## Implications for Mediation Practice of Applicable Ethical Principles

These model standards (2005) are the only guidance on ethics for mediators that have been formally approved by three national organizations (American Bar Association, American Arbitration Association, and Association for Conflict Resolution) representing mediation practice across multiple disciplines and in all areas of practice.

<table>
<thead>
<tr>
<th>Standard</th>
<th>Provisions to Discuss</th>
<th>Discussion Questions</th>
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<tbody>
<tr>
<td>I.</td>
<td><strong>Self Determination</strong>&lt;br&gt; A. “A mediator shall conduct a mediation based on the principle of self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”&lt;br&gt; A.1. “Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these standards.”&lt;br&gt; B. “A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.”</td>
<td>&gt; How does ‘voluntary’ and ‘free choice’ as to process and outcome fit with an evaluative/directive style?&lt;br&gt; &gt; What if the parties want an evaluation or suggestions from a facilitative mediator?&lt;br&gt; &gt; What circumstances could require the Mediator to balance self-determination in order to assure a quality process?&lt;br&gt; &gt; How do court administration and program goals about settlement rates affect mediator behavior?</td>
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<td>IV.</td>
<td><strong>Competence</strong>&lt;br&gt; A. “A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.”&lt;br&gt; A.1. “Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A persons who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.”</td>
<td>&gt; When is mediator subject matter expertise a reasonable expectation of the parties?&lt;br&gt; &gt; When do the parties and their attorneys need/want a mediator who can competently evaluate?&lt;br&gt; &gt; What ‘other qualities’ are necessary to be competent?</td>
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<td>VI.</td>
<td><strong>Quality of the Process</strong>&lt;br&gt; A. “A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.”&lt;br&gt; A.4. “A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”&lt;br&gt; A.5. “The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these standards.”</td>
<td>&gt; How do practitioners of each style insure:&lt;br&gt; - party participation&lt;br&gt; - procedural fairness&lt;br&gt; - party competency&lt;br&gt; - mutual respect?</td>
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<td>IX.</td>
<td><strong>Advance- ment of Mediation Practice</strong>&lt;br&gt; A. “A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following: (1) Fostering diversity within the field of mediation... (4) Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.”&lt;br&gt; B. “A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.”</td>
<td>&gt; As a practitioner with a commitment to your particular style/approach, what does it mean to you to:&lt;br&gt; - foster diversity within the field&lt;br&gt; - demonstrate respect for differing points of view within the field?</td>
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UNITING BY DESIGN℠

Integrity
Ethics in Action

Presented to ADR Institute
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Mark D. Bennett
mark@unitingbydesign.com
www.unitingbydesign.com
Qualifications

MARK D. BENNETT
Professional Summary

PRIMARY ROLES: Organization consultant, facilitator, trainer, mediator, coach, and speaker

AREAS OF EXPERTISE: Effective decision-making, collaboration, dialogue, wise planning, leadership development, and conflict transformation for organizations, groups, and individuals.

Experienced (twenty plus years) facilitator of dialogue and key decision-making processes for a range of clients including federal, state, and local government agencies, non-governmental organizations in the US and overseas, foundations, corporations, schools, hospitals and health care organizations, businesses, colleges and universities. I offer a course for leaders and other organizational decision-makers, Values in Action, that focuses on the intentional use of organizational, professional and personal values when making difficult decisions.

Thirty-three years of professional mediation experience including employment, civil rights, organizational, health care, divorce and family, land use, public policy, and commercial issues. From 1987-2006 I was adjunct professor at the University of New Mexico School of Law teaching courses in general, family, and advanced mediation. I have introduced mediation skills to thousands of people from a wide variety of professional backgrounds (human resource personnel, managers, mental health professionals, lawyers, law students, judges, health care professionals, educators, realtors). I also lead trainings in workplace mediation, conflict transformation, collaboration, strategic planning, and negotiation.

Coauthor of a textbook, The Art of Mediation, used for professional mediation training in the United States, Canada, Israel, and Hungary.

PUBLICATIONS

The Art of Mediation (NITA, second edition, 2005) (coauthor)
Negotiation Skills (ALI-ABA, 1996) (coauthor)
“Using Mediation for Employment Disputes” (chapter in Labor and Employment in New Mexico (Butterworth, 1995)
“Designing Dispute Systems for Organizations” (New Mexico Bar Bulletin, June 1992)
Special Education Mediation and Negotiation (New Mexico State University, 1990)

EDUCATION AND TRAINING

Law degree (J.D.), University of Texas at Austin (1975)
Certificate in Marriage and Family Therapy, University of Texas at Austin (1979)
Graduate and clinical training in counseling psychology, University of Texas at Austin (1978-79)
BBA, Southern Methodist University (1971)
Certified Leadership Coach
## Integrity by Example

<table>
<thead>
<tr>
<th>Elements</th>
<th>How does a leader set the day-to-day example?</th>
<th>How does a leader encourage these characteristics in others?</th>
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<tbody>
<tr>
<td><strong>Integrity</strong></td>
<td>Has a clear statement of values and principles and actively uses them to make key decisions and guide personal/professional behavior,</td>
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<tr>
<td><strong>Character</strong></td>
<td>Honest, candid, and courageous</td>
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<tr>
<td></td>
<td>Keeps commitments</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Admits mistakes and accepts accountability</td>
<td></td>
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<tr>
<td><strong>Consideration</strong></td>
<td>Respectful of others' dignity</td>
<td></td>
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<tr>
<td></td>
<td>Fair-minded and interested in others' needs and concerns</td>
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<tr>
<td></td>
<td>Consistently willing to engage, listen, and learn</td>
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<tr>
<td><strong>Constancy</strong></td>
<td>Even-tempered and non-reactive</td>
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<tr>
<td></td>
<td>Patient and steadfast to address concerns and tackle problems together</td>
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<tr>
<td></td>
<td>Authentic - shows the same, real “face” to others no matter their status</td>
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*A leader knows the way, goes the way, and shows the way.*

**John Maxwell**  Leadership authority
A Values Statement Helps Guide Critical Decision Making

Here is an example of a carefully drafted set of organization core values and commitments to take action. In order to explain the values that guided a key decision, it is important to go beyond the use of the big values words to explain what they mean in the context of a particular decision. This model can be adapted for an individual leader’s statement.

**RESPECT**  positive regard for the dignity of all persons
In working with each other, we will:
- Encourage and value the contributions of each person, and make each feel supported and empowered
- Listen well, communicate openly and honestly, and encourage others to do the same
- Treat others as we would like to be treated ourselves, relating so well with them that they actively seek to associate with us

**INTEGRITY**  honesty, directness, and respect for commitments made
In all of our interactions, we will:
- Foster trust by being truthful, empathetic, and consistent
- Be authentic and courageous, aligning what we are thinking, saying, feeling, and doing
- Be responsible for and follow through on the commitments we make

**STEWARDSHIP**  respectful use of natural, human and financial resources
In managing the natural, human, and financial resources to which we have been entrusted, we will:
- Seek ways to appropriately utilize resources, allowing us to become more effective and productive
- Act responsibly, taking only those actions that align with our mission
- Be accountable to the organization and to each other for our actions and the outcomes they produce

**IMAGINATION**  creativity in all we do
In seeking to fulfill our mission, we will:
- Look beyond the challenges of the present and envision what is possible
- Cultivate and reward innovation and risk taking
- Embrace continuous learning and positive technological advancement

**EXCELLENCE**  striving to exceed the quality, customer service and cost performance expectations of our customers
In all we do, we will:
- Put forth our personal and professional best, providing the highest quality of service of which we are capable
- Commit ourselves to continuous improvement, seeking to set the recognized performance standards within our industry
- Deliver a superior experience for all of our customers, sensing their needs and exceeding their expectations
Define Your Core Values and Guiding Principles

Often, an organization’s core values remain broadly stated. How does your team or department take the organization’s big values language and breathe life into these words with definitions and guiding principles that express your commitment to apply the values in your key decisions, the way you conduct your work, and the way you treat people inside and outside the organization.

Name of Value (Noun) ________________

Basic meaning (1-2 sentences) __________________________________________

Commitment to Action (3-4 affirmative statements) ……. we will:

______________________________________________________________

______________________________________________________________

______________________________________________________________

Name of Value (Noun) ________________

Basic meaning (1-2 sentences) __________________________________________

Commitment to Action (3-4 affirmative statements) ……. we will:

______________________________________________________________

______________________________________________________________

______________________________________________________________

Name of Value (Noun) ________________

Basic meaning (1-2 sentences) __________________________________________

Commitment to Action (3-4 affirmative statements) ……. we will:

______________________________________________________________

______________________________________________________________

______________________________________________________________

Name of Value (Noun) ________________

Basic meaning (1-2 sentences) __________________________________________

Commitment to Action (3-4 affirmative statements) ……. we will:
Identify Supporting and Detracting Behaviors

Name of Value __________________

Supporting Behaviors

Detracting Behaviors

Name of Value __________________

Supporting Behaviors

Detracting Behaviors

Name of Value __________________

Supporting Behaviors

Detracting Behaviors

Name of Value __________________

Supporting Behaviors

Detracting Behaviors
Leaders must consistently clarify expectations for behavior throughout the organization. Ethical values are 'big' words that must be practically defined and turned into concrete action principles that set the standards.

<table>
<thead>
<tr>
<th>Ethical Values</th>
<th>Definition(s)</th>
<th>Action Principles</th>
</tr>
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<tbody>
<tr>
<td><strong>Integrity</strong></td>
<td>honesty, transparency, keeping commitments</td>
<td></td>
</tr>
<tr>
<td><strong>Respect</strong></td>
<td>fairness, listening first, loyalty</td>
<td></td>
</tr>
<tr>
<td><strong>Accountability</strong></td>
<td>diligence, responsibility, compliance</td>
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_The habit of the active utilisation of well-understood principles is the final possession of wisdom._

_Alfred North Whitehead_
What mistakes have you made as a leader in any of your roles? What mistakes have you seen other leaders make? How can you apply these lessons learned and avoid future mistakes?

<table>
<thead>
<tr>
<th>MISTAKE</th>
<th>LESSON LEARNED</th>
<th>APPLICATION NOTES</th>
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<tbody>
<tr>
<td></td>
<td><em>(try to state as a memorable phrase)</em></td>
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*Smart people learn from their own mistakes.*
*Wise people learn from the mistakes of others.*
*Proverb attributed to many*

*Those who cannot learn from history are doomed to repeat it.*
*George Santayana  Spanish philosopher*
Raising Expectations for Ethical Decision Making

**Good decisions build trust**

**Concern for Stakeholders**
Insure open, honest reflection about the possible effect of the decision upon individuals, groups, and organizations

**Focus on Guiding Values**
Clarify the actual motivation for the decision and the guiding values that justify the selection of the preferred option over alternatives

**Straight Talk about the Decision**
Communicate transparently with people who need to know by including the ethical reasoning (values) that supports the decision, intended benefits, and the downside (costs and risks)

**Questionable decisions jeopardize trust**

Failure to understand stakeholders' concerns

Failure to develop ethical reasoning that supports the decision

Failure to effectively communicate to stakeholders

**Poor decisions perpetuate mistrust**

Conflict of interest or appearance of impropriety

Inadequate assessment of downside risks

Intention to 'walk the line' of wrongdoing

**Bad Decisions create mistrust**

Violation of Law, Policy or Regulation

Values in Action

DIALOGUE

Multiple perspectives

Moral imagination

Precautionary foresight
Quick Decision Worksheet

<table>
<thead>
<tr>
<th>What is the decision that you need to make?</th>
<th>Who are the affected stakeholders?</th>
<th>What do you know and what are the options?</th>
</tr>
</thead>
<tbody>
<tr>
<td>What values should guide your decision? (what you want to protect/advance)</td>
<td>What is the downside, short term and long term, of each option?</td>
<td>How can you communicate credibly to stakeholders?</td>
</tr>
</tbody>
</table>

Understanding key information, stakeholders, and available options

Clarity about guiding values

The best option, including the downside(s)

_Haste, haste has no blessing._ **Swahili proverb**
Reviewing the Ethical Structure of a Decision

*Ethical*.. action that is right, honest, open, good, principled, correct.
*Stakeholder*.. individual/group/organization with interest or concern

1. **What was the decision?**

2. **Who were the stakeholders?**

3. **What were the positive outcomes?**

4. **Ethical Reasoning..**
   *What values guided the decision? i.e.WHY was it the right thing to do?*

5. **What was the downside?**

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**If you can't explain what you are doing in simple English, you're probably doing something wrong.**
Alfred Kazin

**Ethics is a code of values which guide our choices and actions and determine the purpose of our lives.**
Ayn Rand
Case #1  Overlapping Bargaining Range

You are acting as a mediator in a case involving a claim of employment discrimination. The major issue is the amount of damages for emotional distress in addition to back pay that the plaintiff will receive. After several caucuses, it seems to be the end of the mediation and time for their final offers. In a private caucus, the plaintiff tells you that his “bottom line” is that he will not settle for any less than $100,000. When you caucus with the company representative, she indicates that she will not pay a “penny more” than $130,000. You have agreed to keep information revealed in caucuses private unless you are specifically given permission to share the information with the other side. Neither party gave you this authority. You are very familiar with this type of case and the likely range of a damage award from a court. You are confident that a realistic value range is $90-115K.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Case #2  “Oh By the Way”

You are acting as a mediator in an employment case involving an employee who was terminated for suspected theft and the civil lawsuit he filed in response. The last item agreed upon provides that the company will provide a carefully worded “to whom it may concern” letter of reference that avoids any mention of the suspected theft and implies satisfactory performance by referring to the employee’s record prior to the incident that led to the termination.

You, however, have an afterthought about the possibility of some claim against the company by someone who might hire the employee in the future and suffer a loss.

Does this raise an ethical issue for you? What are your options? What do you do? Why?
Case #3     Legal Malpractice

You are acting as a mediator in a case involving a potential claim under the Americans With Disabilities Act. No lawsuit has been filed. You become convinced that one party (A) is prepared to make an agreement based on incorrect legal advice on a significant point in the litigation. This is an area of law with which you are completely familiar. The US Supreme Court ruled handed down a landmark ruling two months ago, limiting the definition of disability and excluding the plaintiff’s condition. This means that the defendant has no liability in this situation because plaintiff has no ‘protected disability.’ You have asked the defendant, A, and his/her attorney about their level of confidence in the estimate of likely legal outcome and have been told that they are both quite comfortable with the settlement. The proposed settlement calls for party B to receive a settlement of $40,000. You know that the Party A has a clear, complete defense to any claim. You don’t have any reason to believe that Party B (the one making the ADA claim) is aware of the mistake on the law either.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Do any of your answers change if you know that B is aware of A’s mistaken understanding of the applicable law and is taking advantage of this mistake?

Case #4     Conflicting Duties

You serve as a mediator in a case involving a claim for wrongful discharge. You also practice real estate law. In a private caucus, as s/he weighs a settlement offer, one party discusses their plans for the future with their attorney in your presence. The party specifically refers to a confidential plan for a major development in the local marketplace that will have a favorable impact on her business. It could have a devastating effect on the business of a major real estate client of yours who is currently in negotiations to complete a large real estate acquisition nearby.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Does your analysis change if the impact is not on a law client, but to a close relative such as a spouse or a sibling?
Case #5          Offer to Hire

You serve as a mediator in a case involving a grievance for a major employer in the area. The case settles successfully. Six months later, a representative of the company calls you and, after telling you how impressed s/he was with your work, asks if you are available to advise the company as a consultant in some delicate labor negotiations with one of the company’s unions. This request and the subject of the negotiations have nothing to do with the case you mediated or the individual involved.

Does this raise an ethical issue for you? What are you options? What do you do? Why?

Same facts, but the call is 5 years after your service in the impartial role.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Case #7           Offensive Behavior

You are a mediator in an employment dispute. Both in joint sessions and in caucuses, one party has used highly insulting language referring to the ethnic heritage of the other side and her/his lawyer. The other party has essentially ignored the insults. When you raised the issue in joint session and asked that the insults stop, the ‘insulted’ party indicated that the other person has always had this problem and it wasn’t a concern. However, regarding the party making the insulting references, you find that you are so upset and angered by the language and characterization that you can’t focus on the information you are being given. You have tried to put it out of your mind, but are not able to do so.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Consider if your answer changes if you are also a member of the group that the insult pertains to?
Case #8          The Threat??

You are a mediator in a dispute between two co-workers. In a caucus, you present the final offer from A to B. After B expresses doubts about the settlement, you discuss the court alternative and likely court outcomes if s/he proceeds with litigation. B reluctantly agrees, saying (with extreme bitterness), “‘A’ better watch his back..... He may be able to get away with this legally, but he’ll live to regret this day!”

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Case #9.... Harm to Others

You are a mediator in an employment dispute between a manager and an employee. The employee filed a claim with the company EEO office alleging discrimination based on race in a job assignment decision. The manager and the employee have now reached a proposed agreement. They have agreed (with the approval of the senior vice president who supervises the manager) to create a new job for the complaining employee in another department as a project leader. In order to create this job and fund the position, the company plans to terminate four probationary employees who have no job protection or rights to complain about their termination.

As far as you can tell, the company had no interest in terminating these workers until it became clear that they needed room in their budget to offer the complainant a package he would accept to end the dispute. You see this decision as the company taking the easy way out and ‘buying off’ the complainant by victimizing others.

Does this raise an ethical issue for you? What are your options? What do you do? Why?
Case #10... Unshared Information

You are the mediator in a dispute between an employee and employer. 1) The employer is terminating the employee and is offering minimal compensation and in addition wants the employee to sign a covenant agreeing not to work for any of their competitors for 5 years. 2) The employer is represented by counsel and the employee is not. In caucus, after skillful probing, the employer admits to you in strict confidence, the reason for the covenant. You are told that under no circumstances can you divulge this information to the employee. This is what you are told. The employer is downsizing and moving back to their home base from where they will keep in contact with their customers by phone. They have recently learned however, that their main competitor will be opening up an office in the area they are leaving and will most probably hire this employee due to the fact that she knows the area and has personal sales contacts. They feel that without the covenant they will suffer significant harm to their business in the form of lost revenues. They fear that she will take her existing customers to her new employer. In caucus with the employee, you discover that she has no knowledge of the company’s plans to shut down operations or the fact that a potential employer (the competition) is going to be opening an office and that there is a strong possibility of her landing a job. You also learn that she really needs a job (money) and cannot afford a lawyer. You realize that if the employee agrees to the employer’s terms and signs the covenant, she will get minimal compensation and be unable to accept a job that will most probably become available in the very near future with the competition. You also realize that the company has a need protect it's revenue base.

Does this raise an ethical issue for you? What are your options? What do you do? Why?

Case #11..... Who’s in Charge Here?

Five parties are involved collectively in two court actions in which the same party is plaintiff in a sexual harassment case. All parties are represented by counsel. The plaintiff and the main defendant agree to attempt to mediate their dispute in the belief that, if they can resolve their dispute, the other parties will probably agree to dismiss the pending cases since there would be no additional cost to them. The main defendant entering mediation insists that no counsel attend. The mediator, who is also a lawyer, agrees with counsel for both of the mediating parties in advance that the outcome of the mediation will be subject to the later approval of the parties with the advice of counsel.

Agreement is reached at the mediation and both parties express the wish to make a binding and enforceable agreement at the mediation. The parties, while having access by telephone to their respective lawyers and consulting them from time to time during the mediation, do not wish to further advise their lawyers of their decision to make a binding and enforceable agreement at the mediation and do not wish to submit the draft to their lawyers for review before signing it. The mediator raises concerns about the implications of the agreement and strongly encourages the parties to seek legal review before signing off on a final agreement. The parties say they are comfortable, understand what they are doing, refuse to consult further with legal counsel, and “just want to get this over with.” The mediator does not see any particular problems with the agreement, but is aware of the other pending litigation against other defendants.

Consider the following questions from the point of view of a lawyer-mediator and a non-lawyer mediator. Does this raise an ethical issue for you? What are your options? What do you do? Why?