Ethical Challenges for Mediators around the Globe: An Australian Perspective

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INTRODUCTION

Like much of the western world, in Australia,[1] Alternative Dispute Resolution (ADR)[2] is an integral aspect of the modern legal system, and mediation[3] is used extensively to resolve civil disputes in courts and tribunals. Additionally, Australian governments have recognized mediation as an important tool in improving access to justice for ordinary citizens.[4] However, what justice means in the mediation

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1. Australia has a federal system of government: the Commonwealth Parliament (based in Canberra) and a separate parliament in each of the seven states and territories. The *Commonwealth of Australia Act 1900* and state constitutions, for example, the *Constitution Act 1975* (Vic) (Austl.), set out each parliament's respective powers.

2. ADR refers to various non-court processes used for resolution of disputes and, more particularly, non-determinative processes such as mediation. The former National Alternative Dispute Resolution Advisory Council (NADRAC) distinguished between facilitative, determinative, and advisory processes of dispute resolution. *See Alternative Dispute Resolution*, AUSTL. GOVT. ATT'Y-GEN. DEP'T. 5, *available at* http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx (last visited May 20, 2014).

3. In this Article, we adopt NADRAC's definition of mediation: a process where the participants, with the assistance of an independent person as mediator, identify the disputed issues, develop options, consider alternatives, and endeavor to reach an agreement. The mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. *See id.* at 15–16.

4. *See* AUSTL. GOV'T ATT'Y-GEN. DEP'T, A STRATEGIC FRAMEWORK FOR ACCESS TO JUST. IN THE FED. CIV. SYS. 31 (2009) [hereinafter FRAMEWORK FOR ACCESS TO JUST.].

context is a contested concept.[5] The widespread use of mediation and the increase in the number of practitioners from various disciplines means there is a diversity of views on issues of justice, which are outlined in this Article.

Equally, what constitutes ethical practice for mediators is a vexing question. In the last three decades, mediation in Australia has gone from a community-based activity to being an integral part of the civil justice system.[6] Concurrently, mediators have professionalized.[7] Professional associations have been formed, codes of conduct developed, and accreditation processes adopted.[8] However, similar to mediation in the United States, there is no single umbrella body that all Australian mediation practitioners must belong to. The National Mediation Accreditation Scheme (NMAS) is a voluntary opt-in process, and although there is a set of standards that can be adopted, there is variation in acceptance across the country.[9] There are no clear practical guidelines for mediators on the many questions about what ethical behavior and justice mean for mediators. While professional codes and standards are designed to assist mediators in resolving

5. *See* Lola Akin Ojelabi, *Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice*, 31 CIV. JUST. Q. 318 (2012).

6. HILARY ASTOR & CHRISTINE CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA 8–10 (2d ed. 2002).

7. LAURENCE BOULLE, MEDIATION PRINCIPLES, PROCESS, PRACTICE 397 (3d ed. 2011) [hereinafter BOULLE, MEDIATION PRINCIPLES].

8. For a sample of different standards, see NAT'L MEDIATOR ACCREDITATION SYS. STANDARDS (Mar. 2012), *available at* http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf (Austl.); AM. ARBITRATION ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005) [hereinafter MODEL STANDARDS OF CONDUCT FOR MEDIATORS], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (USA); *IMI Code of Professional Conduct*, INT'L MEDIATION INST., http://imimediation.org/imi-code-of-professional-conduct (last visited Feb. 21, 2014) (International); CIV. MEDIATION COUNSEL, EURO. CODE FOR MEDIATORS, http://www.civilmediation.org/downloads.php?f=75) (last updated July 9, 2010) (UK); *Code of Conduct: Singapore Mediation Centre*, INT'L TRADE CTR., http://www.intracen.org/Code-of-Conduct-Singapore-Mediation-Centre/ (last visited Mar. 17, 2014).

9. The NMAS is a voluntary industry system under which organizations qualify as Recognized Mediator Accreditation Bodies (RMABs) that may accredit mediators. For more detail, see MEDIATOR STANDARDS BD., http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas (last visited Jan. 1, 2014); MEDIATOR STANDARDS BD., NAT'L MEDIATOR ACCREDITATION SYS. (NMAS)—A HISTORY OF THE DEV. OF THE STANDARDS, *available at* http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf (last visited Mar. 17, 2014).

ethical issues, dilemmas still arise because codes do not cover all issues that occur; they sometimes contain competing/conflicting values, and they may also conflict with the mediators' personal values.[10]

This Article explores the ethical challenges mediators face, including how they identify and respond to those challenges. Justice in mediation is examined through the lens of ethical considerations for mediators. In a research study, we asked experienced mediators to respond to case scenarios containing a range of ethical and practical issues. As expected, there was some uniformity in responses, but—more revealing—participants diverged significantly on a number of matters. The Australian mediators' responses indicate that despite the agreed critical role of self-determination in mediation, mediators have individual moral compasses. These compasses lead mediators to a variety of responses to ethical and practical challenges, and to different views about what constitutes justice in mediation. Although the research is based in Australia, the findings have resonance for mediators globally, including in the United States. Overall, these research findings suggest the question of what constitutes ethical mediation practice warrants further research, reflection, and discussion.

In Part I, we contextualize the research study and detail the current academic analysis of mediators' views and our research approach. In Part II, we examine the concept of justice in mediation, sketching the debates about justice in mediation and mediation ethics. In Part III, the topic of ethics in mediation is explored, including what is an ethical issue, standards in mediation, and the core values of mediation. We describe the current regulatory system for mediators in Australia, as well as provisions of relevant codes of conduct.[11] Part IV sets out the participant mediators' responses to a sexual harassment scenario. Part V summarizes the participants' responses concerning mediators and ethical issues, with a discussion of the role

10. Ellen Waldman, *Values, Models, and Codes*, *in* MEDIATION ETHICS: CASES AND COMMENTARIES 1, 14 (Ellen Waldman ed., 2011).

11. It is beyond the scope of this Article to provide a comprehensive comparison of Australian and American standards.

of informed decision making and reality testing[12] in ethical mediation practice.

I. IMPROVING JUSTICE IN MEDIATION: A RESEARCH PROJECT

This Article draws on a larger qualitative research project aimed at harnessing the wisdom of experienced mediation practitioners on ethical and practical issues, using different scenarios that mediators might confront in practice.[13] Despite the development of standards and accreditation processes for Australian mediators, there is little material available that provides practical guidance to mediators about how to address justice and ethical issues. Ellen Waldman addressed this void for North American mediators in her book *Mediation Ethics: Cases and Commentaries*, where she developed case studies and sought commentary from mediation specialists.[14] Our project draws on Waldman's approach, and seeks out the views of Australian mediation practitioners to develop contextualized guides to ethical and practical dilemmas. In this Article, we provide a summary of the critical findings.

A. Context of Research

In 1994, the Australian Access to Justice Advisory Committee (the "Committee") recommended "resort to ADR and continued development of ADR programs" as one solution for improving access to justice.[15] The Committee identified the advantages of ADR to include the provision of broader remedies and less costly and less formal processes.[16] In the two decades since that report, ADR

12. Reality testing involves the mediator putting a series of questions to the parties in order to test the veracity of options generated and usually occurs during private sessions. TANIA SOURDIN, ALTERNATIVE DISPUTE RESOLUTION 82, 239 (4th ed. 2012).

13. Funded by the Legal Services Board (Victoria). *See generally Grants*, LEGAL SERVS. BD., http://www.lsb.vic.gov.au/grants/ (last updated Dec. 17, 2013). The final report is near completion, and readers should contact the authors for an electronic copy.

14. *See* Waldman, *supra* note 10.

15. ACCESS TO JUST. ADVISORY COMM., ACCESS TO JUST.: AN ACTION PLAN 279, 300 (Commonwealth of Australia 1994).

16. *Id.* at 278. In particular, "ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of

processes have become an accepted part of the civil justice system in Australia, as reinforced by recent legislation.[17] This policy and legislative reform is couched in aspirations to improve access to justice.[18] In the state of Victoria, the government has mandated ADR processes (including mediation), stating that the "civil litigation system has become out of balance and is increasingly unable to achieve essential goals of accessibility, affordability, proportionality, timeliness and getting to the truth quickly and easily."[19] In addition to the private practice of mediation, ADR is now being used at all levels of the judicial system in family disputes, consumer and credit finance matters, tenancy, and the majority of small claims cases.[20] Courts and tribunals may require parties to use ADR processes as a result of a court order or as a condition for accessing the courts. Court-annexed dispute resolution schemes dominate the ADR landscape.

B. Related Academic Analysis of Mediation

Although there is an increasing body of Australian research that evaluates and analyzes mediation practices, there are limited studies that document mediator views or perspectives.[21] In 2008, Kathy Douglas conducted interviews with mediators about the models of practice they used.[22] Her findings indicated that although the facilitative model is the one most used in court and tribunal contexts, there is an emerging practice of improvisation and response to the

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resolving disputes . . . the outcomes are those which the parties themselves have decided and are not imposed on them." *Id.*

17. *See, e.g.*, *Civil Dispute Resolution Act 2011* (Cth) (Austl.); *Civil Procedure Act 2010* (Vic) (Austl.).

18. In 2009, Federal Attorney General Robert McClelland stated that access to justice is "central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy." FRAMEWORK FOR ACCESS TO JUST., *supra* note 4, at ix.

19. Vic, Parliamentary Debates, Legislative Assembly, 24 June 2010, 2604–07 (Rob Hulls, Attorney-General) (Austl.).

20. NAT'L ALT. DISP. RESOL. COUNSEL, MAINTAINING & ENHANCING THE INTEGRITY OF ADR PROCESSES: FROM PRINCIPLES TO PRACTICE THROUGH PEOPLE 91, 152 (2011).

21. Two recent North American publications are ERIC GALTON & LELA LOVE, STORIES MEDIATORS TELL (2013) and Waldman, *supra* note 10.

22. Kathy Douglas, *Mediator Stories of Tribunal Practice: Flexible and Fluid to Meet Parties' Needs*, 21 J.J.A. 237 (2012).

dynamics of the mediation process.[23] Mediators are not constrained by the model but can, and do, move through different models during a single mediation. Douglas found they remained "flexible and fluid for the parties' needs."[24] In a larger study, Patricia Marshall interviewed experienced mediators about how they deal with difficult cases.[25] She concluded mediators uphold the ideal of impartiality.[26] However, Marshall also concluded "they judge neutrality (in the sense of having no vested interest in the outcome) to be impossible because mediators are: paid for their services; mindful of the 'fairness' of any outcome; and aware of their professional role in ensuring 'duty of care' [to the parties]."[27] Marshall's research highlights the importance of ensuring mediators are aware of their own biases, and that they provide respect and empathy for all parties. Mediators experience stress from the need to balance power relationships[28] while still behaving in a way that does not favor one party over another.[29] Mediators are aware of the potential for abuse of power to result in injustice, but Marshall's study found mediators would address this problem indirectly.[30]

Finally, Susan Douglas, in a small study, interviewed mediators about how they make sense of neutrality in practice.[31] Her main finding was the importance placed by participants on the principle of

23. *Id.* at 237, 242.

24. *Id.* at 243–45.

25. Patricia Marshall, *The 'Partial' Mediator: Balancing Ideology and the Reality,* ADR BULLETIN OF BOND UNIV. DRC 1761 (Jan.–Feb. 2010) [hereinafter Marshall, *The 'Partial' Mediator*]; Patricia Marshall, *Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress*, 8 QUT. L. REV. 176 (2008) [hereinafter Marshall, *Political Competence and the Mediator*].

26. Marshall, *The 'Partial' Mediator*, *supra* note 25, at 176.

27. *Id*.

28. The question of how power operates between parties to a mediation is complex and depends on the context—power imbalances can arise from situations where there is a history of violence, but power can also derive from multiple sources, such as financial disparity, knowledge and understanding of the legal system, personalities of the parties, disparity in access to legal representation, and other resources. *See* BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 196–204; LAURENCE BOULLE & NADJA ALEXANDER, MEDIATION SKILLS AND TECHNIQUES 299–300 (2d ed. 2012).

29. Marshall, *Political Competence and the Mediator*, *supra* note 25, at 180.

30. *Id.* at 181.

31. Susan Douglas, *Neutrality in Mediation: A Study of Mediator Perceptions*, 8 QUT. L. REV. 139 (2008) [hereinafter Douglas, *Neutrality in Mediation*].

party self-determination when dealing with the dilemmas of neutrality.[32] A key dilemma for the mediators was how to be neutral when one party was clearly negotiating at a disadvantage.[33] They also stressed the need for flexibility in applying the facilitative model.[34] In the face of perceived power imbalances, mediators felt the process/outcome distinction was unsatisfactory.[35] For example, the participants saw it as important for parties to be fully informed about their legal rights.[36] In the discussion of her results, Douglas points to the "growing recognition that the presence and intervention of the mediator does in fact influence both the content and outcome of the parties' dispute."[37] Overall, the current academic analysis of Australian mediators' views has demonstrated that the intersection of mediation, ethics, and justice poses a vast array of questions.

C. Research Approach

In semi-structured interviews, participants were asked to identify potential ethical and practical issues in five mediation scenarios. The issues included party awareness of legal rights, confidentiality, cultural sensitivity, conflicts of interest, reporting of systemic misbehavior, and lawyer conduct. We were interested to learn which ethical issues mediators identified in the scenarios and how they would respond. Twenty-one expert and experienced mediators, including practitioners and practicing academics, lawyers and non-lawyers, were interviewed.[38] All participants were NMAS-accredited

32. *Id.* at 139.

33. *Id.* at 146.

34. *Id.* at 152. There are four main models of mediation: facilitative, settlement, transformative, and evaluative. The NMAS, *supra* note 9, endorses a facilitative model. BOULLE & ALEXANDER, *supra* note 28, at 16. Facilitative mediation is where the mediator "conducts the mediation along strict procedural lines in order to define problems comprehensively, focus on parties' needs and interests and attempt to develop creative solutions which the parties can apply to the problem." *Id.* at 15.

35. Douglas, *Neutrality in Mediation*, *supra* note 31, at 152.

36. *Id.* at 146–47.

37. *Id.* at 147.

38. Of the twenty-one participants, fourteen were lawyers and seven were non-lawyers, and there were eight males and thirteen females. Nineteen of the participants practice facilitative mediation, while two identified themselves as having a preference for transformative mediation, although they were both well versed in facilitative mediation and had practiced it. Interviews were semi-structured. The interviews were transcribed and responses thematically

mediators. In this Article, we draw on responses to one scenario based on a sexual harassment dispute.

II. JUSTICE IN MEDIATION

A motivating factor for the increased use of mediation is the desire to address systemic problems within the civil justice system. However, the connection between institutionalization of mediation and improved access to justice remains unproven, particularly when access to justice is conceived of as including an increased opportunity to gain entry into the justice system and to obtain fair outcomes.[39] Practitioners, proponents, and critics of mediation in Australia are concerned about the justice of mediated outcomes.[40] These concerns include the principle of party autonomy, or self-determination, and the ability of the mediator to address power imbalances; the principle of neutrality and the appropriateness of the mediator raising concerns about the justness of outcomes; and the provision of relevant information and/or advice to the parties.[41] Some critics also suggest

analyzed using NVivo software. *See generally NVivo*, QSR INT'L, http://www.qsrinternational.com/products_nvivo.aspx (last visited Mar. 26, 2014).

39. For an overview of the debate, see Akin Ojelabi, *supra* note 5, at 320; Mary Anne Noone, *ADR, Public Interest and Access to Justice: The Need for Vigilance*, 37 MONASH U. L. REV. 57 (2011).

40. On issues of justice and mediation generally, see Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 160 (2002–2003). *Cf.* Nancy Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 51 (2004) (arguing that although it is a common assumption within the mediation field that "disputants' definitions of justice play an important role in the process," this assumption has not been tested, and that ADR should be about resolution and justice). *See also* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

41. *See, e.g.*, NAT'L ALT. DISP. RESOL. COUNCIL, ISSUES OF FAIRNESS IN ADR (1997), *available at* http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Issues%20of%20Fairness%20and%20Justice%20in%20Alternative%20Dispute%20Resolution.pdf; LUCINDA O'BRIEN, FED'N CMTY. LEGAL CTRS., ACTIVIST ADR: CMTY. LAWYERS & THE NEW CIV. JUST. (2010), *available at* http://www.communitylaw.org.au/cb_pages/federation_reports.php. *See also* TANIA SOURDIN, ALTERNATIVE DISPUTE RESOLUTION 82 (2d ed. 2005); MARIA KARRAS ET AL., LAW & JUST. FOUND. OF NEW SOUTH WALES, ON THE EDGE OF JUST.: THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW (2006), *available at* http://www.lawfoundation.net.au/ljf/site/articleIDs/CB05FD97AAF2458CCA25718E00014293/$file/mental.html; Frances Gibson, *Alternative Dispute Resolution in Residential Tenancy Cases*, 18 AUSTL. DISP. RESOL. J. 101, 101–10 (2007); Noone, *supra* note 39, at 59–61.

mediation provides "second-class justice," arguing mediation operates to "privatize" justice, and that there is a lack of scrutiny of mediated settlements.[42] Other commentators raise concerns over the use of mandatory mediation—especially for unrepresented litigants.[43] Issues include whether unrepresented litigants can make an informed choice about agreements proposed, and whether pressure to settle is exerted on parties in a mediation process.

A specific line of inquiry questions the extent to which a mediator's substantive knowledge of both the dispute and the legal rights of the parties may affect the justice of any outcome.[44] Where the mediator promotes settlement without regard to, or inconsistently with, the legal rights of a party/the parties, the outcome of the mediation may be unjust.[45] It is widely accepted that one of mediation's goals is promotion of fairness, and mediators generally agree that they are responsible for ensuring procedural fairness.[46] Mediators have a duty to provide a process wherein all parties are treated with respect and dignity, and given the opportunity to make their views known and to reach an agreement without coercion.[47] There is debate, however, about whether mediators are responsible for substantive fairness (i.e., fairness of outcome).[48]

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42. For a classic example, see THE POLITICS OF INFORMAL JUSTICE: VOL. 1 THE AMERICAN EXPERIENCE (Richard Abel ed., 1982). Concerns about the appropriateness of ADR for some matters, including loss of precedent, power imbalances, and the privatized nature of ADR, have been raised in Australia in the following reports: *Managing Justice: A Review of the Federal Justice System*, 89 ALRC (2000); *Civil Justice Review*, 14 VLRC (2008); LAW REFORM COMM., PARLIAMENT OF VICTORIA, INQUIRY INTO ALT. DISP. RESOL. & RESTORATIVE JUST. (2009); NADRAC, THE RESOLVE-TO-RESOLVE—EMBRACING ADR TO IMPROVE ACCESS TO JUST. IN THE FED. JURISDICTION (2009).

43. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1989 (1999).

44. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87 (2004) [hereinafter Gunning, *Know Justice*]; Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55.

45. HAZEL GENN, JUDGING CIVIL JUSTICE 117 (2010).

46. NAT'L MEDIATOR ACCREDITATION SYS. STANDARDS cl. 9 (Mar. 2012), *available at* http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf (Austl.).

47. *Id*. at cls. 2.5, 9.

48. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 196.

Scholars from different countries question the ability of ADR to deliver justice.[49] Owen Fiss argues settlement in ADR is a "truce more than a reconciliation.[50] Hazel Genn, writing about civil justice policy in the United Kingdom, takes the view that mediators are not concerned about substantive justice, because their role is so focused on assisting parties to reach settlement.[51] She is concerned about an erosion of the courts' role as protectors of justice. Genn argues, "[M]ediation is not about *just* settlement, it is *just about settlement*."[52] Tania Sourdin disagrees with Genn, arguing that in many mediations, "the legal framework and the understanding of the legal rights of the parties will be a critical issue in determining whether or not parties negotiate and how."[53] She also maintains it is wrong to assume substantive justice can only be achieved through the court system.[54] Nancy Welsh claims the mediation field's focus is mainly on skill development, with little attention to issues of justice.[55] Additionally, Waldman asks whether mediation should concern itself with substantive justice or focus on procedural justice alone.[56] Lola Akin Ojelabi evaluates mediation in light of Rawls' categories of procedural justice, and argues mediation does not fit perfectly into any of the pure, imperfect, or perfect procedural justice categories enunciated by Rawls.[57] She argues policymakers and regulators need to pay more attention to issues of justice.[58] Jonathan Hyman and Lela Love argue that "justice seeking" is a central component of mediation, and that the role of the mediator is to enhance justice and avoid injustice, while honoring the primacy of

49. American sources are more likely to use the word "justice," whereas Australians tend to talk about "fairness," which raises questions of justice.

50. Fiss, *supra* note 40, at 1075.

51. GENN, *supra* note 45.

52. *Id*.

53. Tania Sourdin, *A Broader View of Justice*, *in* THE FUTURE OF DISPUTE RESOLUTION 155, 162 (Michael Legg ed., 2012).

54. *Id.*

55. Nancy Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 49 (2004).

56. Waldman, *supra* note 10, at 3–6.

57. Akin Ojelabi, *supra* note 5, at 327.

58. *Id.* at 335.

the parties in making their own decisions.[59] There is no consensus, however, on what justice is.

Tania Sourdin draws on traditional definitions of justice to argue that it remains a broad concept that can be achieved through ADR processes as well as within the court system.[60] Lawrence Boulle comments on justice in the modern legal system: "Ultimately, justice is not an all-or-nothing attribute of different systems and processes such as mediation or litigation but a question of degree, nuance and balance in different conflict circumstances."[61] Justice in mediation has been described as a broad, multi-faceted concept, and can include concepts such as reparative justice, even retribution, and improved relationships.[62]

Some commentators argue that justice in mediation is measured by the views of the parties—such that public legal norms are relevant but not definitive.[63] The mediator's role is to help the parties determine their own views of fairness or justice, and it does not matter whether the mediator agrees with those views or not.[64] A core value of mediation is the notion of party self-determination. This value fits with the view that a mediated outcome is just if the parties see it as just.[65] Akin Ojelabi and Sourdin suggest concerns about fairness of outcome can be addressed in part by the development of a values approach to mediation.[66] They claim this approach "supports mediators in identifying and addressing power imbalances, abuse issues, participant vulnerability, and other matters which may result in injustice."[67]

Some commentators propose parties cannot exercise self-determination if they are uninformed about their legal rights.

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59. Hyman & Love, *supra* note 40, at 159.
60. SOURDIN, *supra* note 12, at 162.
61. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 212.
62. Hyman & Love, *supra* note 40, at 166; Akin Ojelabi, *supra* note 5.
63. Hyman & Love, *supra* note 40, at 164.
64. *Id.* at 165.
65. *See, e.g.*, Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 44 (2012) (focusing on "party-driven" and "party-centered" practices that minimize the risk of injustice).
66. Lola Akin Ojelabi & Tania Sourdin, *Using a Values Based Approach in Mediation*, 22 AUSTL. DISP. RESOL. J. 258, 259 (2011).
67. *Id.*

Jacqueline M. Nolan-Haley raises this concern in connection with unrepresented parties, and points out that in practice, it may be difficult for parties to get legal advice.[68] She argues outcomes of court-connected mediations should be measured by legal standards, as parties in a court-connected mediation are entitled to expect "equivalency justice," which she maintains has both procedural and substantive components.[69] Similarly, Judith L. Maute contends mediators should refuse to finalize an agreement where it "is so unfair that it would be a miscarriage of justice, or where the mediator believes it would not receive court approval."[70]

Proponents of mediation often link procedural justice and substantive justice, arguing that ensuring procedural justice invariably results in fair outcomes.[71] For example, Joseph B. Stulberg argues mediation could be referred to as a process of "pure procedural justice," because it has the capacity to address issues of injustice through codes of conduct, through allowing legal representation in the mediation, or through the skills of the mediator.[72] Stulberg first identifies factors which may lead critics to the conclusion that mediation is not a just process, including involuntary decision making; negotiating away fundamental interests like, for example, freedom; agreeing to illegal terms, such as terms that violate human dignity and those that contradict fundamental societal values; and the lack of informed decision making. Stulberg then argues that mediators can "build conditions and constraints into the conception of the mediation procedure that minimize" injustice, by ensuring the process is voluntary, the inalienability of interests,

68. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L. REV. 47, 82–83, 92–95 (1996).

69. *Id*. at 50–51.

70. Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 348 (1990).

71. Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 215, 221–22 (2005) [hereinafter Stulberg, *Mediation and Justice*]; Baruch Bush & Folger, *supra* note 65, at 3–4, 14.

72. Stulberg, *Mediation and Justice*, *supra* note 71; Joseph B. Stulberg, *Must a Mediator Be Neutral? You'd Better Believe It*, 95 MARQ. L. REV. 829 (2012) [hereinafter Stulberg, *Must a Mediator Be Neutral?*] (arguing mediator neutrality better facilitates social justice than impartiality). *Cf.* Akin Ojelabi, *supra* note 5, at 318.

the publicity of outcomes, dignity and respect, informed decision making, and toleration of conflicting fundamental values.[73]

The possibility of achieving a just outcome also depends on the model of mediation being practiced.[74] For example, Robert A. Baruch Bush and J. P. Folger argue mediation has the potential to promote social justice, although interventions by facilitative mediators are limited in relation to achieving this goal.[75] They describe substantive fairness in mediation as "*micro-level social justice*"[76] and define social justice as "achieving relative equality of conditions (not just opportunities) as between all groups or classes within society."[77] Bush and Folger acknowledge that facilitative mediators do take steps to balance power between the parties and are concerned about substantive justice.[78] However, they conclude interventions in facilitative mediation are limited and prefer transformative mediation practices as a means of achieving social justice in mediation.[79]

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73. Stulberg, *Mediation and Justice*, *supra* note 71, at 221, 227–28.

74. Models of mediation include facilitative, transformative, evaluative, and settlement. "In facilitative mediation, the mediator conducts the mediation along strict procedural lines in order to define problems comprehensively, focus on parties' needs and interests, and attempt to develop creative solutions that the parties can apply to the problem. In transformative mediation, the mediator assists parties to deal with the underlying causes of their conflict, with a view to the parties engaging in dialogue and being able to 'transform' the way they relate to each other as a basis for resolving the dispute. In evaluative mediation, the mediator guides and advises the parties on the basis of his or her expertise, with a view to their reaching a settlement which accords with their legal rights and obligations, industry norms, or other objective social standards. In settlement mediation, the mediator encourages the parties to reach a point of compromise somewhere between their positional claims through various forms of persuasion, doubt creation, and pressure, without any significant emphasis on the process of decision-making." BOULLE & ALEXANDER, *supra* note 28, at 15.

75. Bush and Folger define social justice as "the absence of structural injustice or inequality." They also argue that "[s]ocial justice can be understood to encompass two 'levels' at which equality among groups can be affected, for better or worse—the micro [individuals] and macro [groups, etc.] levels." Baruch Bush & Folger, *supra* note 65, at 3–4. Canadian author Gemma Smyth puts the case strongly that mediators have a role to play in promoting a commitment to social justice. Gemma Smyth, *Strengthening Social Justice in Informal Dispute Resolution Processes through Cultural Competence*, 27 WINDSOR Y.B. ACCESS JUST. 111 (2009).

76. Baruch Bush & Folger, *supra* note 65, at 14 (emphasis added).

77. *Id.* at 3.

78. The idea that facilitative mediators are concerned about substantive justice is not one generally held by facilitative mediators or their critics.

79. Baruch Bush & Folger, *supra* note 65, at 22–28.

The responses to these sorts of criticisms often focus on the extent to which mediators should intervene to ensure a fair settlement. For the mediator, deciding where justice lies is a finely balanced skill that Marshall calls "political competence."[80] Some of the responses suggested include: placing more emphasis on intake and screening in recognition that some disputes are not suitable for mediation; rethinking how neutrality works in practice; and expanding ethical standards to incorporate some accountability for fair outcomes.[81]

III. ETHICS IN MEDIATION

Irrespective of how justice is defined, the role of the mediator in promoting a fair process is critical. It is a truism that the mediator's conduct impacts the mediation process. As in any profession, mediators often make decisions about a mediation regarding process design or strategy; line of questioning or reality testing; whether to suspend or terminate a mediation process; and whether to allow representation. Such decisions influence the outcome of the mediation. They can be categorized as ethical decisions.

A. What is an Ethical Issue?

A threshold aspect of ethical mediation practice is the recognition of what constitutes an ethical choice. This is not straightforward. Julie MacFarlane argues that every intervention is an ethical decision,[82] but this is not a broadly accepted view, as illustrated in our research. Participants had quite different perspectives on what constituted an ethical issue. A small minority (two) thought ethical issues arose constantly through the confluence of competing priorities and rights, whereas some participants said they had never faced an ethical dilemma. There was significant variability in what mediators understood as constituting ethical dilemmas. For example, some mediators were strongly of the view they could not be involved where a party had admitted to criminal activity, albeit in the past;

80. Marshall, *Political Competence and the Mediator*, *supra* note 25, at 185.

81. *Id.* at 187–92.

82. Julie MacFarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49, 49 (2002).

others took a more pragmatic view about the degree of seriousness and the overriding benefit of sorting out the dispute.

When asked for examples of ethical issues (other than those raised in the scenarios), the research participants—drawing on their own experience—provided a wide range of situations:

- Confidentiality of settlement in a mediation involving an abuse victim and a church organization raised questions about the preservation of the victim's legal rights.
- Racist remarks about the other party made to the mediator in private session. The mediator felt this offended her own value system and indicated a lack of respect for the other party.
- Tension between the mediator's obligations to the parties and larger public interest questions. E.g., if there's a point of law that needs clarifying, the mediator may feel it is better if the matter goes to a hearing.
- Parties were about to enter an agreement that was outside the law (mediation terminated).
- Lack of good faith by one party and deceptive conduct (mediation terminated).
- Capacity of parties: One party had an intellectual disability, and the proposed agreement was staggeringly different from a likely hearing outcome (mediation terminated); one party's behavior changed after lunchtime, because they had not taken their medication (mediation adjourned); workplace bullying dispute, and the victim was too stressed to be in the same room as the other party (mediation did not proceed).
- Inequality and power differentials, particularly where one party was uninformed or misinformed.
- Information received in private session about potential bankruptcy of one party was an illustration of how some parties use mandatory mediation as a "fishing expedition."

- Interpreter stepped outside her role and gave the party her opinion (mediation continued after the interpreter was counselled about her role).

The breadth of examples provided by respondents illustrates that mediation is a complex ethical endeavor. While professional codes are designed to assist a mediator in resolving ethical dilemmas, dilemmas still occur because codes do not cover all ethical issues that may arise; the codes sometimes contain competing/conflicting values and may also conflict with mediators' personal values.[83] A specific challenge that arises is that mediators come from different professional backgrounds with different professional codes. Sometimes, these ethical requirements conflict.

B. Standards in Mediation

Mediation ethics and the need for standards have been debated ever since the ascendancy of mediation as a mainstream dispute resolution process.[84] The debate intensified with the institutionalization of mediation and increased use of court-mandated mediation.[85] Despite the formulation of a set of standards, proponents of mediation in Australia continue to explore this issue more deeply.[86] Some have developed theories that support a more nuanced approach to mediation practice and that allow consideration of ethical issues in a contextual manner, rather than by a strict adherence to the principles of neutrality or impartiality.[87]

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83. Waldman, *supra* note 10, at 14.

84. *Id.* at 9–14. *See also* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

85. *See, e.g.*, Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701 (1993–1994). For the history of the development of standards in Australia, see *supra* note 9 and accompanying text; Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 MEDIATION Q. 55 (1994).

86. For example, Kongress 2011, a conference organized by LEADR (Association of Dispute Resolvers), dedicated various sessions to the issue of justice. Also, the Harvard Negotiation Law Review Symposium of February 2012 focused discussion on issues of effectiveness of ADR processes, though effectiveness is yet to be defined. Arguably, such a definition will include justice issues.

87. *See* Rachael Field, *Exploring the Potential of Contextual Ethics in Mediation*, *in*

The need for clearer ethical rules to ensure quality and accountability in mediation practice led to the development of accreditation and practice standards for mediators in Australia.[88] The Australian standards (the "Standards"), similar to American standards, specify practice and competency requirements for mediators; inform participants and others about what they can expect of the mediation process and mediators; set out minimum practice requirements; and allow mediators to develop or comply with additional standards, if they so wish.[89] The Standards also provide that in the event of conflict with relevant legislation, the legislation prevails to the extent of any inconsistency.[90] In addition, existing professional or organizational requirements prevail over conflicting practice standards relating to entry into mediation.[91]

C. Core Values of Mediation

Traditionally, mediation ethics were conditioned by core values of mediation: neutrality, self-determination, voluntariness, and confidentiality.[92] However, these values have been subject to

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ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 151–98 (Francesca Bartlett et al. eds., 2011) [hereinafter Field, *Exploring the Potential of Contextual Ethics*]. Field developed the theory of contextual ethics facilitated by relational party self-determination. Field describes contextual ethics as what is ethically appropriate and justifiable in the context of a given situation. This approach allows mediators to use their professional judgment to deal with ethical dilemmas. In the context of a mediation, Field argues that supporting the parties in achieving self-determination is the mediator's primary ethical responsibility. She uses the term "relational self-determination" to describe this, and argues that relational self-determination should guide contextual ethics for a mediator. *See also* Waldman, *supra* note 10. Waldman argues for ethical intuitionalism as the basis of mediation ethics. *See also* GENN, *supra* note 45, at 7–9.

88. MEDIATOR STANDARDS BD., *supra* note 9. *See also* SOURDIN, *supra* note 12, at 467–68. The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Austl.) mandated family dispute resolution practitioners become accredited under the Family Dispute Resolution Practitioners Accreditation Scheme. The NMAS became operative in January 2008. Mediators who opt in (who are voluntarily accredited) must comply with the Approval Standards as well as the Practice Standards. *See* MEDIATOR STANDARDS BD., NAT'L MEDIATOR ACCREDITATION SYS. STANDARDS (Mar. 2012) [hereinafter NAT'L MEDIATOR ACCREDITATION STANDARDS], *available at* http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf (Austl.).

89. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 1.4.

90. *Id.* cl. 1.5.

91. *Id.* cl. 3.1.

92. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 8.

challenge, particularly as strict adherence may perpetuate disadvantage and lead to unjust outcomes. In addition, mediators face ethical challenges when choosing between competing values.[93] Under the NMAS, the values that inform the Standards are neutrality/impartiality, self-determination, procedural fairness, voluntariness, confidentiality, and competence.[94]

1. Neutrality/Impartiality

Neutrality has been a traditional value of mediation, with the mediator referred to as a third-party neutral.[95] In the NMAS, mediators are not referred to as neutral third parties but "must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice."[96] Impartiality is described as "freedom from favoritism or bias,"[97] and focuses on conflicts of interest and the need for the mediator to disclose circumstances that may result in conflicts of interest. This represents a shift away from traditional understandings of the role of a mediator as a "neutral" third party and reflects the views of academics and practitioners who have argued against the essence of neutrality in mediation. Among them, Hilary Astor argued neutrality is merely aspirational and is incapable of being practiced by mediators.[98]

Although it would appear the NMAS has shifted away from neutrality as a core value of mediation, neutrality is still referred to in relation to competency, with various elements of impartiality being

93. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 202; Marshall, *supra* note 25; Macfarlane, *supra* note 82; Rachael Field, *Mediation Ethics in Australia–A Case for Rethinking the Foundational Paradigm*, 19 JAMES COOK U. L. REV. 41 (2012) [hereinafter Field, *Mediation Ethics in Australia*].

94. *See* NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cls. 2, 5, 6, 7, 9.

95. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 8 (preamble uses the term "impartial third party").

96. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cls. 2.1, 5.

97. *Id.* cl. 5.1.

98. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I*, 11 AUSTRALASIAN DISP. RESOL. J. 73 (2000) [hereinafter Astor, *Rethinking Neutrality*]; Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221 (2007) [hereinafter Astor, *Mediator Neutrality*]. *See also* Douglas, *Neutrality in Mediation*, *supra* note 31; Tony Bogdanoski, *Beyond the Paradox of Neutral Intervention: Towards a Situated Theory of Mediator Neutrality*, 21 AUSTL. DISP. RESOL. J. 146 (2010).

similar to elements of traditional neutrality.[99] Under the NMAS, a mediator "has no advisory or determinative role in regard to the content of the matter being mediated or its outcome."[100] Mediation is described as a primarily facilitative process.[101] The mediator manages the process[102] and does not provide advice or evaluate or determine disputes.[103] Because mediation is a process based on "the self-determination of the participants,"[104] the mediator may not be directive with the participants as to the content of the mediation, but the mediator may provide general (non-prescriptive) information consistent with a mediation process. All these requirements for the role of a mediator are described in similar terms to traditional neutrality, with the exception that the NMAS classifies familiarity of parties with the mediator as an element of impartiality. Where familiarity is present, disclosure may be required to address conflicts of interest.[105]

In practice, mediators do not ascribe to a single idea of neutrality. Some mediators understand their role as being neutral third parties. Susan Douglas supports this assertion, having found mediators adopt "neutrality as a principle guiding their practice," regardless of the fact that a dichotomy exists between the theory and practice of neutrality.[106] However, mediators interact with neutrality in different ways. For example, the concept of neutrality or impartiality may include different elements in other models of mediation, such as transformative mediation.[107] Sourdin comments that in transformative mediation, the mediator must be "detached from both the outcome and a process structure and order as this is determined by the parties."[108] Consequently, it is difficult to determine a single idea of neutrality in practice.

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99. SOURDIN, *supra* note 12, at 79.
100. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 10.
101. *Id.* cl. 2.3.
102. *Id.* cl. 2.5.
103. *Id.*
104. *Id.*
105. *Id.* cl. 5.
106. Douglas, *Neutrality in Mediation*, *supra* note 31, at 140.
107. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 47–48, 71–79; ASTOR & CHINKIN, *supra* note 6, at 149–50.
108. SOURDIN, *supra* note 12, at 81.

In Australia, many authors agree that, though relevant as a legitimizing concept, neutrality is difficult to practice and, when practiced, may perpetuate injustice.[109] Mediators influence mediation content and outcomes to a greater degree than is acknowledged in theory. For example, Linda Mulcahy argues neutrality is "synonymous with invisibility and passivity."[110] Sarah Cobb and Janet Rifkin "describe neutrality as a discursive practice that actually functions to obscure the workings of power in mediation, and forces mediators to deny their role in the construction and transformations of conflicts."[111] Astor, Douglas, and Rachael Field have argued for a more nuanced and contextual approach to neutrality. Astor focuses on the need to maximize party control and for the mediator to intervene where there is power imbalance, regardless of neutrality.[112] Douglas argues the distinction between process and outcome "grounds understanding of both mediator neutrality and party self-determination as key principles of practice," and since neutrality precludes the mediator from having any input into content and outcome, the ability of the mediator to ensure substantive justice diminishes.[113] She concludes more work needs to be done in relation to mediators' responsibility in the context of ensuring substantive justice.[114] Field argues for a contextual approach that values relational party self-determination.[115] This approach requires a shift away from mediator neutrality so that the mediator can address power

109. Astor, *Mediator Neutrality*, *supra* note 98, at 222–24; BOULLE, MEDIATION PRINCIPLES, *supra* note 7; Susan Douglas, *Constructions of Neutrality in Mediation*, 23 AUSTL. DISPUTE RESOL. J. 80 (2012); Susan Douglas, *Neutrality, Self-determination, Fairness and Differing Models of Mediation*, 19 JAMES COOK U. L. REV. 19, 25 (2012) [hereinafter Douglas, *Neutrality, Self-determination*]; Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 415–16 (2006); Rachael Field, *Rethinking Mediation Ethics: A Contextual Approach to Party Self-Determination*, 22 AUSTL. DISP. RESOL. J. 8 (2011) [hereinafter Field, *Rethinking Mediation Ethics*]; Field, *Mediation Ethics in Australia*, *supra* note 93.

110. Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Impartiality*, 10 SOC. & LEGAL STUD. 505, 509 (2001).

111. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35, 41 (1991).

112. Astor, *Mediator Neutrality*, *supra* note 98, at 222–24. *See also* Bogdanoski, *supra* note 98.

113. Douglas, *Neutrality, Self-determination*, *supra* note 109, at 37.

114. *Id.* at 40.

115. Field, *Rethinking Mediation Ethics*, *supra* note 109.

imbalances, as "it is not accurate to claim neutrality alongside claims that power imbalances can be effectively addressed."[116] As illustrated, the concept of neutrality remains a contested concept.

2. Self-Determination

Self-determination is a core value of mediation. It distinguishes mediation from other forms of dispute resolution where a third party determines the outcome of the dispute and imposes terms of settlement. In mediation, parties determine the outcome of the process. The NMAS provides: Mediation is essentially a process that maximizes the self-determination of the participants. The principle of self-determination requires mediation processes be non-directive as to content.[117] Based on the value of self-determination, mediation participants are responsible for identifying issues, developing options and alternatives, and making decisions.[118] The Standards provide that the "primary responsibility for the resolution of a dispute rests with the participants," and that the mediator is not to "make a substantive decision on behalf of any participant."[119]

These provisions legitimize self-determination as a core value of mediation. As with neutrality, the value of self-determination has been criticized, particularly in situations where a power imbalance exists between the parties. A party may be in a position of disadvantage for various reasons—including health, finance, lack of or poor education, or language difficulties—and the disadvantage may impact the party's capacity to exercise self-determination. In such circumstances, strict adherence to self-determination may mean the outcome of the mediation process favors one party over the other.[120] Field has proffered an alternative to neutrality and self-determination that solves this problem. She argues mediators need the freedom "to make active, responsive and engaged decisions about

116. Field, *Mediation Ethics in Australia*, *supra* note 93, at 68.
117. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 2.6.
118. *Id.* cl. 2.1.
119. *Id.* cl. 9.8.
120. *See* Gunning, *Know Justice*, *supra* note 44, at 88–89; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Delgado et al., *supra* note 44.

balancing the power dynamics between the parties [and] to work in ways that more strongly support a vulnerable party, or in ways that keep in check the controlling directiveness of another" in order for the concept of "relational self-determination," which is "rooted in party-connection, cooperation, collaboration and consensus," to develop."[121]

The Standards make provision for addressing power imbalances in a mediation process. Clause 4 provides that the mediator "shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process . . . ."[122] Interpreted narrowly, this clause only empowers the mediator to take steps that are consistent with the values of neutrality/impartiality and self-determination. As such, the steps taken must be procedural. Interpreted broadly, the clause provides an exception to the requirement of neutrality/impartiality and self-determination where control and intimidation by one party is evident. If this broad interpretation is accepted, it can be argued that—when there are competing values—a mediator can give precedence to one value over another, depending on the context, the relationship between the parties, and the nature of the dispute. This sits well with Field's preference for a contextual approach to mediation ethics. This approach allows the mediator to consider the context before resolving any ethical dilemmas she may encounter in a mediation process.[123]

3. Procedural Fairness

As discussed above, the relationship between mediation and justice is the subject of academic debate. The concern about mediation's ability to provide justice stems from the effect of neutrality and self-determination on mediation outcomes. If the mediator remains neutral when a party is unable to participate in the process due to a particular disadvantage that results from a power imbalance, will the outcome be just? Is the process just, and, even if

121. Field, *Exploring the Potential of Contextual Ethics*, *supra* note 87, at 197–98.
122. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 4.
123. Field, *Exploring the Potential of Contextual Ethics*, *supra* note 87, at 199–200.

the process is considered just, is the outcome of the mediation process just?[124]

The Standards provide a "mediator will conduct the mediation process in a procedurally fair manner."[125] Elements of procedural fairness include ensuring parties make free, voluntary decisions;[126] guaranteeing informed consent and a lack of undue influence;[127] providing the opportunity for parties to speak and be heard;[128] and ensuring balanced negotiation between parties.[129] In addition, since mediation is based on self-determination, the mediator must refrain from pressuring the parties to reach an agreement or to agree to particular terms.[130] To ensure parties are in a position to make informed decisions, the mediator should encourage the parties to obtain independent professional advice or information.[131] In the event self-determination and informed decision making are jeopardized, the mediator should terminate or suspend the process.[132]

Consequently, mediators focus on procedural fairness and not the substance of the outcome.[133] Ensuring procedural fairness is seen as a

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124. For a discussion of these issues for various disadvantaged groups, see Fiss, *supra* note 40; Michele Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989–1990); Delgado et al., *supra* note 44, at 1402; Nolan-Haley, *supra* note 68, at 99; Kathy Mack, *Alternative Dispute Resolution and Access to Justice for Women*, 17 ADEL. L. REV. 123 (1995); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is it an Alternative?*, 70 N.D. L. REV. 269 (1994). *Cf.* Stulberg, *Mediation and Justice*, *supra* note 71; Bush & Folger, *supra* note 65.

125. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 9.

126. *Id.* cl. 9.1.

127. *Id.*

128. *Id.* cl. 9.2.

129. *Id.* cl. 9.4.

130. *Id.* cl. 9.8.

131. *Id.* cl. 9.6.

132. *Id.* cl. 9.3. *See also id.* cl. 11.

133. For empirical research on justice quality and accountability in mediation practice, see AKIN OJELABI & MARY ANNE NOONE, LA TROBE UNIV., JUST. QUALITY & ACCOUNTABILITY IN MEDIATION PRACTICE—A REPORT, (2013), *available at* http://hdl.handle.net/1959.9/204815. *But see* BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 76 (arguing it is now conventional wisdom that mediators do influence the substantive content of settlement outcomes). *See also* Bush & Folger, *supra* note 65 (arguing transformative mediation is insensitive to discrimination, bias, and issues of social justice). *Cf.* Noone, *supra* note 39. Similarly, Stulberg argues that facilitative mediation will result in just outcomes if it is voluntary, interests are inalienable, outcomes are made public, dignity and respect is valued, parties make informed decisions, and conflicting fundamental values are tolerated. Stulberg, *Must a Mediator Be Neutral?*, *supra* note 72, at 829, 849–50 (2012).

guarantee for fairness of outcome, and fairness of outcomes is commonly based on the subjective view of parties. The test is whether the outcome is acceptable to the parties; is it an outcome they can live with? The Standards provide the mediator must support the "participants in assessing feasibility and practicality of any proposed agreement . . . in accordance with participant's own subjective criteria of fairness."[134] This clause clearly indicates that the criteria determined by the parties should be primary. The focus is on feasibility and practicality, rather than substantive justice. The outcome need only be practicable, workable, and reasonable from the point of view of the parties, and need not be based on any external legal or societal standards.

4. Voluntariness

With the increasing number of court-mandated mediations, the value of voluntariness as a basis for professional ethics has somewhat diminished. There is a difference between the traditional requirement of voluntariness[135] and the requirement under the NMAS. While voluntariness is required for entry into the mediation process, the NMAS focuses on voluntariness in agreement making and participation in the process.[136] A mediator may suspend or terminate mediation if a participant is unwilling to participate.[137] In addition, any final agreement must be voluntarily made and devoid of undue influence[138] or pressure[139] from the mediator. Additionally, a clear link exists between self-determination and voluntariness. A party should not be compelled to participate in a mediation process, nor should terms of agreement be imposed, if mediation is to conform to the spirit of self-determination.

134. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 9.7.

135. "In the early stages of the modern incarnation, mediation was defined as a system that was voluntary for all parties." BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 63.

136. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 9.3

137. *Id*. cl. 9.3.

138. *Id*. cl. 9.1.

139. *Id*. cl. 9.8.

5. Confidentiality

Another principle that creates ethical dilemmas for mediators is confidentiality. A mediation process is confidential, but, like other mediation principles, the definition of confidentiality in Australia is unsettled.[140] The Standards provide, "A mediator shall not voluntarily disclose to anyone who is not a party to the mediation any information obtained . . . ."[141] Disclosure is permitted: if parties have consented to such disclosure,[142] where the law requires such disclosure,[143] where information sought to be disclosed is non-identifying,[144] and where there is an actual or potential threat to human life or safety.[145] These exceptions accommodate the legal and public duties of the mediator to disclose in certain circumstances.[146] More problematic for mediators, however, is determining when a public duty arises. Is the existence of a duty to disclose a matter of scale and degree, or does it depend on the imminence of harm? The Standards do not address this issue.

6. Competence

The Standards provide the mediator must show competency in relation to skills, knowledge, and ethical understandings of, among other things, conflicts of interest, confidentiality, neutrality and impartiality, and fiduciary obligations, supporting fairness and equity in mediation, and withdrawal from and termination of process, when necessary.[147] The requirement of competency in relation to ethical understandings creates further tension between the underlying values of neutrality/impartiality and self-determination. An understanding of

140. *See* BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 669–715 (discussing current law).

141. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 6.1.

142. *Id*. cl. 6.1(b).

143. *Id*. cl. 6.1(c).

144. *See id*. cl. 6.1(a).

145. *Id*. cl. 6.1(d). The manner of disclosure must be permitted by ethical guidelines or requirements. *Id*.

146. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 691–704; SOURDIN, *supra* note 12, at 390–91.

147. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 7.3(c). *See also id.* cl. 11 (Termination of the Mediation Process).

the ethical requirements invoked by clause 7.3(c) may require the mediator to act in ways that conflict with the values of neutrality and self-determination. For example, this clause raises the fraught issue of the extent to which a mediator should support fairness and equity in mediation.

Another matter that arises is the requirement that mediators act as fiduciaries, and understand their fiduciary obligations.[148] It may be that the mediator owes fiduciary duties to both parties and must, accordingly, act in the best interests of both. Acting in the best interest of both parties necessitates a mediator be neutral and impartial, but neutrality precludes the mediator from certain interventions that may jeopardize the interests of a party and lead to an unjust outcome.

From the discussion above, it can be concluded that while the Standards provide some guidance to mediators on the requirements of ethical practice, they do not supply answers when mediators face the ethical dilemmas of competing values. These dilemmas might call into competition self-determination versus supporting fairness and equity in mediation; neutrality/impartiality versus supporting fairness and equity in mediation; neutrality/impartiality versus recognition of and addressing power imbalances; neutrality/impartiality versus ensuring informed decision making/consent; self-determination versus ensuring informed decision making/consent/reality testing of options; and self-determination versus the public interest.[149]

Another source of ethical challenge occurs when there is a conflict between a mediator's personal values and mediation values. These dilemmas arise because mediators constantly need to decide between different strategies and types of interventions when faced with competing mediation values. As stated by Lawrence Boulle: "All mediator interventions are based on mediators' perceptions and judgments which are never fully independent and disinterested in any absolute sense."[150]

148. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 726–28.

149. *See* Field, *Exploring the Potential of Contextual Ethics*, *supra* note 87; Field, *Mediation Ethics in Australia*, *supra* note 93.

150. BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 76.

Mediators rely on their personal values, consciously or not, to make these decisions. The Standards cannot cater to all situations. Macfarlane explores the link between fairness, mediating ethically, and the mediator's choice of intervention strategies.[151] She argues, "[E]thical judgment making occurs constantly, intuitively, and often unconsciously," and mediations present myriad ethical choices.[152] It could be argued that everything a mediator says or does has the potential to influence outcomes. Macfarlane suggests codes of conduct are unable to deal with the "complex and moral dilemmas of practice" and proposes a reflective practice approach to complement codes of conduct.[153] Samantha Hardy and Olivia Rundle argue for an inclusive approach to mediation ethics that can "provide guidance for mediators to engage in ethical practice" and "attempts to balance the need for consistency and accountability with the critical element of reflection on practice. It is based on four 'essential dimensions' of decision-making and good practice: accountability, critical reflection, cultural sensitivity, and consultation."[154] This approach, it is argued, will address the issue of competing mediation values and the inadequacy of mediation standards (codes) in addressing ethical dilemmas.[155]

IV. MEDIATORS' RESPONSES TO THE SCENARIO

A. The Scenario

This case has been referred to you by the Victorian Civil and Administrative Tribunal (VCAT) for compulsory mediation. It is a sexual harassment case brought under the Victorian *Equal Opportunity Act 2010*. The applicant is Maree Wilson, a twenty-three-year-old woman. The defendant is a large corporation.

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151. MacFarlane, *supra* note 82.
152. *Id.* at 59, 86–87.
153. *Id.* at 87.
154. Samantha Hardy & Olivia Rundle, *Applying the Inclusive Model of Ethical Decision Making to Mediation*, 19 JAMES COOK U. L. REV. 80 (2012).
155. *Id.* at 80–81, 88.

BACKGROUND

Maree started working for the corporation three years ago. After a year, she was transferred to a different department in the company. Her new boss, Steve, was highly regarded and considered a good manager. He seemed friendly and helpful at first, but soon Maree started to feel uncomfortable with him. She says he often stood close to her, and put his hand on her shoulder while looking at her computer screen. She says he also told her crude jokes and asked about her sex life. Maree talked to the HR manager about it, but the HR manager told her to toughen up and that—if she wanted to keep her job—she had to handle it without making a fuss.

When an opportunity came up for an employee to go on a training course, Steve said he would put Maree's name forward, saying, "One good turn deserves another," and "If you look after me, I'll look after you." Maree's co-workers told her that Steve has done this to other women, and there's no point in complaining because nothing will happen. Maree avoided Steve as much as possible, but, at a company drinks function, Steve stood next to her and put his arm around her, which made her feel extremely uncomfortable in front of her colleagues. The final straw was when he tried to kiss her.

THE MEDIATION

At mediation, six people represented the company: the HR manager, Maree's boss Steve, two company directors, the in-house legal counsel, and a barrister. Maree comes with a union solicitor.[156] You know from other mediations that sexual harassment is commonplace in this company and that management doesn't take action. You also know they will want to settle the claim confidentially to avoid publicity.

In her opening statement, Maree says that one of the reasons she is taking action is that she doesn't want it to happen to anyone else. As the mediation progresses, the union solicitor appears out of his depth. The company barrister says that Maree is incompetent at her job and Steve has to supervise her closely. When Maree starts to defend

156. In Australia, an employee's union will provide a lawyer to represent the employee. The lawyer is not representing the union and acts in the best interest of the employee.

herself, her solicitor motions her to keep quiet, but he doesn't say much in response to the allegations.

In private session with Maree and her lawyer, Maree tells you she wants the company to take sexual harassment seriously, and that the union has promised to publicize the case—it is very important to her that other young women not have to go through what she has. She also says she is finding the mediation quite stressful, is feeling bullied, and is not sure how long she can continue.

Eventually, the company makes an offer that Maree is considering accepting. The offer is conditional on Maree signing a confidentiality agreement. The mediator knows from experience that this offer is considerably less than Maree would be likely to get if she were to be successful in a sexual harassment case at the tribunal. Based on what has been said by the parties, Maree seems to have a strong case. Maree's lawyer doesn't seem to have a good grasp of the relevant case law and other awards in similar cases.

This case is typical of a sexual harassment case dealt with by VCAT under the Victorian *Equal Opportunity Act 2010*. Under that Act, applicants may either complain of sexual harassment directly to VCAT or may attempt to resolve the dispute by conciliation at the Victorian Equal Opportunity and Human Rights Commission (and then, if unsuccessful, turn to VCAT).[157] VCAT often refers these matters to mediation, in an effort to expedite the resolution and to give the parties an opportunity to resolve the matter between themselves with less formality.[158]

The potential ethical issues we identified in this scenario were power imbalance, lawyer conduct/competence, informed decision making (awareness of legal rights), substantive fairness, and public interest. However, in interviews with the mediators in the study, we allowed participants to identify whatever issues they saw as important in the scenario. The applicable code of conduct for the participants was defined by the NMAS.

157. *Equal Opportunity Act 2010* (Vic) pt 8 (Austl.).

158. For more detail about the operations of the Victorian Civil and Administrative Tribunal, see generally VICTORIAN CIV. & ADMIN. TRIBUNAL, http://www.vcat.vic.gov.au/ (last visited May 31, 2014).

Participants' responses to this scenario revealed a diversity of views, but also some common themes in both the identification of ethical dilemmas and how mediators address ethical issues. The different participants' responses reflect the tensions that exist between various values of mediation, including: self-determination and duty to manage power imbalances; self-determination and the role of the mediator to ensure parties make informed decisions; and mediators' ethical understandings in relation to fairness and equity and fiduciary obligations.

B. Public Interest and Confidentiality

In this scenario, the societal norms of protecting the public interest and confidentiality are in conflict. The mediator's prior knowledge of the corporation's culture of sexual harassment and its practice of ensuring the confidentiality of settlement outcomes could raise an ethical dilemma. Should the mediator rely on previous knowledge and be concerned about public interest issues where the corporation insists that all parties keep the settlement confidential? One participant highlighted the tension between the rights of the individual and the need to promote the public interest:

> *It's often the balance between the needs of the individual and the rights of the individual, and the establishment and maintenance of public standards through judicial systems; and there's tension here between all these things.*

In making a decision between competing values, one participant highlighted the relevance of personal values and convictions. For some, the public interest considerations outweighed the desirability of protecting the integrity of the process:

> *I'm afraid I couldn't go ahead. For me, I couldn't go ahead, it's too big. It's such an important matter, especially where we know now that people who are bullied and sexually harassed, it's potentially a danger to people's health, so people are [committing suicide] perhaps or becoming very unwell. So I would have to consider those issues, that she's already stressed and distressed and feeling bullied and how long can she continue, so others will be the same. So in that*

public interest versus integrity of process, I'd go for the public interest.

For this participant, if the company agreed to engage in a change process, she might have changed her view about withdrawing from the mediation; but she also struggled with the company's demand to keep the settlement confidential. Confidentiality, in her view, prevented important public interest issues from being made public.

Some participants maintained neutrality and impartiality, and privileged the integrity of the process over public interest considerations. Even if such a hierarchy would also create tension between personal values and mediation values, they would struggle against their personal convictions in relation to sexual harassment and the pervasive culture within the company:

I'd struggle with something like this personally because I think it's unethical behavior on the part of the company—here they have an employee who's done this before and is continuing to do this. And I know that I would struggle with that. So I would make a real effort to ensure that my behavior and my conduct in that mediation was professional and balanced at all times and that I wasn't in any way appearing to favor or give more time to one party over the other.

There was a divergence of views amongst the participants about whether mediators should be concerned about the broader public interest in these types of matters. A minority expressed a reluctance to participate in a mediation where the outcome was a confidential settlement.

C. Power Imbalances

The unequal numbers for each party at the mediation table in this scenario suggest a significant power imbalance between the parties generally and in representation at mediation.[159] This raises an issue of procedural fairness for the mediator, and whether and to what extent

159. BOULLE & ALEXANDER, *supra* note 7, at 299–300.

a mediator may address power imbalances arising from the characteristics of the parties.

Most of the participants identified significant power imbalances between the parties in relation to the number of people representing each party and the nature and characteristic of the parties (large company versus young, female employee). Other sources of power imbalance identified were victim/perpetrator, boss/employee, unequal bargaining powers in terms of resources and information, experienced lawyer/unexperienced lawyer, and one party being more emotionally engaged than the other. All of these aspects indicate a power imbalance between the parties.

In regards to the unequal number of parties, most participants thought the representation issue should have been addressed in the pre-mediation process, referred to as the "intake." During the intake, the number and roles of each attendee should have been discussed and determined. If these elements were not discussed at intake, however, participants could address the issue in a number of different ways: limit the number of people who may be in the room; ask Maree how she felt about the number of people in attendance from the company; or engage in shuttle mediation as a last resort.[160] Many participants were of the view that the number imbalance was also a matter to acknowledge at the start of the mediation, even if nothing was done to change the situation. Seven interviewees said the intake process should have been better, not only to deal with the issue of the number of people attending the mediation and their roles but also to have enabled discussion with the parties to ensure they came well prepared.

Another issue that leads to a power imbalance is the apparent incompetence of Maree's lawyer. His lack of legal knowledge and relevant information could impact Maree's ability to make an informed decision. Although most participants believed legal representation generally ameliorated the impact of a power imbalance, the possible incompetence of Maree's legal representative in this scenario created a dilemma for some participants: Should a

160. For a discussion of shuttle mediation, see *id.* at 267. This is where parties are in different rooms and the mediator moves between them, shuttling messages back and forth between the parties.

mediator intervene in a lawyer/client relationship, or not? Clause 4 of the Standards provides that a mediator should take appropriate steps to manage a power imbalance in mediation.[161] Clause 8 provides that a mediator should respect relationships with professional advisers.[162] Where a legal representative is not ameliorating the impact of a power imbalance but contributing to it, what should a mediator do?

Most participants identified this dilemma. However, views diverged on whether or not to intervene.

> *I think what I've learned from experience is that it's not a useful place for me to go in my head, making those judgments [about the competence of a legal representative]. I'm better off to be focusing on my own job and a big part of the way I practice is to be looking for the best in everyone in the room, including the lawyers, and I find the process works best when I'm supporting everybody in the room to do their best, including the lawyers. And I think what I've learned from experience is that often those impressions are wrong. So you can have that impression of a lawyer and then usually they turn out to be reasonably good and know what they're doing, they might just have a different way of doing it or a different approach or they might also be playing me a bit.*

Another participant said she would not be concerned about the lawyer's competency at all; it is a matter for the client:

> *It's not my place as a mediator to judge whether the lawyer is competent or not. That is the lawyer the party has engaged to represent him or her. If a client is dissatisfied with advice given by their lawyer, that client may have a potential claim against the lawyer. If the lawyer is clearly unethical by being fraudulent, for example, I would have to terminate the mediation after seriously considering the situation.*

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161. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl.4.
162. *Id.* cl. 8.

Another considered intervening and holding a separate session with the lawyer:

> *And so it may be that I have a conversation with the lawyer to check, you know, what's your experience in this area?*

Alternatively, another would meet with the lawyer and Maree separately, and one participant would challenge the competency of the lawyer this way:

> *So the options would be to meet with the lawyer and the client separately without the other being present, but with the consent of both or at least the client, and just to point out to the client—just assess whether she feels informed and advised on her legal rights and does she have any option in that regards. And with the lawyer too—I think it depends very much on the status of the mediator, but it could be right up to the point of saying there's been a lack of professional conduct, but I think most mediators would take a slightly softer line than that.*

And another participant advocated for a more forceful approach:

> *I would take the union lawyer out and thump him, but not in the presence of his client. And I would ask him does he know what VCAT is likely to do in this sort of case . . . does he know about the relevant cases, and I don't think I'd hesitate to discuss them with him. He's a different category. But that's outside and not in the presence of his client.*

Some would attempt reality testing[163] with the lawyer as to the adequacy of settlement, and in relation to his awareness of court and tribunal decisions in similar cases. For some, such reality testing would be done in a joint session, to put the lawyer on the spot and to allow the client to get a sense of the lawyer's incompetency, but not directly telling the client the lawyer is incompetent:

> *Well I might ask—try and get him to go through with her, you know, look what's her best case scenario, what's her worst*

163. *See supra* note 11 and accompanying text.

case scenario. And perhaps, I guess, put them on the spot a bit—with her in private session this is—and if it feels—if she gets the sense, well maybe he doesn't know all the answers.

Another issue arises when a lawyer restricts his or her client from participating in the mediation process. Again, there is a divergence of views around how to address this issue. Most participants expressed concern, because mediation should enable a party to express her needs and interests. Some participants said they would try to encourage Maree to speak if she wanted to. And in private session with Maree and her lawyer, they would ask him what his concerns were in relation to her speaking in front of the other party. One participant said her practice is to ask lawyers to remain silent in the mediation and to have the clients speak.[164] Lawyers would be given the opportunity to speak with their clients separately if the need arose.

D. Substantive Fairness

Mediators are committed to procedural fairness but differ in their concern for substantive fairness. For some mediators, the challenge is determining strategies they can employ to ensure substantive fairness—especially if one party is clearly disadvantaged—without contravening the ethical requirements of neutrality/impartiality and self-determination. A mediator who handles many anti-discrimination cases at VCAT may be aware of VCAT decisions in similar cases. Is it appropriate to draw on this knowledge? Does a mediator have an ethical responsibility to ensure the mediation outcome reflects the wishes of a less powerful party? In this scenario, we examined whether mediators saw themselves as having any responsibility for substantive fairness where one party has inadequate legal representation.

As stated above, clause 9 of the Standards provides that a mediator should conduct the mediation in a procedurally fair manner.[165] Clause 7 provides that a mediator must demonstrate

164. This approach would have been discussed during the intake process.
165. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 9.

ethical understanding in relation to fairness and equity.[166] In assessing the fairness of the outcome, the Standards privilege parties' subjective criteria over any other.[167] Participants' views were, to a large extent, in line with these provisions.

Most participants believed a mediator should not be concerned with the substantive fairness of the mediated outcome. As one participant commented:

> *My role is not to create justice.*

For these mediators, the mediator need not be concerned with the adequacy of a monetary settlement offer, because decision making lies with the parties, not the mediator. Very few participants thought the mediator should assess whether the deal is reasonable.

> *I don't think it's our role to get involved in the adequacy of the settlement—I think you've got to be fair in the process, but I don't think it's our role, unless it's something that's unconscionable and you think, well I might terminate the mediation—but in terms of a general rule it's not our role to actually say, well that's not an adequate settlement.*

However, some mediators struggled to balance knowing that an outcome is substantively unfair and wanting to do something about it, on the one hand, and maintaining the integrity of the process, on the other hand:

> *As a mediator, I think we need to be very wary of forming any judgments around the strength of someone's case, the estimate of what a court might give them and also the skill level of the legal representative. The scenario suggests that the mediator has a view on them all and any view I might form, again, I just notice it myself and hold it very lightly because it could be very wrong . . . . Why do we turn our mind to that? Part of it is because we're concerned about just outcomes, even though we know it's not our realm to be assessing what is a just outcome, we have a broad sense of wanting to not be*

166. *Id.* cl. 7.
167. *Id.* cl. 9.7.

part of something that's unjust and that's the line you're trying to tread.

The unwillingness to assess the offer against what a tribunal might award stems from a range of reasons, including the unpredictability of court or tribunal outcomes and the reality that parties may be content with non-financial benefits of settling a matter—particularly in cases where there is a high level of emotional engagement, as in a sexual harassment case. Many participants were concerned about Maree's emotional vulnerability, because she had mentioned feeling bullied and harassed. As a result, the participants considered the risks for Maree in having her case heard and determined by a court or tribunal. In particular, they considered the cost, unpredictability of outcome, time, and loss of opportunity involved in legal proceedings. They also thought about the non-financial benefits of settling the matter at mediation, including: Maree's ability to get on with her life, the possibility of the company agreeing to systemic change, recognition by the company of the sexual harassment's impact on Maree, and other personal reasons the mediator may be not be aware of. This group of participants considered it the role of the mediator to assist Maree in negotiating these outcomes.

Fewer participants were of the view that the mediator has an affirmative duty to be concerned with substantive fairness. These participants assessed whether a settlement offer fell within the usual range of settlement in similar cases. If the offer did not, some participants would make a judgment on the adequacy of the settlement and support a party in getting a fair deal:

I don't think you can just let someone do a really bad deal. So if it's just she's being offered a bad deal, I think you would really try and not have her agree.

Rather than being concerned about the justice of the outcome, some participants focused on whether a party had made an informed decision about the acceptability of the offer. These participants linked procedural fairness with substantive fairness. For these mediators, a

procedurally fair mediation should positively impact the fairness of the outcome:

> *It's around the participant's ability to make a decision—my assessment of their ability, so it's not the content of the decision.*

While a mediator may be uncomfortable with the outcome personally, the assurance that the mediator has conducted a procedurally fair process in relation to informed decision making mitigates the tension:

> *I think it's justice in access to information and options. So I might disagree with the outcome, but I would be comfortable with the outcome as long as I felt that the participants came to that outcome with all the information available to them. And not that they came to that decision because they felt that was the only outcome available to them.*

Another mediator agreed that the ethical requirement was to ensure the process allowed parties to make informed decisions:

> *Under the National Mediation Standards, I can't give advice, and the mediator's hand must not be seen in any agreement, but I do think it's absolutely my responsibility to ensure that people have had an opportunity to be informed.*

One mediator commented that mediation should be measured by fairness of the process and not the outcome:

> *I think that mediation is best measured by the process [and] not by the outcome. So I don't hang my hat on outcomes necessarily.*

Although all participants agreed that mediators have a positive duty to provide a fair process, only a minority considered they had an active responsibility to ensure a fair outcome. For all participants, a fair process involved parties being able to make a fully informed decision.

E. Informed Decision Making (Self-Determination)

It is the role of the mediator to maximize a party's decision-making power.[168] Mediators do this by providing opportunities for a party to be heard and to obtain information relevant to their decision making. The Standards emphasize the importance of informed decision making.[169] All participants considered it their role to ensure the parties made free and informed decisions in the mediation process. This Article has previously discussed both the role of a legal representative in providing relevant information and the appearance of incompetency as it affects the capacity of a party to make informed decisions; this part details participants' responses to Maree's feelings of being bullied and stressed, and the impact of those emotions on her decision-making capacity—particularly because she appeared to be agreeing to an outcome not in line with her initially desired outcome.

Some participants (five) were of the view that Maree's feelings of being bullied and stressed affected her capacity to make a free and informed decision. Most mediators would take steps to ensure that the mediation process was a positive experience for Maree. Some considered adjourning or terminating the mediation if Maree continued to feel bullied and stressed, as it was believed those emotions would negatively impact her capacity to make informed decisions.

In regards to Maree's decision to accept a different outcome than originally desired, most participants (fifteen) said the decision about outcome was up to Maree. They would respect her decision, provided she was of sound mind and had enough information. As discussed above, she may have other reasons for settling, including the cost of a court or tribunal hearing, the uncertainty of the outcome, and the emotional strain of continuing. Ultimately, it was up to her to identify her own priorities. Even if the participants thought Maree could do better, they would not intervene:

> *It's around the participant's ability to make a decision—my assessment of their ability, so it's not the content of the*

168. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl. 2.
169. *Id.* cls. 9.1, 9.5, 9.6.

> *decision. If they decide to walk away with $2.50 and they can explain it to me clearly, that's fine. But if they get themselves in a muddle or contradict themselves or are changeable or are exhausted or are under pressure from someone else—so it's the purity, the veracity, of their decision making. So I'm making an assessment of their process, but not of their content.*

All participants considered it crucial that parties are able to make informed decisions in the mediation. Factors that would cause concern for them in this regard included a party feeling bullied or stressed, and a party changing her mind about her desired outcome. The main issue the participants would look out for is whether the party's decision-making capacity appeared to be affected

V. STUDY: MEDIATORS AND ETHICAL ISSUES

This research confirms that even amongst experienced mediators, there are a variety of views about what constitutes an ethical issue for a mediator. Furthermore, this study indicates that once mediators recognize an ethical dilemma, they are guided by codes of conduct, social norms, and personal values. However, the dominant framework in mediators' decision making varies between mediators. Where codes are unclear, mediators are guided by societal norms and personal values. Both the model of mediation being practiced and what they considered to be the role of the mediator influenced the mediators' responses.[170] In this part, we draw on participants' responses to all of the scenarios, not only the sexual harassment scenario detailed above, to demonstrate the variety and divergence in responses to ethical issues.

Participants agreed a proper intake process plays a critical role in mediation. Most participants stated they would have avoided the specific challenges raised in the scenarios by conducting a thorough intake process. In addition to the purposes of intake described above, the intake process provides an opportunity to assess whether the matter is suitable for mediation and whether the parties have

170. Nineteen respondents described themselves as facilitative mediators and two as transformative mediators.

particular needs, e.g., they may need an advocate or support person. Intake also provides a chance to encourage the parties to obtain information or advice before the mediation, and to discuss who should attend the mediation and in what role. The participants contended a thorough intake process could avoid the range of ethical dilemmas contained in the scenarios.

All participants articulated the need for the mediator to remain impartial and neutral, but what that meant differed between participants. Some were more willing to intervene when they perceived "unfairness." There were varying views about what distinguishes the content of a mediation from the process; and this difference in views informs the strategies and interventions employed by the mediator. Mediators need to be able to identify issues relating to a lack of capacity and power imbalance. In doing so, mediators are making assumptions they then put to the test in reality testing with the parties, to assist the party in identifying and naming the situation. This supports other research, and confirms the literature in relation to the impracticability of neutrality and impartiality, and the tenuous divide between process and content.[171]

Participants commonly described the role of the mediator as "helping the parties fully explore their options and understand the consequences of their decisions," to help the parties get the best possible outcome. Party self-determination was seen as an important element of mediation and uniformly guided the participants' responses. However, participants recognized this underlying value causes significant tension when the proposed outcome is viewed as "unfair" by the mediator. Some mediators were much more conscious than others about competing values or dilemmas, such as party self-determination and substantive fairness, or informed decision making and the mediator's inability to give information.[172]

Similarly, the interviewees recognized the key responsibility of mediators to pay particular attention to significant power imbalances,

171. *See supra* Part II.C.1 on Neutrality/Impartiality.

172. The findings of Marshall, *supra* note 25, and Douglas, *Neutrality in Mediation*, *supra* note 31, are consistent with ours: mediators placed importance on party self-determination but were also mindful of "fairness" of outcomes and dilemmas of how to remain neutral in the face of injustice.

which could impact a party's ability to make autonomous decisions or render a matter unsuitable for mediation. Few participants expressed concern about the fact that the parties were ordered to attend mediation by the tribunal and did not have a choice about whether to participate or not.

The mediators in this research valued procedural fairness and would create opportunities for parties to speak and be heard. They would ensure a party is not unduly influenced or pressured into accepting terms of settlement. Some participants were prepared to adjourn the mediation before finalizing the agreement, to give a party the opportunity to reconsider his or her options if the party's capacity were a concern. Mediators indicated that once they were convinced a party had made an informed decision through reality testing, they were generally not concerned about the substantive outcome. If mediators believed the party had fully thought through the consequences of his or her decision, they were less likely to deviate from the principle of party self-determination and withdraw from or terminate the mediation (due to concerns about substantive justice).

Other common responses considered the nature of potential settlements. One response was that the mediator should not make assumptions about parties and the likely outcome if a matter were to be decided by a court or tribunal. Additionally, participants thought a mediator should not be concerned about the adequacy of settlement but should support parties to reach an agreement that satisfies their needs and interests—while bearing in mind that parties may consider non-financial benefits to be more important than a monetary settlement.

However, a minority of the mediators did feel responsible for the justice of the outcome. If they saw one party as being too vulnerable or the power imbalance too great, as to lead to an unconscionable agreement, these participants were more likely to withdraw or terminate the mediation. Despite the substantive judgment aspects at play in such a determination, they tended to describe this as being an issue of procedural fairness rather than substantive fairness.

A. Informed Decision Making

Participants viewed informed decision making as a crucial element of self-determination. Parties need to be fully informed in order to properly participate and make a decision about settlement; this includes having access to legal or financial advice. In the consumer scenario,[173] where one party had received no advice, the study participants were willing to adjourn the mediation to give the party time to get legal advice. They all felt a responsibility to raise the issue with the party, and would actively encourage him to suspend proceedings and get advice. The amount of information each participant would give such a party varied. Some participants would give specific details of agencies he could approach; some would only give him general information about the availability of free legal services and consumer organizations. One participant said she would give him information about the legal system, and another said he would be willing to generally inform him about the applicable substantive law. Both drew a distinction between giving this kind of objective information and giving advice that is seen as inappropriate. Two other participants said they would give advice on negotiating strategy and on the mediation process. This distinction between information and advice is often unclear, and the responses indicated variability in understanding amongst mediators.

B. Reality Testing

Reality testing—or asking questions in private session to determine whether the party understands—was the most significant tool used by the mediators to ensure parties made informed decisions. The sorts of questions the mediators would ask and the degree to which they would "push" particular parties was informed by a sense of fairness as well as other factors, such as whether the party had a legal background.

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173. This was a scenario in which a matter had been referred to mediation by a tribunal in relation to proceedings issued because of a default on car loan repayments. The parties, who were both unrepresented, were a car yard and a consumer.

There is growing recognition that mediators cannot be neutral or impartial as they bring their own values and interests to the mediation.[174] The mediators in this study generally acknowledged this tension. Most participants stated mediators should not be concerned with the adequacy of settlement. They felt substantive justice should not be the main concern of the mediator, although mediators generally do consider it. However, the responses in this study also show that mediators often use strategies to influence the outcome so it is consistent with their own values.[175] For example, in the sexual harassment scenario discussed above, respondents indicated they would use their skills to reality test options being considered by the party in ways that may create doubts in the mind of the party. This use of reality testing was believed to assist the parties in making informed decisions:

> *I can use my skills to reality test in a way that creates enough opportunities in her mind for her to question whether or not she's got enough information to make an informed decision.*
>
> *My main response to this one is focusing in private sessions on what she really wants. So what are the consequences for her of standing her ground or of accepting an offer, and talking through that very realistically because I feel it's an important part of my job to support a party in whatever choice they want to make, but to do my best to ensure they're not making that choice under any illusions, so that they've looked at the harsh reality of what's involved in that path.*

Reality testing of options was considered by all participants an important tool to ensure informed decision making and procedural fairness. However, the extent, content, and form of reality testing differed significantly and were informed by the mediators' values. In the sexual harassment scenario above, most of the responses focused

174. *See, e.g.*, BOULLE, MEDIATION PRINCIPLES, *supra* note 7, at 71; Astor, *Rethinking Neutrality*, *supra* note 98, at 74.

175. Babette Wolski, *Mediator Settlement Strategies: Winning Friends and Influencing People*, 12(4) AUSTL. DISP. RESOL. J. 248, 249 (2001); MacFarlane, *supra* note 82, at 58 (discussing the ways mediators choose intervention strategies).

on reality testing with Maree, although four participants talked about reality testing the company. Those participants would ask the company questions about the impact of a hearing, the impact of making the settlement public, and so on. In relation to reality testing with Maree, some participants would focus on the costs of going to a hearing; others would focus on her legal rights; and a third group would focus on the discrepancy between expressed needs and interests with the settlement offer she is ready to accept. Two participants said they would try to help her realize she might be able to get a better outcome and encourage her to push for a higher offer.

C. Termination

The Standards state a mediator may suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants.[176] Additionally, the mediator may withdraw from mediation when the participants are reaching any agreement the mediator believes is unconscionable.[177] Five participants said they had never had to terminate a mediation, and most said they did it rarely. Other reasons or examples given by participants for termination of a mediation included: a party with anger management problems and the mediation was not working; a serious threat of harm; a party not negotiating in good faith; misleading conduct that involved misrepresentation about financial circumstances materially relevant to the mediation; conflict of interest when it emerged in the mediation that the mediator knew the partner of one of the parties; extreme verbal abuse; bullying tactics; a party's lawyer tampering with the process or being uncooperative; parties unable to negotiate properly; and the involvement of an interpreter not skilled enough to enable a party to really understand what was happening. Clearly, terminating a mediation is a significant decision for a mediator to make, and the participants' responses indicated it was a measure of last resort.

176. NAT'L MEDIATOR ACCREDITATION STANDARDS, *supra* note 88, cl.11.
177. *Id.* cl. 11.3.

CONCLUSION

For those concerned with ensuring mediation enhances rather than diminishes justice, the question of what constitutes ethical mediation practice warrants ongoing reflection, discussion, and action. In Australia, a number of scholars and practitioners propose a contextual and nuanced approach that relies on mediators being reflective practitioners.[178] In this Article, we presented the responses from experienced mediators to a range of ethical issues contained in hypothetical scenarios. As expected, some responses were uniform but—more interestingly—the respondents significantly diverged on a number of matters. The detailed and thoughtful responses indicate that many experienced Australian mediators already take a reflective and contextual approach to ethical challenges.

However, the mediators' responses indicate that despite a common set of standards and the agreed critical value of self-determination in mediation, mediators have varying moral compasses that lead to a variety of responses to ethical and practical challenges. This is not unlike other professions. The current high utilization of mediation and the lack of public accountability of mediators necessitate further research and an ongoing critical reflection from both the mediation sector and scholars.

178. Field, *Mediation Ethics in Australia*, *supra* note 93.

APPENDIX

The following provisions from the National Mediator Accreditation System Practice Standards are relevant to the sexual harassment scenario discussed in Part IV:

1. Self-determination:
    a. Purpose of mediation is to maximize participants' decision making. (cl. 2).
    b. Mediators do not advise upon, evaluate, or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximizes the self-determination of the participants. The principle of self-determination requires that mediation processes be non-directive as to content. (cl. 2.5).
    c. Some mediation processes may involve participants seeking expert information from a mediator that will not infringe upon participant self-determination. Such information is deemed to be consistent with a mediation process if that information is couched in general and non-prescriptive terms, and presented at a stage of the process which enables participants to integrate it into their decision making. Such information might include the provision of general information and a reference to available material that could assist the participants. (cl. 2.6).
    d. The primary responsibility for the resolution of a dispute rests with the participants. The mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant. (cl. 9.8).
    e. The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome. The mediator can advise upon and determine the mediation process that is used. (cl. 10).
    f. Consistent with the standards relating to impartiality and preserving participant self-determination, a mediator may, with the clearly informed consent of the

participants, provide the participants with information that the mediator is qualified by training or experience to provide. Such information should be couched in general terms. (cl. 10.1).

2. Addressing power imbalances:
    a. Mediators shall have completed training that assists them to recognize power imbalances and issues relating to control and intimidation, and take appropriate steps to manage the mediation process accordingly. (cl. 4).
3. Impartial and ethical practice:
    a. A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice. (cl. 5).
4. Inter-professional relations:
    a. Mediators should respect the relationships with professional advisers, other mediators, and experts which complement their practice of mediation. (cl. 8).
    b. Mediators should promote cooperation with other professionals and encourage clients to use other professional resources when appropriate. (cl. 8.1).
5. Procedural fairness:
    a. A mediator will conduct the mediation process in a procedurally fair manner. (cl. 9).
    b. A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent. (cl. 9.1).
    c. To enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information. (cl. 9.5).
    d. Participants should be encouraged, where appropriate, to obtain independent professional advice or information. (cl. 9.6).
    e. It is a fundamental principle of the mediation process that competent and informed participants can reach an agreement which may differ from litigated outcomes.

> The mediator, however, has a duty to support the participants in assessing 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 and, where appropriate, the interests of any vulnerable stakeholders into account. (cl. 9.7).

6. Termination of mediation process:
   a. The mediator may suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants. (cl. 11).
   b. The mediator may withdraw from the mediation process when any agreement is being reached by the participants that the mediator believes is unconscionable. (cl. 11.3).