

APPLYING THE INCLUSIVE MODEL OF ETHICAL DECISION MAKING TO MEDIATION

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I INTRODUCTION

There has been considerable discussion about ethics in mediation recently, particularly in relation to mediator accountability, public confidence, and legitimacy of mediation as a nascent ‘profession’.¹ The introduction of Australian National Mediator Practice Standards and various Ethical Standards² has gone some way to defining and pursuing a level of consistency in mediation practice; however, many suggest that such codes and standards are insufficient, and in fact may be detrimental, in supporting ethical practice in mediation.³ Two authors, Julie Macfarlane and Rachael Field, have put forward persuasive arguments for a contextual approach to mediation ethics, based on reflective practice.⁴ The authors strongly support their views. However, mediators would still benefit from some guidance for their contextual navigation of ethical dilemmas in their practice. The authors propose in this article that the

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¹ Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities’ (1997) 38 *South Texas Law Review* 407, 419; Rachael Field, ‘Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination’ (2011) 22 *Australasian Dispute Resolution Journal* 8; Julie Macfarlane, ‘Mediating Ethically: The limits of codes of conduct and the potential of a reflective practice model’ (2002) 40 *Osgoode Hall Law Journal* 49.

² For example: Australian National Mediator Practice Standards (2008); The Law Council of Australia (2006) *Ethical Standards for Mediators*; NADRAC (2000) *The Development of Standards for ADR*; Sourdin, T. (2007) *National Mediator Approval Standards*; CHCDISP803A Family Dispute Resolution Practitioner Accreditation competency *Facilitate Dispute Resolution in an Impartial Manner and Adhere to Ethical Standards*.

³ See for example Field, above n1, 8; Macfarlane, above n1.

⁴ Field, above n1, 8; Macfarlane, above n1.

Inclusive Model of Ethical Decision Making provides a useful framework for developing contextual and reflective ethical practice in mediation. This model was developed in the social work context by Donna McAuliffe and Lesley Chenoweth.

This article starts by providing a broad overview of different approaches to ethical decision-making, and why ethical literacy is important for mediators. Following this, the authors explain why current codes and practice standards are insufficient in addressing the challenge of ethical decision making. The needs of the mediator in navigating ethical practice are then explored. McAuliffe and Chenoweth's model is introduced as a proposal for additional guidance for mediators. A scenario is then used to demonstrate how the model could be applied. It is concluded that the inclusive model of ethical decision making has much to offer individual mediators and the profession as a whole.

II APPROACHES TO ETHICAL DECISION-MAKING

Traditionally, ethical decision-making fell within one of two philosophical approaches: utilitarianism (based on an analysis of what action serves 'the greater good') and deontology (based on an analysis of the particular individual's duties).⁵ Frequently the two approaches are in direct contradiction in terms of the appropriate action in a given situation, and neither allow for flexibility in relation to particular contextual factors. Later philosophical approaches have rejected the absolutist character of both, recommending a more fluid and intuitive approach.⁶ As Waldman notes, a context-driven balancing approach is particularly important in a field like mediation in which existing ethical guidelines are not unified and consistent (see further below). However, the problem with open-ended context-driven approaches is that they can be too fluid and lack guidelines for practitioners. One of the main benefits of the Inclusive Model of Ethical Decision Making is that it provides a balance between the benefits of the various approaches: it provides a framework, but also flexibility; it allows for practitioner intuition, but guides practitioners in how to use it; it considers aspects important from both a utilitarian and a deontological perspective, without prioritising one over the other.

The practise of mediation requires a balancing of goals such as impartiality be-

⁵ Russ Shafer-Landau, *The Fundamentals of Ethics*, (Oxford University Press, 2nd ed, 2010) 112-175.

⁶ See for example W.D. Ross, 'The Right and the Good' in Philip Stratton-Lake (ed), (Oxford University Press, 2009) and the discussion of his work in Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (Jossey Bass, 2011).

tween the parties, self-determination, fairness and empowerment. Macro and micro decisions by a mediator affect the balance between these (frequently) contradictory aims. Ethical literacy supports mediators to make deliberate, mindful and justifiable decisions about whether, when and how to contribute to or intervene in the mediation process. Without confidence about ethical decision-making, it may be difficult for mediators to reflect upon their practice critically and make decisions that they can explain and justify. Ethical practice requires more than a vague measure of whether an action or inaction ‘feels right’ or ‘is how I do things’.

III STANDARDS ARE INSUFFICIENT TO SUPPORT ETHICAL PRACTICE

A considerable amount of effort, consultation, thought, discussion and inquiry has been invested in the development of standards for mediator practice in Australia.⁷ As well as the Australian National Mediator Accreditation Standards, there are a number of other codes of conduct and guidelines produced by various organisations.⁸ These practice standards and codes of conduct are seen as important for three main reasons. Firstly, standards and codes are a form of policing. They provide a framework for practitioner accountability, a means to make sure that mediators do the right thing, and sanctions for unethical conduct.⁹ They also support public confidence in and the legitimacy of mediation,¹⁰ to protect the public interest and to establish mediation as a legitimate profession.¹¹ Practice standards also make a positive contribution towards defining and supporting ethical practice by defining what is clearly unethical, reminding practitioners of aspirational values and building a foundation from which ethical dilemmas can be considered.

However, while standards are a useful beginning point for developing a more detailed set of ethical considerations for mediators, they are not much more

⁷ See Mediator Standards Board ‘National Mediator Accreditation System (NMA) – A History of the Development of the Standards’ available at <http://msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf> (accessed 27 July 2012).

⁸ See discussion of the various Australian mediator codes of conduct in Laurence Boulle, *Mediation: Principles, Process, Practice*, (Lexis Nexis 3rd ed. 2011), 466–486.

⁹ Menkel-Meadow, above n1, 419.

¹⁰ Menkel-Meadow, above n1, 419; Field, above n1, 8.

¹¹ Barbara Wilson, ‘Mediation Ethics’ (2010) 12 *Cardozo Journal of Conflict Resolution* 119–141, 120;

than that¹² and can be problematic for a number of reasons. Rachael Field argues that the main problems with current Australian standards are that they are stated in broad, generic terms; have no universal acceptance or application; and are not enforced.¹³

Guidance in the form of Codes of Conduct or Ethical Standards alone is insufficient to support mediators to make robust ethical decisions. Codes have an inherent limitation in that ‘ethical *practice* must respond to the unique situational constraints and possibilities of each mediation, whereas ethical *standards* are unable to do so’.¹⁴

IV WHAT SUPPORT DO MEDIATORS NEED IN DEVELOPING ETHICAL PRACTICE?

Mediators need some form of guidance to support them in engaging in and developing ethical practice, individually and as a collective ‘profession’. Any guidance should ideally provide recognition of the relevance of, and guidance for using, individual judgement/discretion; allow for diversity in practice; focus on context; and provide accountability and a mechanism for the mediator and others to learn from decisions made.

A. Individual judgment and discretion

While practice standards and codes of conduct can provide generalised information about ethics, they cannot provide the answer to any given ethical dilemma that arises in practice. Standards and codes generally fail to acknowledge the critical role of the individual mediator’s personal traits, values, judgement and discretion.¹⁵ However, the mediator’s personal orientation to practice, skills, values and personality are inescapable and integral to the way mediation is practised. Therefore, external prescriptive guidelines are only part of the ethical framework. It is necessary for individual mediators to engage actively and thoughtfully in being an ethical practitioner of the mediation craft. The mediator’s choice of action is always based on his or her individual judgement and discretion in the particular circumstances. This kind of decision-

¹² Robert Schuwerk, ‘Reflections on Ethics and Mediation’ (1997) 38 *South Texas Law Review* 757, 760-761.

¹³ Rachael Field, ‘A mediation profession in Australia: an improved framework for mediation ethics’ (2007) 18 *Australasian Dispute Resolution Journal* 178-185.

¹⁴ Macfarlane, above n1, 63.

¹⁵ Macfarlane, above n1, 62; Field, above n14.

making is intuitive and often unconscious.¹⁶ Any guidance provided to mediators in relation to ethical decision making needs to provide a structure by which a mediator can identify and evaluate his or her own criteria and process as they apply to the particular problem faced, but to also allow flexibility for the mediator to apply his or her own discretion.

B. Allowance for diversity in practice

The diversity of mediation practice and the wide range of mediator beliefs and ethical positions are masked¹⁷ by standards that rely on ‘generic principles, fastening on relatively uncontentious virtues for the mediation process’¹⁸ Example of such ‘uncontentious virtues’ might include impartiality, confidentiality, and ensuring self-determination of parties. However, those virtues might be interpreted quite differently by mediators who practice with a facilitative model, compared with mediators who practice with a transformative model. For example, transformative mediators would likely interpret self-determination to include the parties making their own choices about the process of the mediation, and would not take steps to ‘balance power’ between the parties for this purpose; whereas a mediator using a facilitative/problem-solving model would see his or her role in controlling the process of the mediation and taking steps to balance power between the parties as an important part of ensuring parties’ self-determination.

The lack of universal acceptance and application of ethical codes stems from a number of characteristics of such codes. Codes of conduct are inherently value-based, but most do not clearly articulate their underlying values, either because the values are assumed to be universal, or because the authors of the codes have failed to adequately consider them. Most ethical codes are not inclusive, and tend to be based on a particular ideology/model. For example, the Commentary on the Australian Practice Standards acknowledges that there are a range of different mediation models in use across Australia and that the mediation process described in the Practice Standards is broad and flexible,¹⁹ however, the Standards refer specifically only to a facilitative or blended process.²⁰

¹⁶ Macfarlane, above n1, 59.

¹⁷ Wilson, above n12, 120-121.

¹⁸ Macfarlane, above n1, 60.

¹⁹ Clause 1.4, Commentary on the National Mediator Accreditation System Practice Standards.

²⁰ Clause 2, National Mediator Accreditation System Practice Standards; Clause 2.3

The flexibility and adaptability of mediation has contributed to the evolution of models of practice that differ markedly from one another in terms of the ethics and values that they promote.²¹ This presents a challenge for the development of a unifying code of mediation ethics.²² The polarisation of ideas about what mediation should aim to do and what values underpin it has also contributed to the gap between theory and practice (because the reality of practice rarely fits into one neat theoretical ideal). Field goes so far as to argue that ‘the dissonance that exists between the ethical theory of mediation, and the reality of its practice... could even be said to raise questions about the legitimacy and credibility of the mediation process itself’.²³

Any guidance provided to mediators needs to be applicable to different models of mediation and different contexts in which mediators practice. A framework for ethical decision-making needs to be adaptable and broad enough to cover a range of practice scenarios.

C. Increased focus on context

Current standards and ethical guidelines relating to mediation tend to be broad statements of what is and is not appropriate conduct without any reference to context. Field argues that the mediation profession needs ‘contextual ethics’ which require account of the context of the situations, particular circumstances of the case, its contextual and relational quality and the intuitive, responsive, reactive and integrated nature of its practice.²⁴ Waldman also emphasises the need for ‘a context-driven balancing approach’ in the mediation field in which existing ethical guidelines are not unified nor consistent.²⁵

Macfarlane points out that it is not possible to describe and prescribe behaviour independent of context.²⁶ However, most codes work on a top-down basis, setting out abstract principles that then need to be applied to particular situations.²⁷ For example, Baruch Bush has prepared a list of categories of the types of ethical dilemmas that practising mediators are confronted with, based

National Mediator Approval Standards.

²¹ See for example comparison of the ethical underpinnings of four seminal mediation texts in Wilson, above n12, 119-141.

²² Menkel-Meadow, above n1.

²³ Field, above n1, 9.

²⁴ Field, above n1, 10.

²⁵ Waldman, above n7, 9.

²⁶ Macfarlane, above n1, 70; Brad Honoroff and Susan Opotow ‘Mediation Ethics: A Grounded Approach’ (2007) 23 *Negotiation Journal* 155-172.

²⁷ Honoroff and Opotow, above n27, 156.

upon empirical data derived from his interviews of eighty mediators.²⁸ His list includes the following dilemmas:

- Keeping within the limits of competency (when skills or knowledge are lacking);
- Preserving impartiality (when relationships exist or emerge with parties or the mediator reacts to a party);
- Maintaining confidentiality (both to interested outsiders and between the parties – where there is a reason to disclose);
- Ensuring informed consent (where there is possible coercion, incapacity or ignorance);
- Preserving self-determination and maintaining non-directiveness (when tempted to offer or oppose a solution);
- Separating mediation from counselling or legal advice (when the parties need expert information, therapy or coaching);
- Avoiding harm (when mediation may work against a party's interests);
- Preventing party abuse of the mediation process; and
- Handling conflicts of interest.²⁹

Most mediation standards and codes of conduct have provisions that relate to these typical ethical dilemmas. However, what standard and codes ignore is the fact that these abstract principles are sometimes contradictory, reflecting 'tensions among mediation's underlying values: disputant autonomy, substantive fairness, and procedural fairness'³⁰ and there is generally no guide for how a mediator should prioritise between competing principles.³¹

Field suggests that mediators should prioritise 'self-determination'.³² Baruch Bush's research indicates that self-determination appears to be a 'fundamental and ever-present value' for mediators.³³ However, Macfarlane points out that the 'principle of self-determination is constantly mediated by the realities of power and accountability.'³⁴ She also suggests that simply making a hierarchy

²⁸ Robert Baruch Bush, 'A Study of Ethical Dilemmas and Policy Implications' (1992) *Journal of Dispute Resolution* 1.

²⁹ List summarised from Baruch Bush, above n29.

³⁰ Waldman, above n7, 2.

³¹ Wilson, above n10, 121; see also Baruch Bush, above n27, 42.

³² Field, above n1, 8.

³³ Baruch Bush, above n29, 42.

³⁴ Macfarlane, above n1, 64 and 67-69.

or prioritising will not help.³⁵

Waldman notes that ‘mediators have to decide for themselves how to prioritise and weigh these values when they push in competing dimensions’.³⁶ Standards and ethical codes do not provide any practical guidance for mediators in making such decisions.³⁷ Therefore, standards alone are insufficient to guide mediators to resolve the dilemmas that arise because of the competing aims and values of mediation.

Standards and ethical codes also tend to emphasize process,³⁸ and in particular tend to focus on the beginning and ending of process, set up and outcomes, not ethical dilemmas arising in the middle.³⁹ Many also tend to be based on artificial distinction between content, process and individual circumstances.⁴⁰ They ignore factors that occur before and after the mediator is active, such as systemic issues.⁴¹

Standards and codes tend to provide examples of standardised problems⁴² and ideal responses,⁴³ such as the mediator choosing between terminating or continuing with the process.⁴⁴ Macfarlane argues that codes ‘consistently underestimate and oversimplify the complexities of what it means to mediate ethically... in an uncertain, fluid and private process.’⁴⁵ Codes do not provide particularised ethics for a diverse actual practice.⁴⁶ In reality a mediator has many choices to make about how to continue, what interventions to make, which includes questions, comments, suggestions, calling an adjournment and who to talk to. These are much more subtle and sophisticated decisions than the extremes of to change nothing and continue or terminate the process forever.

Another problem with ethical codes is that they tend to focus on the role, behaviour, and perspective of the mediator; ignoring the parties’ and others’

³⁵ Ibid, 69.

³⁶ Waldman, above n7, 2.

³⁷ Wilson, above n12, 121.

³⁸ Macfarlane, above n1, 53 and at 58 (noting that Baruch Bush’s dilemmas all revolve around the mediator’s role: Baruch Bush, above n29).

³⁹ Macfarlane, above n1, 66-67.

⁴⁰ Ibid, 60; Honoroff and Opatow, above n25.

⁴¹ Honoroff and Opatow, above n27, 157.

⁴² Macfarlane, above n1, 55.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Macfarlane, above n1, 49-50.

⁴⁶ Honoroff and Opatow, above n27, 156.

perspectives.⁴⁷ They also tend to ignore the cultural and situational factors that frequently have a significant impact on decision-making at any particular time.⁴⁸

As Field and others have argued, any attempt to develop a way to guide mediators in ethical practice must ‘meet the challenges of the day-to-day realities of the mediation room, and the rigours of the real responsibility that is created by the privilege of the mediator’s role.’⁴⁹ Being a mediator is inherently complex and being a good mediator involves a contextual adaptation of practice.⁵⁰ Flexibility is a much recognised strength and risk of the mediation process.⁵¹ Field argues that any approach to mediator ethics must acknowledge ‘the reality of the relational, interactive, and engaged nature of mediation practice.’⁵²

Any ethical guidance for mediators should support the ‘constant generation of internal norms appropriate for a *specific mediation and set of parties*’.⁵³

D. Accountability and a mechanism for learning

Macfarlane suggests that a focus on reflective practice:

focuses on teasing out the values and assumptions behind the choices often made intuitively by mediation practitioners when they face ethical dilemmas in the course of their practice and the values they imply. These values can then be debated, critiqued, and diversified across different frames of action.⁵⁴

She recommends that mediators share and analyse their ethical decisions in order to be accountable, engage in discussion about ethical dilemmas, understand their own ‘theory-in-use’ and build an ethical practice both individually and as a community.⁵⁵

Supported critical reflection on practice also emphasises the need to explore the basis of ethical choices and impacts, rather than determining whether it was

⁴⁷ Macfarlane, above n1, 53 and at 58 (noting that Baruch Bush’s dilemmas all revolve around the mediator’s role: Baruch Bush, above n29); Honoroff and Opatow, above n27, 157.

⁴⁸ Macfarlane, above n1, 55.

⁴⁹ Field, above n14, 185.

⁵⁰ Menkel-Meadow, above n1, 444.

⁵¹ See for example, Macfarlane, above n1, at 50.

⁵² Field, above n1, 8.

⁵³ Macfarlane, above n1, 52.

⁵⁴ Macfarlane, above n1, 73.

⁵⁵ Macfarlane, above n1, 83-86.

the ‘right’ choice.⁵⁶ It provides a forum for mediators to share individual and experiential truths (identify and deconstruct).⁵⁷ Macfarlane observes that “[p]utting the principles of reflective practice into practice requires the conscious nurturing of a collaborative professional environment in which personal experiences and choices are shared in a continuous, self-critical, non-defensive, and open dialogue.”⁵⁸

Ethical guidance for mediators should include a process of critical self reflection and sharing of ethical decisions with other practitioners in a non-judgmental atmosphere. Clearly guidance alone is insufficient for this purpose, as the development of a community of practice that could support this aspect of ethical decision making would also be necessary.

V A PROPOSAL FOR FUTURE GUIDANCE

Baruch Bush’s research presents ‘strong evidence that mediators are ... concerned about good practice, sensitive to what the dilemmas are, and anxious to resolve them responsibly’ but that they need and are asking for guidance to do so.⁵⁹ He argues that mediators need coherent programmatic guidance in solving ethical dilemmas involving subtlety, complexity and seriousness.⁶⁰ While the Australian National Mediator Accreditation Standards provide some generalised guidance on most of the typical ethical areas identified in Bush’s research,⁶¹ they do not provide any guidance for mediators on the process to be used in making decisions about nuanced ethical dilemmas that might arise in a particular mediation context.

The Inclusive Model of Ethical Decision Making provides a useful framework

⁵⁶ Macfarlane, above n1, 70.

⁵⁷ Ibid.

⁵⁸ Macfarlane, above n1, 85.

⁵⁹ Baruch Bush, above n29, 43.

⁶⁰ Baruch Bush, above n29, 44.

⁶¹ For example Clause 4 of the Australian National Mediator Approval Standards requires applicants for accreditation to demonstrate that they have appropriate competence by reference to applicable practice standards. The National Mediator Practice Standards include Clause 5 ‘Impartial and ethical practice’ which requires mediators to conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice. The subsections of the clause include requirements relating to mediator bias and conflicts of interest, and inappropriate relationships with parties. The remainder of the Standards include clauses that relate to all of the standard categories of ethical dilemmas identified in Baruch Bush’s research.

that can provide guidance for mediators to engage in ethical practice. It is a model that addresses many of the concerns raised above about the deficiencies in ethical codes (but still recognises that they have an important place as part of the process of ethical practice). It includes specific consideration of contextual factors, and it emphasises reflective practice and a collaborative professional environment.

A. *The Inclusive Model of Ethical Decision Making*

In 2008 McAuliffe and Chenoweth, academics in human services and social work, published their article on the Inclusive Model of Ethical Decision Making (the Inclusive Model).⁶² Their model developed in response to the tension between standardised processes (which promote consistency and accountability) and decision-making models based on an element of intuition and critical reflection. Similar tensions exist in the mediation field, with some authors promoting a kind of checklist approach to managing ethical dilemmas⁶³ and others favouring a less process-drive approach.⁶⁴ Although ethics and managing ethical dilemmas are a required part of mediation training,⁶⁵ these tend to be taught in a kind of ad hoc, case study focused way, without providing a model or guidelines for actually managing real-time dilemmas in practice.⁶⁶

The Inclusive Model attempts to balance the need for consistency and accountability with the critical element of reflection on practice.⁶⁷ It is based on four ‘essential dimensions’ of decision-making and good practice: accountability, critical reflection, cultural sensitivity and consultation.⁶⁸

B. *What does the Inclusive Model provide?*

The Inclusive Model provides standardisation (consistency) of the decision-making process and recognises and allows for practitioner intuition in regard

⁶² McAuliffe and Chenoweth, above n5.

⁶³ Baruch Bush noted as problematic ‘the absence of any generally accepted, clear and demanding standards of practice for mediators...especially as to ethical conduct’: Baruch Bush, above n29, 4. However, he also notes that codes and standards are often very general and unhelpful when guidance is needed in a specific situation: Baruch Bush, above n27, 45.

⁶⁴ For example Honoroff and Opatow, above n27.

⁶⁵ Australian National Practice Standards, clauses 5 and 7.3(c).

⁶⁶ Baruch Bush notes that this kind of training is very rare: Baruch Bush, above n29, 46.

⁶⁷ McAuliffe and Chenoweth, above n5, 39.

⁶⁸ McAuliffe and Chenoweth, above n5, 42.

to the decision-making outcome. The Inclusive Model is a structured process framework that can accommodate any kind of ethical dilemma. Mediators are given a concrete series of steps to engage in to make their decision. Practitioners are not directed as to what response, intervention or other step they ought to take. This enables the Inclusive Model to be applied to all mediation process styles, purposes and contexts.

Accountability is ‘the ability of the worker to clearly articulate and justify decisions made, while taking into account the broader social context in which they operate... about being open, transparent and honest’.⁶⁹ Accountability is achieved in the Inclusive Model by taking decision making out of the private thoughts of the mediator into the external sphere. The mediator therefore needs to be self-aware, deliberate and transparent about her or his decisions. Decisions may be revealed to clients, the co-mediator, supervisor or community of practice.

The Inclusive Model supports practitioners to engage in critical reflection about their ethical decisions by guiding them through a framework of considerations. Critical reflection is about the practitioner ‘open[ing] up their decision making to scrutiny by self and others in a way that will lead to better future practice’.⁷⁰ It involves looking back and asking ‘what did I do well?’; ‘what could I have done differently?’; ‘what have I learnt?’; ‘what impact did my decision have on the process/parties/outcome?’ An opportunity for critical reflection is given at each stage of the Inclusive Model (defining the ethical dilemma, mapping legitimacy, gathering information, identifying alternative approaches and action, and critical analysis and evaluation).

Cultural sensitivity involves respect for the world views of others, and being mindful of appropriate cultural responses and norms.⁷¹ Therefore, the Inclusive Model is not prescriptive about the responses that a mediator ought to make.

Consultation is ‘using the wisdom and counsel of others wisely and to engage in discussions with others who may assist the practitioner to uphold important values in the interests of integrity and prudence’.⁷² In sharing the dilemma with others, the practitioner can benefit from external perspectives and an improved understanding of the issues.

⁶⁹ McAuliffe and Chenoweth, above n5, 43.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

VI HOW THE INCLUSIVE MODEL COULD BE APPLIED TO A MEDIATION ETHICAL DILEMMA

There are five stages to the decision making framework of the Inclusive Model, moving from definition of the ethical dilemma to critical reflection and evaluation of the decision that is ultimately made. The application of McAuliffe and Chenoweth's model to assist a mediator to respond to ethical dilemmas is demonstrated here through a hypothetical scenario.

SCENARIO: In mediation between a separating husband and wife over property and financial matters, you, the mediator (also a qualified lawyer), learn during a caucus with the husband that he has a hidden bank account that he does not want to disclose to the wife so that he can avoid including the funds in that account in the financial settlement.

Step 1: Defining the ethical dilemma

McAuliffe and Chenoweth explain that it is important to first identify the competing principles that make a situation into an ethical dilemma for the practitioner.⁷³ They refer to Banks' definition of an ethical dilemma: 'when a worker is faced with a choice between two equally unwelcome alternatives that may involve a conflict of moral principles, and it is not clear which choice will be the right one'.⁷⁴

Applying this step to the mediation scenario given, the mediator should identify which competing principles apply to make this situation an ethical dilemma. Bush's categories are a useful checklist to consider; however, it is important for the mediator to recognise that some of those categories might not apply to his or her mediation model or context. A facilitative mediator faced with this scenario may identify the following categories of dilemmas that potentially apply:

- Preserving impartiality – whatever decision the mediator makes in this situation is going to favour one or other of the wife or husband in terms of the outcome of the mediation.
- Maintaining confidentiality – the mediator should keep information provided in caucus confidential from the other party to the mediation.
- Ensuring informed consent – if the wife agrees to a settlement based on

⁷³ Ibid.

⁷⁴ S. Banks Ethical dilemmas for the social professions: work in progress with social education students in Europe', (2001) *European Journal of Social Work* 6: 1-16 at 11-13.

incomplete information, arguably she is not giving fully informed consent.

- Preserving self-determination and maintaining non-directiveness – if the mediator intervenes to oppose a settlement that does not include the secret funds, or if she or he withdraws from the mediation in circumstances where the parties wish to continue to mediate, the mediator may be creating a barrier to self-determination.
- Separating mediation from legal advice – the mediator, as a lawyer, may know that the husband's actions constitute a fraud and that the agreement reached may not be enforceable if the fraud is discovered.
- Avoiding harm – if the mediator does not take any action, the mediation may work against the party's interests.
- Preventing party abuse of the mediation process – if the mediator does not take any action, he or she may be facilitating the husband's perpetration of a fraud in the mediation process.

Even this first step of identifying and thinking about the impact of the competing principles is a good reflective process for mediators to unpack their mediation values and to consider how they as an individual might prioritise them in practice.

Step 2: Mapping legitimacy

The second step of the model requires the mediator to consider the relationships involved, and whether to share the dilemma with the client/s or others.

For the mediator in this situation, some relationships that might be relevant could include:

- The relationship between the parties and the mediator;
- The relationship between the parties;
- The relationship between the parties and other people (e.g. children of the relationship) who might be impacted by the decision;
- The relationships between the parties and their advisers (their lawyers, for example, if they are represented).

The mediator should also consider the impact of disclosing the dilemma on those various relationships.

The mediator should consider whether he or she should disclose either the dilemma or his/her decision about how to manage the situation to anyone.

Questions to consider in relation to disclosure might include:

- Who could the mediator disclose to? (e.g. the other party, the party's lawyer, the mediator's supervisor, police, the Family Court)
- Who should the mediator disclose to? (e.g. are there any requirements for disclosure of a serious offence, would they apply in this situation?)
- What might be the impact of disclosing (and not disclosing) to each of these possible people?
- Which of the values/principles identified in Step 1 would or would not be promoted by disclosure?
- What options does the mediator have to consult with somebody before making a decision?

The purpose of this step of the Inclusive Model is to identify who is legitimately involved in the situation (including the clients, members of their families and professionals). This enables the impact of the decision on each of these people, and the responsibilities that different actors have to the situation, to be assessed. This step also assists the mediator to decide who should be informed of the ethical dilemma and consulted in order to make a decision.

Step 3: Gathering information

This step requires mediators to identify sources of information that may assist them in managing the ethical dilemma. Sources of information for mediators may include formal documentary sources such as legislation governing the mediation or the kind of dilemma (e.g. Family Law Act, criminal laws), practice standards (e.g. NMAS, FDRP competencies, any applicable codes of conduct or ethics), training materials, and research or other literature addressing such a situation. Other sources of information might be less formal and undocumented, such as the mediator's knowledge of personal, professional and societal values.

It is important for the mediator to consider professional and personal information that might be impacting on ethical decision making in any given situation. This is because some ethical dilemmas may involve the same impulse, but the source of the impulse might vary. For example, Bush explains that the self-determination and counselling/legal advice categories both involve a mediator's impulse to be directive. However, in the first situation the impulse comes from the mediator's personal judgment and values, and in the second, from the mediator's expertise in the area of counselling or law.⁷⁵ Step 3 of the Inclusive Model specifically addresses this difference, by referring the practi-

⁷⁵ Baruch Bush, above n29, 41.

tioner to consider and identify both professional and personal information and values that might be impacting on her or his decision-making in the particular circumstance.

A consideration of cultural factors could also take place in this step. While the participants in this scenario may not be cross-cultural in one sense, it may be that as this mediation is taking place ‘in the shadow of the court’ then the adversarial culture of the law is a relevant factor to take into account. For example, does the mediator’s legal training, and enculturation into the adversarial tradition of legal practice, impact on the mediator’s decision making in this situation, and if so in what way? The mediator might reflect upon what his/her legal perspective is, how it is affecting her/his approach as a mediator, what alternative perspectives or approaches are available and whether her legal orientation is appropriate in the circumstances.

Step 3 also involves a consideration of the various contextual factors that might impact upon the situation. The context might be general (in that this is a family conflict), specific to the mediator’s values (the situation in which a man is withholding information and finances from his ex-wife may be particularly challenging for a mediator with a strong feminist/social justice ethic) or particular to the characteristics of the clients or the conflict (for example if there is apparently little property to divide, the ex-wife is nearly destitute, and the hidden fund contains a very large amount of money).

Step 4: Alternative Approaches and Action

The fourth step of the decision making framework asks mediators to identify the alternative approaches and actions that could be taken in response to the ethical dilemma. This enables a risk analysis to be conducted of what the consequences of certain actions or inactions might be. It may enable the mediator to identify options that would do no harm. At the very least, the generation of a range of options will support identification of the least harmful response. The risks in a mediation context include what the consequences will be after the immediate process ends.

In the family law property scenario, the options available to the mediator include:

- Exploring with the husband why he is reluctant to share the information about the bank account. For example: ‘Can you tell me more about that?’, ‘What is making you reluctant to share that information?’, ‘What do you think might happen if you did share that information?’

- Sharing the mediator's ethical dilemma with the husband and explaining the difficulty that his disclosure has presented for the practitioner and/or the continuation of the mediation process.
- Encouraging the husband to disclose the existence of the bank account by one or more of the following:
 - Asking him to identify any dangers involved in failing to disclose the information.
 - Reminding him of the agreement to mediate, if it provided that the parties would share all relevant information within the mediation;
 - Explaining that his failure to disclose the existence of the bank account constitutes a fraud;
 - Explaining that an agreement reached where there was fraud may be unenforceable;
 - Telling him that a failure to disclose all property at the mediation would amount to an abuse of the mediation process;
 - Explaining that if he does not disclose the information, the mediator will have to withdraw from the process because her impartiality would be compromised.
- Alerting the wife/ breaching confidentiality by one or more of the following:
 - Emphasising to the wife that it is very important that all of the marital property is identified before the parties make a final decision;
 - Asking the wife whether she is certain that all relevant property has been disclosed;
 - Asking the wife whether she trusts that the husband has been open and honest in providing information about finances;
 - Informing the wife that it has come to your attention that not all relevant information has been disclosed and that she ought to make further inquiries;
 - Telling the wife that the husband has not been honest and that you are therefore terminating the process;
 - Asking the wife how she would feel if the husband had hidden some money from her.
- Continuing with the mediation process without taking any action in rela-

tion to the husband's disclosure.

- Terminating the mediation process, with or without explanation to the parties.

The analysis of risks and consequences of each option would need to be conducted from the perspective of the individual mediator, who has her own bundle of ethics, values, culture and context. Different mediators may respond in different ways to the same ethical dilemma. A single mediator may respond differently in separate instances to the same ethical dilemma.

Step 5: Critical analysis and evaluation

At any given moment in a mediation, it can be difficult (if not impossible) for the mediator to perform a thorough evaluation of all the factors that might impact on his or her choice of action in the next moment. McAuliffe and Chenoweth acknowledge that a common criticism of ethical decision making models is that there is often no time to consult, to gather information, or even to reflect before a response needs to be given.⁷⁶ However they suggest that with practice, a framework of decision making can be internalised and become second nature. Through critical reflection a mediator can 'move practice from a routinized and rote response to a more dynamic and thoughtful engagement with moral issues that lie at the heart of human services work.'⁷⁷ In order to support this process, their model includes an integrated process of critical reflection on practice.

Critical analysis and evaluation is an essential part of reflective practice. Supervision is not as developed in mediation as in other spheres, such as counselling or social work.⁷⁸ Opportunities to debrief and consult other practitioners are essential to the accountability and critical reflection stage of the Inclusive Model. Although some mediation organisations provide internal opportunities for supervision, it is desirable that more sophisticated practices and support systems are developed within the Australian mediation profession. In encouraging communities of practice and supervision frameworks to develop, it may

⁷⁶ McAuliffe and Chenoweth, above n5, 47.

⁷⁷ McAuliffe and Chenoweth, above n5, 46.

⁷⁸ Little attention has been paid to the development of standards, frameworks or models for supervision in mediation, which can be contrasted with the substantial amount of literature available regarding supervision of other helping professions such as social work, counselling, nursing etc. This may be due in part to the relative youth of the mediation profession. However, there is scope for guidance about how to supervise another mediator's practice, acknowledging the particularities of mediation.

be appropriate for mediation to borrow from other fields. There needs to be a safe space where the focus is on supporting good practice rather than penalising unacceptably bad practice (although that may be warranted in extreme cases).

The reflective activities that the mediator could engage in include solitary reflection, supervision style reflection and sharing the dilemma more broadly. The mediator may debrief alone with or without reference to a formal sequence of debriefing questions; or write a reflective diary (which provides an opportunity to contemplate and to return to the record of thoughts at a later time). Supervision style one on one reflective activities might include debriefing with a co-mediator during or immediately after the mediation; or seeking one on one supervision with an experienced mediator.⁷⁹ Sharing ethical dilemmas and decision making more broadly than in the privacy of solitary or supervisory reflection contributes not only to the practitioner's own professional development, but also contributes to the fostering of healthy practice in the mediation field more broadly. Options include sharing the ethical dilemma, reflecting and critiquing decision making at a meeting of the mediator's community of practice; or publishing or presenting the mediator's ethical dilemma, decision making and self-reflections.⁸⁰

VII CONCLUSION

There are a number of reasons why mediator codes and standards are insufficient to guide mediator's ethical practice. The diversity of mediation practice and the inevitable conflicts between mediation values and ethical principles make the maintenance of ethical practice a complex and challenging task. The context within which an ethical dilemma arises must be considered in deciding how to respond. As Field points out, the implementation of contextual ethics would require 'a significant investment in professional training but also far more time, effort and practical competence than is the case for a formulaic ethical method.'⁸¹ However, there is a danger that without guidance about how to navigate the complexities of the situation that the mediator faces, sound decision-making will not be supported. This article has proposed that the Inclusive Model of Ethical Decision-Making provides a useful guide for mediators that strikes a balance between the need for useful structure and an ability

⁷⁹ These first four activities are mentioned by Laurence Boulle and Nadja Alexander *Mediation: Skills and Techniques* (LexisNexis Butterworths 2nd ed 2012) [12.14].

⁸⁰ As Julie Macfarlane did in Macfarlane, above n1.

⁸¹ Field, above n1, 10.

to contextualise the problem.

The Inclusive Model could be incorporated into mediation training programmes and taken from that context into mediation practice. It would not be difficult to teach the steps of the Inclusive Model and apply them to hypothetical ethical dilemmas. Discussion among trainees would model the accountability and critical reflection involved in practising the model. The challenge that the implementation of the Inclusive Model presents is in providing the required supervision, reflective opportunities and sharing once practitioners have completed their training. It is desirable that support systems and frameworks be developed to ensure that practitioners have access to supervision from experienced and skilled mediators.

While the authors promote the Inclusive Model as a valuable framework for the practice of contextual mediator ethics, there are some limitations that need to be acknowledged.⁸² The cumbersome reality of applying such a complex decision-making framework in the moment of mediation may present an obstacle to its adoption. Other models or processes of ethical decision-making may be more effective for some mediators, so the Inclusive Model should not be considered to be the only ethical decision-making model that can be applied in the mediation context.

This article has demonstrated two things. First, although it was developed in the social work context, the Inclusive Model can be successfully and usefully applied to mediation. Secondly, the mediation profession can look to other human service professions for frameworks to assist in the resolution of ethical challenges. Those challenges are integral to and inevitable in the practice of mediation.

⁸² McAuliffe and Chenoweth, above n 5, acknowledge the limitations of their model at 47-48.