



:: MARCEL ALTER
LL.B. (HONS), B.E.c.o, A.I. Arb A
SOLICITORS & RESOLUTION CONSULTANTS

ETHICS – MEDIATION

WHAT IS ETHICS? Is it Morals, Fairness, Justice, Arbitrary Rules, or is it The VCAT code of Conduct

IF “Ethics and Morals” are about what is “right” and “wrong”, are Mediations and by definition Mediators unethical. The process is ABOUT PARTIES RESOLVING DISPUTES. There are no right or no wrong outcome, whichever solution the parties come to, is the right one.

“WHAT IS MEDIATION”? Where once Mediation was said to be practice in search of a theory, it has now been now theorised up-hill and down. Thus is there still a process recognisable as Mediation.

WHICH IS OR SHOULD BE OUR VCAT MODEL of Mediation

1. Settlement Model,
2. The Facilitative Model,
3. The Therapeutic Model,
4. The Evaluative Model.
5. Some Other model
6. Should VCAT focus on the consequences and outcomes of the Mediation process, or the principles involved in arriving at the decision.

THE DEFINITION

“A process by which a competent impartial third party assists the parties in a confidential setting to come to terms with their issues, and to move to resolution by developing options and considering alternatives that will meet their needs.”



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ARE THE COMPONENT PARTS OF THE DEFINITION A CODE FOR BEHAVIOUR –

(A) COMPETENT

That is the Mediator should be able to understand and deal with the matters or issues in dispute. Some ethical question may involve the following

1. Is it Ethical for a Mediator to remain the Mediator when the dispute is a highly technical one outside their area of expertise
2. Should a mediator waste the parties time by educating themselves
3. What of lack of diagnostic skills such as recognition issues of mental health. Or other impediments, such as cultural cringe, language difficulties,
When does the lack of competency become important?

(B) IMPARTIAL

By being a third party the Mediator is not involved and is not prejudiced. Ethical issues here are

- 1 how far does one go in declining to mediate because of knowing either of the parties socially or professionally?
- 2 what if the acquaintance is with the advisors
- 3 what if it is about the subject matter owing to another part of life
- 4 What if the Mediator becomes aware of a possible past acquaintance with the participants well into the mediation
- 5 AND what of a situation when what a party is saying or their actions or the personal appearance of a party, or their adviser, gives out negative vibes.
- 6 Similarly, developing feelings of sympathy, or wishing to help
- 7 Is it giving an appearance of bias when a mediator expends more time and energy on one party either because they need help to understand, or because one party has a large group of advisor and one has none
- 8 Should the mediator set out the other parties arguments or warning of the consequences in session or private session.



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- 9 Would it be unethical to accept work at a latter stage from the parties or their advisors

(c.) CONFIDENTIAL.

By its nature, Mediation is confidential thus allowing the parties to have full and unbridled discussions. But what if What if the Mediator becomes aware of

- i. Possible threats of crimes or violence,
- ii. A Conspiracy or that a third party may be adversely affected
- iii. That one party is lying or trying to entrap the other
- iv. That confidential information as to another issue is being given out.
- v. That the mediator later becomes aware of the consequences of the agreement reached
- vi. That there are allegations made as to what went on implicating innocent parties or the Mediator
- vii. A Court requires answers as to how agreements was made or What went on
- viii. VCAT and other Bodies reporting Requirements

In Separate sessions discussions can be a “little bit more robust” What is said in such Sessions can lead to Ethical dilemmas as to confidentiality if

- (i) The mediator becomes aware that the other party is fishing or bullying or being dishonest
- (ii) There are long term agendas
- (iii) That without certain information the other party may make an inappropriate settlement
- (iv) That without certain disclosures a real settlement is impossible
- (v) And is the mediator compromised by knowing or believing he knows each parties bottom line, or The parties financial circumstances



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(D) FACILITATIVE.

The accepted theory is that Mediators are to allow the parties to self-determine and control the process and the final terms. The mediator is not the advisor. These are for the parties to bring to mediation. But what of the basic commandment “Thou shalt settle” Dilemmas here include

- 1 Mediators do come with Knowledge and opinions
- 2 Mediators are in control of the process (traffic Cop, mute figurines)
- 3 Tension between the Mediators desire to settle and intervene when they see a solution or the parties are stuck.
- 4 Should a Mediator ever stop a settlement if it is unfair to a party, based on the Mediators knowledge, or possible consequences to third parties?
- 5 What if the Mediator believes information being provided is wrong?
- 6 Can the Mediator ever step over the line? What if the knowledge would hasten the process or allow the parties to conclude today instead of coming back

Question “Should not the Mediator help with advise given that they are there to assist in resolving the matter and have been chosen due to their competence.”

(E) INFORMED CONSENT.

The parties arrive at a consensual decision after they have considered and understand all issues. That is they come to the Mediation and acquire further “learning” at the mediation. Dilemmas include

- 1 When does a Mediator decide lack of “knowledge” makes the process unfair or flawed?
- 2 Is the issue knowledge, or where the parties want the process to take them.
- 3 How far can the mediator say there is a lack of knowledge? Is it because of the mediator’s biases?
- 4 When can the mediator use his own knowledge?
- 5 What of the situation whereby the Mediator believes the advisor is giving the wrong or flawed advise, or



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- 6 That the reliance on the expert or the advisor is inhibiting the process
- 7 And what of the ethical issues of excluding advisors altogether, or
- 8 Of ignoring the parties and only engaging with their advisors
- 9 Or when there is suspicion of an advisor (or interpreter) not actually doing what they say they are doing
- 10 What about the state of knowledge with Self Represented Parties,
- 11 When to use the discretion re allowing or not to allow advisors

MEDIATION, ETHICS and FRIENDLY PERSUASION

- (1) Costs consequences
- (2) Batnas and Whatnas
- (3) The joys of Court and cross examination
- (4) The rights of the other party case and
- (5) Certainly not the awareness of the other parties case
- (6) Whether a participant is a good liar or one is just a bad teller of the truth. How far must the Mediator go into the evidence?

THE VCAT CODE.

What is it?

Does it make mediators job harder

Can Mediators live by the rules?

Is change Necessary

Should the code be reworded?

The VCAT Code of Conduct Confirms the Mediator role is to assist in resolution, but in doing so to have an ethical eye to

- i. Being and being seen to be impartial
- ii. Understanding the issues
- iii. That each party has the opportunity to speak and to listen “Natural Justice”.
- iv. Confidentiality is maintained both in joint and private setting,



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- v. That whilst the Mediator is a participant, participation is as a facilitator not a Decider or an advisor
- vi. That the Mediator is to assist and develop options and approaches.
- vii. Access is available to resources where lack of Knowledge or representation is an issue
- viii. That the system is fair and that the parties are as far as reasonable equal in putting their case and options
- ix. That the parties are not forced into something against their will due to financial, time or physical force