



BOOK REVIEW

Mediation Ethics edited by Ellen Waldman (San Francisco: Jossey-Bass, 2011)

By Susan Oberman

M*ediation Ethics* is an ambitious effort to categorize, define, and exemplify a wide range of ethical issues mediators face. Ellen Waldman, a professor at Thomas Jefferson School of Law, presents these dilemmas in the application of the basic principles of mediation, and uses case examples to offer a practical reference guide for how to address specific decisions. The first chapter outlines the underlying concepts of the book and each chapter that follows presents an ethical dilemma, a description of the issues at play, case studies, and commentaries by various mediator/scholars. Thus Waldman provides a written panel discussion among top mediators and scholars in the field on each of these dilemmas, and offers a range of answers. She finishes each chapter with a comparison and summary of the comments from the other experts.

In Chapter One, "Values, Models, and Codes," Waldman identifies three underlying values as the foundation of mediation ethic: *disputant autonomy*, *procedural fairness*, and *substantive fairness or "a good-enough outcome."* She defines autonomy, which she regards as a synonym for self-determination, as the assumption made in mediation that "disputants should retain control over how their conflicts are presented, discussed, and resolved." The next three chapters deal with ethical issues surrounding party autonomy:

capacity, emotionality, and power imbalances, which when in question threaten self-determination. Chapter Eight also deals with disputant autonomy in addressing the requirement that mediators promote candor so that parties (and their attorneys) act in good faith, revealing all relevant information.

The remaining chapters present ethical requirements of mediators: to ensure that parties have information, to preserve privacy through confidentiality, and to establish fairness free of cultural biases, conflicts of interests, and alliances with referral sources. Waldman sees procedural fairness as critical to parties' acceptance of the outcome, and substantive fairness as dependent on the values or norms being referenced. She concludes that even when mediators attempt to follow the various statutes and codes, these do not give specific answers to many ethical dilemmas. In fact she maintains that there is not likely to be one answer or one principle that can provide definitive answers, and notes that "the codes governing professional conduct in mediation are inconsistent. Not only will applying two separate sets of codes to the same case often yield different directives, different provisions within individual codes themselves are in conflict as well."

In Chapter One Waldman also describes several “mediation philosophies” or models, a term she then uses synonymously with *models*. She cites the transformative and narrative models and Riskin’s descriptors of facilitative and evaluative mediation. (While many mediators still use Riskin’s terms to explain what they do, Riskin never intended them to be either/or categories and attempted to correct the misinterpretations of his 1996 article in 2003.) Several difficulties arise from this terminology. First, the descriptors “facilitative” and “evaluative” distinguish between functions or strategies, but may not meet criteria for defining models. Continued validation of these strategies as models reinforces the confusion about differences in what mediators do. Second, Chapter One would have been stronger and more cogent had Waldman used the three categories of mediation she named in her important 1996 and 1998 articles (“The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity”, 30 U.S.F.L. Rev., 723-756 (1996) and “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence”, 82 Marq. L. Rev., 155- 170 (1998)): Norm-Generating, Norm-Educating and Norm-Advocating. That typology is not introduced until Chapter Five, and even then Waldman does not implement it in analyzing the commentaries. This is unfortunate, because those three categories brilliantly resolved the longstanding confusion about discrepancies in mediator practices by identifying differences in what norms are referenced.

Thus, without use of a uniform framework, differences in how the writers handle the ethical dilemmas in the case studies become personal rather than theoretical. If mediators’ choices are purely individual, then decisions must be attributed to something hidden—some mystery or artistry. The notion of artistry or an eclectic mix of approaches maintains the often heard claim that mediation is somehow magical, and ignores criticisms of mediation for its lack of theoretical underpinnings.

While the commentators in *Mediation Ethics* generally do not identify their preferred models, there are two exceptions, both of whom use what Waldman called Norm-Generating models. Dorothy Della Noce, who has contributed significantly to the scholarship on defining models, clearly identifies herself as a transformative mediator, and John Winslade names his use of the narrative model. We can find clues in the statements of the other contributors about the models they use. For example, Carol Liebman in Chapter Two recommends that mediators have familiarity with ADA law and state regulations in order to provide legal information. Michael Moffitt in Chapter Six states that: “At some point, if a party is ignorant enough of the process, the implications of a proposal, or her or his alternatives to settlement, we cannot consider the outcome to have been the product of truly informed consent.” Both Liebman’s and Moffitt’s statements fall within the Norm-Educating category. In Chapter Twelve Carrie Menkel-Meadow states that “legal and social justice concerns all mitigate against my deferring to the parties’ claimed desire to use religious law and principles to resolve their dispute.” Phyllis Bernard says in Chapter Eight: “mediation works well when power between the parties is balanced; it works poorly when power is severely unbalanced.” The views of both Menkel-Meadow and Bernard can be seen as examples of Norm-Advocating models.

Waldman claims that most mediators pick and choose between models: “A transformative mediator may decide that she will use that style—and remain faithful to its underlying assumptions—in

all cases. Other mediators move between models depending on the type of case...” Some mediation research, however, has found that mediators do not use different models for different cases, even though they may think they do. It might nevertheless benefit mediators to recognize that giving information about mediation to parties during the orientation phase (including what model will be used) is Norm-Educating, and informing parties of statutes governing confidentiality is Norm-Advocating. Once the orientation is completed and the decisions regarding confidentiality have been made, the mediator is then free to utilize his or her preferred model.

Waldman’s book makes it clear that mediation practitioners must carefully consider the difficult ethical choices with which we are faced. Using specific case examples, *Mediation Ethics* categorizes the range of ethical issues in reference to the basic elements of mediation: self-determination, good faith, fairness, neutrality/impartiality, and confidentiality, furthering a discussion of ethics that is of major importance to mediation practitioners and consumers. In addition, looking at the complexities of codes, rules and standards surrounding the mediation process brings home the reality that mediation is an option within the law, not an alternative to it. Beyond these contributions, Waldman also broadens the conversation about self-determination (frequently narrowly defined as voluntary agreement to a settlement), by equating it with autonomy. This broadened conception of self-determination includes the *capacity* to comprehend information and weigh options, the *autonomy* to think independently, the *authority* (power) to make the decisions, and the ability to give *informed consent* (which depends on the mediator to provide the necessary information). These concepts reflect fundamental constitutional and legal rights applied in mediation. Mediators are charged through state codes and ethical standards with the responsibility of assessing and ensuring that these rights are protected.

Mediation Ethics challenges mediators to think critically about the ethical issues we will invariably confront. It begins by addressing mediation models because without doing so we would have no reference points. As the discussion about ethical decisions continues, the question of mediation models will persist. What norms are referenced? What strategies are used? What information is relevant? It stands to reason that ethical decisions as well as process decisions are made according to the model each mediator adopts. The conversation on ethics will make a great deal more sense when we recognize Waldman’s categories as a uniform framework for understanding the models mediators are actually using. Then we might clarify how the ethical decisions individual mediators make reflect these models.

Overall, *Mediation Ethics* is a valuable resource to any mediator, beginning or experienced, who is struggling with an ethical dilemma and would benefit from knowing what other mediators might do in a similar situation. It would make an excellent text for mediation courses, and offers mediation trainers specific examples of ethical issues they are preparing mediators to handle. It covers a vast amount of territory and at the same time divides it into comprehensible pieces.



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