

# Ethical Perspectives in Mediation

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**Moral excellence comes about as a result of habit. We become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts. *Aristotle***

**Always do right - this will gratify some and astonish the rest. *Mark Twain***

**Action is the sole medium of expression for ethics. *Jane Addams***

## Ethics

Ethical issues in mediation are typically associated with confidentiality and conflict of interest. However there are a broader range range of challenges we face that involve a much wider range of ethical choices. This paper will consider the role of those challenges and the application of those choices in mediation.

Mediation faces ethical issues in four basic areas:

The actions of the mediator guided by Model Standards

The actions of the parties guided by community norms

The mediation process guided by the ground rules

The outcome guided by principled decision making

Ethics is the process of determining what one considers right and wrong actions. This may sound easy, but in reality it's a complicated task. Right and wrong are dictated by one's perspective and may vary according to culture, moral climate, and individual circumstance. What may be the right principle or action for one party may be absolutely wrong for another. To help navigate through this ambiguity, we need some guidelines for decision-making and action. Due to the large number of considerations involved in many decisions, ethical decision support systems have been developed to assist decision makers in considering the implications of various courses of action. They can help promote the integration of virtues and principles into the decision.

Mature ethical reasoning is generally defined by those who recognize the concerns of others, as opposed to those with less mature thinking, who focus only on themselves. This should sound familiar as transformative mediation. Practicing ethical reflection is a necessary requirement to promote maturity in ethical thinking. The application of a practical ethical decision-making framework also assists in the reflection process.

This framework involves using values and reciprocity. Values are beliefs (virtues) or standards (principles) and come into practice through virtue ethics and principle ethics. Ethical decision-making can be a profoundly simple skill that can become a compass for guidance. **Ethics should answer the questions: Who do I want to be (virtue ethics)? What shall I do (principle ethics)? And how does it affect others (reciprocity)?**

### **A unified paradigm could combine ethical theories into:**

- the belief there are primary moral principles (objectivism)
- within a variety of individual actions that can be taken (subjectivism, pluralism)
- that are bounded by acceptable limits (relativism)
- based on universal virtues (universalism)
- shared by all people (relativism).

## **Principle Ethics**

Principle ethics answers the question What shall I do?, and is seen through our actions and expressed in the quotes from Aristotle and Addams at the beginning of this article. Kitchener (1984) has identified five moral principles that are viewed as the cornerstone of most ethical guidelines. Ethical guidelines can not address all situations that we are forced to confront, however reviewing these ethical principles can help clarify the issues involved in a given situation. The five principles, autonomy, justice, beneficence, nonmaleficence, and fidelity, are each absolute truths in and of themselves. By exploring the dilemma in regards to these principles one may come to a better understanding of the conflicting issues.

1. **Autonomy** is the principle that addresses the concept of independence. The essence of this principle is allowing an individual the freedom of choice and action. There are two important considerations in autonomy: clashing values and incompetent parties.
2. **Nonmaleficence** is the concept of not causing harm to others. Often explained as "above all do no harm", it also reflects both the idea of not inflicting intentional harm, and not engaging in actions that risk harming others.
3. **Beneficence** reflects our responsibility to contribute to the welfare of each other. Simply stated it means to do good and to be proactive.
4. **Justice** does not mean treating all individuals the same, it means treating equals equally and unequals unequally but in proportion to their relevant differences.
5. **Fidelity** involves the notions of loyalty, faithfulness, and honoring commitments. We must be able to trust each other and have faith in our relationship if growth is to occur.

### **Co-existence of Principles**

Principles can only provide guidance. There are a myriad of situations that will never lend themselves to an easy formula, and the principles can only be used to trigger our conscience or guide our decisions. As well, there are many times when principles will collide with other principles. When exploring an ethical dilemma, you need to examine the situation and see how each of the above principles may relate to that particular situation. At times this alone will clarify the issues enough that the means for resolving the dilemma will become obvious to you. In more complicated cases it is helpful to be able to work through the steps of an ethical decision making model, and to assess which of these moral principles may be in conflict. If two or more principles are in conflict you need to decide which is the guiding principle.

## Virtues

One of the chief characteristics of ethical action is the premise that there are universal values that can help guide our choices. Underlying every principle is a virtue. Trust is the most common virtue and may be the foundation for all of the others. For example, trust is a fundamental aspect of confidentiality. Virtue Ethics answers the question: Who shall I be? Livingvalues.net has identified 12 virtues and principles shared by everyone they have surveyed, over 2500 communities and cultures around the world. The Livingvalues list of virtues and principles includes: Happiness, Honesty, Humility, Love, Respect, Responsibility (virtues), Cooperation, Freedom, Peace, Simplicity, Tolerance and Unity (principles). Virtues are the qualities of an individual, principles are the qualities of a community. All principles involve some sort of social exchange to be manifested. These virtues and principles can then become the criteria for evaluating an ethical decision.

## Ethics of the Mediator - Model Standards

Mediators are guided in their actions by the Model Standards developed by ACR, ABA and AAA. These principles are designed to help the mediator resolve practice related issues and should be used to clarify and define appropriate responses to most situations. The following is a comparison of ethical guidelines within specific professions. These written codes provide rules of conduct and standards of behavior based on the principles of Professional Ethics. Even when not written into a code, principles of professional ethics are usually expected of people in a professional capacity.

### **Ethical principles from 3 different professions**

<u>Kitchener</u>	<u>Medicine</u>	<u>Mediation</u>	<u>School Counselors</u>
Beneficence	Beneficence	Competence	Encourages max development
Non-maleficence	Non-maleficence	No harm to self/others	No harm to self/others
Autonomy	Autonomy	Self Determination	Right to choose
Justice	Fairness	Impartiality	Fairness
Fidelity	Confidentiality	Confidentiality	Confidentiality

## Ethics of the Parties - Community Norms

Parties in mediation have been unable to resolve issues to their mutual satisfaction. They may have done things which would be outside of what they consider acceptable behavior in their community. It is important to be aware of what the parties consider to be ethical behavior while keeping in mind our unified model of ethical guidelines.

Personal ethics might also be called morality, since they reflect general expectations of any person in any society, acting in any capacity. One definition of culture says "culture is what every knows that everyone else knows." These are the principles we try to instill in our children, and expect of one another without needing to articulate the expectation or formalize it in any way.

Principles of Personal Ethics include:

- Concern for the well-being of others, doing good (beneficence)
- Respect for the autonomy of others (autonomy)
- Trustworthiness & honesty (fidelity)

- Willing compliance with the law, with the exception of civil disobedience (justice)
- Basic justice; being fair (fairness)
- Preventing harm (non-maleficence)

In looking to globalize the issues for the parties and look at the situation from the broadest possible perspective, parties might want to consider what acceptable behavior is in other cultures and communities. They might also want to consider their role in promoting better actions among people, in not doing what is expected but in doing what is better than expected.

Global ethics is a controversial category, and the least understood. Open to wide interpretation as to how or whether they should be applied, these principles can sometimes generate emotional response and heated debate.

Principles of Global Ethics include:

- Global justice (as reflected in international laws)
- Society before self / social responsibility
- Environmental stewardship
- Interdependence & responsibility for the 'whole'
- Reverence for place

### **Ethics in the Process - Ground rules**

Ethics in the process is defined and maintained through the ground rules. Ground rules define appropriate ways of interaction. Ground rules are applying our principles to our actions, and reflect an agreed upon interaction for the parties. Ground rules typically would include full disclosure, good faith, speak openly, listen actively, respect one another, voluntary participation and confidentiality. As we have seen these principles are based on virtues such as trustworthiness, truthfulness, integrity and respect.

### **Ethics in the Outcome - Principled Decision Making**

Ethics in the outcome is using virtues and principles to evaluate the available choices. This model can be used with any of the four ethical categories in this paper. It is a way to evaluate our options based on our values. How do we teach the skill of making positive choices? Mediation allows the parties the unique opportunity to work together to decide on a better future. Decision making criteria are the factors that differentiate one choice from another. They can include tangibles like time, people or money, questions like those listed below, virtues or principles mentioned above, or any combination. The criteria you choose will determine the quality of your action.

- Does it solve the problem completely?
- Does it solve it permanently?
- Does it create another problem?
- Does it meet our values - virtues and principles?
- Does it improve the relationship of the parties?
- Is it possible, practical, legal, proper?
- Is it wise, fair, efficient? (Getting to Yes)

- Are the sources credible?
- Can we distinguish facts from beliefs, desires, theories, suppositions, unsupported conclusions, opinions and rationalizations?
- Would you be comfortable if your actions were publicized?
- Would you be comfortable if your family was observing you?
- Will it make you a better person?
- Would your decision withstand scrutiny?
- Will your decision ensure compliance? With laws, policies and ethical guidelines?
- Does the decision show leadership through integrity, accountability and efficiency?
- Is your decision fair to yourself, family, colleagues, industry and community?

Rotary service clubs use a simple ethical decision making model to guide their actions.

1. Is it the TRUTH? (virtue)
2. Is it FAIR to all concerned? (principle)
3. Will it build GOODWILL and BETTER FRIENDSHIPS? (reciprocity)
4. Will it be BENEFICIAL to all concerned?"

Getting to Yes say that any method of negotiation may be fairly judged by four criteria: It should produce a **wise** agreement, it should be based on **objective criteria**, it should be **efficient**, and it should **improve or at least not damage the relationship** between the parties. (GTY, 4) Transformative Mediation says that a resolution should result in people not just being better off but better. In a world in which people remain the same, solved problems are quickly replaced by new ones (PM, 29).

## Ethical Decision Making Model

Model Standards - reflect on the standards before and during the process and use the principles to guide your actions when uncertainty or confusion arises.

Community norms - what is acceptable in the community of the parties?

Ground rules - work with the parties to devise a working set of rules for their interaction. These rules should consider the community norms as well as

### 1. Perspective

What are the facts from your perspective? What are the facts from the other parties' perspective? Listen to all perspectives and identify the problem. Gather as much information as you can that will illuminate the situation. In doing so, it is important to be as specific and objective as possible. Use first hand sources from people that have direct knowledge of the situation.

### Community norms

### 2. Feelings

Understand the feelings and the meaning behind those feelings. How do you feel about the situation? What is your intuition telling you? How do others feel about the issue? Are they anxious? What is behind their feelings? Is the issue behind the feelings being addressed? How

strong are the feelings? What feelings do you share with the other parties? Common feelings could be the starting point for discussion. What feelings are different? How do you feel about resolving the issue? Is it important to resolve the issue now? Feelings are what give any situation meaning.

**3. Virtue Ethics**

Who are you? What types of personal qualities are important to you? Who do you want to be? Reflect on what you believe. What does the other party believe? Consider the virtues listed above.

**4. Principle Ethics**

What principles are important to you? Consider the moral principles of autonomy, nonmaleficence, beneficence, justice, and fidelity. Decide which principles apply to the specific situation, and determine which principle takes priority for you in this case. Consult outside sources to see if they have standards or principles that can provide help with the dilemma.

**5. Reciprocity**

Identify the problem from a variety of perspectives. Broaden the issue beyond the narrow positions of the parties. What would the other party prefer? What do they know about your preferences? How can you offer more than they need? How can you put their needs ahead of yours? Can you do more than they need?

**6. Generate potential choices**

State the problem in a way that is neutral, future focused and will allow the possibility for a solution. Break complex problems down into component parts and solve the parts of the issue that you can. Brainstorm as many possible courses of action as possible. Be creative and consider all options. If possible, enlist the assistance of others to help you generate options. The most options lead you to the best decisions.

Principled decision making - use the

**7. Evaluate Choices**

Identify decision making criteria, virtues, principles and reciprocity, and consider the potential consequences of all options in relation to those criteria. Use the matrix below to help evaluate your choices.

In applying the test of justice, assess your own sense of fairness by determining whether you would treat others the same in this situation. For the test of publicity, ask yourself whether you would want your behavior reported in the press. The test of universality asks you to assess whether you could recommend the same course of action to another in the same situation.

If the course of action you have selected seems to present new ethical issues, then you'll need to go back to the beginning and reevaluate each step of the process. Perhaps you have chosen the wrong option or you might have identified the problem incorrectly. The following matrix is one way to consider the principles in relation to the choices.

**Evaluation - How do we compare our options?**

<u>Options</u>	<u>Virtues/ Principles</u>				Score
	Autonomy	Justice	Fidelity	Reciprocity*	

<b>A</b>	-	-	-	-	-4
<b>B</b>	0	-	-	0	-2
<b>C</b>	-	0	0	0	-1
<b>D</b>	+	-	0	0	0
<b>E</b>	+	0	+	0	2
<b>F</b>	+	+	+	+	4

\* see Reciprocal Negotiation article by same author

A through F represents options available to resolve the issue. In the matrix above, all options are rated according to whether they promote (+), are neutral (0) or detract (-) from the principle. In other words option A actually decreases the party's autonomy, is unjust, detracts from fidelity and is not reciprocal. Likewise option F promotes all of the identified values. Until you have an option that is all pluses, you may not have found the best answer.

You can also consider other criteria in this model, such as money, time and resources. Finally, consider which options promote reciprocity. Are there obligations for both parties in this decision? Will this decision allow both parties to grow?

### **8. Action**

Take the action decided upon. Ethical action is the result of value based decision making. As Jane Addams says in the opening quote "Action is the sole medium of expression for ethics."

### **9. Reflection**

Reflect on the results of your action. What was the plan? What was the effect or outcome? What virtues or principles were demonstrated? Reflect on past decisions and compare outcomes with the consequences that were anticipated at the time of the choice. This step can help reinforce the practice of principle-based decision-making.

It is important to realize that different professions may implement different courses of action in the same situation. There is rarely one right answer to a complex ethical dilemma. However, if you follow a systematic model, you can be assured that you will be consistent and able to give a professional explanation for the course of action you chose.

I have been able to use this model several times. I used it with a division of a major pharmaceutical company with interesting results. I had been invited in to assist in implementing an employee empowerment program. As part of that program they were considering a decision making model. During my presentation I asked them to name two or three issues they were currently facing and to select one of those for discussion. We then generated options around that issue. Like many companies they had a corporate value statement and we selected the values from that statement for our criteria. We then filled in the matrix to evaluate our choices. The key is to find choices that address all of your values. The matrix always leads to an interesting discussion and in this case actually brought the corporate values statement to life.

## **Principles of Professional Ethics**

Individuals acting in a professional capacity take on an additional burden of ethical responsibility. For example, professional associations have codes of ethics that prescribe required behavior within the context of a professional practice such as medicine, law, accounting, or engineering., which include:

- Impartiality; objectivity
- Openness; full disclosure
- Confidentiality
- Due diligence / duty of care
- Fidelity to professional responsibilities
- Avoiding potential or apparent conflict of interest

## **Golden Rule**

The teaching that we should treat others as we ourselves would wish to be treated, an ethic variously repeated in all the great religions, sums up the moral attitude, the peace-inducing aspect, extending through these religions irrespective of their place or time of origin; it also signifies an aspect of unity which is their essential virtue.

The Golden Rule, the teaching that we should treat others as we ourselves would wish to be treated, is an ethic variously repeated in all the great religions:

- ❖ Buddhism: "Hurt not others in ways that you yourself would find hurtful." Udana-Varqa, 5:18.
- ❖ Zoroastrianism: "That nature only is good when it shall not do unto another whatever is not good for its own self." Dadistan-i Dinik, 94:5.
- ❖ Judaism: "What is hateful to you, do not to your fellow men. That is the entire Law, all the rest is commentary." The Talmud, Shabbat, 31a.
- ❖ Hinduism: "This is the sum of all true righteousness: deal with others as thou wouldst thyself be dealt by. Do nothing to thy neighbour which thou wouldst not have him do to thee after." The Mahabharata.
- ❖ Christianity: "As ye would that men should do to you, do ye also to them likewise." Luke 6:31.
- ❖ Islam: "No one of you is a believer until he desires for his brother that which he desires for himself." Sunnah.
- ❖ Taoism: The good man "ought to pity the malignant tendencies of others; to regard their gains as if they were his own, and their losses in the same way." The Thai-Shang.
- ❖ Confucianism: "Surely it is the maxim of loving-kindness: Do not unto others that you would not have them do unto you." Analects, XV, 23
- ❖ Bahá'í Faith: "He should not wish for others that which he doth not wish for himself, nor promise that which he doth not fulfill." Gleanings.

There are two important considerations in encouraging clients to be autonomous. First, helping to understand how their decisions and their values may or may not be received within the context of the society in which they live, and how they may impinge on the rights of others. The second consideration is related to our ability to make sound and rational decisions. Persons not capable of

making competent choices, such as children, and some individuals with mental handicaps, should not be allowed to act on decisions that could harm themselves or others.

5. If an individual is to be treated differently, we need to be able to offer a rationale that explains the necessity and appropriateness of treating this individual differently.

**Ethical Fitness Seminar**  
**Rush Kidder, Founder, Institute for Global Ethics**  
**March 15, 2007, San Francisco**

Ethics - a statement of shared moral values

Moral - right vs. wrong conduct

Ethics - study of standards

Value- principle, standard or quality that is worthwhile

Leadership is concerned with values; management is concerned with goals, strategies and tactics.

Ethics is obedience to the unenforceable

Follow the right vs. wrong choices until you get to a right vs. right choice - this is ethics

5 Values that we all share

- honesty
- respect
- kindness
- justice
- responsibility

4 Classical ethical paradigms

- Truth vs. loyalty
- Individual vs. community
- Short term vs. long term
- Justice vs. mercy - compliance vs. compassion

3 Principles of Moral Philosophy

- Ends - the greatest good for the greatest number
- Rules - follow the principle that others should follow
- Caring - Golden rule - put others first

2 choices - deciding right versus right

1 decision - Action is the sole medium for the expression of ethics, Jane Addams.

3 fears to action: 1.) ambiguity, 2.) public exposure, 3.) personal loss

Trust in the outcome is behind every moral act

Trust in your: 1.) experience, 2.) character, 3.) faith, 4.) intuition, and 5.) network

Notes from Trip Barthel

## Ethical Considerations in Mediation

Mediator - What do you believe? Model Standards

Parties - What do you believe? Personal conduct

Process - How should you treat one another? Ground Rules

Outcome - What shall you do? Principled decision making

Exercise – brainstorm all of the values you would put over a door to a school

List – trust, honesty, respect unity, wisdom, responsibility, kindness, caring, compassion, justice fairness, cooperation, loyalty, courage, duty

The top5 are chosen by almost all groups, with no distinction between male, female, religious and non-religious, English and non-English. Missing any one of these makes you unethical

willing endurance of significant danger for the sake of principle

Trip's idea - promoting an ethical society through positive values and the simplification of laws

Decision making is said to be a psychological construct. This means that although we can never "see" a decision, we can infer from observable behaviour that a decision has been made. We can conclude that a psychological event that we call "decision making" has occurred. If these actions appear to be from man's higher nature, they are honored and remembered, if they are from man's lower nature, they are punished and forgotten.

It has ethical roots in a Plato and Aristotle and avoids some of the ethical difficulties associated with a focus solely on rules (Kantian ethics), maximization of benefits (Utilitarian ethics) selfish goals (Egoist ethics), or subjective relativism where no one can judge a good decision anyway.