dilemma – parties’ expectations that the mediation practitioner has all the answers to their problems and disputes, and parties’ perception that the mediation practitioner is the final arbiter who “makes the final decision”.

The sampled mediation practitioners felt that despite having been briefed and explained on the proper mediation process, including the role of the mediation practitioner in the mediation process, parties still possessed expectations that the mediation practitioner had all the answers to their problems. Their perception was that the mediation practitioner was the final arbiter, like a judge or arbitrator who made the final decision.

When parties in dispute came to a mediation session, often times their expectations and perception of the role of the mediation practitioner needed to be level set properly. Parties

were briefed at the beginning of the mediation process that the mediation practitioner was a neutral third party. He was neither a representative nor an agent of the parties in dispute, nor an advocate for their interests. The mediation practitioner was simply a helper, i.e. a catalyst to the negotiations between the parties.

Parties were always reminded that mediation practitioners were not lawyers. The role of an impartial mediation practitioner should not be confused with that of a lawyer who was an advocate for a client. The mediation practitioner might define the legal issues, but should not direct the decision of the parties based upon the mediation practitioner's interpretation of the law as applied to the facts of the situation. The mediation practitioner had to ensure that the parties had sufficient understanding of the mediation process.

The sampled mediation practitioners felt that the root cause for parties to harbour such expectations and perception was cultural in nature. In the Asian society like Singapore where traditional culture is still deeply entrenched, a third party whose role was to resolve disputes was always perceived as the "wise one" as was similarly portrayed in the role of a judge. Hence, it was not a surprise for parties to assume that the mediation practitioner was the "wise one" akin to a "village headman" who had all the answers to their problems and disputes.

From the parties' perspective, it was the mediation practitioner who conducted the mediation process from end to end; he who facilitated the discussions between parties, and was in control of the process; and was knowledgeable about the subject matter in

dispute. It was the perception of the parties that the mediation practitioner was the person who “runs the show”, not their legal counsels who were supposedly to be proficient in protecting the clients’ rights and interests in the dispute in question.

Owing to this “trend”, the sampled mediation practitioners found it very difficult to manage the parties’ expectations and perception. They had to consistently set the parties’ expectations right, and to consistently remind the parties not to harbour such expectations and perception.

Those sampled mediation practitioners who are legally-trained admitted that sometimes they were tempted to offer legal advice or solutions to the party who kept going back to them for “answers”, and had been hopeful that the “answers” were forthcoming from the mediation practitioners themselves.

To a certain extent, the mediation practitioners had their egos boosted when parties consistently went back to them to seek for their advice and opinions on solutions offered on the table by the other party. It was easy to give in to the temptation.

2. Dilemma #2: Managing mediator’s body language, facial expression and voice.

Being a neutral party to the parties in dispute, it was so difficult to keep a “straight face” or “poker face” during the entire mediation session. According to the mediation practitioners sampled, the problem was how to maintain a neutral “look and feel” throughout the entire mediation process.

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It became extremely difficult for one mediation practitioner when one of the parties in dispute was a “very attractive lady with a huge problem”. He felt remorseful when she shed tears during the mediation session, especially during a caucus. As a man, the mediation practitioner had found himself “falling for her sob story” of a domestic family dispute.

He admitted that he was too taken in by her story that he felt himself losing objectivity during the mediation process. He saw her as a “damsel in distress” and was tempted to “save her from her predicament.” He had to fight very hard to keep a straight face, including his body language and tone of his voice. It was very important for him to maintain his professionalism, and in the way he conducted the discussions between the parties in dispute.

In another situation which involved an old lady who was evicted from her own house by her two sons, the mediation practitioner felt remorseful and sympathetic towards her. Yet, he had to maintain the neutral “look and feel” including his body language and tone of his voice. He had to fight back his personal feelings about the situation – he admitted that he felt angry when he heard the facts of the dispute.

To him, it was a simple case of two sons who bullied their old mother. On one occasion during the private caucus with the two (2) sons, he almost raised his voice at them. He

said it was as if he felt like he was one of their siblings trying to protect “their old mother” from the “bullies”.

As a mediation practitioner, he found this to be an ethical dilemma as the issue at hand was against Asian teachings where children in an Asian society like Singapore have always been taught to be filial piety, and have respect for the elders, especially one’s own parents.

3. Dilemma #3: Handling difficult parties.

There were several types of “difficult” parties to handle in any mediation session. One group of “difficult” parties comprised those who were illiterate, that is, those who did not have any formal education, and could neither read nor write. They were usually the older generation such as senior citizens and retirees.

Then, there were those who were ignorant about the idea or concept of an amicable dispute resolution, and did not respect the very spirit of mediation. They usually came to mediation without any legal representation, or had been ill-advised about mediation. One mediation practitioner opined that such a group of people had come to mediation with the idea that the mediation process was akin to a litigation process where there was a “winner” and a “loser”.

Their expectations were to have the mediation practitioner hand over a “verdict” or an “award” to them, and that they were not expected to speak during the mediation process.

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The mediation practitioners observed that this group of people was non-civic-minded and uncultured.

Explaining the mediation process, the do's and don'ts, including the role of the mediation practitioner was a harrowing experience for some of these mediation practitioners. This observation was more evident amongst parties in community mediation than in commercial mediation.

On some occasions, the Master Mediators in community mediation practice had to repeat the rules and guidelines countless times on a regular basis throughout the entire mediation session. On other occasions, mediation sessions had involved a show of shouting matches between parties as the rules of the mediation process were not properly respected and followed.

The nature of disputes usually centred on commercial or business territorial issues relating to hawker/stall disputes in Singapore's food courts at residential estates, and HDB flat disputes between neighbours. What started as usually minor simple disputes turned serious when such illiterate parties became emotional and rowdy, at times racial in nature. One Master Mediator had to give a stern warning to one party who had used vulgar language towards the other party during the mediation session.

In the case of such illiterate parties, the biggest challenge yet was the use of the right language as a basic communication tool. Getting the right mediation practitioner to

handle situations where the parties did not speak English was not easy. Usually, these parties only spoke in their own mother tongues such as popular Chinese dialects in Singapore (Hokkein and Teochew), Tamil or the Malay language.

The issue arose when the mediation practitioner did not speak in either of the mother tongues of the parties, or in a worse situation, where the mediation practitioner could speak in one of the mother tongues of the parties. In an instance cited by one mediation practitioner, where the mediator could speak Teochew, and one of the parties also spoke Teochew, but the other party spoke in Hokkien, a different Chinese dialect, the mediation practitioner had to be very careful not to be seen or perceived as being biased towards the Teochew party.

One Chinese Master Mediator shared that he had to converse in the Malay language with one party who could only speak Malay, and that he had to converse in Hokkein with the other party who could only converse in Hokkein. His experience had involved a neighbourhood dispute where the Chinese family had encroached into the Malay neighbour's veranda area which was used as their clothes drying area, thereby blocking his path towards his flat unit. The Master Mediator felt that he had also acted as the interpreter in ensuring that both parties understood each other.

His dilemma arose whenever he conversed in the respective languages of the parties, and later had to translate his conversations with one party to the other, and vice versa. Owing to the fact that he was not professionally trained as an interpreter, he had feared that some

of the thoughts and information which were not professionally interpreted to the other party could have caused the parties to arrive at a different solution to their disputes.

There was also the experience in handling yet another “difficult” party which comprised those who were dishonest or abusive of the mediation process. Ironically, this group of people had understood the mediation concept and process too well to be able to take advantage of the other party who may be ignorant or illiterate or those without legal representation. This group of people usually came well-prepared, and had legal representation.

They would typically use several tricks and tactics to achieve their objectives. Some resort to delaying tactics to “buy time” and to “tire out the other party”. This group usually was not prepared to reach a quick resolution, and would give plenty of excuses to protract the mediation session.

The longer the mediation session was prolonged, the easier it was for the weaker party to give in to their demands. Some of the experienced mediation practitioners interviewed recognised these types of tactics as commonplace. However, these mediation practitioners had to grapple with striking the right balance between the parties’ separate objectives in arriving at the agreed solution.

It was also observed that there were parties who were dishonest when sharing their sides of their stories to the extent of even providing false information or had even lied blatantly

just to ensure that they had an unfair advantage over the other party. The dilemma which the mediation practitioners had to face was the inconsistency of such information when they were shared during the private caucuses.

4. Dilemma #4: Avoiding conflict of interest.

There were two areas of conflict of interest where the legally-trained mediation practitioners interviewed faced in their mediation practice. The first one was the conflict of interest in the professional sense. In this context, mediation practitioners found themselves tempted to offer professional advice or counselling to the parties instead of playing the role of a mediation practitioner.

There were times when they were “torn between” their role as the mediation practitioner and the “urge to advice or counsel” based on their professional knowledge training about the subject matter in dispute when the opportunity presented itself for the mediation practitioner to offer advice or counselling to the parties.

For example, more than half of those mediation practitioners who were legally trained admitted that there were numerous occasions where they had to hold back this “urge to advice or counsel” and to offer legal advice to the parties.

According to some of these mediation practitioners interviewed, one of the main reasons why such a temptation presented itself was the fact that some parties did not have adequate legal representation. On other occasions, where there was legal representation,

the mediation practitioners felt that better legal advice could have been provided to the parties by the lawyers who represented them during the mediation session.

They also stated that the other root cause of this temptation was the fact that the lawyers who represented the parties in the mediation session did not have sound or adequate knowledge of the mediation process, and of the role which lawyers play in mediation sessions.

Owing to this lack of knowledge, the parties were ill-advised in terms of ensuring that their interests had been taken into consideration. Instead, these lawyers were forward in getting the “rights” of their clients (the parties) heard in the mediation session. By so doing, this had confused the parties on the real purpose of a mediation session. Similar ethical dilemmas were also evident amongst mediation practitioners, who were trained in professions such as counselling, architecture, building and construction.

The second area of conflict of interest was of a personal nature where there were or had been personal relationships with the parties and/or with their lawyers. In this context, personal relationships arose from both prior and subsequent relationships. There were also relationships which arose from the race, sex, religion or class with one of the parties.

In situations where there were prior relationships with one of the parties or their lawyers, the mediation practitioners usually disclosed these relationships to the parties, and let the parties decide whether to proceed with the mediation session or not. A worse dilemma

faced by the mediation practitioner was when the parties waived their objections and agreed to proceed with the same mediation practitioner. So the mediation practitioner felt very uncomfortable about continuing with the session.

There were times when no prior relationships existed at the time of the mediation, but the mediation practitioner had the opportunity to enter into a relationship with one of the parties and/or with their lawyers subsequent to the mediation. In one of the cases shared during the interview, where one of the parties discovered after the mediation session, that the mediation practitioner and the other party had just struck a relationship, that party wondered whether they were in fact “close” during the mediation session.

In such an instance, the mediation practitioner felt so uncomfortable that he did not know whether to continue with the relationship or to just end it to avoid such conflicts of interest in the future. Hence, the ethical dilemma faced by the mediation practitioner in this situation was how to avoid such a conflict of interest, and what was the best way to handle this dilemma.

5. Dilemma #5: Preserving confidentiality.

Mediation is a process which involves exchange of confidential information between parties, where reporting of certain confidential information to non-parties may be required by the law. According to the mediation practitioners interviewed, often times they were unsure or unclear about the extent of such confidentiality. In their mediation practice, they were faced with various forms of uncertainty of what they ought to have

done when faced with ethical dilemmas concerning preserving confidentiality to the extent possible.

One popular area of such dilemma arose in a situation where an impasse had happened. Both parties did not want to relent nor give in to the other party, and there was no sign of a resolution. Hence a deadlock was imminent. But the mediation practitioner thought that if certain confidential information which was disclosed to him by one party in a private caucus were to be shared with the other party, the deadlock would have been broken, and an amicable solution would have been achieved.

He felt frustrated as the dispute protracted and he did not see how the mediation session would reach any form of settlement. That case was destined to be litigated in the courts. He was caught in this ethical dilemma where he was bound by the principles of confidentiality of mediation, and was in no position to breach that. Yet, he felt useless that he could not use that piece of confidential information to convince the other party to reach a resolution.

So, in this particular case which involved a divorce settlement where the wife had discovered the husband's infidelity through a hired private investigator, the husband would have agreed to a give in to the higher divorce settlement if he knew the extent of the wife's knowledge on his other life.

Unfortunately, the wife was adamant about not letting the husband know that she had hired a private investigator to spy on him over a period of eight (8) years! She had started suspecting him of seeing another woman in the second year of their marriage! During the private caucus, she confided in the mediation practitioner that she could not bear to let him know this information - that she had never trusted him all these years.

On the other side of the coin, mediation practitioners who handled family disputes also experienced the dilemma where if they had disclosed the confidential information to the other party, that confidential information would have prevented a resolution which was unfair and inequitable. But because that information was not made known to the other party, the settlement was accepted. These mediation practitioners felt that they could have prevented such settlements from being reached if they had revealed that confidential information.

This is the dilemma which these mediation practitioners found themselves bound by the principle of confidentiality in a mediation process. There were numerous occasions where parties had confided in them and shared such information during private caucuses which had they been revealed to the other party, a resolution might not have taken place.

In other words, if the other party had known about such information, they would not have accepted the settlement offer. It was in such situations where these mediation practitioners felt that they had done injustice to the other party by not providing the

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complete picture of the dispute in question including all its available options for settlement.

Yet another area on confidentiality which mediation practitioners who handled contractual disputes and construction disputes faced was where they were not required by the law to disclose to the court, to outside parties or agencies, but they felt that they had a duty to make such disclosure. However, by so doing, they had then breached the principle of confidentiality in the mediation process.

To some of these mediation practitioners interviewed, this was one of the worst kinds of ethical dilemmas they had faced. Yet to some, they admitted that they had no choice but to make such disclosures given the seriousness of the contents disclosed to them. Where they did, they had to live with the guilt of having breached their principle of confidentiality where the party had disclosed the information in strict confidence.

The question on the table was this – if there were no statutory requirement for such disclosures, should they never report allegations of crime or risks of criminal harm to individuals? If they did not, they asked if their conscience would be able to handle that guilt for the rest of their lives. They also pondered sometimes if there was a middle ground which they could take. But until today, they had found none.

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The last area of confidentiality shared by the mediation practitioners was confidentiality in caucusing from two aspects, namely, full disclosure of information from caucuses into joint meeting, and agreement to maintain confidentiality in separate meetings.

In the first instance, from their experience, confidentiality in caucusing had created two (2) ethical dilemmas. First, notwithstanding that the mediation practitioners had already made it clear that there would need to be proper disclosure in the joint meeting of matters discussed with each party separately, a party had said something in the caucus which he or she did not want the mediation practitioner to disclose to the other. This had put the practitioner in a difficult position, especially where the information in question was something embarrassing or defamatory in nature.

Second, there were some risks that the mediation practitioners, in carrying the information back from the caucuses to the joint meeting, had summarised or paraphrased it inaccurately and consequently, did not fully comply with the agreement that there was complete disclosure of the matters separately discussed.

In the second instance where there was agreement to maintain confidentiality in caucusing, the mediation practitioners were being placed in a position of having confidential information from both sides, and moving between the parties releasing information as authorised to do so.

The ethical dilemma which arose was where the mediation practitioner had received information from one party in the caucus which indicated to the practitioner that another party was under a misapprehension about some matters in terms of the legal position, and as to the consequences of any proposed course of action. The dilemma he faced was that if he was not able to disclose that confidential information to the other party, any such misapprehension might not be able to be remedied.

The mediation practitioners also mentioned that one other ethical dilemma would also arise if they had practised evaluative mediation (they all practised facilitative mediation). They felt that they would not be able to give an evaluative view where they had received confidential information not known to the other party. Further, the mediation practitioner might wish to discuss the position informally with each party to see whether and to what extent the confidential information might be reflected in the evaluation if he were to give one.

6. Dilemma #6: Maintaining trust.

This type of ethical dilemma involved two (2) aspects of mediation practitioners maintaining trust with the parties, as well as with the parties' legal counsels. In the first area of maintaining trust with the parties in dispute, this dilemma became more pronounced in situations where parties did not speak nor understand the English language.

Where the mediation practitioner had to be engaged in communication with one party in a language which was not the English language, the other party who did not understand the non-English language became suspicious. Then, it became difficult for the mediation practitioner to maintain the trust he so required from the parties in order for the mediation process to be effective.

In our Asian culture, the English language is not a widely spoken language especially amongst the older generations in Singapore. As this language is not their mother tongue, the mediation practitioners had the experience of having to converse in Chinese dialects or the local Malay or Tamil languages where one of the parties did not speak nor comprehend the English language.

Some common examples which were cited by the mediation practitioners included situations where one party was a Chinese-speaking old lady who wanted to contest the will of her late husband who had married an Indian lady from Malaysia. The Indian lady only spoke English, being a well-educated professional. The mediation practitioner was Chinese who was bi-lingual in Mandarin and the English language. Both parties were not legally represented.

During the course of the mediation process, the mediation practitioner had to converse in Mandarin when he communicated with the Chinese lady, and then translated their conversations to the Indian lady. He repeated the process when he had to translate his conversations with the Indian lady to the Chinese lady.

In such a situation, the mediation practitioner felt that it was difficult to maintain the trust from both parties as they were both doubtful whether his translated conversations were representative of the actual conversations in the respective languages.

In the other aspect of maintaining trust, the mediation practitioners shared that it was also difficult to maintain trust with the parties' legal counsels. They felt that trust was a key element in the mediation process, and that it was imperative that the parties' legal counsels had absolute confidence in the mediation process as an alternative dispute resolution mechanism.

It was undeniable that most lawyers were sceptical about going for mediation to resolve the parties' disputes. They opined that the majority of lawyers in Singapore, especially the older generation, preferred litigation to mediation.

One other key point raised by the mediation practitioners who handled contractual disputes was that the lawyers had great influence over the parties whom they represented. The dilemma they faced was when such lawyers who had a pre-conceived notion or prejudice against the non-effectiveness of the mediation process swayed the parties' decision when an offer of settlement was made or when a settlement was imminent.

Mediation practitioners were in an ethical dilemma when they found themselves tempted to brush the lawyers' advice aside, and instead were tempted to offer legal advice (where

mediation practitioners were legally trained themselves) to the said parties. The dilemma of maintaining the trust of these lawyers was tough, and these mediation practitioners did not know where to turn to in order to diffuse the situation.

7. Dilemma #7: Maintaining impartiality.

In this type of dilemma, the mediation practitioner was concerned about his impartiality when he was tempted to provide his personal views/opinions based on personal values and cultural influences. Owing to the parties' situation, actions, or positions, the mediation practitioner was "moved" or experienced a strong personal reaction such as sympathy or empathy towards the parties.

One of the examples shared by the mediation practitioner was the dispute between the land owner and the housing developer where the land owner's title to the property was disputed. In this case, the land owner had refused to move out of the land, and had insisted that he was the rightful owner but did not have valid documentation to prove his legal ownership of the said property.

The mediation practitioner in this case had experienced the same situation in his family, and he admitted that he was tempted to take the side of the land owner. He revealed that as a young boy he had seen how his father was bullied by housing developers and was eventually chased out of their property. He recalled that after the incident, his family was left without a roof over their heads, and had to depend on their relatives for shelter. That was a very embarrassing experience, he recalled.

He felt that he had empathized with the parties' predicament or dilemma. According to him, the ideal solution was to avoid such temptation totally, but mediation practitioners are humans after all, and such reactions were unavoidable in the practical sense of the word.

The dilemma was evidently pronounced during caucuses when the parties "did not hold back their emotions and feelings" about the dispute. This was the most difficult stage in the entire mediation process to maintain complete mediator impartiality, and to contain and to avoid having such emotions.

On other occasions, the mediation practitioners developed antipathy reactions towards parties. In the same instance, the mediation practitioner admitted that he felt "angry" or "mad" at the housing developer for what they did to the land owner. During the course of the mediation process, he began to develop negative feelings or reactions towards the housing developer, and he felt that his impartiality was questionable.

Hence, the question remains – these mediation practitioners were caught in such an ethical dilemma, and did not know what to do or how to handle it. They felt that they had to withdraw themselves as mediation practitioners in some cases.

But then again, they were unsure as to the extent of such reactions, that is, *when* would it be too strong to proceed with the mediation, or were such reactions acceptable in a

mediation process. They did not know how to make such judgements, and on what basis such judgements ought to be made.

In some cases, they felt that they had over-reacted, where there was no real need to withdraw from the case. They were aware of the fact that a withdrawal midway in the mediation process would definitely upset the entire process, not to mention the extent of the inconvenience caused to the parties concerned.

8. Dilemma #8: Preventing abuse of process.

Mediation is an informal and private process, and so it is prone to abuses by the parties. In this interview, the mediation practitioners revealed that they had experienced situations where the parties withheld information, and deliberately concealed information. If the other party had known about this concealed information, a different decision could have been arrived at.

One mediation practitioner who handled contested divorce matters was in dilemma when he found out about this non-disclosure and deliberate withholding of pertinent and relevant information which would have been of great consideration by the other party. He was unsure what he was supposed to do. On the one hand, if he had played the role as a policeman, he felt that he would be seen to have intruded into the parties' autonomy and self-determination.

On the other hand, if he did nothing, then would he have played his mediator role properly and professionally? Alternatively, should he disclose that he had found out about the concealed information, whether or not he would have breached the principle of confidentiality?

Or should he have persuaded the concealing party to disclose that information and that he did nothing himself? Or would he then be classified as a party to the concealment? Even if the parties knew that this was a risk of negotiation and settlement, the mediation practitioner was unsure if he was obligated to protect the parties from this risk.

In another type of situation, the mediation practitioners revealed that parties lied in their stories, where it was deliberate on their part not to tell the truth about the facts of the dispute. They felt that there was no sure way of validating what the parties told in the mediation process unless there was an inadvertent leak of the truth, and the mediation practitioner discovered that one of the parties had lied.

The question which bugged the mediation practitioners was whether they ought to continue with the mediation process when they made such a discovery. Or should they do nothing and take it that parties lied to each other all the time during mediation, even during private caucuses? Or should they accept the fact that the parties knew about this fact, and they took the risk anyway? Ultimately, should they just sit back and allow the process to take care of the parties?

There were also situations when parties played the delaying tactic by buying time to protract the mediation process. This was where the party simply agreed to the settlement, but had no intention of carrying it out. Such protracted actions would have given this party plenty of time to prepare their side of the story or “defence” if the other party decided to proceed with litigation for the same kind of settlement.

In other instances, according to the mediation practitioners, this delaying tactic was played by one party to tire the other party out. Some parties were unable to bear the length of the mediation session which sometimes took a few days, spanning long hours per day. As one party tired out, it was easier for that party to concede to the requests and demands of the other party in the proposed settlement.

This was one dilemma where they were unsure if they ought to discontinue the mediation session, or to just proceed to draft the settlement agreement, and to respect the parties’ mutual decision in reaching that settlement. Or should they refuse to draft the settlement agreement, and discontinue with the session in their effort to protect the other party from being “pressured” into accepting the settlement. If they did that, would the mediation practitioners be seen to have intruded into the parties’ autonomy and self-determination?

9. Dilemma #9: Preserving self-determination.

Almost all of the mediation practitioners interviewed shared the fact that this type of dilemma was closely linked with the principle of impartiality. They felt that there was a

thin line drawn between them providing a solution to the parties versus not being too directive or controlling in their role as the mediation practitioner.

At times they could not help being too intervening and directive in some cases as the parties were unable to take control of the situation, and literally looked up to the mediation practitioner to provide the solution.

Even though the mediation practitioners were fully aware that the key trait of the mediation process was the parties' autonomy and self-determination, the dilemma they faced was *when* should they intervene (even if they could) and yet would not exude directiveness towards the parties. This was by far the most popular type of ethical dilemma experienced by the mediation practitioners interviewed.

In some instances, their experience centred around the situation where the parties had not reached a solution and were going round and round in circles, struggling to reach an amicable solution. The mediation practitioner who watched the whole process protracted with no progress was tempted to offer a solution to the parties.

Yet in other cases, an impasse had occurred, and the parties were in deadlock and did not know how to proceed. In such cases, the mediation practitioners felt that they had better solutions to offer to the parties. They were tempted to offer recommendations. Often, it would be the parties who asked the mediation practitioner to "help" them with a

recommendation. In some cases, the parties even asked for the mediation practitioner to decide for them.

The question was whether the mediation practitioner should agree to decide for the parties as they had specifically made this request to the mediation practitioner? If he did, would he be undermining the parties' self-determination and autonomy?

If the parties knew that the mediation practitioner could be called to give them a solution or to decide for them, would this knowledge undermine the parties' self-determination and their confidence in the mediation practitioner's impartiality on the solution or outcome?

In other instances, it was interesting to hear from the mediation practitioners that they sometimes felt like they needed to "oppose" or "reject" to the parties' solution. Numerous reasons were cited by the mediation practitioners. Where they felt that the solution which the parties arrived at was of "amateurish" or of "low quality", their dilemma was whether they should dissuade the parties from it; at times, they felt that they ought to block it totally.

Another reason cited was where mediation practitioners felt that the solution was unfair due to power imbalance. This happened when one of the parties had poor bargaining power, and was under the intimidation of the stronger party, and ultimately, the weaker party succumbed to it. Sometimes, there might not be any power imbalance, but the

mediation practitioners felt that the solution was unfair or unreasonable to one of the parties.

The dilemma faced by these mediation practitioners was whether they should prevent unfairness to the weaker party given the circumstances. They were unsure if they ought to form their judgements about the quality of the solution which the parties had agreed to.

The mediation practitioners were fully aware of the risk they would run into which would infringe on the parties' self-determination and autonomy, including the mediation practitioners' impartiality. They had to be very careful about not crossing the line from mediation to legal advice.

Almost all of the mediation practitioners interviewed also believed that if a party had participated unwillingly in the process or was in any respect not acting in a voluntary way, the issue of power imbalance would remain an obstacle to proper and effective negotiation.

10. Dilemma #10: Ensuring informed consent.

This is yet another dilemma where the parties did not enjoy free and informed choice in terms of the options for settlement. There were cases where there was coercion or undue pressure or intimidation by one party and/or party's legal counsel.

One of the parties might be intimidated by the other party even on the surface it might appear that all was well. In other situations, the coercion was stemmed from the party's legal counsel who pressured his client to accept (or reject) a proposed solution.

The dilemma which the mediation practitioners faced was to what extent should they play their role as the mediator strictly? Should they take the situation in their own hands to ensure that the coerced party received sufficient opportunity to understand his informed consent to any proposed settlement or solution?

Should they insist on speaking directly to the coerced party to question him whether he understood the consequences of his decision? If they did this, would this act interfere with the lawyer-client relationship though it might help to ensure that the coerced party had the opportunity to understand what informed consent was all about?

Another area of informed consent was where the mediation practitioners suspected that one of the parties suffered from mental incapacity to fully understand the mediation discussions and to make an informed decision about the settlement. The mediation practitioner who handled the family dispute matter was unsure if he ought to discontinue the mediation session assuming that he had accurately diagnosed such signs of mental incapacity even if the parties agreed to proceed with the mediation session.

The dilemmas faced here was whether to allow the mediation session to continue in such a situation where one of the party's understanding was compromised, or to discontinue the mediation session, thereby overriding one of the party's consent.

Yet another area concerning informed consent was party ignorance where there was lack of relevant information. The mediation practitioners felt that if there was lack of such information, then, in principle, there could not be informed consent. There were situations where such information was only known to the mediation practitioner, the mediation practitioner could invariably be implicated in the problem of lack of consent of the parties.

Handling Ethical Dilemmas

The findings revealed that the ethical dilemmas faced by the mediation practitioners in Singapore were similar in nature in all the fields of practice studied in this research – community mediation and commercial mediation practices. Even though there were minor differences in terms of the specific situations relating to the area of practice, nevertheless, distinct commonality was evident in these cases.

Be that as it may, when faced with such dilemmas, it was interesting to note that the way these dilemmas were handled by the mediation practitioners tend to be different in nature. These practitioners were faced with the question of how to maintain integrity of the mediation process, which is based on mediator neutrality and impartiality, without letting the process be abused or be taken advantage of by the parties, and at the same time,

without allowing the process be used to violate the interests of unrepresented parties or where there was power imbalance between the parties.

From the interviews, it could be seen that these mediation practitioners handled their ethical dilemmas in a number of interesting ways, namely, by looking at themselves as mediation practitioners, by looking towards the parties, and lastly by looking amongst themselves as professionals.

In the first approach where the mediation practitioners looked at themselves as mediation practitioners, one very popular way was for them to go back to the fundamentals of the mediation process, and to keep reminding themselves of the purpose of mediation. They felt that this was a very useful guide.

They reminded themselves constantly of the purpose of mediation, their role as the mediator, the concepts of the mediation process, and the explicit and implicit contract under which mediation was selected as the alternative dispute resolution mechanism by the parties.

They also reminded themselves of the standards of mediation practice and the code of ethics which bind them as mediators. Where some of them were also lawyers or accountants by training, they constantly reminded themselves that their other professional standards of practice and code of ethics were not to be construed as a competitive code of

behaviour, rather as a supplement to guide them in performing their current roles as mediation practitioners.

However, one key observation was that these standards of practice and codes of ethics governing mediation practitioners did not provide for the various ethical dilemmas which they encountered during the mediation sessions. Often, these practitioners were left to deal with these dilemmas by themselves as they grappled with what should be the right and proper course of action to take. That was one of the reasons why they had to seek for advice elsewhere.

The second approach used by these practitioners was looking towards the parties. A common way of handling these dilemmas was to provide guidance to the parties as they went through the mediation process. Even though these mediation practitioners saw themselves performing various functions in the different stages of the mediation process, nevertheless, their underlying key role was to guide the parties through this process and aid them to arrive at an amicable solution to their dispute.

As all mediation practitioners accredited to the SMC were trained to practise interest-based, facilitative mediation, their focus of the mediation was on ascertaining the underlying interests or concerns of the parties, and searching for an appropriate solution which could reasonably satisfy the interests of both parties. They did not tell the parties who was right or who was wrong. Their focus was on problem solving, and not on who had a better case.

By so doing, they felt that when the parties were more fully knowledgeable about the mediation process, its do's and don'ts, there would be fewer cases of ethical dilemmas which the mediation practitioners had to handle. Further, even if these ethical dilemmas occurred, the extent and complexity would be greatly minimised, and therefore, would be much easier for these practitioners to handle.

Besides guiding the parties through the mediation process, these mediation practitioners also used the parties' own capacities to take an objective look at the issues in dispute, and at their underlying interests in the dispute. The way they did this was to ask the right questions and help the parties think through the various options and alternatives before arriving at the final outcome, rather than making recommendations for the parties.

In the opinion of these mediation practitioners, they felt that there would be fewer instances of very difficult ethical dilemmas which they had to face when the parties knew the extent of their own capabilities and how to use them.

Finally, using the last approach, the mediation practitioners often exchanged views and opinions amongst themselves on how to handle such ethical dilemmas without divulging details of the cases. They found that the exchange of professional opinion and ideas had helped tremendously in the way they handled and grappled with such dilemmas.

Commercial Mediation versus Community Mediation

These mediation practitioners who were engaged in community mediation were volunteer mediators who were respected members of society from all walks of life, different age groups, ethnic groups and professions including lawyers and other professionals. They comprised mainly grassroots and other community leaders, chosen for their commitment and dedication to community service work. They were easily recognizable and respected by residents in their respective communities.

The ethical dilemmas which they encountered were no different from their counterparts in commercial mediation. The ten (10) types of ethical dilemmas were evident in both types of mediation practice. These dilemmas were equally experienced by both the SMC panel of mediation practitioners in the commercial mediation area, and by the CMC panel of volunteer mediators.

Even though the mediation practice areas in community mediation were fewer in number (four such practice areas with highest percentages in neighbourhood disputes and stallholders/hawker squabbles) than those practised under commercial mediation, nevertheless, the mediation practitioners faced similar dilemmas in their practice.

In fact, according to the mediation practitioners who conducted community mediation, they faced even more incidents of such ethical dilemmas as the disputes were typically “less commercial in nature” and “more community in nature” which tend to experience more emotional outbursts by the parties.

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Further, the parties were not typically highly-educated people, and did not fully appreciate the concept of mediation as an alternative dispute resolution, the role of the mediator in facilitating their disputes, and the do's and don'ts of the mediation process.

To overcome such problems, the CMC had embarked on a pilot project which involves conduct of visits by paired teams of trained CMC mediation practitioners and grassroots leaders to the residences of unwilling parties who were embroiled in neighbourhood conflicts to persuade them to try mediation.

In many ways, this replicated the concept of a *ketua kampung*, or a Malay village elder who historically played the role of “mediator” in village disputes. This was an initiative unique to the Singaporean context, and had lent a personal touch to the mediation services offered by these mediation practitioners.

Over the years, satellite mediation venues had been set up in co-operation with various agencies for community mediation purposes. This had provided parties in dispute with the additional convenience of having their cases mediated at an alternative location closer to their residences.

Towards the end of October 2003, the latest satellite venue was set up at Evergreen Circle in Tampines. With this addition, the number of satellite mediation venues available around the island now stands at seven (7) at the time of this study, with the others being

Ayer Rajah Community Centre, Eunos Community Club, Hougang Neighbourhood Police Post, Kebun Baru Community Club, Loving Heart Multi-Service Centre and Nanyang Community Club.

Key Factors Influencing or Affecting Ethical Dilemmas

Based on the interviews on the sample of 44 mediation practitioners in Singapore, several factors were identified to have influenced or affected some types of ethical dilemmas as experienced by these practitioners.

1. Culture

The definition of “Culture”²⁴⁹ refers to “habits, behaviours and manners of a given people at a given period of development. It comprises a unique set of attributes relating to an aspect of social life which is acquired through acculturation or socialisation by the individuals from that society.”

According to the mediation practitioners, Singapore being a multi-racial society with the Chinese race as the predominant race²⁵⁰ is largely influenced by some traits of the traditional Chinese culture which are still prevalent in Singapore today. They opined that some of the older generations in Singapore still practise such traits.

²⁴⁹ *Supra*, at n. 75.

²⁵⁰ According to the World Fact Book 2003 published by the Central Intelligence Agency of the US Government, the Chinese race comprises the largest population of 76.7%, followed by the Malays at 14.0%, Indians at 7.9% and others 1.4%.

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One such trait is trust and friendship as important requisites for successful business ventures with the Chinese community. In general, the Chinese feel more comfortable dealing in business with people they can trust and who are sincere in their friendship. Hence, in a mediation session, the mediation practitioner had to be aware of such a trait where one or both parties in the dispute were Chinese.

In their professional experience, where one or both of the parties comprised the older Chinese generation, these mediation practitioners found that it was difficult for them to keep these parties “in tow” during the mediation session. They had seen cases where parties had tried to foster the trust and friendship with these mediation practitioners, and had tried to “win” them over.

These practitioners were caught in the ethical dilemma of respecting the wishes of these parties (typically older folks) and at the same time had tried very hard not to become their “friends” as these parties became very comfortable and had felt at ease talking to these practitioners during the course of the mediation session. These parties focussed on values such as mutuality, reciprocity, harmony and holism in dealing with conflicts in their daily lives.

Another trait which was evident amongst the Chinese community is personal relations. By this, personal relations connote long-term and deep relationships transcending beyond friendships. Such relationships come in handy when dealing with higher management of

businesses and companies. It also connotes being socially or politically well-connected in the respective social or political circles.

As in the first instance, such traits had greatly influenced the ethical dilemmas which occurred in the mediation practitioners' professional experience. The parties felt that the mediation practitioner was someone who could do something that might be impossible for the ordinary person.

With the "personal relations" that he had with the mediation practitioner, the mediation practitioner would now be able to bestow and reciprocate personal favours. In this respect, the mediation practitioners felt that the line between "personal" and "professional" advice seemed blurred here.

The notion that the mediation practitioners were able to help the parties "save face" was also a root cause to the types of ethical dilemmas these practitioners faced with Chinese parties. This trait, face-saving circles around the concern for what other people might think or say about certain events.

Hence, the parties were very keen to resolve issues quickly to avoid fear of shame or disgrace to the family name. At times, they were too keen to accept any settlement or resolution without due consideration.

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The mediation practitioners realised that the very trait of fear of shame drove such Chinese parties to choose mediation to resolve their personal or community conflicts due to the private and informal approach to resolving disputes. However, their dilemma was this.

On the one hand, how to ensure that the parties fully understood the underlying issues of the dispute, and that their interests would be addressed by the full extent of the various options which the parties had come up with, and that they would not give in to options too quickly without due consideration. On the other hand, to respect the need for avoidance of shame and embarrassment to the family name and honour if the disputes were not resolved quickly.

The same could also be said of the Malay community where face-saving, personal relations, and trust and relationship are also key traits in their culture. Hence, mediation becomes the ideal solution for them to resolve their disputes amicably without having to undergo formality and public scrutiny by going to the courts. The dilemma faced by the practitioners was how to ensure that these parties had evaluated and had given the options due consideration before making their final decision on the resolution.

One other cultural trait which is common amongst Asian or oriental culture is where people of authority and power are given high respects such as the Head of the Government, the Judiciary, the School Principal, and the like. As with mediation practitioners, they felt that no matter how frequent they had explained and reminded the

parties on their role as the mediator (which was unlike that of a judge who makes the final decision), the parties persistently looked up to the mediation practitioners for “answers” or “advice”. In some instances, they had even requested for the mediation practitioners to make the final decision for them.

According to the mediation practitioners, one probable reason why such a trend seemed to persist was because of the element of their Oriental culture. The nature of their upbringing and values had created such an ethical dilemma for these mediation practitioners as they grappled to strike the right professional balance.

They understood that Oriental cultures are structured on the premise of a strong emphasis on social harmony and consensus. They also understood that when dealing with disputes which involved these parties, it was important for them to understand the parties’ background which usually was derived from their ethnicity and socio-economic status.

Hence, these mediation practitioners realised that they were required to completely understand and appreciate the sensitivity to these cultural traits especially when dealing with cross-cultural disputes in a multi-racial society like Singapore.

2. Previous Professional Training

It was no surprise that the mediation practitioners were faced with making ethical decisions and interpreting sometimes conflicting standards based on their previous professional training. About 30% of the sampled mediation practitioners were legally

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trained, and hence had been exposed to the codes of ethics designed to apply to all lawyers, as well as to codes which have been designed to apply to all mediation practitioners, including lawyers.

To these legally-trained mediation practitioners, mediator codes have ethical provisions including the centrality of neutrality and impartiality, the importance of confidentiality, admonitions against contingency fees, and the need to describe the process of mediation to disputing parties in advance.

Codes designed for lawyers also have similar ethical provisions requiring the giving of legal information, if this was to be given at all, must occur in the presence of all parties, that the lawyer may not represent any one party subsequently in the same matter as was the subject of the mediation; and that the lawyer must describe the difference between mediation and traditional lawyer-client representation.

However, these codes failed to address any substantial conflicts in the treatment of the proper role of legal practice as performed by the mediation practitioners for the parties, thereby creating ethical dilemmas for these legally-trained practitioners. They felt that it was unclear how precisely the legal issues could be framed to suit the questions and needs of the parties.

They did not know whether the lawyer-mediator was to provide more detailed information when a party did not receive independent legal advice. They were also in the

dark as to whether they could provide an interpretation of the law as applied to the facts of the situation where they did not “direct the decision” of the parties based on their legal interpretation.

Essentially, in their opinion, since the legal profession has yet to articulate and institutionalise a clear standard for lawyer-mediators, there are no clear and direct rules. These mediation practitioners felt that legal advice by lawyer-mediators should be permitted while assuring that there is proper protection for the parties’ interests and expectations.

They felt that future parties in dispute would stand to lose vital, timely, fair and cost-effective legal services should they be banned from such. In their opinion, it is in the interests of lawyers and the Bar organization to meet the future needs of mediation by allowing the integration of the special talents of lawyering into mediation when the parties so desire.

The decision as to what type and how much lawyering to be permitted in a given mediation ought to be left to the parties to the greatest practicable extent. They truly believed that many parties would seek a lawyer to mediate their dispute because they expect the benefit of supporting legal skills.

Adequacy of Ethical Standards

The mediation practitioners felt that as a neutral in the mediation process, their role was to act in a responsible, competent and effective way with principle and integrity. They should not try to impose their own views or settlement terms for the parties, even though they had the scope to influence the course of the mediation session by the way in which they conducted the session, the questions they asked and the options they had helped the parties to explore. Hence, an abuse of this role could be harmful rather than beneficial to the parties, and could bring their own reputation and that of the mediation process into disrepute.

That is why these practitioners felt that they needed to comply with the rules and agreements about confidentiality, neutrality, impartiality, fairness, self-determination, informed consent, and generally, needed to observe high ethical standards in the way they conducted the mediation process and themselves within it.

To them, there were a number of sources of these ethical standards. First, in their traditional role as a neutral in the mediation process, the traditional occupation of the neutral may provide standards and requirements. Second, the SMC and CMC stipulate the standards of neutral conduct required of their members in the form of a code of practice to which they were asked to subscribe to.

Third, as professionals, they subscribed to their own code of practice. Fourth, being trained in the mediation process, they ought to be aware of the ethical considerations and the need to work with integrity.

However, there were several issues which commonly arose during the mediation process which the practitioners felt that there were no adequate ethical standards which they could refer to. One such issue was on fairness of the outcome of the mediation. They often wondered who was responsible for the negotiation and for the terms of settlement – the mediation practitioner or the parties.

As a fundamental principle of mediation, the parties are the negotiators and the mediation practitioner is the facilitator. Hence, the parties must be responsible for their own settlements, and for the decisions they each make in arriving at the final resolution.

Mediation practitioners have the responsibility for ensuring the management – and hence, the fairness – of the process, and the parties have the responsibility for the outcome. As a result, the ethical dilemma created was how to preserve parties' self-determination and party autonomy, and when to intervene to ensure fairness of the outcome reached.

Confidentiality was one other area which the mediation practitioners felt that the standards of practice and codes of ethics were inadequate to address their ethical dilemmas in relation to this issue. For example, they explained that caucusing in mediation had challenged the traditional legal concept of confidentiality.

They felt that some mediation practitioners reserved the right to share information between caucuses where it was “their” judgement that such disclosure would serve the parties’ settlement outcome well, whilst others promised never to disclose unless authorised by the parties.

To the mediation practitioners, this was problematic because a mediation practitioner’s settlement option might implicitly contain messages about the preferences or facts of one party without actual disclosure of these preferences or facts. Therefore, in their opinion, in mediation it was difficult to characterise what was and what was not, confidential.

The practitioners felt that it would be helpful for them to work to a code of practice which could assist with at least some of the ethical dilemmas that arose. The Model Standard of Practice for Court Mediators²⁵¹ and Code of Ethics for Court Mediators²⁵² which had been established for court purposes in Singapore do not shed any light on these issues.

This Standard explains in detail the objective and role of court mediation, the types of mediation conducted, the nature of the mediation process with an emphasis on quality and training of court mediators. The Code, on the other hand, explains the general responsibilities of mediation practitioners and their responsibilities to the parties. Court

²⁵¹ See Appendix C.

²⁵² See Appendix D.

mediators are required to comply with these ethical standards. Where there was no guiding code which could assist in any particular dilemma, there were no easy answers.

The mediation practitioners believed that the difficulty of establishing standards of practice for a newly emerging profession such as this in Singapore was that the standards must emanate from a common perception of the goals of practice as well as its social role. Essentially, the standards must accurately portray what the practice was all about, and what makes it a distinctive service with a need for a separate set of practice standards.

They felt that today in Singapore, mediation does not yet have an academic base with an accepted curriculum; hence, there have been no universally accepted criteria for structuring standards of practice. They also believed that if mediation was viewed as a distinct and valuable service in its own right rather than a substitute for legal advice, mediation complemented legal services and should not be considered as an unauthorized practice of law.

This distinction between mediation practice and legal practice might be made clearer by the formulation of a set of practice standards for mediation practitioners that recognises mediation as a separate profession on its own.

CHAPTER 6

CONCLUSION

Introduction

We have seen from previous Chapters that ethical dilemmas remain a key component in mediation practice in Singapore. We have also looked at the ten (10) types of ethical dilemmas faced by mediation practitioners in this country, and how these practitioners have grappled with such dilemmas in their professional practice.

From this analysis, it is clear that culture has a strong influence, and is a key factor in affecting or influencing how these dilemmas have been handled in the Singapore context thus far. The cultural element sets this study apart from previous researches²⁵³ in that it has greatly influenced the types of ethical dilemmas faced by mediation practitioners in Singapore as compared to their counterparts in other countries²⁵⁴, and how these practitioners have viewed and handled such dilemmas in their daily mediation practice.

This Chapter is focused on the implication of culture on the ten (10) ethical dilemmas as revealed by these practitioners today, with discussions on suggested recommendations as an attempt to overcome the identified issues and concerns facing them in this area of their mediation practice in Singapore.

²⁵³ See Chapter 2.

²⁵⁴ *Ibid.*

Cultural Influence

Today, mediation practice in Singapore is undeniably greatly influenced by the cultural element in terms of the types of ethical dilemmas faced by mediation practitioners in Singapore and how these practitioners grappled with them. Ironically, this was the very factor which brought the successful introduction of mediation to Asia (and Singapore) where its oriental culture rests on social harmony and consensus as dominant traits.

In fact, there is a gradually increasing recognition of the importance of culture in conflict management and dispute resolution efforts.²⁵⁵ There is significant relationship between disputes and the cultural context, including a cross-cultural perspective.

It is not quite easy to explain how culture affects behaviour; its complexity is probably caused by the culture of a group of people who belong to a particular ethnicity, geographical area, religion, race, etc. Today, experts emphasize that cultural aspects are crucial components of alternative dispute resolution efforts (which include mediation), and should not be mere “modules” to be added as an afterthought.²⁵⁶

Outside of Asia, from the perspective of standards of practice, the Mediation UK Practices Standards provides that mediation practitioners should be aware of “local and cultural differences that need to be taken into account”.²⁵⁷ This useful provision refers to all mediation practices generally.

²⁵⁵ Othman, A., “Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges”, (2002) 2 *Malayan Law Journal*, ccxxiv-ccxlv.

²⁵⁶ Avruch, K., “Culture and Conflict Resolution”, Washington: United States Institute of Peace, 1998, *Ibid.*

²⁵⁷ Mediation UK, *Mediation UK Practice Standards*, 1993, Bristol: Mediation UK. Article 3.

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Further, Family Mediation Canada²⁵⁸ is considering these factors in the creation of its new draft code of ethics where it suggests that “except where culturally appropriate mediators must be cautious about mediating disputes involving close friends, relatives, colleagues/supervisors or students”.²⁵⁹

Where multicultural societies exist such as in Singapore, what is also important is that mediation practitioners need to be more aware of the culturally specific ethical biases which often surface in discussions during mediation sessions. They need to be mindful of discussions about ethics because they are most useful when they are clearly understood and appreciated by all cultures in any given society.

One researcher²⁶⁰ made an interesting conclusion from his research that “insider-partial mediators – who are by definition well versed in local cultural meanings, and expectations, and have vested interests in conflict outcomes, have better chances of making important contributors than mediators who play the North American model of the disinterested, impartial outsider.”

Mediation practitioners should also be mindful about how culture is defined and perceived. As proposed by Avruch²⁶¹, there must be a concept of culture that consists not

²⁵⁸ Family Mediation Canada, *Code of Professional Conduct (Revised)*, 1996.

²⁵⁹ *Ibid.* Draft Article 4:1.

²⁶⁰ Lederach, J. P., “Cultural Assumptions of the North American Model of Mediation: From a Latin American Perspective”, 4 *Conflict Resolution Notes*, n.3, January 1987, 24.

²⁶¹ *Supra*, at n. 253.

only of the aspects of past experiences learnt or created, but also those which have been newly-created.

There is a danger of inaccurate perceptions about culture as such misperceptions would portray the idea that culture is homogeneous, timeless, and synonymous with custom and is uniformly distributed amongst all members in a society. The reality is that it is not.

In fact, mediation practitioners need to understand the cross-cultural list of qualities of trusted practitioners²⁶². In the selection of mediation practitioners, qualities such as trust, credibility and legitimacy have been considered. Essentially, dispute resolution across cultures must be focussed on having the needs for respect, caring, and procedural fairness in mediation practice.

RECOMMENDATIONS / SUGGESTIONS

Based on the results of the findings of this research, it is evident that for mediation practitioners in Singapore to be able to handle the identified ten (10) ethical dilemmas professionally, the following actions are highly recommended, namely:

1. Train mediation practitioners on cross-cultural elements, ethics and how to confront ethical dilemmas; and
2. Develop standards of practice and rules of conduct to guide specific responses to ethical dilemmas, and to include cross-cultural content.

²⁶² Duryea, M., *Conflict and Culture: A Literature Review and Bibliography*, 1992, Victoria, BC: UVic Institute of Dispute Resolution.

Training - Cross-Cultural Elements

The training programmes conducted by the SMC and CMC prior to appointing mediation practitioners to their respective panels do not have specific modules on the cross-cultural components in its programme content.

It is recommended that such training programmes planned for mediation practitioners must include cross-cultural elements given the fact that Singapore is a multi-cultural society. However, the cross-cultural content of these programmes may need to be seriously studied by looking at what others outside of Asia have done.

There have been scholars who are involved in cross-cultural mediation training like Lederach²⁶³, who have focussed concerns in an international context on the creation or uncovering of shared values. For example, in mediation training for American mediation practitioners, participants could also share their own knowledge and misperceptions of different identity groups as part of the mediation training. These discussions should be part of the basic mediation training, and should not be relegated to an advanced form of training on cross-cultural mediation.

²⁶³ John Paul Lederach, Beyond Prescription: New Lenses for Conflict Resolution Training Across Cultures, (unpublished article prepared for Interaction '92 Sharing Common Ground: Culture in Canada, May 1992, on file with the author).

This approach to mediation training teach mediation practitioners to explore their own reliance upon “negative cultural myths”²⁶⁴, to learn to identify when such myths are being relied upon in a mediation session to create ways to talk about the effect of such negative interpretations in ways that may help the parties to create new interpretations in the process.²⁶⁵

Hence, mediation training needs to emphasize several things in order to combat negative cultural myths. Basic mediation training needs to explore these negative cultural myths, and interpretations and methods to expand the range of options and alternatives to be used for all parties regardless of their particular identity or organization.

Based on this, mediation practitioners need to be trained to look at situations where these negative cultural myths arise, and then to analyse whether the disputes in question will be appropriate for mediation. There are three (3) questions which mediation practitioners should ask to address these negative cultural myths:²⁶⁶

1. First, to examine own negative cultural myths regarding the parties both as members of particular identity or organizational groups and as individuals.

²⁶⁴ Gunning, I. R. (1995) refers “negative cultural myths” to prior notions about the behaviour of categories of people which is negative. By this definition, she attempts to capture those aspects of the prejudice that thrive in our society which are unconscious. These also include prior ideas about categories of people which, though in and of themselves do not put the group’s members in a bad light, still under the circumstances limit any individual group member from being different than the characterization portrayed in the myth.

²⁶⁵ Gunning, I. R., “Diversity Issues in Mediation: Controlling Negative Cultural Myths”, (1995) *Journal of Dispute Resolution* 55, 11-14.

²⁶⁶ *Ibid.*

The purpose is to determine whether a broad range of interpretations could be formed to understand the disputes in question.

2. Second, to assess the parties. Questions should include the parties' abilities to speak for themselves and articulate their needs and values without fear or intimidation, and also analyse what the parties are seeking in mediation. What are the underlying interests of each party?
3. Third, to explore whether the parties do share values or understandings of shared values. What are their definitions of social relations of each other, and are they willing to accept and apply each other's definitions?

Yet another approach to this form of mediation training is to match mediation practitioners and parties based upon gender or race²⁶⁷ or sexual orientation. However, this approach does not assure that those individuals who happen to be members of the same identity groups will have the same perspectives. What it can achieve is for the parties to feel that they are or will be treated fairly and be heard accurately.

Training - Ethics and Handling Ethical Dilemmas

Mediation practitioners know that they need to behave ethically during the mediation process. Yet many may determine individually and in situations what conduct are ethical

²⁶⁷ "Race-switching" as one way to explore the impact of cultural myths regarding disadvantaged group members. Ms Marcia Choo, Executive Director of the Asian and Pacific American Dispute Resolution Centre in an interview in Los Angeles relating to a dispute between a Korean-American fast food stand owner and an African-American car repair shop owner (September 30, 1993). The term "race-switching" is coined by Professor Patricia Williams in analyzing the racial context of the Bernard Goetz case in Patricia Williams, "The Alchemy of Race and Rights: Diary of a Law Professor", 1991, 73-78.

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and what are not, and how to avoid or handle ethical dilemmas when confronted in such situations.

Some mediation practitioners may not even be aware of the ethical aspects of their actions. Standards of practice cannot address this issue alone; subjective ethics must be addressed in training programs for mediation practitioners to help them formulate their sense of ethics.

Today, the mediation training programmes conducted by the SMC and CMC do not ensure the mediation practitioners' awareness of the ethical aspects of the mediation process, of the practitioners' practices, and how they confront ethical dilemmas when faced with them.

Hence, the recommended mediation training must address the issue of ethics directly. This involves more than simply discussing ethical standards which primarily serve as guidelines for mediation practitioners' behaviours.

These training programs should provide advice and guidance to them to confront the ethical dilemmas they encounter in their mediation practice. In essence, these programs ought to provide these practitioners the practical experience of such ethical quandaries which often arise during mediation. At the end of the day, they must develop an awareness of and sensitivity to their role in *facilitating dispute resolution and settlements*.

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As mediation practitioners learn about the ethical dilemmas they may encounter, they can develop skills for dealing with them. They should know how to anticipate and recognise ethical problems, and about the constraints of particular situations of these dilemmas. Furthermore, they need to understand the various options for dealing with questions of fairness, and intervention in each of these dilemmas.

The approach which is highly recommended is one that uses instructional methods when promoting skill development in ethics.²⁶⁸ Mediation practitioners are subject to discussions of professional standards of practice, and subsequently, case studies could be used to introduce ethical problems in an attempt to promote discussion of problems and available alternatives.

The other advantage of using case studies is that they encourage mediation practitioners to examine their own ideologies (values, predispositions, and biases) and the potential effects on mediation issues. With such emphasis on the ethical component in the training content, mediation practitioners ought to become increasingly aware and be constructively critical of their own ideologies. According to Moore (1986)²⁶⁹, case studies also facilitate the introduction of ethics into discussion of the entry stage of mediation²⁷⁰.

²⁶⁸ *Supra*, at n. 201.

²⁶⁹ Moore, C. W., "Training Mediators for Family Dispute Resolution". In J.A. Lemmon (ed.) *Successful Techniques for Family Break Up*. (1988) 2 *Mediation Quarterly*, San Francisco: Jossey-Bass.

²⁷⁰ *Ibid*. The entry stage includes (1) building personal, institutional, and procedural credibility; (2) establishing rapport with the disputants; (3) educating participants about the negotiation process, the role of the mediator, and the function of mediation; and (4) gaining a commitment to begin mediating."

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In addition to case studies, training programs should use role playing and simulations to teach subjective ethics. Mediation practitioners who undergo this training should observe simulated mediators and discuss perceived successes and mistakes. They should also participate in these simulations, both as parties in dispute, and as mediation practitioners.

Questions should be used to encourage mediation practitioners' understanding of alternatives, choices, options, and reasons for these choices and options. Essentially, trained observation, supervision, and discussion are crucial dimensions of this training process.

The competence of the trainers is one key area which cannot be compromised in order to realise effective instruction in ethics. These trainers must be skilled questioners, and their role is to promote critical analysis of mediation situations, various situations involving ethical dilemmas experience, party-related variables, and mediators' dispute resolution ideologies. The trainers' role is a proactive one in order to encourage the examination and discussion of subjective ethics, rather than dictating behaviours and choices for mediation practitioners.

As aptly put by the New South Wales Law Reform Commission,

“Mediators need to behave ethically. Ethical violations are more likely to result from ignorance and poor training than intent. Training which addresses substantive ethics and provides a model of ethical behaviour will promote a more ethical service for customers.”²⁷¹

²⁷¹ New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditations of Mediators*, Discussion Paper 21, October 1989, 23.

Standards of Practice and Rules of Conduct - Ethical Dilemmas and Cross-Culture

It can be said that standards of practice on mediation practice today in Singapore²⁷² lack clear direction on specific responses to ethical dilemmas which confront mediation practitioners in their mediation practice, as well as cross-cultural elements.

Owing to the fact that these ethical dilemmas and cultural issues are complex and complicated in nature, these standards have to be specific to the context in which they will be used. Today, there are no particular sets of standards which can provide an adequate remedy for the quandaries which mediation practitioners face in their practice in Singapore.

It is imperative for mediation practitioners to make every effort to learn about the cultural and social expectations and perception of each party in dispute. Essentially, mediation practitioners, like all other professionals, must follow their conscience, common sense, and their understanding of the ethics of mediation premised upon the cultural context (including cross-cultural) in which the mediation process takes place.

Rules of Conduct for such a purpose need to be developed for cross-cultural mediation. Mediation practitioners in Singapore must recognise that the perception of Singaporeans on dispute resolution is based on the impact of cultural *differences in the context of the* country's legal culture.

²⁷² See Appendix C and Appendix D.

CHAPTER 6 – CONCLUSION

Legal culture²⁷³ refers to the values and attitudes which determine the place of the legal system in the culture of the society as a whole. It determines what legal structures are used, which legal rules are used, and the application of law in that society.

Hence, in Singapore, even though the country was under the British rule in the 19th century where English law prevailed, each ethnic community was governed by its own customary or religious practices. The Chinese community which has been the dominant race in Singapore handled their disputes according to its own rules and customs without considering the courts.

In the absence of such Rules of Conduct, mediation practitioners could only rely on their conscience and common sense. The following set of guidelines²⁷⁴ could be useful when dealing with cross-cultural mediation:

1. Expect different expectations when parties from differing cultural background come to the negotiation table in a mediation session. Responses from parties are subject to different interpretations.
2. Do not assume that what one says is always understood. The same words spoken in English may be understood differently by people of differing cultural background, especially where the *English language is not their mother tongue*.

²⁷³ Friedman, L., "Legal Culture and Social Development", (1969) 4 *Law and Society Review* 1, 29, 34-35.

²⁷⁴ *Supra*, at n. 37.

CHAPTER 6 – CONCLUSION

3. Listen carefully. Try to understand the underlying interests of each party when they come together at the negotiation table.
4. Seek ways of getting both parties to validate the other's concerns.
5. Be patient, be humble, and be willing to learn.

CONCLUSION

Mediation practice in Singapore is becoming increasingly demanding both in the commercial world as well as in communities alike given the multi-cultural society of this city-state. It is therefore equally important for mediation practitioners to arm themselves with the appropriate professional skills and development. The call for mediation practitioners not to practise mediation in a theoretical vacuum is loud and clear.

For mediation practitioners in Singapore to be elevated to professional status including accreditation, they need a sound understanding of the theory, practice and ethics of mediation regardless of their previous professional qualifications, training and experience.

It has also been contended that while there will always be different *levels of skills* and professional development in any field, these skills can be improved with training of the right aspects of the practice. In this case, training in cross-cultural elements and subjective ethics form the key content of the training programs for mediation practitioners in Singapore.

CHAPTER 6 – CONCLUSION

It is understood that no Standards of Practice nor Rules of Conduct for mediation practitioners can provide full answers for all situations which may transpire in a mediation session (since much depends on the individual mediation practitioner's subjective interpretation of the guidelines and own value judgements). It is also understood that no set of guidelines can attempt to itemise the way in which a mediation practitioner ought to behave in all the situations which might arise during a mediation session.

However, it is essential that these fundamental questions of ethical choices, competing values are confronted, shared, examined, prioritised, and fully addressed in training programmes for mediation practitioners to assist in the handling of ethical dilemmas faced by these mediation practitioners.

In closing, the excerpts below encapsulate the true essence of this study:

“Mediation is not only about resolving individual conflicts, it also has a loftier and larger objective of achieving an important societal goal in building a harmonious community.”

Assoc Prof Lim Lan Yuan, PBM, PPA, JP

“It is my hope that more Singaporeans will avail themselves to non-litigious forms of dispute resolution such as mediation to resolve their disputes.”

*Prof S Jayakumar
Deputy Prime Minister and Minister for Law
Republic of Singapore*

CHAPTER 6 – CONCLUSION

“A mediation culture will go a long way in preserving the chords that bind our Singaporean community.”

*Assoc Prof Ho Peng Kee
Senior Minister of State for Law and Home Affairs
Republic of Singapore*

“There would be no more moral dilemmas if moral principles worked in straight lines and never crossed each other.”

Tom Stoppard, Professional Foul

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APPENDIX A

APPENDIX A

Law Society's Report on ADR published in July 1991*

MEDIATION

CODE OF PRACTICE

I. PRINCIPLES OF MEDIATION

1. Mediation is a process in which a neutral mediator (or in some cases, two co-mediators) help parties in dispute to try to work out their own principles and terms for the agreed resolution of the issues between them. Mediators do not arbitrate and have no authority to make or impose decisions regarding the parties' issues.
2. Mediation is voluntary, and any party or the mediator may terminate it at any time.
3. Notwithstanding that a mediator may be a solicitor, barrister, accountant or other professional, when acting as a mediator he or she acts as a neutral facilitator of negotiations and does not give professional advice to the parties, individually or collectively, nor does he or she represent any party, and mediation is not a substitute for each party obtaining independent legal, accounting, tax or other professional or technical advice.
4. The mediator tries to assist the parties to reach a conclusion of the dispute which is appropriate to their particular circumstances, and not necessarily the same conclusion that might be arrived at in the event of adjudication by the court. That allows the parties to explore and agree upon a wider range of options for settlement than might otherwise be the case.
5. The mediator may meet the parties individually and/or together and may assist the parties, for example, by identifying areas of agreement, narrowing and clarifying areas of disagreement, and defining the issues; helping the parties to examine the issues and their alternative courses of action; establishing and developing alternative options for resolving any disagreement; considering the applicability of specialised management, legal, accounting, technical or other expertise; and generally facilitating discussion and negotiation, managing the process and helping the parties to try to resolve their differences.
6. A mediator will not act as such in a dispute in which he has at any time acted as a professional adviser for any party, nor in respect of which he is in possession of any information which was obtained by him (or any member of his firm) as a

APPENDIX A

result of having so acted or advised; nor having once acted as a mediator will he act for any party individually in relation to the subject matter of the mediation.

II. CONFIDENTIALITY AND PRIVILEGE

1. The mediator will conduct the mediation on a confidential basis, and will not voluntarily disclose information obtained through the mediation process except to the extent those matters are already public or with the consent of the parties. The only other exception to this is that if the mediator considers from information received in the mediation that the life, safety or health of any person is or may be at risk, the duty of confidentiality shall not apply; and in such event the mediator shall try to agree with the person furnishing such information, and if practicable and appropriate any person affected by it, as to how disclosure shall be made.
2. Where the mediator meets the parties separately and obtains information from any party which is confidential to that party and which is not already public, the mediator shall maintain the confidentiality of that information from all other parties except to the extent that the mediator has been authorised to disclose any such information.
3. Privilege will be sought for all communications and negotiations in and relating to the mediation which will be conducted on a "without prejudice" basis, unless this is waived by the parties by agreement, either generally or in relation to any specific aspect. No party is to refer in any proceedings that may subsequently take place to any such privileged discussions and negotiations, or require the mediator to do so. No party may have access to any of the mediators' notes or call the mediator as a witness in any proceedings.

III. DUTY OF IMPARTIALITY

1. The duty of impartiality by the mediator is inherent in the mediation process.
2. If a mediator believes that any party is abusing the mediation process, or that power imbalances are too substantial for the mediation to continue effectively or that the parties are proposing a result which appears to be so unfair that it would be a manifest miscarriage of justice, then the mediator will inform the parties accordingly, and may terminate the mediation.

IV. INFORMATION AND DOCUMENTS

1. The mediator will assist the parties, so far as appropriate and practicable, to identify what information and documents would help the resolution of any issue(s), and how best such information and documents may be obtained.
2. Mediation does not provide for the disclosure and discovery of documents in the same way or to the same extent as required by court rules. The parties may

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voluntarily agree to provide such documentation, or any lesser form of disclosure considered by them to be sufficient. This may be considered and discussed in the mediation.

3. The mediator has no power to and does not purport to make or require independent inquiries or verification to be made in relation to any information or documentation sought or provided in the mediation. If this may be material to the resolution of any issues, consideration may be given in the mediation to the ways in which the parties may obtain any such information, documents or verification.

V. RELATIONSHIP WITH PROFESSIONAL ADVISERS

1. Solicitors or other professional advisers acting for the individual parties may but need not necessarily participate in the mediation process. Such solicitors and/or advisers may take part in discussions and meetings, with or without the parties, and in any other communications and representations, in such manner as the mediator may consider useful and appropriate.
2. Professional advisers representing all the parties collectively, such as the accountants of a partnership whose partners are mediating their differences, may be asked to assist in the mediation in such manner as may be agreed.
3. Parties are free to consult with their individual professional advisers as the mediation progresses. On some occasions the mediator may make recommendations to the parties as to the desirability of seeking further assistance from professional advisers such as lawyers, accountants, expert valuers or others.

VI. RECORDING OF PROPOSED AGREEMENT

1. At the end of the mediation, or at any interim stage if required, the mediator or the parties' lawyers may prepare a written memorandum or summary of any agreement reached by the parties, which may where considered appropriate comprise draft heads of such agreement for subsequent formalisation by the legal advisers acting for the parties. No agreement as to the terms of any settlement reached in the mediation will be binding on the parties unless and until recorded in writing and signed by the parties.
2. If the participants wish to consult their respective individual legal advisers before entering into any binding agreement, then any terms which they may provisionally propose as the basis for resolution will not be binding on them until they have each had an opportunity of taking advice from such legal advisers and have thereafter agreed to be bound.

APPENDIX A

* This code is based on the draft prepared by Henry Brown for the Law Society's Report on ADR published in July 1991, with some amendments. It draws on a number of sources, including the Family Mediators Association's Code, which was prepared in consultation with a Law Society working party on this subject.

Source: Brown, H. & A. Marriot, *ADR Principles and Practice*, London: Sweet & Maxwell, 2nd edition, 1999 (Chapter 19, *Ethics, Fairness and Power Balance*, pp 337-340).

APPENDIX B

Standards of Ethics and Professional Responsibility for Certified Mediators

(Adopted by the Judicial Council of Virginia, June 2002)

A. Preamble

The Commonwealth of Virginia permits the referral of civil disputes pending in court to mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia. The referral of cases from the court system to mediation places an important responsibility upon persons who serve as mediators. Mediators shall conduct themselves in a manner that will instill confidence in the mediation process, confidence in the integrity and competence of mediators, and confidence that the disputes entrusted to mediators are handled in accordance with the highest ethical standards.

These standards are not intended to unduly restrict the practice of mediation and recognize the need for flexibility in style and process. These standards are intended to guide the conduct of mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia and to promote public and judicial confidence in the mediation process. The comments contained in the body of these Standards are meant to be interpretative of the main text of the standards.

B. Scope

The *Standards of Ethics and Professional Responsibility* applies to all certified mediators.

C. Assessing the Appropriateness of the Mediation

Prior to agreeing to mediate, and throughout the process, the mediator should determine that:

1. mediation is an appropriate process for the parties;
2. each party is able to participate effectively within the context of the mediation process; and
3. each party is willing to enter and participate in the process in good faith.

If in the judgment of the mediator the conditions specified in (1) through (3) are not met, the mediator shall not agree to mediate or, if the concerns arise after the process has begun, shall consider suspending or terminating the process.

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Comment: Section 8.01-576. 5 of the Code of Virginia allow a court to refer any contested civil matter to a dispute resolution orientation session. "Orientation session" is defined in section 8.01-576.4 as a preliminary meeting during which the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication. A major goal of the orientation session is to educate the parties about dispute resolution processes available to them, such as mediation.

The orientation session can also play an important role as an assessment tool. Assessment as to whether a case is appropriate for a dispute resolution process, like mediation, may involve, particularly in family cases, separate screening interviews with the clients. Where appropriate, these interviews should include specific questions regarding violence and abuse (physical, emotional, and verbal abuse and/or threats), child abuse/neglect, drug and/or alcohol use, and balance of power. In cases where separate screening interviews have been conducted by an intake specialist or organization, such as a court program or community mediation center, such screening will meet the requirements of this section. This in no way relieves the mediator from continual assessment of appropriateness throughout the mediation process.

D. Initiating the Process

1. Description of Mediation Process. The mediator shall define mediation and describe the mediation process to the parties and their attorneys, if present.

- a. Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties enables them to understand and to reach a mutually agreeable resolution to their dispute.
- b. The description of the process shall include an explanation of the role of the mediator.
- c. The mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement to mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.
- d. The stages of the mediation process shall be described by the mediator.

2. Procedures

- a. Prior to commencement of a court-referred mediation, the mediator shall inform the parties in writing of the following:
 1. The mediator does not provide legal advice.
 2. Any mediated agreement may affect the legal rights of the parties.

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3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
 4. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.
- b. In all other cases, the mediator shall inform the parties, orally or in writing, of the substance of the following:
1. The mediator does not provide legal advice.
 2. Any mediated agreement may affect the legal rights of the parties.
 3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
 4. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.
- c. The mediator shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and conditions under which mediation may be terminated by the mediator.
- d. If the mediation is conducted in conjunction with another dispute resolution process, such as arbitration, and the same neutral conducts both processes, the mediator must describe to the parties the procedures to be followed in both processes clearly, prior to entering into the agreement to mediate.

Comment:

In section D.1.b., the description of the mediation process may include an explanation of the role of the mediator as that of a facilitator, not advocate, judge, jury, counselor or therapist. The role of the mediator also includes, but is not limited to, assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

In Section D.1.d., the stages of mediation should include at a minimum, an opportunity for all the parties to be heard, the identification of issues to be resolved in mediation, the generation of alternatives for resolution, and, if the parties so desire, the development of a Memorandum of Understanding or Agreement.

In Section D.2.b., the primary role of the mediator is to facilitate the voluntary resolution of a dispute. In order to ensure that parties make informed decisions, mediators should make the parties aware of the importance of consulting other

professionals. Particularly where legal rights are involved or the parties' expectation is to enter into a binding and enforceable agreement, clear notification of the information in (b)1-4 is essential. A mediator can most effectively verify that he or she has informed the parties of the items listed in (b)1-4 if these items are put in writing.

E. Self-Determination

1. Mediation is based on the principle of self-determination by the parties. Self-determination requires that the mediator rely on the parties to reach a voluntary agreement.
2. The mediator may provide information about the process, raise issues, and help explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute.
3. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.
4. The mediator shall promote a balanced process and shall encourage the parties to conduct the mediation in a collaborative, non-adversarial manner.
5. Where appropriate, the mediator shall promote consideration of the interests of persons affected by actual or potential agreements, who are not present or represented at the mediation.

F. Professional Information

1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice are needed to reach an informed agreement or to protect the rights of a participant.
2. A mediator shall give information only in those areas where qualified by training or experience.
3. When providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination.

G. Impartiality

1. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favouritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement.
2. A mediator shall avoid conduct which gives the appearance of partiality towards one of the parties. A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background, or performance at the mediation.
3. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

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H. Conflicts of Interest

1. The mediator has a duty to remain free from conflict of interest that could, in any way affect the ability of the mediator to conduct a neutral and balanced process.
2. A mediator must disclose any current, past, or possible future representation or relationship with any party or attorney involved in the mediation. Disclosure must also be made of any relevant financial interest. All disclosures shall be made as soon as possible after the mediator becomes aware of the interest or relationship.
3. After appropriate disclosure, the mediator may serve if the parties so desire.

I. Confidentiality

1. The mediator has the obligation, prior to the commencement of the mediation, to inform the parties of the following and to determine that the parties have a reasonable understanding thereof:
 - (a) all memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential;
 - (b) any communication made in or in connection with the mediation which relates to the controversy being mediated, including screening, intake and scheduling a dispute resolution proceeding, whether made to a mediator or dispute resolution program staff or a party, or to any other person, is confidential;
 - (c) a mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing;
 - (d) allegations of child abuse are not confidential as mediators are mandatory reporters of such information;
 - (e) in reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanour of the parties and their counsel during the dispute resolution proceeding, unless the parties agree otherwise.
2. The mediator further has a duty to explain that confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:
 - (a) where all parties to the mediation agree, in writing, to waive the confidentiality;

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- (b) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation;
 - (c) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation;
 - (d) where a threat to inflict bodily injury is made;
 - (e) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime;
 - (f) where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint;
 - (g) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation;
 - (h) where communications are sought or offered to prove or disprove any of the grounds listed in Virginia Code § 8.01-576.12 in a proceeding to vacate a mediated agreement; or
 - (i) as provided by law or rule.
3. If the mediator has established specific exceptions to the general rule of confidentiality, they must be disclosed to the parties at the start of the mediation. Consistent with the rules set out here, the parties must agree, in writing, to waive confidentiality with respect to those issues.

J. Agreement

The mediator has no vested interest in the outcome of the mediation; therefore, the mediator must encourage the parties to develop their own solution to the conflict. The mediator may suggest options for the parties to consider, only if the suggestions do not affect the parties' self determination or the mediator's impartiality. The mediator may not recommend particular solutions to any of the issues in dispute between the parties nor coerce the parties to reach an agreement on any or all of the issues being mediated.

Prior to the parties entering into a mediated agreement, the mediator has the obligation to determine that:

- (1) the parties have considered all that the agreement involves and the possible ramifications of the agreement;

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- (2) the parties have also considered the interests of other persons who are not parties to the mediation but are affected by the agreement; and
- (3) the parties have entered into the agreement voluntarily.

The mediator shall encourage review of any agreement by independent counsel for each of the parties prior to the mediated agreement being signed by the parties.

If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its ramifications, the mediator has the obligation to raise these concerns with the parties. Under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.

K. Level of Skill or Expertise

1. The mediator has the obligation to refuse a referral if he or she believes that the referral would require skill that would exceed his/her current level of expertise.
2. If a mediator determines during the course of a mediation that a lack of technical knowledge or skill impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and may withdraw of his own accord or if requested by any party.

L. Quality of the Process

1. A mediator shall conduct the mediation diligently and shall not prolong the mediation for the purpose of charging a higher fee.
2. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, the mediator shall inform the parties. The mediator shall discontinue the mediation in such circumstances, but shall not violate the obligation of confidentiality.

M. Fees

1. A mediator shall fully disclose compensation, fees, and, charges to the parties.
2. A mediator shall not charge a contingent fee or fee based upon the outcome of the mediation.
3. A mediator shall not give or receive any commission or other monetary or non-monetary form of consideration in return for referral of clients for mediation services.

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Comment: Section M.3. is not intended to preclude a dispute resolution organization or program from receiving a commission or consideration for acceptance of a case which it then refers to a member of the organization's panel of neutrals.

N. Advertising

A mediator shall be truthful in advertising and solicitation for mediation.

O. Community Services

The mediator is encouraged to provide pro bono or reduced fee services to the community, where appropriate.

P. Additional Responsibilities

These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other profession to which the mediator belongs or any other code of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the Society of Professionals in Dispute Resolution or the Academy of Family Mediators.

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Source: <http://www.courts.state.va.us/soe/soe.htm>

APPENDIX C

Model Standards of Practice for Court Mediators

1. Preamble

Court mediation is a conflict resolution process in which a court mediator assists the disputing parties to negotiate a consensual and informed settlement. In mediation, decision making authority rests with the parties. The role of the mediator includes facilitating communication, maximising the exploration of alternatives, and addressing the needs of those who are involved or affected.

Mediation is based on principles of problem solving which focus on the needs and interests of the parties, fairness, privacy, self-determination and the best interests of all parties.

These standards are intended to assist and guide mediation. It is understood that the manner of implementation and adherence to these standards may be influenced by practice directions or court rules. Special standards may be provided for specific cases such as family or civil disputes.

2. Types of Mediation

Court mediation in Singapore may adopt one or two styles of mediation, that is, single mediation and co-mediation.

Single mediation involves one mediator conducting the session. Co-mediation refers to the presence of two mediators. This will be known as Joint Conferencing. As in family mediation, the mediators will be a mediator/counsellor and a Judicial Officer. Joint Conferencing will be used for complex family cases which contain both issues of law and emotional issues. The Judicial Officer will focus on the legal issues and the mediator on non-legal issues.

3. Mediation Process

Introduction

The mediator shall define the process for mediation and delineate it from other forms of dispute resolution or counselling.

Agenda

The mediator shall assist the parties to define the areas of conflict. This may involve each party giving a statement about the issues to be discussed.

Problem Solving

The mediator shall assist the parties to explore options for the resolution of the conflict. The mediator shall then assist the parties to negotiate on the options raised. This may involve the mediator caucusing with each party.

Outcome

The mediator shall ensure parties are clear about the outcome, that is, any agreement or part agreement reached, or no agreement and why.

Local Features

In Singapore's culture, people look to authority figures, for example, the court to provide indications of how to resolve a matter. People also tend to be less vocal in a formal setting. Therefore, during any session the mediator needs to remain aware of power imbalances and impasses which can inhibit the process. Due to this, the mediation process will be more directive than facilitative. This will involve the mediator being more active in proposing options. However, the mediator must never coerce parties to an agreement. The final decision making authority still rests with the parties.

Another local feature is language and culture. Even though English is the language of the government, there are many people who either do not speak English or do not feel able to adequately express themselves in English. Due to this, the mediation sessions will try to be conducted in the language that the parties are most comfortable with. To this end, the court has employed qualified interpreters from all the main language and ethnic groups in Singapore. These interpreters are trained to conduct the mediation sessions themselves.

4. Code of Ethics

Mediators have to comply with a code of ethics which covers areas relating to impartiality, neutrality, confidentiality, informed consent, conflict of interests and promptness.

5. Quality

Qualifications

All mediators shall undergo training in mediation before accepting any cases. Such training may be provided by the court or other appropriate agencies. The mediator shall also acquire practice and procedural knowledge in the area of specialisation. In family mediation, this may include, but is not limited to, family and human development, family law, divorce procedures, community resources, the mediation and counselling process and professional ethics.

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The court has organised a programme of accreditation for mediators. This is based on the mediators meeting the agreed requirements to conduct sessions.

Training

The mediator, once accredited, shall participate in continuing educational and training programmes. They shall also be responsible for their on-going professional growth. A mediator is encouraged to join with other mediators and members of related professions, to promote mutual professional development and interests.

Source: Lim, Lan Yuan & Liew, Thiam Leng, Court Mediation in Singapore, FT Law & Tax Asia Pacific, Singapore, 1997, pp 208-210.

APPENDIX D**Code of Ethics for Court Mediators****1. General Responsibilities**

Court mediators must remain personally responsible for the professional decisions they make. They should be honest, unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of the parties. They must also act fairly, have no personal interest in the settlement and be certain that parties are informed of the process in which they are involved.

2. Responsibilities to the Parties*i. Impartiality*

The mediator is obligated to maintain impartiality towards all parties. This means he or she is to be free from bias or favouritism either in word or action. Impartiality implies a commitment to aid all parties as opposed to a single party, in reaching a mutually satisfactory agreement. Impartiality means that the mediator will not play an adversarial role in the process.

ii. Neutrality

Mediators should reveal any associations or affiliations that they have with any of the parties, which may affect perceived neutrality. If such associations may bias the performance of the mediators, they are to withdraw from the process. Mediators have a responsibility to ensure that any other persons assisting with the session (for example, interpreters), also demonstrate the same standards of neutrality.

iii. Conflict of Interests (Disclosure)

The mediator must refrain from entering or continuing in any dispute if he or she believes his or her participation would result in a conflict of interests. Conflicts of interests can come from two main areas:

(a) Prior Relationship

A mediator shall preferably not proceed if he or she has provided previous legal or counselling services to one of the parties. If such services have been provided, the mediator should only continue when the prior relationship has been disclosed, his or her role is made distinct from the previous relationship and the parties both wish to proceed with that mediator.

(b) Post Relationship

The need to protect against conflicts of interests also governs conduct after mediation. The mediator shall not establish a professional relationship with one or both of the parties unless both parties are in agreement and it is not in relation to the same dispute. Other general issues can, however, be worked on. The mediator has a duty to disclose any conflict of interests. This duty is a continuing obligation throughout the process.

iv. Confidentiality

The mediator will respect the privacy of the parties and hold information obtained during the process in confidence. Such confidentiality applies both within and external to the process. This is to encourage candour and full exploration of the issues. The mediator will also encourage the parties to hold any information in confidence.

There are limits to this confidentiality and the parties must be informed of these limits. Such limits will stem from legal, moral or ethical obligations. For example, mediators have an obligation to break confidence when it seems that one party is in immediate threat of violence from the other party.

v. Informed Consent and Consensual Decision Making

The mediator has an obligation to ensure that all parties understand the nature of the process, the procedures, the role of the mediator and his or her relationship with the parties. A mediator shall recognise that the process is based on an informed choice and on the consensual, non-coercive resolution of a dispute. To this end, the mediator shall make every effort to foster self-determination and social responsibility by the parties.

The mediator has a responsibility to see that the parties consider implications and ramifications of available options (for example, the financial and emotional costs of hearings, obtaining legal advice on the proposed settlement). The mediator also has a responsibility to promote the consideration of the interests of persons affected by any agreement. This may involve the mediator educating the parties as to these interests or needs.

Under no circumstances, however, shall the mediator coerce parties into a settlement.

vi. Promptness

The mediator shall make every effort to expedite the process and not allow one party to lengthen the process in an effort to force the other party into an agreement.

vii. Safety

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Mediators should give priority to the safety of all parties before, during, and after the sessions, including themselves.

viii. Professional Advice

Where necessary the mediator shall encourage the parties to seek independent information and advice, for example, in relation to legal rights or obligations, or the effects of their agreement on themselves and other affected parties.

A mediator shall only give information in those areas that fall within his or her qualifications and experience.

3. Special Responsibilities

i. Co-mediation

Where more than one mediator is involved in a case, each has an obligation to inform the other regarding his or her entry into the case. Co-mediators should maintain an open and professional relationship with each other.

ii. Background, Qualifications and Support

A mediator should only accept responsibility in cases where he or she has sufficient knowledge regarding the appropriate process and subject matter to be effective. The mediator has a responsibility to maintain and improve his or her professional skills, to participate in the development of new practitioners in the field, and to educate the public about the value of use of alternative dispute resolution procedures.

iii. Remuneration and Advertising

No commissions, rebates or other forms of remuneration should be given or received by a mediator for the provision of services or the referral of clients. No advertising or claims of specific results or promises which imply favour of one mediator over another, for the purpose of obtaining business, should be made.

Source: Lim, Lan Yuan & Liew, Thiam Leng, Court Mediation in Singapore, FT Law & Tax Asia Pacific, Singapore, 1997, pp 211-214.

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Code of Professional Conduct for Mediators

Preamble

Mediation is an approach to conflict resolution in which an impartial third party intervenes in a dispute with the consent of the parties, to aid and assist them in reaching a mutually satisfactory settlement to issues in dispute.

Mediation is a profession with ethical responsibilities and duties. Those who engage in the practice of mediation must be dedicated to the principle that all disputants have a right to negotiate and attempt to determine the outcome of their own conflicts. They must be aware that their duties and obligations relate to the parties who engage their services, to the mediation process, to other mediators, to the agencies which administer the practice of mediation, and to the general public.

Mediators are often professionals (attorneys, therapists, social workers) who have obligations under other codes of ethics. This code is not to be construed as a competitive code of behaviour but as additional guidelines for professionals performing mediation. When *mediating*, professionals will be bound by the ethical guidelines of this code.

This code is not designed to override or supersede any laws or government regulations which prescribe responsibilities of mediators and others in the helping professions. It is a personal code relating to the conduct of the individual mediator and is intended to establish principles applicable to all professional mediators employed by private, city, state, or federal agencies.

1. The Responsibility of the Mediator to the Parties

The primary responsibility for the resolution of a dispute rests upon the parties themselves. The mediator at all times should recognise that the agreements reached in negotiations are voluntarily made by the parties. It is the mediator's responsibility to assist the disputants in reaching a settlement. At no time should a mediator coerce a party into agreement. Mediators should not attempt to make a substantive decision for the parties. Parties may, however, agree to solicit a recommendation for settlement from the mediator.

It is desirable that agreement be reached by negotiations without a mediator's assistance. Intervention by a mediator can be initiated by the parties themselves or by a mediator. The decision to mediate rests with the parties, except where mediation is mandated by legislation, court order, or contract.

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Expenses of Mediation – Mediators will inform all parties of the cost of mediation services prior to a mediator's intervention. Parties should be able to estimate the total cost of the service in relation to that of other dispute resolution procedures.

Ideally, when costs are involved, the mediator should attempt to have parties agree to bear the costs of mediation equitably. Where this is not possible, all parties should reach agreement as to payment.

2. *Responsibility of the Mediator toward the Mediation Process*

Negotiation is an established procedure in our society as a means of resolving disputes. The process of mediation involves a third party intervention into negotiations to assist in the development of alternative solutions that parties will voluntarily accept as a basis for settlement. Pressures which jeopardise voluntary action and agreement by the parties should not be a part of mediation.

The Mediation Process – Mediation is a participatory process. A mediator is obliged to educate the parties and involve them in the mediation process. A mediator should consider that such education and involvement are important not only to the resolution of a current dispute, but will also better qualify the parties to handle future conflicts in a more creative and productive manner.

Appropriateness of Mediation – Mediation is not a panacea for all types of conflicts. Mediators should be aware of all procedures for dispute resolution and under what conditions each is most effective. Mediators are obliged to educate participants as to their procedural opinions and help them make wise decisions as to the most appropriate procedures. The procedures should clearly match the type of outcome which is desired by the parties.

Mediator's Role – The mediator must not consider himself or herself limited to keeping the peace or regulating conflict at the bargaining table. His or her role should be one of an active resource person upon whom the parties may draw and, and when appropriate, he or she should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since the status, experience, and ability of the mediator lend weight to his or her suggestions and recommendations, he or she should evaluate carefully the effect of his or her interventions or proposals and accept full responsibility for their honesty and merit.

Since mediation is a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential for the effective performance of mediation procedures. The manner in which the mediator carries out professional duties and responsibilities will measure his or her usefulness as a mediator. The quality of character as well as intellectual, emotional, social, and technical attributes will reveal themselves in the conduct of the mediator and in his or her oral and written communications with the parties, other mediators, and the public.

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Publicity and Advertising – A mediator should not make any false, misleading, or unfair statement or claim as to the mediation process, costs, and benefits, and as to his or her role, skills, and qualifications.

Neutrality – A mediator should determine and reveal all monetary, psychological, emotional, associational, or authoritative affiliations that he or she has with any of the parties to a dispute that might cause a conflict of interest or affect the perceived or actual neutrality of the professional in the performance of duties. If the mediator or any one of the major parties feels that the mediator's background *will have or has had* a potential to bias his or her performance, the mediator should disqualify himself or herself from performing a mediation service.

Impartiality – The mediator is obligated during the performance of professional services to maintain a posture of impartiality toward all involved parties. Impartiality means freedom from bias or favoritism either in word or action. Impartiality implies a commitment to aid all parties as opposed to a single party in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role in the process of dispute resolution.

Confidentiality – Information received by a mediator in confidence, private session, caucus, or joint session with the disputants is confidential and should not be revealed to parties outside of the negotiations. Information received in caucus is not to be revealed in joint session without receiving prior permission from the party or person from whom the information was received.

The following exceptions shall be applied to the confidentiality rule: In the event of child abuse by one or more disputants or in a case where a mediator discovers that a probable crime will be committed that may result in drastic psychological or physical harm to another person, the mediator is obligated to report these actions to the appropriate agencies.

Use of Information – Because information revealed in mediation is confidential and the success of the process may depend on this confidentiality, mediators should inform and gain consent from participants that information divulged in the process of mediation will not be used by the parties in any future adversarial proceedings.

The mediator is also obligated to resist disclosure of confidential information in an adversarial process. He or she will refuse to voluntarily testify in any subsequent court proceedings and will resist to the best of his or her ability the subpoena of either his or her notes or person. This provision may be waived by the consent of all parties involved.

Empowerment – In the event a party needs either additional information or assistance in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached that is fair, equitable, and has the capacity to hold over time, the mediator is obligated to refer the party to resources – either data or persona – who may facilitate the process.

Psychological Well-Being – If a mediator discovers that a party needs psychological help either prior to or during mediation, he or she will make appropriate referrals. Mediators recognize that mediation is not an appropriate substitute for therapy and shall refer parties to the appropriate procedure. Mediation shall not be conducted with parties who are either intoxicated or who have major psychological disorders which seriously impair their judgement.

The Law – Mediators are not lawyers. At no time will a mediator offer legal advice to parties in dispute. Mediators will refer parties to appropriate attorneys for legal advice. This same code of conduct applies to mediators who are themselves trained in the law. The role of an impartial mediator should not be confused with that of an attorney who is an advocate for a client.

NOTE: The authors must take exception to the above paragraph. Lawyers may serve as mediators and may provide impartial legal advice to the parties together. We offer the following substitute wording: At no time, will a mediator who is not a lawyer offer legal advice. Mediators will urge parties to separately consult with independent attorneys for legal advice. The role of a mediator should not be confused with that of an attorney who represents a client as an advocate. A lawyer-mediator should not represent either party during or after the mediation process.

The Settlement – The goal of negotiation and mediation is a settlement that is seen as fair and equitable by all parties. The mediator's responsibility to the parties is to help them reach this kind of settlement. Whenever possible, a mediator should develop a written statement that documents the agreements reached in mediation.

A mediator's satisfaction with the agreement is secondary to that of the parties.

In the event that an agreement is reached which a mediator feels (1) is illegal, (2) is grossly inequitable to one or more parties, (3) is the result of false information, (4) is the result of bad faith bargaining, (5) is impossible to enforce, or (6) does not look like it will hold over time, the mediator may pursue any or all of the following alternatives:

1. Inform the parties of the difficulties which the mediator sees in the agreement.
2. Inform the parties of the difficulties and make suggestions which would remedy the problems.
3. Withdraw as mediator without disclosing to either party the particular reasons for his or her withdrawal.
4. Withdraw as mediator but disclose in writing to both parties the reasons for such action.
5. Withdraw as mediator and reveal publicly the general reason for taking such action (bad faith bargaining, unreasonable settlement, illegality, etc.)

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Termination of Mediation – In the event that the parties cannot reach an agreement even with the assistance of a mediator, it is the responsibility of the mediator to make them aware of the deadlock and suggest that the negotiations be terminated. A mediator is obligated to inform the parties when a final impasse has occurred and to refer them to other means of dispute resolution. A mediator should not prolong unproductive discussions that result in increased time, emotional, and monetary costs for the parties.

3. *The Responsibility of the Mediator toward Other Mediators*

A mediator should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to cooperative effort and should extend every possible courtesy to his or her co-mediator.

During mediation, the mediator should carefully avoid any appearance of disagreement with or criticism of his or her co-mediator. Discussions as to what positions and actions mediators should take in particular cases should not violate principles of confidentiality.

4. *The Responsibility of the Mediator toward His or Her Agency and Profession*

Mediators frequently work for agencies that are responsible for providing mediation assistance to parties in dispute. The mediator must recognise that as an employee of said agencies, he or she is their representative and that his or her work will not be judged solely on an individual basis but as a representative of an organization. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but upon the employer and as such jeopardises the effectiveness of the agency, other agencies, and the acceptability of the mediation process itself.

The mediator should not use his or her position for personal gain or advantage, nor should he or she engage in any empowerment, activity, or enterprise which will conflict with his or her work as a mediator.

Mediators should not accept any money or thing of value for the performance of services – other than a regular salary or mutually agreed upon fee – or incur obligations to any party which might interfere with the impartial performance or his or her duties.

Training and Education – Mediators learn their trade through a variety of avenues – formal education, training programs, workshops, practical experience, and supervision. A mediator has the responsibility to constantly upgrade his or her skills and theoretical

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grounding and shall endeavour to better himself or herself and the profession by seeking some form of further education in the negotiation and mediation process each year that he or she is in practice.

A mediator should promote the profession and make contributions to the field by encouraging and participating in research, publishing, or other forms of professional and public education.

Expertise – Mediators should perform their services only in those areas of mediation where they are qualified either by experience or training. A mediator should not attempt to mediate in a field where he or she is unprepared and where there is risk of psychological, financial, legal, or physical damage to one of the parties due to the mediator's lack of background.

A mediator is obligated to seek a co-mediator trained in the necessary discipline or refer cases to other mediators who are trained in the required field of expertise when he or she does not possess the required skills.

Voluntary Services – A mediator is obligated to perform some voluntary service each year of practice to provide assistance to those who cannot afford to pay for mediation and to promote the field. It is left up to the individual mediator to determine the amount and kind of service to be rendered for the good of the profession and society.

A mediator should cooperate with his or her own and other agencies in establishing and maintaining the quality, qualifications, and standards of the profession. Mediators should participate in individual and agency evaluations and should be supervised either by an agency, a mutually agreed upon peer, or the professional organization's Board of Ethics. A mediator involved in any breach of this code of conduct should notify his or her agency of the said breach. Mediators hearing of violations of this code of ethics should also report said information to their agency or the Board of Ethics.

5. *The Responsibility of the Mediator toward the Public and Other Unrepresented Parties*

Negotiation is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve a settlement. Such assistance does not abrogate the rights of the parties to resort to economic, social, psychological, and legal sanctions. However, the mediation process may include a responsibility of the mediator to assert the interest of the public or other unrepresented parties in order that a particular dispute be settled; that costs or damages be alleviated; and that normal life be resumed. Mediators should question agreements that are not in the interest of the public or unrepresented parties whose interests and needs should be and are not being considered at the table. Mediators may and should raise questions as to whether other parties' interests or the parties themselves should be at the negotiating table. It is understood, however, that the mediator does not regulate or control any of the content of a negotiated agreement.

APPENDIX E

Publicity should not be used by a mediator to enhance his or her position. Where two or more mediators are mediating a dispute, public information should be handled by a mutually agreeable procedure.

Source: Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, Jossey-Bass Publishers, San Francisco, 1984, pp 349-354.

APPENDIX F

APPENDIX F

QUESTIONNAIRE ON
“ETHICAL DILEMMAS IN MEDIATION PRACTICE:
A SINGAPORE PERSPECTIVE”

GENERAL INFORMATION

Name (Optional): _____

Area of Mediation Practice: _____

Years in Practice: _____

Legally Trained? _____

Current Occupation: _____

All information disclosed in this Questionnaire shall be kept in
the strictest confidence.

THANK YOU FOR YOUR COOPERATION

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"Ethical Dilemma" is defined broadly as:

“a situation in which you felt some serious concern about whether it was proper for you as a mediator to take a certain course of action, i.e. where you were unsure what was the right and proper thing for you as mediator to do.”

Question 1:

In your practice as a mediator, please describe in your own words situations which you encountered in mediation practice which presented some kind of ethical dilemma on what was the proper course of action for you to take as a mediator.

University of Melbourne

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Question 2:

Why do you consider or view the described situations as presenting a dilemma?

of Malaya

Question 3:

How did you or would you have handled those situations which you have just described.

This image shows a blank sheet of white paper with horizontal blue or grey ruling lines. A large, light-colored watermark with the word "University" is oriented diagonally from the top-left towards the bottom-right across the center of the page. The paper appears to be a standard notebook or stationery page.

INTERVIEWER'S NOTES²⁷⁵:

DILEMMA #1:

How to keep within the limits of mediator's competency.

As a practising mediator, you will sometimes encounter situations where you are confronted with the need to go beyond your skills of competency. So, how would you respond in these two general situations?

Where your "diagnostic" competency is lacking.

For example: In cases where there is a history of violence where there are indications in the session that one disputant feels intimidated by the other, perhaps as a result of past violence or fear, or in mental incapacity situations.

Where your substantive or skill competency is lacking.

For example: Some disputes may require specific background knowledge, information, or skills that you may not have.

DILEMMA #2:

How to preserve impartiality.

Where questions arise with regards to what is necessary to maintain both the appearance and fact of impartiality in terms of 3 areas, namely:

Relationships with disputants or lawyers

- a. You may still be uncomfortable to proceed where a prior relationship is disclosed and the disputants waive objections and agree to proceed.
- b. You may have the opportunity to enter into a relationship with one of the disputants /lawyers subsequent to the mediation (even where there is no prior relationship which existed at the time of mediation).
- c. You may share a class or group identification, for example, race, sex, religion, etc with one of the disputants, where your impartiality may be questioned by the other disputant.
- d. Other situations/experience

Personal reactions to disputants during mediation

You may experience a strong personal reaction, whether of sympathy or antipathy towards one of the disputants during mediation, perhaps due to the disputant's situation, actions, or positions.

²⁷⁵ *Supra*, at n.1 based on Professor R.A.B. Bush's study in Florida (1992).

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DILEMMA #3:

How to maintain confidentiality.

You may have concerns about the limits to the principle of confidentiality in 2 key areas where you face this tension, namely:

Confidentiality from outside parties or agencies

- a. You may a situation where you may be required to report allegations of past or threatened violence or crime if revealed in mediation sessions.
- b. Sometimes you may see that a disputant has a severe need for professional help of some kind, beyond the matter in mediation but the disputant is reluctant to follow up by themselves based on your suggestion or referral.

Confidentiality between disputants

- a. You may feel strongly to reveal or disclose confidential information where an agreement is about to be reached that the other disputant would probably not accept if the confidential information were disclosed.
 - b. You may feel strongly to reveal or disclose confidential information where the disclosure would probably convince the other disputant to reach a settlement. Otherwise, no settlement is likely.
-

DILEMMA #4:

How to ensure informed consent for free and informed choice for disputants regarding options for settlement.

Where there is a possibility of coercion.

- a. Coercion in the form of fear or intimidation may be caused by one disputant towards the other disputant.
- b. Coercion caused by the lawyer for one of the disputants preventing that disputant from participating and communicating with you and/or pressuring the disputant.
- c. You may be concerned if you may be stepping over the line from persuasion to coercion in the case of a recalcitrant disputant.

Where there is suspicion of disputant incapacity.

You may encounter a situation where you suspect that one of the disputants is temporarily or permanently suffering from incapacity to comprehend the discussion and make decisions during mediation.

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Where there is party ignorance.

This situation arises where you have the information which one disputant in deciding whether to accept or reject a proposed settlement does not realise that he lacks such relevant information. This information could be of a factual and/or legal nature.

DILEMMA #5:

How to preserve self-determination or maintain nondirectiveness.

Where you are tempted to give the disputants a solution.

- a. The disputants may ask you for a recommendation or for an actual decision when they are struggling to find a solution and/or facing an impasse.
- b. Or you think you can see a good or ideal solution that the disputants have not seen but will find it acceptable.

Where you are tempted to oppose a solution formulated by the disputants.

- a. Because the solution is illegal.
 - b. Because the solution is unfair to the weaker disputant (due to imbalance of power).
 - c. Because the solution is unwise.
 - d. Because the solution is adverse to the interest of an absent disputant (especially children).
-

DILEMMA #6:

How to separate mediation from counselling/therapy and legal advice/advocacy.

- a. Where the disputants need expert information - therapeutic or legal information.
 - b. When you are tempted to express a professional judgement – therapeutic or legal advice.
 - c. When a disputant needs a therapist or advocate.
-

DILEMMA #7:

How to avoid disputant exposure to harm as a result of mediation when open and frank discussions are encouraged.

- a. When mediation can make a bad situation. Sometimes, disputants can be left in greater distress, discord, and even danger than if no mediation had taken place.
- b. When mediation can reveal sensitive information which may give the other disputant a bargaining advantage.
- c. When mediation can encourage or create a false sense of resolution.

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DILEMMA #8:

How to prevent disputant abuse of the mediation process.

You may encounter several abusive behaviours such as:

- a. Where a disputant conceals information. You find out that a disputant intentionally does this that, if known to the other disputant, would lead him to make a different decision about a proposed solution.
 - b. Where a disputant lies. You find out that one disputant intentionally lies to the other.
 - c. Where a disputant "fishes" for information. You find that disputants use the mediation process to fish for information or pump information from the other disputant, without any intention to come to any agreement.
 - d. Where a disputant stalls to "buy time". You find that a disputant uses the mediation process to drag out mediation with no intention to settle, but by agreeing to a settlement they have no intention of carrying out.
 - e. Where a disputant engages in intimidation. You may find that it is difficult to draw the line between useful communication and abusive intimidation.
-

DILEMMA #9:

How to handle conflicts with mediator's self-interest.

Where conflicts arise from relations with courts or other referring agencies.

You may face the tension between the need to satisfy the court and the obligation to do what is best for the disputants.

Where conflicts arise from relations with the legal and other professions.

You may encounter conflicts with not offending lawyers and other professional groups with your obligation to serve the disputants' interests. Or by maintaining the principles of self-determination and nondirectiveness, you run into the risk of offending these groups.

OTHER FORMS OF DILEMMA
