Swindlers, Dealmakers and Mediators: A Brief History of Ethics in Negotiation
by Robert Benjamin

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Stripped of all the lofty purposes and noble intentions in which we seek to enwrap ourselves as professional mediators and conflict managers, what we are at core are dealmakers. There have been third parties involved in brokering business deals, treaties, and conflicts since the beginning of time but only in recent years have we begun to formalize and professionalize that role. And while we would like—or need—to believe we are making the world a better place as peacemakers, that is not always how middlemen and collaborators have been viewed through history. Similarly, negotiation, the heart of mediation, has generally been viewed in Western cultures as a sign of weakness, preferred by the faint of heart. There remains a strong cultural antipathy and resistance to negotiation and mediation. After all, would John Wayne, an American cultural icon, negotiate? Historically, many dealmakers were considered outright swindlers; pragmatic opportunists without scruples. Arthur A. Leff, a Yale Law professor, aptly noted the thin line between swindling and selling and challenges many of our simplistic notions of honesty. According to Leff, an important observation for mediators to keep in mind is that negotiated exchange has many characteristics of a con-game, and to the uninitiated is indistinguishable. (Leff, A., Swindling and Selling, Free Press, 1976)

Negotiation also carries a taint of being immoral and sinful. Drawn from Christian theology, Satan is the archetype of evil in the world. His primary modus operandi is to tempt, persuade and negotiate for your soul. The Faustian deal with the Devil has become the primary metaphor that haunts every difficult negotiated settlement. (Benjamin, R.D., “Negotiation and Evil: Moral and Religious Resistance to the Settlement of Conflict,” Mediation Quarterly, 1998)

Present day mediators tend to ignore and dismiss the relevance of that past at their peril. That history continues to influence the current public acceptance of mediation. Fending off that past also appears to drive mediators’ preoccupation with how mediation is practiced and in particular the obsession with the formulation of ethical principles and standards of practice.

The mediator...never a prophet in her own land

Historically, negotiation and mediation have seldom been the first option to be considered for managing conflict and mediators have often been viewed with some suspicion. They largely work deals behind the scenes and, as agents of reality, deliver unwelcome messages to one or more parties who feel violated by another’s actions. Most people find conflict distasteful, if not outright disgusting, not unlike garbage or other forms of pollution that they want out of sight. Mediators are obligated to deal with that conflict, as distasteful as it may be, and can become tainted in the process. Ethical guidelines might help, but are not likely to cure the basic public perception of the

mediation process as ineffectual or inappropriate, and the mediator, who counsels compromise, as suspect.

Examples abound throughout history. Neville Chamberlain will forever be remembered as a notorious appeaser who was duped by Hitler and sold out the former country of Czechoslovakia for “peace in our time.” Talleyrand, a French diplomat, best known as an architect of the Congress of Vienna in 1814-15, that arguably allowed Europe a century of peace, is still considered by many to be of questionable moral character, even by the French. Those Jewish groups who negotiated with Hitler’s Third Reich in the early 1930s for the release of Jews from Germany before World War II, remain detested by many Jews around the world. President John F. Kennedy was second guessed and almost undermined by his own advisors because he pursued negotiations with Soviet Premier Kruschev during the Cuban Missile Crisis in 1962, despite the risk of all out nuclear war. Each of those negotiations presented anguished choices. Even though these examples are taken from the geo-political context, the same personal professional strains remain regardless of the matter or dispute context in question.

The “enlightened” mediator

In the post World War II era and the dawn of the Cold War, it became clear that unfettered confrontation and competition was too costly and deadly. Many thought that negotiation could be unhinged from its dubious past and reconstituted as a quasi-scientific process for resolving conflicts. Fisher and Ury’s, Getting to Yes summarized and articulated the idea of “principled negotiation,” an interest–based approach to negotiation that presumes people will act rationally and predictably out of their self-interest.

Despite the rationalist cover, however, negotiation remains problematic because it essentially challenges the core Enlightenment principles of reason and the quest for the truth, which are the bedrock of “techno-rational” society’s belief system. Negotiation often requires that the pursuit of the truth of a matter be set aside in deference to reaching a pragmatic understanding. If you are right, and the evidence backs you up, negotiation is nothing less than an unprincipled sellout. The “myth of rationality” is firmly ingrained in our system of thinking, and negotiation fights against that mythology every step of the way.

Similarly, the mediator role does not jive with traditional notions of what it means to be a professional. Unlike mediators, as ministers of their particular discipline, other professionals are expected to possess a substantive expertise. And, borrowed from the scientific culture, the traditional professional is expected to be an objective, dispassionate, neutral. By contrast, if mediators are to gain the trust of the parties in conflict, they cannot afford to be removed and “above the fray.” While not the manipulative and deceptive agents of the past, neither can mediators take refuge in the traditional professional model. Sometimes the preoccupation of standards of practice with establishing the mediator as a neutral or impartial agent can appear to be little more than an overwrought effort to rehabilitate and cleanse the image of a mediator. Those standards can constrain the mediator’s flexibility and the movement necessary to make an agreement work.

While other professionals can establish artificial standards of conduct, mediators must directly confront peoples' raw conflicts that do not fit neatly into any discipline. Mediators must confront people in conflict who very often do not think or act rationally, at least, in the conventional sense of being rational. Even the notion that people predictably act in their own self-interest is often sorely tested. Parties are often unable or unwilling to straightforwardly articulate or state their "interests and needs" which are embedded in fears or other complex motivations that are strategically disguised or go unrecognized in the negotiation process. Few people are the rational beings we often pretend to be—not when we buy a car, decide to marry or start a business. Thus, to ask people in conflict, directly or by implication, to be trusting, cooperative and reasonable, borders on the absurd. When people are afraid of being played for a fool, swindled or duped in negotiation, as many are, the mediation process makes little sense. For mediators to present themselves as removed, distant "neutrals," does little to address the underlying fears of a party.

Early in their practice, most mediators discover that they must sometimes abandon their manual of techniques and draw on their intuition, wit, guile and "gut instincts" to reach a settlement. That may include the use of strategies drawn from an inner reserve of "crazy wisdom" that defies established standards of practice. This is the source of what Peter Adler calls "unintentional excellence." (Bowling and Hoffman, Bringing Peace into the Room, Jossey-Bass, 2003). Sometimes the very reason mediators are effective in managing a dispute is because the mediator and the parties have been willing to bend or ignore established rules, policies or regulations. Force fitting practice into closely cropped ethical parameters might well compromise the effectiveness of the process rather than support it.

Pledged fealty to impartiality and neutrality may well get in the way of the work a mediator must do to be effective. Clearly a mediator cannot take sides and needs to be balanced, but that is far removed from being a disengaged, dispassionate neutral. Being actively engaged is essential for effective mediation practice. The "cool-headed reasoner," viewed as the ideal in our hyper-rational culture, is an illusion unsupported by scientific research, suggests Antonio Damasio and a growing number of neurobiologists. Not surprisingly, neutrality is a notion that experienced mediators may discard relatively soon after their initial training.

Crafting ethical standards in a morally ambiguous terrain.

In developing standards of practice, we need to ask who is being protected from whom or from what? And, what actions by a mediator would most alarm us and need to be guarded against? In addition to protecting the parties, how do we also protect ourselves from ourselves, from our own best intentions to help that can undermine the mediation process? The last quarter century lends some hope that the practice of negotiation and mediation may continue to evolve as viable and accepted modes of conflict management. At the same time, the history of the craft cannot be changed and should not be denied. It holds within it important lessons for the realistic design of the current field. The formulation of ethics and standards of practice are essential for the shaping and structuring of the conflict management field and as a foundation for professional mediation practice. The risk, however, is that we might become so pre-

occupied with ethics in an effort to distance ourselves from the past that we lose sight of what is necessary to be competent practitioners.

For centuries, negotiation and mediation have been practiced without the benefit of written ethical codes of conduct. Just a scant 20 years ago, at a meeting of the Society of Professionals in Dispute Resolution, a discussion about ethics with a highly regarded Federal Mediation and Conciliation Service mediator brought a puzzled look to his face, as if to say, “what does ethics have to do with getting an agreement between a labor union screaming for workers’ rights and an entrenched management determined to hold the line? My job is to get both sides to sign a collective bargaining agreement that neither side really wants but that will end a debilitating strike. Anything that works toward that end is fair.” He had been around long enough to remember first hand the origins of his agency, established by the National Labor Relations Act to bring some order to the literal life and death struggles of the labor movement in the 1930s, where the only ethical precept in play was making a deal that would forestall or limit bloodshed.

In some ways, the field has changed, but perhaps not as much as we would like to believe. Many disputes today can be just as explosive and the mediator’s role just as difficult. Are we ready to expect, let alone demand, that mediation services be conditioned on the presence of a “level playing field?” Can we truly assure the self determination of the parties, or that parties will participate in “good faith?” How do practice standards that obligate the mediator to protect children or other parties reconcile with the mediators’ first responsibility to pursue a potential agreement—not at all costs—but actively and thoughtfully? Ultimately, we will need to come to grips with how a practitioner’s strategies and techniques are to be scrutinized and how subjective judgments of transgressions are to be made and sanctions imposed? Setting standards for mediation practice is essentially a political act whereby some define the nature of the field for others that follow. The result is that one practitioner’s style might not just be viewed as irregular or different, but risks being ruled unethical.

Many of the traditional topics of professional practice standards are well-intentioned, but nonetheless, aspirational and subjective. They may be more successful at encouraging battle lines to be drawn between varying styles of practice, more so than offering a useful code of behavior. If we are to protect ourselves from ourselves, then we need to be clear, focused and limited about the requirements established. The fewer the better; less is more. There are four that come to mind, that are behaviorally specific, protect the parties and the integrity of the mediation process.

1. Conflicts of interest. The prospective mediator shall disclose to the parties any and all contacts or relationships with any of the parties, their associates, families, or organizations of the parties. The mediator should avoid even an appearance of impropriety that could cause a party to question an agreement or the favoritism of the mediator not only at the time of the agreement, but in the future.

2. Clarity of role. The mediator shall never make a recommendation or binding decision in a matter without the written agreement of all parties concerned, whether or not there is a standing order by a court or an appointing authority. The mediator should probably

have a further duty to advise the parties of the risks and advantages of making such a determination. Too many mediators remain confused about the importance of never crossing the line from facilitator to decision maker.

3. Parties' right of termination. The mediator shall assure and protect the right of the parties to terminate the mediation process at any point without explanation. If the mediator cannot offer adequate reason for the parties to stay engaged in the process, they should not compel their participation under the guise of a court or any other authority.

4. Confidentiality. The mediator shall not disclose to any third party, courts, judges, attorneys, other appointing authorities any information about the parties, their attitudes, motivations, or actions at any time. The mediator must maintain a primary duty of loyalty to the parties. This means, for example, that the mediator should not be pressed into the defacto role of child abuse investigator. Imposing the requirement to report suspected abuse can undermine the integrity of the mediation and can injure families and children by depriving them of the availability of mediation services. There are more than enough other professionals up and down the system with the duty and desire to watch for and discover abuse without involving and compromising mediators, of which there are too few available. Mediators may choose as a personal and moral matter to report suspected abuse where it is immediate and serious. However, it should not be an ethical duty to do so and should not be a core tenet of mediators' standards of practice.

The right measure of ethics—just enough

The necessity and value of ethical standards of practice is unquestioned. Codes of conduct offer useful parameters for professional behavior. Yet, as with all rule schemas, and especially those of the ethical variety, there is a dynamic tension between those of the "never-do" variety, and those others that are less clear. Especially in difficult cases, agreements seldom follow logical and predicable paths; they are not always decided upon for the right reasons, nor are they always fully in compliance with the letter of the prevailing law or regulation. As often as not, parties back into agreements after reaching the point of sheer exhaustion. To reach a workable understanding, the parties—and the mediator—sometimes must come to terms with the necessity of gently maneuvering around strict interpretations of ethical guidelines.

As the profession of mediation evolves, we need not be captives of our history as swindlers and dealmakers, but neither should we wholly deny that past either. That would be akin to denying part of who we are as both human beings and mediators. Our human proclivity for deception presents risk, it also may well be a mediator's creative source for effective practice. Ethical codes are essential to protect ourselves from the most erratic parts of our nature but do little to make us better practitioners. The best mediators need to have the soul of a humanist, the mind of a strategic analyst, and the heart of a dealmaker, with a pinch of larceny thrown in, just for good measure.

BiographyRobert Benjamin , M.S.W., J.D… has practiced mediation in most dispute contexts, including business, personal injury, probate, health care, education, employment, family and divorce since 1979. He presents negotiation and mediation

programs nationally and internationally and is a Fellow at the Straus Institute for Dispute Resolution of the Pepperdine University School of Law is a former President of the Academy of Family Mediators. He is the author of numerous articles and book contributions and an Associate Editor for Mediate.com. More information is available at ***www.rbenjamin.com*** and he can be contacted at *rbenjamin@mediate.com.*

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