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Citation

Dorcas QUEK ANDERSON. Mediation Ethics: From Theory to Practice, Field, Rachael and Crowe, Jonathan. Edward Elgar Publishing, 2020. (2021). *Conflict Resolution Quarterly*. 39, (1), 67-74.
Available at: https://ink.library.smu.edu.sg/sol_research/3699

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**Mediation ethics: From theory to practice, Field, Rachael and Crowe, Jonathan.
Edward Elgar Publishing, 2020 [book review]**

Dorcas Quek Anderson

Published in *Conflict Resolution Quarterly*, 39 (1), 67-74. DOI: 10.1002/crq.21316

1 THE LONG-STANDING DEBATE ON MEDIATOR NEUTRALITY

For too long within the mediation field, there has been confusion on how the foundational principles of mediator neutrality, impartiality, and self-determination work together to bring about a fair outcome. There has been a corresponding lack of clarity on what the mediator does to ensure that these principles are collectively fulfilled through a consensual settlement. Astor (2007), who has written extensively on mediator neutrality, has described the mediator's role as maximizing party control. However, Astor also comments that making decisions aimed at maximizing party control is not simple and highly dependent on the context. The mediator has to intervene in order to fulfill this goal, but they are “not given a license to impose their own views and ideologies on unwilling parties.” “Rather they must decide whether their interventions are necessary in the circumstances or whether they should avoid intervening in order to give the parties the maximum control possible” (Astor, 2007, p. 236). The type of mediator intervention appears to be very difficult to determine, being highly dependent on the mediator's contextual assessment of the parties' level of autonomy.

In this publication, Field and Crowe have boldly confronted these long-standing difficulties and have made a radical proposal for a new framework of mediation ethics. As suggested by the chosen title, the authors grapple with the practical difficulties caused by theoretical incoherence within mediation ethics. In essence, they contend that the reliance on neutrality and impartiality in current mediation ethics is unrealistic as it ignores issues such as the reality of the mediator's power and does not guide mediators to proactively deal with power imbalances in order to advance the parties' self-determination. In practice, the mediator is required to actively intervene in the process to take into account the distinctive needs of the parties. Such a mediator may not truly be neutral in the sense of being detached and disinterested in the dispute, or impartial by treating parties identically and objectively. The authors therefore propose a new paradigm of mediation ethics focusing on relational party self-determination—mutual self-determination for the parties achieved in relationship with each other—and complemented by an emphasis on informed consent and an ethos of professionalism. Their carefully constructed framework represents a commendable attempt to introduce both theoretical coherence and practical guidance to mediation ethics.

2 THE UNSUSTAINABILITY OF THE CURRENT MODEL OF MEDIATION ETHICS

Field and Crowe have made a compelling case for the need for a new model of mediation ethics. In the first seven chapters, they thoroughly discuss the difficulties posed by current mediation ethics through carefully layered arguments. Having surveyed the development of mediation in Western societies, they argue in chapter 2 that mediator neutrality and party self-determination are well-entrenched core principles within the facilitative mediation model. Based on the relevant literature, mediator neutrality involves independence from the parties, having an unbiased attitude toward the parties, and the mediator having no personal interest in the outcome (pp. 65–72). Facilitative mediation represents a shift away from third-party decision-making toward finding a solution that the parties themselves construct. The mediator's primary role is to support the parties to achieve their self-determined outcome by focusing on process management. It is therefore important for the mediator to

remain independent and non-determinative; any compromise of mediator neutrality is seen to be a compromise of party self-determination.

The authors then embark on a detailed analysis of the development of mediation ethics across Western jurisdictions in chapter 3, showing that the ideals of neutrality and party self-determination have been widely embedded in many codes of conduct, thus providing a benchmark for the regulation of mediation practice. Nevertheless, these codes have provided little guidance on how the ethical values may be achieved practically or how to manage situations involving conflicting ethical principles. Consequently, mediators facing ethical dilemmas have relied on their intuition, resulting in considerable confusion and inconsistency within the mediation profession.

Turning to examine the individual ethical principles, Field and Crowe argue that the ethics of neutrality and self-determination can be said to jointly legitimize the mediation process (ch. 4). However, the complementary nature of these principles rests on the premise that a neutral mediator makes it possible for the parties to reach their own self-determined agreement. Disputing this assumption, the authors point out that a mediator who is strictly neutral would effectively allow the parties to reach an outcome that only satisfies the needs of the more powerful party and fails to advance the self-determination of the weaker party.

There are also other unresolved tensions between the principles of neutrality and self-determination set out in chapter 5. First, neutrality is unrealistic because mediators are humans who are prone to biases and affected by their individual values and perspectives. Second, the neutrality principle fails to acknowledge the power of the mediator and the mediator's capacity to influence the outcome of disputes through a range of interventions. Furthermore, neutrality may undermine party self-determination, particularly in situations of power imbalance. If the mediator is to ensure that parties have a voice, the mediator must be active and engaged, and will invariably influence the content of the mediated outcome. Finally, the parties do not always expect mediator neutrality. It is unavoidable that the parties experience the mediator as a person with a high level of influence and authority. Moreover, some parties prefer a mediator who is more directive. In sum, the demands of mediator neutrality effectively incapacitate mediators from responding dynamically to the needs of individual parties to enable self-determination.

The authors also critique the principle of mediator impartiality that has been developed to refer to the mediator treating parties with fairness and even-handedness, which they explain as giving identical treatment, rather than being neutral in the sense of being disinterested in the dispute and outcome (pp. 5, 131–132). They content in chapter 6 that mediator impartiality has drawn inspiration from content similar to mediator neutrality and is therefore subject to the same problems. Alternatively, the impartiality principle still fails to provide substantive guidance to mediators to guide them in resolving ethical conundrums. Hence, the notion of impartiality is effectively empty and does not solve the dilemmas caused by mediator neutrality.

The authors further observe that the problems caused by neutrality and impartiality have been exacerbated by the informality of mediation. Relying on the notion of language games to examine the discourse within mediation, they persuasively argue that parties who are inexperienced with mediation often experience a clash of genres, in which the modes of communication they are familiar with clash with the implicit expectations of the mediation process (ch. 7). As a result, their capacity to negotiate effectively and achieve self-determination is compromised. This reality calls for mediators to play an ethically active role to support parties to operate effectively within the mediation language game.

3 A FRAMEWORK FOR MEDIATION ETHICS BASED ON RELATIONAL SELF-DETERMINATION

Having thoroughly argued that the current model of mediation ethics is theoretically unsustainable, Field and Crowe set out in chapters 8–10 their proposed paradigm of mediation ethics. They conceptualize mediation ethics as an evolving body of standards arrived at through consensus and dialogue. This approach lies between two extremes of the regulatory and the practice models. The former assumes that a professional community will identify shared standards of conduct that form the basis of accreditation and adjudication of complaints. In contrast, the latter model focuses on the decisions that mediators make in response to practical situations. Field and Crowe contend that neither model is appropriate to mediation, which is an inherently relational and unstructured process with an interest-based focus (ch. 8). The way forward is to create a guided model that will value the significance of the practice model while also stress guidelines that can assist mediators in forming realistic norms of practice. The authors also term this as the contextual ethical method (p. 217).

Under this new paradigm, the emphasis shifts from neutrality and impartiality to relational party self-determination. In earlier chapters, the authors contend that neutrality and impartiality are ultimately meant to support self-determination. By contrast, self-determination has been widely recognized in most Western countries as an intrinsic value of mediation, a defining characteristic that legitimizes mediation as a valid alternative to litigation, and a notion rooted philosophically in the ideals of democratic participation and personal autonomy (pp. 72–74, 89–91). Furthering this argument, the authors suggest that self-determination should be the primary ethical imperative of the mediation process (ch. 9). However, they make a distinction between relational self-determination and individual autonomy. Self-determination in mediation is premised on connection and collaboration. All parties, and not merely one, must experience such self-determination (pp. 185–186).

Two other checks are proposed to support the primary principle of self-determination (ch. 9). First, the parties' informed consent is required in the form of fully understanding their available choices. This principle helps to measure the ethic of self-determination by checking the mediator's power and informing a mutually satisfactory agreement in which neither party has been taken advantage of. Second, the new framework must be undergirded by an ideology of professionalism centered on technical competence and a fiduciary-like obligation to the parties.

The authors propose in chapter 10 four ethical principles under the contextual ethical method. First, the only categorical driver of all ethical action is the need to support party self-determination. To achieve this mandate, the mediator's practice must be informed by a contextual analysis of the dispute and the parties. A range of mediator decisions—including neutrality and impartiality—may be justified as appropriate in the circumstances. The second guiding principle is that mediator actions must never entail imposing a decision on parties. Third, ethical action in mediation should be guided by informed consent. In practical terms, informed consent may be achieved through the use of the intake process, ethical mediator activism in support of informed consent, and allowing parties access to legal and other external advice. The final principle highlights that ethical action is relational and caring.

4 ADVANCING THE THEORETICAL UNDERPINNINGS OF MEDIATION ETHICS

Field and Crowe have contributed many valuable insights to mediation theory and practice through this book. Their well-researched arguments concerning the practical challenges caused by the mediator neutrality principle should be read by beginner and experienced mediators, as well as dispute resolution scholars. They have made the keen observation that mediator neutrality, together with self-determination, was instrumental to the early mediation movement's credibility. Paradoxically, mediators' rigid adherence to the neutrality principle could undermine the advancement of party self-

determination, and bring the mediation movement into disrepute. It is thus timely that the authors directly address this theoretical incongruence. They have done so with comprehensive arguments drawn from a wide range of literature and disciplines.

Chapter 5 on the “myth of mediator neutrality” is a worthwhile read. It highlights how, for the mediator, neutrality has often been relied upon to justify not passing judgment and making proposals to the parties, and yet how such precise interventions are necessary when the parties are not evenly matched. The most perturbing implication of complying with the neutrality ethic is the mediator's refusal to actively support the weaker party and equalize the power imbalance. On a related point, Field and Crowe astutely note the reality of the mediator's influence and power. Referring to Silbey and Merry's framework (2001), they explain how mediators claim authority in how they present themselves and the mediation process to the parties in the pre-mediation stage, in controlling each stage of the in controlling each stage of the mediation process, and in exerting control, over the substantive issues discussed in mediation. The authors refer to the term “selective facilitation” (Davis, 1988; Piper, 1993) to underscore how mediators have great scope to encourage certain outcomes while discouraging others, while continuing to present themselves as neutral (p. 121). Overall, this chapter offers valuable insights in understanding the real impact of mediators' interventions, the disconnect between mediation ethical principles and practice, and the tension between the ethical principles of self-determination and neutrality.

Two other chapters have provided novel insights that have significant implications on mediation practice. Chapter 7 on “party self-determination and the mediation language game” draws upon the authors' earlier work based on Wittgenstein's (1968) concept of a language game: a set of rules for the use of language in social interaction, which influences social behavior and the social dynamics (p. 146). The authors explain how some parties who are accustomed to mediation can express their interests more effectively than others. They also make the pertinent argument that the relatively informal nature of mediation gives the parties the wrong impression that there are few conventions to grasp in order to succeed in mediation. The dual emphasis on party self-determination and mediator neutrality further conveys that the mediator has less power than is the reality. The reliance on the concepts of language games and genres is most beneficial in underscoring how power imbalances potentially impact the mediation outcome. It also helps broaden the conventional understanding of power differentials within mediation beyond inequality of resources and uneven access to information.

Chapter 8 on models of professional ethics offers yet more intriguing insights. The authors situate the debate on mediation ethics within a broader discussion on practice and regulatory models for professions. Drawing from political theories such as MacIntyre's (2007) concept of a practice arising from a “living tradition,” they argue that the practice model, which regards ethical discourse as shaped by judgments of practitioners and reflection, is more appropriate for the mediation profession. Consequently, they have suggested infusing the practice model with four guiding principles, so that the resulting model of ethics is not indeterminate. This principled approach grounded in relational self-determination ensures that mediators cannot freely adopt an “anything goes” approach (p. 221).

5 THE GUIDED MODEL OF MEDIATION ETHICS

It is challenging to resolve the question of which approach to adopt to develop mediation ethics. As the authors have acknowledged, the flexible nature of mediation requires ethical standards that are sufficiently dynamic to accommodate the diversity in practices. A top-down approach is also not congruent with the need for the mediation profession to have communal discourse to ensure that standards reflect their practice. At the same time, mediation has been institutionalized in many jurisdictions and there is an equally compelling need for certainty in the regulation of mediator

conduct and assurance of quality. More recently, the entering into force of the UN Convention on Enforcement of International Commercial Mediated Settlements has brought to the fore the need to have clarity in mediation standards. Article 5(1)(e) allows nonenforcement of a mediated settlement if there is a “serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement.”

Institutionalization of the mediation process on a global scale has heightened the need for not only mediators, but also courts and users of mediation, to understand when there are serious breaches of mediation standards. In this regard, this author has suggested that the standing of mediation standards has been strengthened from soft regulatory codes hitherto connected only with disciplinary action of mediators or educational standards, to quasi-legal standards impacting the cross-border enforcement of mediated settlement agreements (Quek Anderson, 2020a). Yet the flexible and generalized nature of mediation standards may cause external parties such as the courts to misinterpret them.

Furthermore, while mediators may be able to adopt a guided contextual approach to understand how the ethics should be applied, it is highly uncertain whether courts or other regulatory institutions are able to do the same because of the absence of similar training. In this regard, the authors have noted that the method requires mediators to be trained to recognize and reflect on ethical issues and to develop the ability to exercise professional judgment (p. 232). As such, the proposed contextual ethical method with self-determination as the primary ethical imperative may well cohere with the mediation community but may not, on its own, provide sufficient certainty to meet the external regulatory needs. Further measures may be needed to ensure that the contextual approach is correctly adopted by disciplinary and regulatory mediation bodies.

Field and Crowe have comprehensively illustrated how the contextual ethical method may be applied to different circumstances. For instance, they explain how mediator's giving advice would be regarded as unethical under the current neutrality paradigm (pp. 238, 243). Under the new paradigm, this action may be ethical depending on the context. The mediator must first make a thorough analysis of the context to know whether such an action would support or hamper the achievement of relational party self-determination. Second, the mediator must be of a view after this analysis that the opinion will not be adopted as a decision by the parties. Third, offering an opinion may be appropriate if the required elements of informed consent are fulfilled, that is, the parties should be in a position to analyze and test the opinion with the mediator and with an external advisor. Finally, the offering of an opinion must be made with a view to the parties' need for care and support. Failing to offer an opinion may sometimes leave the parties feeling abandoned. On the other hand, care and support might also be best addressed not through giving an opinion but another intervention. If the mediator has applied the above guiding principles to assess whether an opinion should be given, the decided course of action will be justifiable in terms of supporting self-determination.

Notably, a novice mediator may not necessarily apply the above four guiding principles correctly. In this respect, this reviewer has observed mediators who have wrongly assessed that their opinions are needed to support party self-determination and who have failed to discern that their unsolicited opinion has been perceived by the parties as an imposition of an outcome on them. A mediator's accurate discernment of context takes time, experience, and training to be developed. This reality could explain why beginner mediators are frequently given simple guidelines on the mediation process at the early stage of their mediation career. As Field and Crowe have noted, co-mediation and reflective practice are required to effectively operationalize the contextual method (pp. 230–233). Suppose that an external party deciding on the potential breach of mediation ethics also has to apply these guiding principles. It is highly conceivable that the party, without a sufficiently accurate understanding of mediation, will similarly fail to accurately grasp the context of the mediator's decision to give advice. It thus appears challenging to implement the contextual method on a large scale within both the mediation community and regulatory bodies that need to apply mediation ethics.

This may well be due to the concurrent needs in mature mediation industries for certainty and flexibility in the interpretation and application of ethics.

6 THE RESIDUAL ROLE OF MEDIATOR IMPARTIALITY

A significant aspect of the new paradigm is the categorical importance of relational self-determination, and the secondary role of neutrality. Field and Crowe have suggested that self-determination is an overarching principle based on the historical development of mediation in Western jurisdictions, where this concept is embedded in dominant political and philosophical ideals. This begs the question of whether the proposed model will be effective in non-Western societies. While party self-determination may also be an important principle of mediation in a country such as Singapore, it may not hold similar dominance as in the Western mediation communities (Quek Anderson, 2020b). In addition, it is uncertain whether other ethical principles such as impartiality are ascribed equal or more importance than self-determination. The authors have observed how mediator neutrality, coupled with self-determination, was integral in providing legitimacy to the early mediation movement. They also note how this concept mirrors the traditional judicial impartiality paradigm, which has been crucial to preserving the dignity of the judiciary. Arguably, the notion of mediator neutrality, although unattainable in fact, may still be critical to sustaining the credibility of the mediation profession in some countries. Cultural factors, such as the strength of the power distance index in a society, could also increase the prominence of the mediator neutrality ethic. Where members of a society habitually respect persons of authority and standing, they may also expect such persons to act with impartiality, without fear or favor, as they dispense their authority. A mediator may be regarded as a person of high standing who should act with fairness. If so, the parties' trust in the mediator and the mediation process could be intimately connected with their perceived impartiality of the mediator. Removing the mandate of mediator neutrality or impartiality from the framework of mediation ethics could then severely undermine the legitimacy of the mediation process.

Putting aside cultural influences, it is also worth examining whether neutrality is undoubtedly secondary to self-determination in all Western jurisdictions. Most mediators are likely to readily accept that true neutrality and objectivity are unattainable. However, the perception of impartiality seems to assume great importance in many national and international mediation codes of conduct. The EU Code of Conduct for Mediators (section 2) and several mediator codes of conduct in EU investment agreements (such as the EU-Singapore Investment Protection Agreement, Annex 7) emphasize the need to disclose any circumstances that may be seen to affect the mediator's independence or suggest conflicts of interests and have exhorted the mediator to endeavor to act or be seen to act with impartiality toward the parties. Furthermore, the UN Convention on the Enforcement of International Commercial Mediation Agreements has specified the failure to disclose circumstances raising doubts about mediator's impartiality and independence as a ground for nonenforcement (article 5(1)(f)). Similar to how judicial independence is seminal to public trust in the courts, the parties' perception of being treated equally by the mediator could also be integral to maintaining trust in the mediation process. Moreover, the parties' sense of being treated with even-handedness has been shown by research to be an antecedent of procedural justice, a psychological term referring to parties' perceptions of fairness (Hollander-Blumoff & Tyler, 2008). Positive perceptions of even-handed treatment are likely to lead to favorable perception of substantive fairness, more durable agreements, and legitimacy of the relevant person or institution (Tyler, 2006; Tyler & Lind, 1992). It is thus common for mediators to ensure they give equal time to each party for private sessions and provide each party equal opportunity to speak. The mediator may also give an opinion on the merits of the dispute in a private session instead of the joint session to prevent the perception the mediator is favoring one party over the other. In short, impartiality in the eyes of the beholder could still play a

critical role in maintaining the legitimacy of mediation. The diminution of its importance in a mediation ethical framework could result in mediators being less vigilant of actions that may affect their perceived even-handedness and result in a loss of trust in the mediator.

7 MEDIATION ETHICS: A TOPIC THAT COULD NOT BE MORE TIMELY

Overall, Field and Crowe have offered to the dispute resolution community a very timely reflection on the role played by mediation ethics in the theoretical and practical development of mediation. Their critique of mediation ethics is well grounded in the understanding of mediation practice, comprehensive research on the relevant debates, and historical development of mediation in a range of countries. In suggesting a new paradigm, the authors have not shunned controversial issues and have boldly formulated a framework that directly addresses the confusion plaguing the discourse on mediation ethics. This book also represents a laudable attempt to bridge theory and practice and to bring about theoretical coherence that may lay the foundation for more innovations in mediation practice. Such discussions are sorely needed for the mediation profession to flourish as mediators and commentators confront the thorny issues facing the practice of mediation. As highlighted above, the mediation industry has been highly institutionalized and regulated in many countries. Mediation ethics have to keep up with the many needs brought about by the growth of mediation, the distinctive nature of mediation, and the interface between mediation and regulators. And it has to do so by depicting the mediation process realistically. This book has skillfully articulated the reality of how mediation works, as well as how current ethical frameworks have diverged from reality and offered inadequate guidance to mediators struggling with ethical dilemmas. It is hoped that this book will lead to many similar reflections and conversations that will help mediation ethics play a relevant role in the continuing development of mediation.

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