THE MEDIATOR AND ETHICAL DILEMMAS: A PROPOSED FRAMEWORK FOR REFLECTION

Louise Otis* and Catherine Rousseau-Saine**

Abstract .............................................. 43

Introduction ........................................... 45

Section 1. Codes of professional conduct ............... 47

Subsection 1. Fundamental codes of conduct in mediation .... 48

§1. Self-determination ................................. 50

§2. Impartiality of the mediator ....................... 51

§3. Conflict of interest and independence .............. 51

§4. Confidentiality .................................... 52

§5. Quality of the mediation process ................. 54

§6. Lawyers’ ethics in the mediation process .......... 55

Subsection 2. Functional limits of codes of professional conduct .................. 57

Section 2. Practical case studies – ethical dilemmas .... 58

* International judge and professor, McGill University.
** Lawyer and Mediator, Norton Rose Fulbright Canada.
Subsection 1. Ignorance of changes in the law or of Praetorian law. .......................... 58

Subsection 2. Unrepresented parties ................................................................. 59

§1. The dilemma of the unrepresented party, as discussed by mediators ............. 60

§2. Answers to the dilemma of the unrepresented party .................................... 61

§3. Exceptional behaviour .................................................................................. 63

Section 3. Reference framework for ethical reflection .......................................... 64

Conclusion ......................................................................................................... 65
The Mediator and Ethical Dilemmas:  
A Proposed Framework for Reflection

Louise Otis and Catherine Rousseau-Saine

ABSTRACT

Mediation frequently gives rise to dilemmas that involve ethics, professional codes of ethics and the Law. Ethical dilemmas arise in the course of judicial mediation as well as in extrajudicial mediation. While codes of professional conduct set forth the regulatory principles intended to guide mediators in their interventions, they cannot foresee all the ethical issues and questions that arise in the course of mediation activities. This article will: (1) examine the basic ethical principles that apply to mediators; (2) consider how some of these principles can come into conflict; (3) identify ethical dilemmas encountered by mediators; and (4) propose a reflexive reasoning process for making ethical choices.

Keywords: Ethical dilemma – Mediator – Judge mediator
INTRODUCTION

Our societies are founded on the rule of law, of which moral values common to subjects of law form an integral part. The hierarchical organization of standards of conduct introduces an order of relationship between manifestations of human activity that are posed and defined by ethics, codes of ethics, morality and the law. These standards of conduct are continually called into question and frequently mixed up.

Morality is the science of doing what is right and good for life in a given society. Morality puts forward absolute or transcendent precepts for living together. It represents shared awareness based on customs, times and places in the world, establishing regulatory principles for action and conduct.

Ethics is a reflexive discipline that seeks to evaluate human conduct from the viewpoint of a value system. Applied ethics is embodied in reality and defines the steps we can take to lead to a just action. When the Latin moralists assimilated Greek thought, they retained and Latinized the word êthika, the meaning of which was ramified according to the subjective nature of morality.

Ethics is a search for meaning. It has a subjective dimension, referring to values that hold currency in a place and time circumscribed in the present. It is a function of the object, but centred on the subject, attaching itself to relative and immanent values.

Professional codes of ethics are fixed on regulated human activities. They translate just action into rules and duties, notably those governing the exercise of professions. The foundations of professional codes of ethics are thus found in codes of conduct for engineers, architects, physicians, lawyers, etc. Even federally appointed judges in Canada, who are institutionally independent, are governed by “Ethical Principles for Judges.”
The law sets out rules for the operation of human society to ensure the well-being and continuity of society. It allows, defends, sanctions and punishes. The law turns morality into action.

Mediation is a consensual or obligatory way of resolving disagreements, based on negotiation and assisted by a neutral third party, the mediator. In North America, mediation is either judicial or extrajudicial.

Extrajudicial mediation intervenes on the fringes of the formal justice system. It results from a simple intention of the opposing parties, the contract that institutes mediation as a means of resolution prior to arbitration, or the law, which imposes mediation first before the conflict becomes judiciarized.

Judicial mediation is a consensual or obligatory means of resolving disputes that is based on negotiation and integrated into the formal judicial system. In Quebec, judicial mediation is voluntary and is essentially presided over by judges in all the courts and tribunals, including the Court of Appeal. In the other Canadian provinces, judicial mediation is a hybrid process that sometimes involves judges and sometimes institutional or private mediators, by summary procedure.

Mediation frequently gives rise to dilemmas that involve ethics, professional codes of ethics and the Law. Ethical dilemmas arise in the course of judicial mediation as well as in extrajudicial mediation.

Codes of professional conduct set forth regulatory principles intended to guide mediators in their interventions. While these codes establish the general orientations that should guide mediators, they cannot foresee all the ethical issues and questions that arise in the course of mediation activities.

Many books and feature articles have been written on ethics and mediation. A recent phenomenon is the lively debate in the field of


2. Recently, E. Waldman, with the contributions of many mediators, has dedicated a book on ethics and mediation: E. Waldman, Mediation Ethics, San Francisco: Jossey-Bass, 2011.