

TYPES OF ETHICAL DILEMMAS MEDIATORS FACE*

A. Keeping within the limits of competency

1. When "diagnostic" competency is lacking
 - (a) to diagnose a history of violence
 - (b) to diagnose a mental incapacity
3. When substantive or skills competencies are lacking

D. Preserving impartiality

1. In view of relationships with parties or lawyers
 - (a) after disclosure and waiver of objections
 - (b) when relationships arise after mediation
 - (c) when class or group "relationships" exist
4. In view of a personal reaction to a party in mediation
 - (a) Antipathy to a party
 - (b) Sympathy to a party

C. Maintaining confidentiality

1. Vis-à-vis outsiders
 - (a) reporting allegations of violence or crime
 - (b) communicating to a court or referring agency
 - (c) communicating to a party's lawyer
4. Between the parties
 - (a) when disclosure would prevent "uninformed" settlement
 - (b) when disclosure would break "uninformed" impasse

C. Ensuring informed consent

1. In cases of possible coercion of one party
 - (a) by the other party
 - (b) by the party's own lawyer/advisor
 - (c) by the mediator's "persuasive" measures
4. In cases of party incapacity
5. In cases of party ignorance
 - (a) of factual information known to the mediator

(b) of legal/expert information know to the mediator

C. Preserving self-determination/Maintaining nondirectiveness

1. When tempted to give the parties a solution
 - (a) at the parties' request
 - (b) on the mediator's own initiative
3. When tempted to oppose a solution formulated by the parties
 - (a) because the solution is illegal
 - (b) because unfair to a weaker party
 - (c) because the solution is unwise
 - (d) because unfair to an outside party

E. Separating mediation from counseling and legal advice

1. When the parties need expert information
2. When tempted to express a professional judgement
3. When a party needs a therapist or advocate

D. Avoiding party exposure to harm as a result mediation

1. When mediation may make a bad situation worse
2. When mediation may reveal sensitive information
3. When mediation may induce "detrimental reliance"

D. Preventing party abuse of the mediation process

1. When a party conceals information
2. When a party lies
3. When a party "fishes" for information
4. When a party stalls to "buy time"
5. When a party engages in intimidation

F. Handling conflicts of interest

1. Arising from relations with courts or referring agencies
2. Arising from relations with lawyers/other professionals

*From Robert A. Baruch Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," 1994 Journal of Dispute Resolution 1, 9-10.

POSSIBLE VARIATIONS IN MEDIATION SETTINGS

- **Nature of cases** -- Number of parties (Multi-party or two-party) - Complexity - Length - Subject matter (Environmental/policy - Civil enforcement - Mass tort, insurance, product liability, or similar litigation - Commercial/business conflicts - Small claims litigation - Workplace /employment - Family - Consumer - Labor-management - Neighborhood - Other

- **Voluntariness of parties' participation in mediation**-- Voluntary -- Mandated -- Other

- **Parties' role in selecting a mediator**-- Full - None - Other

- **Relative nature of parties** -- Unsophisticated/vulnerable/pro se/novice - Experienced/fully represented - Individual v. organization - Individual v. Individual - Other

- **Process assistance requested of mediator** -- Facilitative mediation -- Evaluative mediation -- Other

- **Status of ADR provider organization**-- Court - Public regulatory agency - Public dispute resolution provider agency - Other public entity (State DR Agency, University, Administrative support agency, Office of ALJs, Shared neutrals program) - Private not-for-profit (e.g., neighborhood mediation program, self-regulatory entity, NASD, or a HMO) - Private for-profit (employer)

- **ADR provider organization's role in listing and referring neutrals**- Pure clearinghouse - Selective listing (objective) - Selective listing (subjective) - Party-identified panels - Assignor of neutral - Mixture

- **ADR provider organization's role in quality control**-- Certification of listees - None - Qualifications and selection process - Conflicts check - Performance evaluation - Discipline - Training

- **ADR provider organization's operational transparency**- Opaque - Open decisionmaking - Rules of procedure defining required competencies, disclosing standards and/or methods for selecting neutrals individual cases

SOME QUESTIONS TO KEEP IN MIND

- _ What situational factors, if any, may affect ethical duties of the mediator?
- _ Nature of ethical standards: minimum requirements, aspirational goals, a mix or some other approach?
- _ Who should be developing standards, and for whom?
- _ Relation between ethical duties and "best practices"?
- _ How specific should standards be?
- _ What if standards provide only sketchy, or internally inconsistent, guidance? Are some standards "more equal"?
- _ How will/should standards be enforced?
- _ How should standards be inculcated? How should mediators' ethical awareness be sharpened?
- _ Are there other activities that would help promote ethical behavior in mediation?

A. Competence

I. Conflict of interest

B. Impartiality

H. Good faith

C. Confidentiality

G. Avoid harm

D. Informed consent

F. Role limitation

E. Self-determination

