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APRIL 1992 $5

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AN IN-DEPTH DEMOGRAPHIC STUDY OF LAWYERS IN CALIFORNIA

Emerging Ethical Issues in Mediation

With few standards to guide them, mediators sometimes differ in their approaches

BY RICHARD A. ZITRIN

THE MEDIATION express has arrived. More attorneys than ever are using the services of mediators. Some observers argue that lawyers should be required to offer clients mediation; a few even suggest lawyers may be liable for malpractice if they do not.

What is it that lawyers are getting when they use nonjudicial mediation services? Unlike judges and ordinary lawyers, mediators have few official ethical standards or even unofficial guidelines to assist them in their practices. American Bar Association Model Rule of Professional Conduct 2.2 discusses lawyers as "intermediaries" in a general way. More specific rules, such as the Standards of Practice of the Academy of Family Mediators, are narrowly focused and have no official status anyway. The rules of the Society of Professionals in Dispute Resolution are so general they apply to arbitrators as well.

All mediators accept the ideals of confidentiality, equality and neutrality, repeated at workshops, seminars and training sessions and in writings on mediation. The challenge is to translate these ideals into their practices. Some of the difficult areas of mediation ethics include the effect of caucusing—private meetings between the mediator and one of the parties—on confidentiality, the extent to which the lawyer-mediator practices law, the appropriate balance of power between the mediator and the parties and among the parties themselves, and problems with maintaining neutrality.

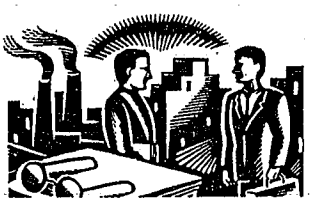
Mediators have developed widely divergent approaches to these ethical problems. Lawyers considering mediation should be aware that this diversity exists, and mediators should continue debating the difficult issues in this still nascent profession to ensure the mediation express does not derail.

Confidentiality and caucusing. Confidentiality issues in mediation differ significantly from the requirements of everyday law practice. Evidence Code section 1152.5, enacted in 1985, specifically protects communications during mediation conducted for the purpose of "compromising, settling, or resolving a dispute." Most mediators interpret this law broadly, claiming that all communications are in furtherance of settlement negotiations and thus are neither admissible into evidence nor discoverable.

They differ widely, however, in their approach to caucusing, a practice that can affect confidentiality. To some extent this has to do with the kind of mediation involved. In litigation mediation, for instance, caucusing with the parties and their counsel forms the very basis of the process. Outside of a brief opening session, the entire mediation is conducted by shuttle diplomacy, with the mediator moving back and forth between the plaintiff's camp and the defendant's.

For most litigation mediators, matters discussed in caucus will never be revealed outside the mediation or to the opposition without authorization. Some mediators use confidentiality as a shield, in order to inspire the trust of the parties. But some mediators take a more aggressive approach. Anthony C. Piazza is a mediator and partner in San Francisco's Gregorio, Haldeman & Piazza with a reputation both for successfully settling cases and for an unusually confrontational style. Piazza uses the revelation of disclosures as a sword, to show the parties their vulnerability. His mediation contract, however, makes clear that he discloses only what is authorized.

Good mediation settlements do not have to be based on probable court results.



In domestic relations mediation, the question is whether caucusing is appropriate at all. This type of mediation generally consists of joint sessions in which mediators work directly with parties without counsel. At these sessions there can be no confidences. Since under the traditional caucus model everything is confidential, many domestic relations mediators believe caucuses in the domestic relations setting are inappropriate.

Recently some domestic relations mediators have relaxed this prohibition on caucusing in unusual situations, such as when caucusing is necessary to break an impasse. H. Jay Folberg, dean of the University of San Francisco School of Law, a pioneer in family law mediation and a frequent author on mediation issues, believes that caucusing has a place, although he still finds it dangerous. If one party gives information privately to the mediator, the mediator's neutrality is jeopardized.

Once a domestic caucus occurs, mediators disagree about what should remain confidential. Folberg, for example, won't keep material facts confidential but accepts the confidentiality of negotiating positions. What is considered material can be a tough call, however. Gary J. Friedman of Mill Valley, a business and domestic relations mediation pioneer and full-time mediator since 1976, takes an absolutist approach. He feels that if parties share information while together, everything said in private must also be shared.

The safest view? Either *everything* or *nothing* is confidential.

The mediator as practitioner. An issue that arises primarily in the context of family law mediation, where parties generally appear without lawyers, is the extent to which the lawyer-mediator

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represents the parties or practices law.

Most domestic relations mediators contend they represent no one. Friedman further distances himself from representation by making available to his clients a roster of consulting lawyers who will independently review the settlement agreements he prepares.

ABA model rule 2.2 permits "common representation" of two parties provided certain disclosure conditions are met. Similarly, California case law authorizes limited joint representation. See *Klemm v Superior Court* (1977) 75 CA3d 903. But whether a lawyer-mediator represents both parties or neither may be nothing more than a semantic debate. As Friedman says, "Lawyers care about this distinction, but not mediators."

Besides the issue of representation, do lawyer-mediators practice law? Most prefer to think they do not, but under accepted definitions it appears they do. Friedman drafts marital settlement agreements and, when clients have no independent counsel, assists in the preparation of court documents. He also feels that mediators should at the least draw up memoranda of agreement.

In addition, mediators generally acknowledge that part of their job is to make sure the parties are aware of the significant rules of law that might affect their decisions. Friedman's mediation contract states that he will advise the parties of the probable court result, whether or not they wish to consider it. Moreover, in litigation mediation, where the parties are fully represented, mediators often discuss the law as it relates to the specific facts of the case. Indeed, they often use their knowledge of the law to highlight the strengths and weaknesses of both sides of a case, a practice that is a fundamental tool of the mediator's trade.

Fairness and the balance of power. Because parties lean heavily on mediators to create the environment for settlement, mediators have great psychological control of the process. Thoughtful mediators are acutely aware that this gives them enormous power and a special responsibility to use it wisely. They are also aware that power imbalances often exist among the parties, particularly those who are unrepresented.

Large power imbalances are most likely to occur in domestic relations cases. Trina Grillo, assistant professor of law at the University of San Francisco, points out in "The Mediation Alternative: Process Dangers for Women," 100 Yale LJ 1545 (1991), that women in divorce mediation sometimes accept settlements significantly less favorable than a court would award or are persuaded to concede issues they should not have. As a result some have suffered emotional harm years after mediation.

How a mediator deals with a power imbalance is, as Folberg says, "a subtlety not easily covered by rules." On one hand, mediators must guard against taking the easy way of siding with the more powerful party, allowing that party's will to control the result. On the other hand, they must keep in mind that good mediation settlements do not have to be based on probable court results. According to Friedman, "There's a much broader basis, like people's own sense of fairness."

Mediators are also concerned about maintaining their own sense of fairness. Although settlement is the foremost goal in the minds of most parties, mediators generally speak of fairness as their primary goal. Folberg says it's dangerous for mediators to feel they "win" only when they obtain settlements. Friedman argues that his job is not to settle cases; rather, he says, his goal is for the parties to "reach a certain quality of dealing with each other." Both within

and outside the mediation, Piazza objects to suggestions that his sole function is to get the case settled. He views his role as assisting the parties to do what is best for themselves.

But what do mediators do when their sense of fairness runs up against a significant power imbalance? Friedman asks himself if he can be a party to someone taking advantage of another. Piazza belies his settle-at-all-costs reputation with a concern that the settlement be fair or right and not the result of one side's will overbearing the other.

Any mediator is tempted to try to even an imbalance by presenting facts, law or negotiating positions slanted toward the weaker party. But even when done delicately, this compromises mediator neutrality and creates a danger that the mediator's version of fairness will supplant that of the parties. Folberg calls this using your thumb to level the scales. Is it justified? Even Grillo feels the answer is no, unless the mediator tells the parties what is being done and why.

The subversion of neutrality. Unlike settlement conference judges, mediators are not always presumed by the parties to be impartial. Litigation mediators are frequently referred cases in bunches by insurance or construction company clients. These mediators must ensure their neutrality is preserved at all times, regardless of who referred the case or who may refer the next dozen. Bruce A. Edwards, a former litigator and now a partner in a San Francisco litigation mediation firm, the Bates Edwards Group, says the easiest way for a mediator to jeopardize credibility is to fail to disclose even the perception of a conflict.

All mediators agree that a certain amount of manipulation and exaggeration is part of their job. Most feel, however, that in order to preserve their neutrality they must guard against involving their own egos and personalities in the process.

Piazza, on the other hand, says his mediation contract licenses him to do what he feels is appropriate to have the parties hear the truth "realistically." Although he emphasizes his neutrality, he believes that "people in a tough fight filter information to an astonishing degree" and may not accept the real truth presented neutrally. Thus when he thinks it necessary, he throws his opinions and the considerable force of his personality into the fray.

Piazza compares his approach in mediation to aikido, which he teaches: So long as his thoughts are cooperative and designed to achieve a just result, his expressions of opinion, however strong, are an extension of his desire to "do the right thing." He admits that in expressing his own interpretation of a case, he is "taking moral risks." But he points out that litigation is always full of risks.

The differences between Piazza and other mediators are really a matter of degree. Most admit they are more than passive facilitators. Edwards, for example, acknowledges that, while he would never lie in a mediation, there can be "a different kind of truth."

Grillo remains mistrustful of the mediation process. There are trends in mediation that depend on current fashion, she says; a current example is the tendency to encourage joint custody whether warranted or not.

All mediators, even the most circumspect, must own up to the charge of occasionally "playing God." Mediators cannot avoid considering their own views of what is fair or right. What remains is for thoughtful mediators to translate these ideas into cogent standards that can be used to guide not only the mediation community but the attorneys who use it. ❖