

Practical, Ethical Guidelines for Comprehensive Family Mediation

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As more unrepresented parties going through separation and divorce seek out mediators rather than lawyers, it becomes apparent that those practicing this kind of mediation must exercise great care in defining, implementing and preserving the ethical framework of their service.

Often, people contact a comprehensive family mediator without having first retained a lawyer. They have only a general sense of what mediation is like; mostly, they want expediency and to avoid the financial and emotional expense of going to court. They are rarely fully aware of the issues they need to discuss; few of them have ever seen a separation agreement. They rarely appreciate the range and complexity of decisions they must make in order to comprehensively and competently arrange their post-separation affairs. A mediator who accepts such clients is assuming great responsibility. In reality, the mediator becomes, for both parties, their primary source of legal and practical information, their negotiation coach, their conduit to legal and other essential advice, and their trusted advisor in determining what the issues are or should be, and how they might deal with them.

This role is entirely different from that of a representative lawyer and, as many writers have pointed out, the codes of conduct that guide lawyers in their representation of clients are of limited assistance to such mediators.¹ It is similar to but not the same as that of a commercial mediator providing Rule 24 civil mediation services under the Ontario Mandatory Mediation Program; and it is also very different from the role played by a therapist or social worker mediating a parenting plan.

¹ See, for example, Carrie Menkel-Meadow's article "Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities", (1997) *South Texas Law Rev.* 407. Underlying Menkel-Meadow's argument is the claim that where ADR seeks to express different values with respect to both dispute resolution and justice, its standards of rules of ethics must be responsive to a different set of underlying values than those that inform traditional adversary ethics.

There is, for good reason, great debate in the field about whether there should be mandatory codes of conduct for mediators. Many variables among mediators' philosophies, their qualifications, their backgrounds and their practice styles make standardized ethical codes for mediators less than useful.²

However, there is an understanding that the ethical obligations of family mediators are more onerous, particularly for comprehensive family mediation (meaning mediation of all disputes arising from the breakdown of a marriage or relationship, including comprehensive financial disclosure, settlement of asset and liability issues, child and spousal support, parenting plans, and miscellaneous issues including security for future obligations, life insurance, wills, pension splitting, property transfers, tax provisions and property valuations.)

For instance, codes of conduct for family mediators are more detailed and have specific guidelines for procedural fairness.³ Much of the literature about power imbalances, abuse in mediation, and the impact of gender and cultural differences is in the context of family mediation.⁴ And some authors and mediators go so far as to advocate a duty for family mediators to ensure substantive fairness in settlements.⁵

² Although codes of conduct provide a barometer of existing ethical philosophy and practice, their utility for mediators is limited by their prescriptive nature, as the facts underlying ethical dilemmas rarely fit within the four corners of such codes. Also, they ignore the role of the parties in resolving ethical dilemmas and fail to address the diversity in practice and goals among mediators. This issue is addressed in detail in Catherine Morris' "The Trusted Mediator: Ethics and Interaction in Mediation", in Julie Macfarlane, ed., *Rethinking Disputes, The Mediation Alternative* (Toronto: Emond Montgomery, 1997) 301. Michael Coyle also writes about the limitations of mediator codes of conduct in "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 *Osgoode Hall L.J.*, 625. Coyle points out that such codes offer only limited guidance for the mediator in relation to fairness and deception, ethical issues that mediators must be sensitive to. And, he writes at p. 645, they offer "little or no guidance as to the appropriate course for mediators where a duty in relation to fairness appears to conflict with a duty to respect party autonomy, impartiality or confidentiality."

³ For example, Family Mediation Canada's *Code of Professional Conduct for Mediators* is a detailed and practice-specific set of rules for mediator conduct that is considerably more interventionist in terms of procedural and outcome fairness than the *Model Code of Conduct* for mediators of the Ontario Bar Association, the latter intended to apply to civil non-family mediations.

⁴ Government-funded voluntary family mediation programs, such as the one offered at the Family Court of the Ontario Superior Court of Justice, require participants to undergo extensive "screening" processes to

This paper canvasses the practical realities and challenges of comprehensive family mediation and proposes a set of practical rules to help family mediators practice ethically, meaning effectively and without causing harm to the parties.

The Risk of Mediation

In order to truly resolve our conflicts we must move towards them. This is inherently “dangerous” in the sense that it can cause the conflict to escalate. If mediation promises honest communication, that presents a danger that the listener will hear something he or she does not like. Every authentic communication, the kind we promise in mediation, requires openness, honesty and vulnerability. This means risking more pain and disappointment. The outcome is unpredictable and risky. If mediation promises the opportunity for transformation, change of that nature is difficult to anticipate and predict. Even the most dysfunctional ruts seem safer than doing something different which could result in change.⁶ According to Kenneth Cloke in his book “Mediating Dangerously”:

“As mediators, we need to be willing to bring a deep, dangerous level of honesty and empathy to the dispute resolution process. Otherwise, we become characters in other people’s scripts, rationalizing their torments, fears and avoidance. As mediators, we need to avoid producing agreements that do not resolve conflicts,

ensure that the mediator is appropriately aware of factors that could have a adverse impact on the fairness of the process or outcome, such as abuse, cultural and linguistic differences, and other imbalances. Mediators operating in the environment of Ontario’s Mandatory Mediation Program for civil non-family cases are not required to similarly screen their clients.

⁵ In the *Family Mediation Handbook, 3rd Edition*, by Landau, Wolfson, Landau, Bartoletti and Mesbur (Toronto: Butterworths, 2000), it is stated that “**the mediator must....ensure that the agreement reached is fair and reasonable, particularly where children are involved.**” (p. 203). However, nowhere in any family mediation code of conduct, nor in the *Family Mediation Handbook*, is the term “fair and reasonable”, defined, presenting the mediator with a great responsibility that is impossible to fulfil in a meaningful way. The closest the handbook comes to a definition is in repeating the “non-malaficence” principle that applies to all mediators: “*The mediator is under a duty to suspend or terminate mediation whenever he or she believes that the process may be harmful or prejudicial to one or more of the participants.*” p.210.

⁶ “The only way to escape the gravitational tug of a conflict to which we have grown accustomed, even addicted, is by honestly and energetically confronting the reasons we got into it, that kept us in it, that allowed us to accommodate and adapt to it. When we realize that we have gotten lost by engaging in it, and what will happen if we remain trapped in it, we quickly discover which is the greater danger”, Kenneth Cloke, *Mediating Dangerously* (San Francisco, Jossey-Bass: 2001), p.5.

but merely suppress, silence or settle them, that result not in growth, but in reluctant acquiescence and enduring discord.”⁷

Cloke’s beliefs are particularly true of comprehensive family mediation, and they help understand why competent and ethical mediation of such disputes is necessarily “dangerous”. It is not strictly “*evaluative*” mediation, which regards conflict as something to be ended, with the mediator directing the parties toward a settlement that need not come to grips with the underlying issues that gave rise to the conflict. Nor is it strictly “*facilitative*” mediation, which views conflict as something to be overcome, with the parties doing so by active listening and describing their feelings. And it is not even strictly “*transformative*” mediation, which views conflict as something to be learned from but the role of the mediator does not include suggesting solutions or directing the parties toward resolution.

The role of the comprehensive family mediator should be to elicit, conciliate and facilitate but also, when appropriate, to evaluate and direct parties in seeking resolution or transformation. It is therefore something of a hybrid of all three other approaches.

Why a “practical” set of ethical guidelines for comprehensive family mediators?

What is it about comprehensive family mediation that makes it a candidate for a practical set of ethical rules? In short, it is the unique vulnerability of the parties to the mediation and of those directly affected by it, their children. They are emotionally vulnerable; they are going through a process of grieving akin to those coping with the death of a loved one. They are somewhere along a very slow and steep learning curve, experiencing a painful personal transformation (if they possess sufficient insight) that will prevent them from making the same mistakes again.⁸

⁷ *ibid*

⁸ John Gottman describes the stages of deterioration in a troubled marriage, and how and why partners fall into destructive patterns in response to each other, in *Why Marriages Succeed or Fail* (New York: Fireside, 1994).

Research shows that there is a good chance of a history of physical and/or emotional abuse between separating couples.⁹ And given the emotional intensity and complexity of the breakdown of the marriage and ensuing separation, they are certain to be faced with a negotiating partner who can be bitter and vengeful, fearful, guilty, resentful, unrealistic, demanding, dismissive, manipulative, bullying, dishonest and non-cooperative, depressed, anxious or impatient on any given day.

They are financially vulnerable, being somewhere in the process of realizing that there is not as much money when two households are being supported. Often at least one spouse is trying to upgrade skills or change employment or entering the work force for the first time. The personal and financial change can be overwhelming.

They are often trying to cope with the grief and distress and change and volatile emotions their children are experiencing, along with all the changes their children must endure.¹⁰ They may be depressed, feeling guilt, anger or blame.

And they are legally vulnerable. They know that they are caught in a web of complex, sometimes unfair legal rules which are hard to avoid and harder to understand, even with the help of expensive legal advice. They know that some of the law cannot be avoided (for example, the child support guidelines) and often feel powerless and without clear direction in assessing their needs in the context of the law. Rightly or wrongly, they tend to want and need to depend on the mediator for some amount of legal guidance.

⁹ For detailed research on the subject of separation and abuse, see Rhonda Freeman, "Parenting After Divorce: Using Research to Inform Decision-Making About Children", (1998) 15 Can. J.Fam.Law 79-129; Jennifer Maxwell, "Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators"(1999), 37 Fam.& Concil.Cts.Rev 335; Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks: Sager Publications, 1996), ch. 4,5 &6; and Goundry, Peters, Currie et al, *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998).

¹⁰ Judith Wallerstein's *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000) is an excellent analysis of the short and long-term impact of divorce on children.

The unique vulnerabilities of the parties extend to the beneficiaries of the process; the children. Rarely are they present or represented in mediation, and yet their interests form the subject matter of much of the mediation process.

These vulnerabilities are enhanced by the often aggravated state of escalation of the dispute by the time the parties reach mediation. The symptoms of enhanced escalation are almost always present in whole or in part either at the outset or early on in the mediation process; a proliferation of issues, a change in focus of criticism from behaviour to character, a shift in tactics from light to heavy, a change in motivation from seeking fairness to seeking vindication and revenge, and the increased involvement of third parties, particularly family members.¹¹ Psychologically, the parties will escalate the conflict until they reach a point of stalemate; at this point the parties are in a transition from a determination to beat each other to the grudging understanding that it may be possible and even desirable to try to get what one wants through collaboration. Noted author on the subject of the psychology of conflict, Jeffrey Rubin, writes that third party interventions work well both before and after this point, but tend to be disastrous at the point of stalemate.¹²

According to Rubin's theory, the conflict can be de-escalated and reduced at stalemate by bringing the parties into greater contact with each other, working on communication skills and building momentum towards goals that transcend the conflict. But to do so well, in a way that resolves the conflict instead of just papering over the deal made in resignation by two emotionally exhausted people, requires a clear-headed and unique ethical orientation.

Because of their unique vulnerabilities, parties going through comprehensive family mediation will present mediators with unique and important challenges. If establishing a consistent and meaningful ethical standard for such mediation is the goal, something

¹¹ Jeffrey Rubin, "Conflict From a Psychological Perspective", in Hall L. ed., *Negotiation Strategies for Mutual Gain* (Thousand Oaks: Sage Publications, 1993) p. 125-127

¹² *ibid*, p.133.

more than the bland, non-directive and non-particular codes of ethics now in existence is called for.

What is the formal source of a special ethical duty towards such vulnerable mediation participants?

The first source of a special ethical duty devolves directly from the way we, as family mediators, promote our services in comparison to what lawyers do. It is based on the concept of “promise”. This concept looms large in the field of mediation. We claim to offer a better process that will cost parties less money than using adversarial lawyering. The proclaimed lure of mediation is in its fairness, effectiveness and cost-efficiency. Michael Coyle summarizes what is promised as: objectivity, constructive communication, expertise, efficiency and social transformation.¹³ One of our guiding texts is called *The Promise of Mediation*¹⁴. Our claims have created certain shared expectations on the part of those offering and using the process. Those expectations are summarized by Carrie Menkel-Meadow:¹⁵

1. mediation allows genuine party consent to the both process and outcome;
2. the parties have a fair opportunity for choice throughout (self-determination);
3. mediation is premised on the principle of democratic participation;
4. this participation occurs in the context of a fair process overseen by an unbiased person;
5. it allows for the creation of particularized solutions to legal problems which do no more harm to the parties than if the dispute was not resolved; and
6. the orientation is towards joint problem solving as opposed to adversarialism.

¹³ Coyle, FN 2, p.632-636

¹⁴ Robert Bush & Joseph Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994)

¹⁵ Carrie Menkel-Meadow, FN 1, p. 453.

These expectations are condensed into three ethical principles by Sarah Grebe: (1) non-maleficence (the mediation process and the actions or omissions of the mediator should not cause harm to a party); (2) justice, meaning both parties should be treated fairly; and (3) respect for personal autonomy.¹⁶

The mediator therefore holds out a promise to deliver a process which possesses certain ethical, financial and procedural benefits, with the implicit promise of a result that the parties consider to be fair. It is a compelling draw for separating couples.

Codes of mediator conduct form a second source of special ethical status. For instance, the Family Mediation Canada Code of Professional Conduct (“FMC Code”) provides insight into the intended goal of family mediation, and how that goal is to be achieved. The identified goal is to help the parties reach a “fair and workable agreement that meets the participants’ mutual needs and interests, not a settlement at any cost”.¹⁷ On the mediator’s duty of impartiality, the FMC Code reads:

“Impartiality means freedom from favoritism or bias either in word or action, or the appearance of such favoritism or bias. Notwithstanding the above, a mediator has a duty to assist participants to reflect upon and consider how their proposed arrangements realistically meet the needs and best interests of other affected persons, especially vulnerable persons.”¹⁸

Article 9 of the FMC Code addresses the mediator’s duty to ensure fair negotiations. Mediators must endeavor to ensure that participants reach agreement voluntarily and on the basis of informed consent. The mediator has a positive duty to ensure procedural fairness and also to “*explore whether the participants are capable of engaging in the mediation process*”. There is also a duty to ensure balanced negotiations and an absence of “*manipulative or intimidating*” negotiating tactics. “*While mediators must be impartial*

¹⁶ Sarah Grebe, “Ethics and the Professional Family Mediator” (1992) 10 Med.Q.155

¹⁷ Family Mediation Canada *Code of Professional Conduct*, Article 3.1

¹⁸ *ibid*, Article 8.1 & 8.2

*towards the participants, impartiality does not imply neutrality on the issue of procedural fairness.”*¹⁹

And while the FMC Code does not go so far as to require mediators to ensure substantive fairness (as do the authors of the *Family Mediation Handbook*) it does require them to ensure that each party has had full opportunity to understand the implications of any proposals, imposing a duty to “*assist the participants to assess the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant’s own subjective criteria of fairness, taking cultural differences into account.*”²⁰

Article 10 requires the mediator to “actively encourage” parties to make decisions based on full information and advice, and to require “undertakings” from them to disclose their financial and related circumstances. Article 13.1 sets out the duty to terminate mediation where the process is likely to harm or prejudice a party, or where one or both parties is acting in bad faith.

The Ontario Association for Family Mediation also has a detailed Code of Ethics (“OAFM Code”). Although similar in principle, it has specific provisions for “Potential Problems in Mediation”. The OAFM Code includes a duty to advise parties of the possibility that one of them may conceal or dissipate assets during the mediation process (bad faith); that a status quo regarding custody may develop during the mediation that could prejudice a party (no harm to parties principle); and that the promise of confidentiality is not absolute insofar that information learned during mediation, though strictly provided on a “without-prejudice” basis, might “open up lines of enquiry” that might not otherwise have come to light in subsequent litigation (no harm principle).²¹

¹⁹ *ibid*, Article 9.2-9.4

²⁰ *ibid*, Article 9.5 & 9.6

²¹ Code of Ethics, Ontario Association for Family Mediation, Article 7.

Both Codes illustrate the special ethical challenges in family mediation that could thwart realization of the goal of the process. They provide a clear sense of the “lay of the land” in terms of the sorts of behaviour we are not to engage in or countenance. But they use bland and neutral language that does not provide much practical guidance. How zealous should we be in protecting the ethical standards reflected in the codes? Which ones are most important? If we have to sacrifice one principle in order to achieve the goals of the process, which should it be?

For instance, by what means is a mediator to assist the parties to assess the impact of their proposals on affected third parties? How far should a mediator “push” clients to determine whether their consent is “informed”? What does it mean to tell a mediator to “actively encourage” parties to make decisions based on informed consent? What are the kinds and/or degrees of manipulative tactics that mediators must not condone? What is meant by “an undertaking” to provide financial disclosure? Is this intended to be a promise made by the participants to the mediator, and how far should the mediator go to enforce this undertaking? Why does the mediator have a duty to advise clients that the process may be abused by a rogue to dissipate assets, but apparently no duty to advise that a party’s failure to be honest and empathetic may preclude settlement, thereby making the situation worse than if they’d never come to mediation? The former reflects lawyers’ fears about mediation, but the latter is far more often the real cause of a “failed” mediation. And there is no guidance in the Codes as the appropriate course for mediators when a duty in relation to fairness appears to conflict with the duty to respect party autonomy, impartiality or confidentiality.²² This tension between the principle of party self-determination and the use of mediator influence to avoid party exposure to harm, to prevent abuse of mediation, to ensure a fair process and to reach the (often unspoken) goal of a fair outcome, exists in almost all mediations.²³

²² Coyle, FN 2, p. 645

²³ Morris, FN2, notes that the concept of non-intervention is based on the Western preference for self-determination and autonomy; ethical tensions about when and how to intervene reflect this bias. Not all cultures are so committed to individual autonomy, resulting in less ethical tension for mediators operating in other cultural environments. Milton Bennett’s article “Towards Ethno-relativism: A Developmental Model of Intercultural Sensitivity”, in *Education in Intercultural Experience*, R. Michael Paige ed., (Yarmouth: Intercultural Press, 1993) examines stages of ethno-centricism (“assuming that the

The third source of ethical rules for family mediators is found in their mediation agreements. Parties and mediators are bound by the ethical commitments they make to each other by contract. The “standard” agreement to mediate describes the mediator’s role, the rules of confidentiality that apply to the process, and what the parties commit to do or not do to each other during the mediation process. Rarely do such agreements detail the ethical expectations the parties and the mediator have of one another.²⁴ Yet such reciprocal obligations underlie the very process; why else would parties consent to mediation unless they expected to abide by reciprocal ethical obligations, such as not lying to each other or to the mediator, or responding to the honesty of the mediator with equivalent honesty?

Four suggestions

Given the unique vulnerability of family mediation clients, and taking what exists already in the form of codes of conduct for family mediators, the following is a set of practical ethical “rules” which should, in my view, be the minimum requirements for this kind of mediation practice:

1. You must know and explain, openly and honestly, who you are, and how you practice mediation. Morris calls this first step “know yourself”. By this she means understand your own ethical values, and the assumptions which underlie them.²⁵ This in turn will impact the kind of mediation you tend to practice; for example, what do you consider to be the goals of mediation and the indicia of success?

worldview of one’s own culture is central to all reality”) and ethno-relativism (“cultures can only be understood relative to one another and that particular behavior can only be understood within a particular cultural context”).

²⁴ David Wilkins, “Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars” 11 *Geo. J. Legal Ethics* 855 (1998); see also Carrie Menkel-Meadow, “Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins’ “Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars””, 11 *Geo. J. Legal Ethics*, 901.

²⁵ Morris, FN 2, p. 340

How do you deal with issues of confidentiality, particularly where the process involves caucusing? Do you caucus? How hard and far do you “push” parties to be open, honest, vulnerable and empathetic with each other in the name of reaching the goals of mediation? Are you prepared to be substantively evaluative if that is what the parties want? How do you deal with perceived bullying, lying, deceit, manipulation (however you might define that complex concept) or mere reluctance to fully participate? How hard do you try to enable the parties to realize some type of transformation, as opposed to “merely” reaching settlement? Much of this self-analysis will turn on your personality type; your natural inclinations to introversion or extroversion, to thinking or to feeling, and to sensing or to working with concrete facts will have a real impact on your own comfort levels and practices.²⁶

2. You must clarify, in writing, the reciprocal obligations and expectations between you and your clients, in terms of ethics, process and outcome. This includes explaining to your clients “who” you are and “how” you practice mediation as discussed above. This is the only way of fairly and honestly letting clients know what to expect of you and what you expect of them, in order to reach the goals that they and you share for the particular mediation. Most mediation agreements state that the parties agree to mediate in good faith, but the expression of reciprocal ethical obligations and expectations pretty much begins and ends there. What do you expect of your clients ethically? And what do they expect of you? Presumably you will covenant not to lie to or mislead each other²⁷. Substantively, the mediator and parties should identify at the outset the desired goal of the

²⁶ It is suggested that all family mediators should complete a Myers-Briggs personality typing process to help them answer these questions about themselves, and therefore direct themselves in their practices.

²⁷ This covenant will require thought; the agreement should define “lying”. Gerald Wetlaufer in “The Ethics of Lying in Negotiations”(1990)765 Iowa Law Review 1218, defines lying as “all means by which one might attempt to create in some audience a belief at variance with one’s own”, at p. 1223. Given that there is a distributive element to the mediation process, lying can be seen by parties to mediation as an effective strategy. It is therefore essential that mediation contracts be based on the premise that “full and truthful disclosure is the key to identifying and exploiting opportunities for integrative bargaining”, (p. 1228) and that the parties and mediator all promise to each other to mediate in the spirit of candid and full honesty in order to fulfill the objectives of the process.

process; such as mutual commitments for behaviour to prevent abuse, a property division agreement that both parties consider fair, processes for improved communication, a sense of being heard, closure, to learn from past mistakes, a parenting plan that puts the interests of the children first, an agreement to start or continue counselling, and so on. The agreement should address how much direction, evaluation, and legal information the parties want from you, as well as your expectations of the parties in terms of them seeking legal and other advice. Clarifying these expectations in writing not only reduces the possibility of misunderstanding and disappointment during the mediation process, it protects the parties from their own lack of knowledge about the process. It “warms them up” for what they need to do. And it makes it more likely that the sorts of conduct you are covenanting not to engage in will in fact be avoided, making for a more useful and positive experience for all. In doing so you will be protecting, in the most effective way possible, the “weaker” party from bullying and other negative behaviour that might otherwise cause them harm.²⁸

3. It is impossible to provide comprehensive family mediation in a way that is fair to the parties unless you have practised family law. For example, it is unfair to the parties for a non-family lawyer mediator to mediate a marriage contract. This is because this kind of mediation necessarily and continually implicates the practice of law.²⁹ A comprehensive family mediator must understand the nature and complexity of the parties’ legal rights and obligations in order to know whether true informed consent exists; a non-family lawyer will be incapable of making that assessment, or of determining if a party understands the legal advice he or she has been given sufficiently to apply informed consent. Some of the issues that will be mediated are not only done so in the shadow of the law; child support law, for

²⁸ For more on the issue of reciprocal solicitor-client obligations, see Wilkins and Menkel-Meadow FN 23.

²⁹ Menkel-Meadow , FN1, asserts that mediation invariably involves elements of the practice of law among many practices, because of the application of legal skill and judgement to fact situations. (p. 424) This is undeniably a part of a comprehensive mediator’s role. See also Carrie Menkel-Meadow, “Is Mediation the Practice of Law?” (1996) 14 *Alternatives to High Cost Litig.* 57. This journal is premised on the argument that comprehensive family mediation must, if it is to be done in a way that lives up to its promise, include “the practice of law”.

example, cannot be contracted out of. The law must be applied and the parties will rightly look to the mediator for understanding as to how the guidelines operate. Determining income pursuant to the guidelines, for the purpose of calculating child support, is complicated and technical, especially for self employed people. A mediator who does not have legal skill and training risks doing harm to the parties by mediating child support settlements. The mediator should be able to competently guide the parties through financial disclosure issues and “net family property” calculations, as almost all separating couples will want to work through the family law act provisions as a starting point for their discussion about division of property. Legal skill and training is required just to know what assets are valued and how; the parties are entitled to expect this kind of expertise and guidance from their mediator. It is not the job of the mediator to judge the settlement the parties make, nor to advise the parties of their rights and obligations if they prefer to divide property in a way that is entirely different from the Family Law Act. But the mediator must be able to help the parties work the issues through based on the law and assess whether the consent to accept a settlement is truly informed. If the mediator does not understand the law, he or she will not be able to make this assessment.

The mediator needs moral and substantive credibility in the eyes of the parties; otherwise a bully may take advantage of real or perceived superior legal knowledge, resulting in a settlement that lacks real consent. The fair process that is promised will not materialize; not will the anticipated fair result.

How, one might ask, can there be a “risk of harm” to parties when the mediator does not prepare a binding agreement? Most family mediators prepare only a non-binding memorandum of agreement which enables the parties to seek legal advice on its proposed terms. (In fact, the FMC and OAFM Codes prohibit the preparation of binding documents.) This practice serves the interests of non-lawyer mediators as much, or more, than the interests of the parties; it gives the mediator comfort, from a liability and unauthorized practice of law standpoint, in

- mediating settlements notwithstanding the mediator's lack of substantive expertise in the subject matter of the dispute. But it provides no comfort to parties who commit in principle to settlements which they later learn, from their lawyers, are profoundly unfair from a legal perspective. At this point, such settlements may unravel, and the mediator has done more harm than if the parties had not mediated at all. The promise of mediation will not have materialized and the hostility, resentment and aggravation of the conflict may be worse.
4. The mediator must never be lazy; ethically this translates into brutal honesty with the parties and with yourself, a passion for the process and empathy for the parties. The mediator must never tolerate conduct that takes away from the realization of the goal of the process. The mediator is ethically obligated to push the parties relentlessly to find out what is needed and why, and what lies behind a party's resistance to do what is needed. It means aggressively and tirelessly compelling the parties to verbalize the interests behind their positions, and to make sure that each party understands the other. It means smoking out bad faith, bullying, lies, misinformation and intentional half-truths, by talking about it, by putting what you are seeing or intuiting "on the table" for discussion; it means challenging the parties' assertions and assumptions without appearing partial; it means never losing sight of the goal of the parties and the fairness of the process by which you are trying to help them accomplish that. It means evaluating positions that the parties may take if evaluation is what is needed to maintain a fair process, and not tolerating disingenuous, self-serving conduct. It means directing the parties towards possible solutions when that is what is needed, and knowing when to bring in third parties to help break impasse or to obtain reliable information that both parties trust. It means providing straightforward opinions about assertions made by parties as to the legal merit of their argument if they are just plain wrong, but doing so in an impartial and non-judgmental way. And it means knowing when to leave the parties alone and completely stay out of the process.

These four principles may appear to be incompatible with traditional notions of “neutrality” and “self-determination”, but it is suggested that respecting and practicing them will go a long way towards ensuring that real and meaningful impartiality and self-determination are in fact occurring. The concept of “neutrality”, for example, implies objectivity and distance from the source of the conflict. It is derived from the law, as a result of the superficial similarity between the roles of judge and mediator.³⁰ But the mediator’s role is nothing like that of a judge. What parties to mediation want is not actual neutrality, but the appearance of impartiality, honesty, empathy and an ability to find a connection with each side’s story.

“Because neutrality implies objectivity and distance from the source of the conflict, it cannot countenance empathy or give the mediator room to acknowledge or experience grief, compassion, love, fear, anger or hope. Neutrality can paralyze emotional honesty, intimate communication, vulnerability and self-criticism. It can undermine shared responsibility, prevention, creative problem-solving and organizational learning. It can ignore the larger systems in which conflict occurs. It can fail to comprehend spirit, forgiveness, transformation or healing, which are essential in mediation. As a result, it can become a straitjacket and a check on our ability to unravel the sources of conflict.”³¹

Conclusion

Comprehensive family mediation is a high-risk area of practice. The decisions made in mediation and the way in which they are made will affect the parties and their children for the rest of their lives.

The mediation process is occurring in the context of a very complex and difficult body of substantive law that is rapidly changing. The mediator must understand the currents of the law. Of equal importance is the emotional context in which the parties are trying to

³⁰ Cloke, FN 4, p.13.

³¹ Ibid, p. 14

make critically important decisions; it is a vortex of love, hate, passion, fear, grief, anger, depression, confusion and anxiety.

Mediators promise to deliver a process that will help the parties move on from all of this. It promises free and genuine consent, true self-determination, true democratic participation, a fair process, an impartial, skilled and committed mediator, cooperative problem-solving and a result that does not harm the parties or their children.

Practising their craft with these four principles in mind will help them keep their promise.