

ETHICAL CONSIDERATIONS IN MEDIATION

A Presentation for the Asia Pacific Mediation Forum

2008 International Conference

Harun M. Hashim Law Centre

International Islamic University Malaysia

June 16-18, 2008

Michele S. Riley

Msr2133@columbia.edu

212-288-2931

ETHICAL CONSIDERATIONS IN MEDIATION

**A Presentation for the Asia Pacific Mediation Forum
2008 International Conference
Harun M. Hashim Law Centre
International Islamic University Malaysia
June 16-18, 2008**

Michele S. Riley
Msr2133@columbia.edu
212-288-2931

Abstract

There are ethical dimensions to every mediation. No matter what your mediation style or orientation is—evaluative, facilitative or transformative—choices need to be made concerning how you as mediator treat the parties at the table (and perhaps those not at the table). This presentation provides an overview of different ways of thinking about those choices and offers practical approaches to common ethical dilemmas arising in mediation.

Ethical dilemmas to be covered in the presentation include:

Neutrality Dilemma

- Relationships with parties
- Personal feelings about the parties

Confidentiality Dilemma

- Disclosure by mediator to one party of information revealed by the other party in caucus
- Disclosure by mediator to outsiders

Self-Determination Dilemma

- Solution is unfair to one party
- Solution is unfair to an outside party
- Solution is illegal or against public policy

Participants in the session will be invited to explore these ethical dilemmas; their sources in law, religion and culture; and the practice of ethics in actual mediations. This exploration will be conducted by mini-lectures and interactive discussions based on viewing and analyzing video and written case studies in small groups.

Participants in the session will:

- Become familiar with different ethical orientations.
- Identify the major ethical issues in mediation.
- Gain a deeper understanding of how predispositional factors, such as culture, influence ethical choices and mediator behavior.
- Consider context-specific ethical dilemmas such as those arising in different organizational and cultural settings.

- Appreciate the interface among law, culture and ethics on mediator behavior.
- Support each other's learning by working in collaborative groups during the session.

I. OVERVIEW OF MEDIATION

The Model Standards of Conduct for Mediators was prepared in 1994 and revised in 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution (hereinafter referred to as the "Model Standards"). The full text of the Model Standards appears in the Appendix attached hereto.

The Model Standards were adopted by each of these organizations in 2005 and are widely viewed in the United States as establishing a standard of care for mediators in the United States (Model Standards, 2005, pp. 1-2). For example, the Financial Industry Regulatory Authority ("FINRA") asks that its mediators adhere to the Model Standards (<http://www.finra.org>). Other codes of conduct that govern the conduct of mediators are derived from the Model Standards. See, for example, the Standards of Conduct for Mediators governing all who serve as mediators in cases that are mediated pursuant to the Alternative Dispute Resolution Program of the Commercial Division of the New York State Supreme Court, New York County.

The Model Standards serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes (Model Standards, 2005, p. 1).

The Model Standards provide the following definition of mediation:

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

(Model Standards, 2005, p. 1)

Mediation relates to other conflict resolution processes along a continuum that reflects the degree of coercion of the parties to reach a resolution of their dispute, and the participation of a third party.

Continuum of Conflict Resolution Processes

Private Decision Making by Parties	Private Third-Party Decision Making	Public (Legal) Authoritative Decision Making	Extra Legal Coerced Decision Making
Negotiation/Mediation	Arbitration	Judicial Decision /Legislative Decision	Nonviolent Direct Action/Violence

----->
Increased Coercion

(Moore, 2003, p. 7)

In the next section, the nature of the participation of the third party—the mediator—will be briefly examined.

II. MEDIATION AS FACILITATED NEGOTIATION

On the foregoing continuum of conflict resolution processes, both negotiation and mediation are types of private decision making by the parties. On this continuum, mediation is an extension of the negotiation process that involves the intervention of a third party who has limited or no authoritative decision-making power (Moore, 2003, p. 8).

The mediator’s view or theory of what conflict is will significantly influence the process of mediation, how directive the mediator will be, and the types of intervention that the mediator will initiate.

Conflict can be defined under several theories:

- Power theory: conflict is a struggle for domination
- Rights theory: conflict is a contest between competing claims of “rights”
- Needs and interests theory: conflict is a problem in how to meet incompatible needs with limited resources
- Transformative theory: conflict is a crisis in human interaction

(Bush and Pope, 2002, p. 2)

Each theory suggests that a different type of intervention on the part of the mediator is needed:

- Under the power theory, parties need help in organizing and mobilizing
- Under the rights theory, parties need help in argumentation and advocacy
- Under the needs/interests theory, parties need help in problem solving
- Under the transformative theory, parties need help in overcoming their crisis in interaction and restoring constructive interaction

Can there be ethical dilemmas without values?

Ethical dilemmas are principally conflicts over values:

- Values are freely chosen internal standards that people use to judge whether issues, behaviors or events are good-bad, right-wrong, moral-immoral, fair-unfair
- Development of values is the result of complex socialization process
- The end result, the value system of an individual, is an elaborate set of beliefs that have developed over a long period of time

(Moore, 2003, p. 401)

Most people have a hierarchy of values with some beliefs or standards being more important than others. In general, people have three levels of values:

- A. Identity or Moral Values
 - Deepest and most basic form of belief
 - Define how a person or group believes that they really are
 - Values about integrity, honesty and truthfulness, candor, fairness and equality fall into this category
- B. Terminal Values
 - Deep beliefs that guide behavior in most areas of life
- C. Operational Values
 - Standards and norms that people use to guide everyday life

(Moore, 2003, pp. 401-404)

Mediators may have values that conflict with values that are associated with or underpin mediation. This conflict is the source of many of the ethical dilemmas that arise in mediation. In the next section, we will examine some of those core values in mediation.

IV. MODEL STANDARDS OF CONDUCT

The Model Standards provide standards by which mediators are to conduct themselves in conducting mediations. They include mandates to:

- Conduct a mediation based on the principle of party “self-determination” which is defined as the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome (Model Standards, Standard I. A)
- Conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality, maintaining “freedom from favoritism, bias or prejudice” (Model Standards, Standards II. A and B)

- Avoid conflicts of interest or the appearance of conflicts of interest during and after a mediation (Model Standards, Standard III. i)
- Maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law (Model Standards, Standard V. A)

(Model Standards, 2005, pp. 2-6)

What core values are reflected in these Model Standards?

- Self-Determination
- Mediator Impartiality
- Mediator Neutrality
- Confidentiality

These core values embedded in the Model Standards may conflict with an identity or moral value of the mediator: what the mediator may consider to be fair. This ethical dilemma transcends culture; even if we do not all agree on what is fair due to cultural differences, whatever is fair in our view may be incompatible with the values reflected in the Model Standards. In the next section, we will identify the kinds of ethical dilemmas that arise from that incompatibility.

V. FAIRNESS IN MEDIATION

Some ethical dilemmas arise from the conflict between the mediator's values or sense of fairness and the outcome of the mediation process. Other ethical dilemmas arise from the mediator's values or sense of fairness and the mediation process itself.

Outcome-based Fairness versus Model Standard I

- Self-Determination Dilemma

Process-based Fairness versus Model Standards II, III and V

- Impartiality Dilemma
- Neutrality/Conflict of Interest Dilemma
- Confidentiality Dilemma

In the next four sections, we will examine the contours of each of the foregoing dilemmas and provide ethical hypothetical situations to illustrate them.

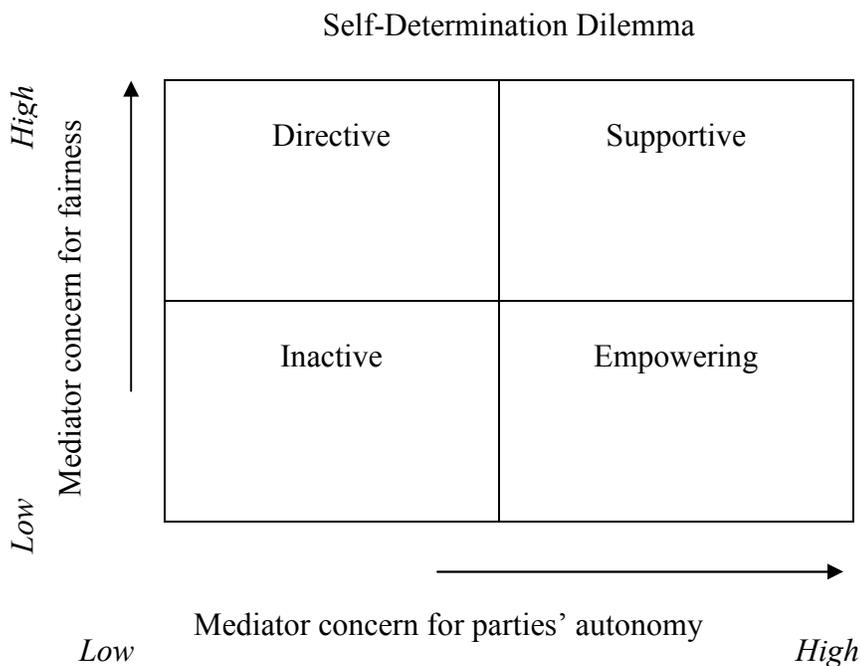
VI. SELF-DETERMINATION DILEMMAS (OUTCOME-BASED FAIRNESS)

As we have seen, Standard I of the Model Standards requires that the mediator conduct a mediation based on the principle of party self-determination (Model Standards, 2005, p.

2). This obligation is qualified in two respects: first, a mediator may need to balance such party self-determination with his or her duty to conduct a quality process in accordance with the Model Standards (Model Standard I. A. 1). Secondly, the Model Standards recognize that a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions (Model Standard I. A. 2).

The ethical dilemma that may arise, then, is what happens when the mediator’s sense of fairness conflicts with the obligation to respect the parties’ autonomy or right to self-determination? The degree to which the mediator respects the parties’ autonomy or right to self-determination will determine his/her participation orientation and affect his/her desire to maintain nondirectiveness.

This tension between the mediator’s concern for fairness and the mediator’s concern for the parties’ autonomy can be conceptualized as follows:



The first dimension explains the degree (high or low) to which a mediator wishes to satisfy his values of fairness. The second dimension explains the degree (high or low) to which the mediator wishes to preserve the parties’ autonomy or right of self-determination. Combination of the two dimensions results in four specific participation orientations: directive, inactive, empowering and supportive. The participation orientations are described as follows:

A. Directive Orientation

This orientation indicates high concern for the mediator’s own sense of fairness and low concern for the parties’ autonomy or right to self-determination.

Mediators who have this orientation may behave forcefully and be highly directive. Examples of such directive behavior include evaluation of the merits of the dispute, offering substantive recommendations on how the dispute should be resolved, and pressure tactics to accept particular agreements.

B. Inactive Orientation

This orientation shows a low concern for both the mediator's sense of fairness and low concern for the parties' autonomy. Few, if any, mediators have this orientation. In their view, the mere presence of a mediator in the mediation room, without more, would likely be the only manifestation of this orientation.

C. Empowering Orientation

This orientation indicates a low concern for the mediator's sense of fairness but a high concern for the parties' right to decide the outcome of their negotiation. This orientation is one of the hallmarks of the transformative approach to conflict (Bush and Folger, 1994). The transformative mediator's allegiance is to the interdependent concepts of empowerment and recognition. Empowerment refers to strengthening each party's ability to analyze its respective needs in the conflict and to make effective decisions. Recognition refers to improving the capacity of the disputants to become responsive to the needs and perspectives of the other. This orientation is critical of mediator interventions to produce settlement, direct problem-solving, or substitute mediator judgment or analysis for that of the parties. All of these activities are felt to diminish party autonomy (Kressel, 2006, p. 536).

D. Supportive Orientation

This orientation represents the middle range on the spectrum of satisfying the mediator's sense of fairness and preserving the parties' autonomy or right to self-determination. Mediators in this quadrant seek to balance the competing values of fairness and party autonomy and, as a result, most likely feel torn between these competing values.

This dilemma can manifest itself in the following situations:

- A. Offering the parties a solution
 - At the parties' request
 - On the mediator's own initiative

- B. Opposing a resolution formulated by the parties because
 - the resolution is unfair to a weaker party
 - the resolution is illegal
 - the resolution is unfair or not "just"
 - the resolution is unfair to a non-party

Fairness to a Non-Party

- Most mediations have consequences for others outside the mediation
- How absent parties are treated is an important factor in evaluating the fairness of any mediation process (examples: children in divorce mediations, future generations in environmental disputes)
- To the extent that negotiations are being facilitated by mediators, are mediators accountable to outsiders?

Reasons for Holding Mediators Accountable

- Precedential effects of even privately mediated matters
- Special role of ethics of leadership implicated in actions of mediators
- Educational effects of showing that better quality solutions can be obtained by processes (such as mediation) that are conducted with the goal of benefiting as much as possible all relevant stakeholders

(Susskind, 2004, pp. 514-516)

Hypotheticals #1-8

A. Solution/Advice

Hypothetical #1

In a personal injury case, a party or both parties say to you, the mediator, “You’ve seen lots of these cases. What do you think a judge or jury would award in this case?”

How should you as the mediator respond to this question?

Hypothetical #2

In a dispute over the sale of a business, the parties ask you, the mediator, to give advice on the application of certain accounting standards to the sale. You are an accountant by training.

How should you as the mediator respond to this question?

Hypothetical #3

You are the mediator in a breach of contract case in which the parties differ in their interpretation of the contractual terms. Both parties assume that the oral contract is valid but you, the mediator, who is also a lawyer, knows that it would not be enforceable under

the applicable statute of frauds which requires that certain contracts (including the one in dispute) be put in writing.

What do you as the mediator do?

B. Unfairness/Illegality

Hypothetical #4

You have been asked to mediate a dispute between a landlord and tenant. The tenant claims that the landlord has been harassing her because he wants her to move out so that he can rent the apartment at a higher rent. She claims that the landlord knocks on the door in the middle of the night, sticks gum in her door locks, and has inserted a camera in the shower head in the bathroom.

How do you as the mediator handle this dispute?

Hypothetical #5

You have been asked to mediate another landlord-tenant dispute. The landlord has initiated an eviction proceeding against the tenant based on non-payment of rent. The tenant is about to accept an offer of money from the landlord in exchange for vacating the apartment. The tenant has not received any legal advice concerning his rights as a tenant under the city's tenant protection laws.

What do you as the mediator do?

Hypothetical #6

Vladimir is the founder of a homecare firm in New York City that places homecare workers with elderly persons who need different levels of assistance in their homes. His firm provides training to these workers who are mostly from Russia and Eastern European countries.

Vladimir has procured a contract with a New York State government agency to provide such workers to a program administered by that agency for the benefit of low-income elderly living in subsidized housing in New York City. He believes that his firm provides a good and important service to both the homecare workers by way of stable employment at higher than minimum wages and the elderly who are served by them.

While his firm is paid a placement fee by the government agency for each worker he places in the program, Vladimir also requires each such worker to pay him a percentage of their wages that they are paid directly by the agency. He sees nothing wrong with this; after all, this is how things are done in Russia.

Olga is a homecare worker who has recently been placed by Vladimir's firm in a program administered by a New York State government agency. She provides home care services to low-income elderly citizens living in subsidized housing in New York City.

Olga is paid wages directly by the government agency. When she was first placed in the program, Vladimir had vaguely mentioned that he expected her to pay him a "commission." Olga is aware that Vladimir is paid a fee by the government agency and she does not want to pay him any moneys out of her wages. Those wages, she believes, are rightfully hers.

During the mediation, the parties suggest that they can inflate the number of hours that they submit to the government agency to pay Vladimir's commission. Under applicable law, inflating the number of hours worked is illegal.

How do you as the mediator handle this situation?

Hypothetical #7

Jeff and Susan have retained you to mediate their divorce. Among their assets is an apartment in New York City worth US\$4 million today.

Jeff would like to sell the apartment and split the proceeds with Susan. She adamantly refuses to put the apartment up for sale because to do so would make public the couple's divorce. In Susan's worldview, to be divorced would cause her to lose face among her extended family and in her social circle. So she is willing to pay Jeff US\$2 million in cash for his half of the apartment. Susan is aware that the value of the apartment will be substantially diminished over the next year due to the construction of a high-rise next door that will block the view from most windows.

What do you as the mediator do?

Hypothetical #8

Jeff and Susan also have a 13 year old daughter. Susan is willing to grant Jeff sole custody over the daughter. Jeff travels 200 days a year. You believe that the daughter would be better off living with her mother.

What do you as the mediator do?

VII. IMPARTIALITY DILEMMAS (PROCESS-BASED FAIRNESS)

Standard II of the Model Standards requires that the mediator conduct a mediation in an impartial manner and "not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason" (Model Standards, 2005, p. 3).

These dilemmas typically arise when the mediator is an independent mediator

- A North American model of mediation
- This model is widely accepted in those countries with an independent judiciary, which is a model for impartial third parties as decision makers (Moore, 2003, pp. 52-55)

An independent mediator

- Is neutral/impartial regarding relationships and specific outcomes
- Serves at the pleasure of the parties
- May be a professional mediator
- Seeks a jointly acceptable, voluntary, and non-coerced solution developed by the parties
- May or may not be involved in monitoring implementation
- Has no authority to enforce agreement

(Moore, 2003, pp. 44-45)

Neutrality vs. Impartiality

- Impartiality refers to the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions they are advocating
- Neutrality refers to the relationship or behavior between mediator and disputants
- Neither concept means that the mediator may not have a personal opinion about a desirable outcome or feel closer to one party than another
- Ultimate test lies in the judgment of the parties

(Moore, 2003, pp. 53-54)

The ethical dilemma that is implied from Model Standard II is what happens when the mediator's sense of fairness conflicts with the obligation to remain impartial?

This dilemma can manifest itself in the following situations:

- A. in view of a personal reaction to a party in the mediation
 - antipathy toward a party
 - sympathy toward a party
- B. in view of personal experience with a similar conflict

Hypotheticals #1-3

Hypothetical #1

In a mediation between a homeowner and a house painter where the issue at dispute is an exterior paint job, your co-mediator directs the following comment to the homeowner and says in the presence of both parties: "When I had my home painted, the painter did the

job when it was very hot outside and the paint bubbled up. Of course, that was a different case than this one, but I can understand how upset you must be.”

Was this comment appropriate?

Hypothetical #2

The stock exchange in your country has asked you to mediate a claim brought by an investor against a major brokerage firm for losses suffered in his purchase of securities issued by a company (Company X) that is listed on that stock exchange. You have no prior or current association with either the brokerage firm or the investor. However, a few years earlier, you had invested a significant amount of money in Company X through another brokerage firm and lost your entire investment when the stock of Company X lost most of its value.

Should you as the mediator say anything and to whom?

Hypothetical #3

You have been asked to mediate the break-up and dissolution of a family business. Unbeknownst to the parties is the fact that years ago you were a partner in a real estate investment firm with three other business associates. Because you and your partners could not agree on the direction of the firm, the firm was dissolved.

Should this personal experience of yours be disclosed to the disputants?

VIII. NEUTRALITY/CONFLICT OF INTEREST DILEMMAS (PROCESS-BASED FAIRNESS)

Standard III of the Model Standards requires that the mediator avoid conflicts of interest or the appearance of a conflict of interest during or after a mediation (Model Standards, 2005, p. 4).

The ethical dilemma that may arise from compliance with the obligation to avoid a conflict of interest is that it may be incompatible with the mediator’s sense of fairness to himself or herself. Unlike the other ethical dilemmas involving fairness to the parties or third parties, this type of ethical dilemma brings to the surface what the mediator believes is fair to him or her. Avoiding conflicts or the appearance of conflict is often at the expense of the mediator.

So this ethical dilemma can be framed in terms of relationships with parties

- prior to mediation
- when relationships arise during or after mediation
- when class or group “relationships” exist

Hypotheticals #1-3

Hypothetical #1

You have been asked to mediate a dispute between two large financial institutions. Your spouse works for a major law firm in town. You believe that your spouse's firm represents one of the parties on a regular basis, but you believe that your spouse has never represented that party.

What should you as the mediator do?

Hypothetical #2

You're a high school teacher and have already mediated two sessions with a divorcing couple. Between the second and third session, you discover that one of your students is dating the couple's daughter.

What should you as the mediator do? Would your answer change if your student confides in you that the divorce has been hard on the couple's daughter?

Hypothetical #3

You are a mediator with a private law practice. During a caucus with one of the corporate parties, the General Counsel (the chief legal officer) of that corporation indicates that she is always looking for good outside counsel and to give her a call after the mediation to discuss possible opportunities.

How should you as the mediator respond?

IX. CONFIDENTIALITY DILEMMAS (PROCESS-BASED FAIRNESS)

Standard V of the Model Standards requires that a mediator maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law (Model Standards, 2005, p. 5).

Confidentiality dilemmas often arise when the mediator caucuses, that is, meets privately with a party. The mediator may call for a caucus for various procedural reasons:

- to allow intense emotions to be vented without escalating differences between the parties
- to clarify perceptions or misperceptions
- to change unproductive or repetitive negative behavior
- to diminish and limit unhelpful communications

(Moore, 2003, p.369)

The mediator may also call for a caucus for various substantive reasons:

- to clarify positions
- to explore interests and needs
- to formulate new proposals and conduct reality testing of those proposals
- to weigh the other party's proposals

(Moore, 2003, pp. 369-370)

A party will often reveal information to the mediator that he does not want to have disclosed to the other party. Standard V. B. provides that a mediator who meets with any persons in private session during a mediation “shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person (Model Standards, 2005, p. 6). Hence, mediators can often find themselves in an ethical bind: Should confidentiality be the mediator's highest value, or should full disclosure of information relative to a settlement that is fair in the eyes of the mediator have primacy?

Such ethical dilemmas can be categorized as follows:

A. Vis-vis outsiders

- Reporting allegations of violence or crime
- Communicating to a court
- Communicating to a party's lawyer

B. Between the parties

- When disclosure would prevent uninformed settlement
- When disclosure would break impasse

Hypotheticals #1-3

Hypothetical #1

You learn in the course of a mediation that a company official has been committing tax fraud by knowingly charging expenses to his company.

Do you as the mediator have a duty to take any particular action?

Hypothetical #2

In a divorce mediation, you, the mediator, learn during a caucus with the husband that he has a hidden bank account that his wife does not know about and that he does not want to include in the financial settlement.

What should you as the mediator do with this information?

Hypothetical #3

In a caucus with one of the parties, the seller tells you, the mediator, that he would accept \$1,000 for settlement of an overdue payment for the purchase of goods rather than the \$1,500 he had been demanding. When you then caucus with the buyer, the buyer offers to pay \$1,250 in order to settle the claim. Only you know about this \$250 overlap.

What should you as the mediator do?

X. CONCLUSION

Mediators can face many different ethical dilemmas caused by the conflict between the core values embodied in the Model Standards and many other codes of conduct that govern the conduct of mediators, on the one hand, and their own identity or moral values, on the other hand. One such identity or moral value that is held by all mediators is that of fairness. It may be useful for mediators to analyze any ethical dilemma that comes his or her way by first identifying the core value of mediation at stake and then examining how it competes with or is incompatible with his or her own values of fairness.

REFERENCES

- Bush, R A. B. and Folger, J. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.
- Bush, R. A. B. and Pope, S. G. "Mediation: The Transformative Framework," a presentation for the City Bar of New York ADR Committee, March 7, 2005.
- Kressel, K. "Mediation Revisited." In Deutsch, M., Coleman, P., and Marcus, E. (eds.), *The Handbook of Conflict Resolution*. San Francisco: Jossey-Bass, 2006.
- Moore, C. W. *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed.). San Francisco: Jossey-Bass, 2003.
- Rahim, M. A. *Managing Conflict in Organizations*. Westport: Quorum Books, 2001.
- Susskind, L. "Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties not at the Table." In Menkel-Meadow, C. and Wheeler, M. (eds.), *What's Fair: Ethics for Negotiators*. San Francisco: Jossey-Bass, 2004.