

Ethics in Mediation

By: Antonio M. Prida Peón del Valle¹

1. Ethical Principles of Mediators²

Any professional practice related to the settlement of disputes between individuals must be carried out in accordance with ethical and legal standards based on moral principles, but primarily based on the concept of professional honor and dignity, as well as the sincere desire to cooperate with the good administration of justice.

The issue of Mediators' ethics is intimately related to that of the professionals who can perform such mediation. In this regard, the contention, both national and international, has focused on defining whether professionals outside the legal profession can act as Mediators. Depending on the position being taken in this regard, the particular ethical standards of each profession shall apply, in addition to the particular ethical standards of the Mediator. It is of particular relevance to this definition, the distinctive "professional secret" of the law profession, but not common to all professions. Without being able to analyze now this contention, we are in favor of the opinion that **Mediators should be lawyers by profession** so that they can be able to know the legal scope of the dispute between the parties, as well as the rules governing the mediation process and the legal scope of the settlement agreement to be reached to solve the dispute. Moreover, as will be seen below, the principle of Quality of the Process referred to in Article 6 of the Code of Ethics for Mediators of the Mexican Mediation Institute, requires that Mediators take into account the "General Principles of Law" and apply the uses and practices that do not contravene public policy, concepts only fully known precisely by legal professionals. Notwithstanding the above, professionals from any other discipline may intervene in the mediation process as experts, being subject to their respective codes of professional ethics.

As for the figure of Mediator, the main feature of the role they play in the mediation process is that which defines the fundamental ethical elements of their performance. In fact, the acts of the Mediators shall follow the "**principles of objectivity, equity and justice**"³. From these principles derives the first ethical duty of Mediators: **to be neutral** regarding the parties of the dispute and to behave neutrally in the mediation process. Thereby, they must gain the parties confidence, both in their neutrality during the process and in their confidential handling of the information and documentation disclosed to them by the parties, and even regarding the existence of the mediation procedure. To be neutral, Mediators must disregard nationality, race, sex, religion, or any other personal trait of the parties to the dispute. Likewise, Mediators must not have any family, friendship or business ties with the parties to the dispute which may jeopardize their impartiality.

Mediators' **impartiality** encompasses both the content of the dispute and the mediation process, and the settlement agreement to be adopted by the parties. Thus, Mediators require absolute independence with respect to any of the disputed issues. As for the process, Mediators must ensure equal opportunities for the parties to participate in it, as well as assessing the parties' positions with impartiality and consistency. Regarding the settlement agreement that puts an end to the dispute, Mediators must refrain from having any personal or financial interest in it. Due to

¹ Founding partner of the law firm Curtis, Mallet-Prevost, Colt & Mosle, S.C., former Vice-President of the Illustrious and National Bar Association of Mexico, President of the Mediation Committee of ICC Mexico and member of the Mexican Mediation Institute, A.C.

² This section contains ideas of David Richbell, published in The CEDR Mediator Handbook.

³ Article 7, paragraph 2 of the Mediation Rules of the Mexican Mediation Institute, A.C.

the latter reason, Mediators are prevented, as will be seen later, from setting their fees based on a *Pacto de Cuota-litis*. It is also essential that Mediators renounce their personal interest in reaching a successful settlement of the dispute, respecting the parties' freedom to terminate the mediation process without a satisfactory settlement; which prevents them from making any attempt to persuade either party to have a precarious legal position in case of litigation.

Mediators' neutrality can be tested in case one of the parties is poorly counseled or **lacks of appropriate advice**. In this regard, it should be highlighted that Mediators' role is to assist the parties in finding an adequate solution to solve their disputes, satisfactorily to all parties involved, but does not include counseling them, nor suggesting to initiate legal actions within or outside the mediation process. In the event that one of the parties does not have counseling, Mediators should suggest them to obtain it and alert them of the risks of not doing so, but in case Mediators consider that one of the parties is poorly counseled, they can not suggest to look for another advisor other than the one who is advising such party. Mediators who become advisors to one of the parties violate the neutrality to which they are bound. In case Mediators become aware of an error incurred by the parties due to the lack of appropriate advice, they cannot correct it, but should call it to the attention of the party benefiting from such error, urging that party to correct it and alerting of the legal consequences of not doing so, since that error could be corrected in litigation after the mediation process. If Mediators are reasonably concerned that a settlement agreement is clearly inequitable for one of the parties, due to a lack of advice or poor counseling, they may determine a cooling-off period, prior to the formalization of such agreement, so that the affected party has one last opportunity to obtain the appropriate counseling.

The neutrality and impartiality of Mediators, which is essential within the mediation process, requires that Mediators have **no conflict of interest** with the parties. In case there is even the most remote possibility of a conflict of interest during the mediation process, Mediators are compelled to disclose it to the parties and, if applicable, to the body administering the mediation, and shall excuse themselves from acting as Mediator in the event that either party so desires or that the Mediator itself anticipates the actual emergence of such a conflict. The fact that Mediators know one of the parties or some of their representatives or advisers does not necessarily represent a conflict of interest for Mediators, but in any case they are compelled to disclose it openly to the parties. Mediators must conscientiously excuse themselves from acting as Mediator, in case they have any prejudice against or in favor of any of the parties due to their personal characteristics, including without limitation, their gender, race, nationality, religion or any other.

In addition to the neutrality of Mediators and their duty of confidentiality, the Mediator must have high **prestige** in matters of **integrity** and **honesty** and act accordingly during the mediation process. It should be noted that these characteristics of personality are aspects related to the character and lifestyle of the Mediator, which requires an exemplary behavior over the years allowing to provide confidence to the parties. While concepts of integrity and honesty are difficult to define in an abstract concept, it is relatively easy for parties in a mediation process to determine whether or not Mediators act with integrity and honesty. For example, Mediators' honesty may be tested during the mediation process if they know the minimum position one of the parties is willing to accept to solve the dispute and is consulted by the other party in that regard. In such case, Mediators have an impediment to disclose that information, but also to lie since this would result in the loss of confidence of the other party. In that situation, it is advisable that Mediators refrain from answering and appeal to their duty of confidentiality.

In the event that during the mediation process, Mediators suspect of any illegality, including one of a criminal nature, they have the **right to excuse** themselves from participating in the process and in extreme cases to put an end to their duty of confidentiality, even without the parties authorization, in order to protect public interest and avoid serious risks for the parties or for

third parties.

Since Mediators' role in the process does not include counseling the parties, their **negligent performance** rarely harms the parties. However, such negligent performance handling confidential information may affect the interests of any of the disputed parties, as well as if the Mediator improperly advises one party and consequently it results affected. In any case, in order to exercise any liability action against Mediators, the affected party must prove in court not only the Mediators' negligent performance, but also the damages suffered as a result of such negligence.

Although unfortunately the new Code of Professional Ethics of the Mexican Bar Association dated February 1, 2017 did not expressly include as an ethical conduct of lawyers the proposal to privilege the use of Alternative Dispute Resolution Methods prior litigation,⁴ it expressly acknowledges the Mediators, when dealing with rules of professional conduct of lawyers in front of judges, authorities, arbitrators or "Mediators", prohibiting lawyers from intervening in matters in which they have participated in such capacity (Article 8.1).

However, it is admirable that such Code in Article 9.1 has established as the very first lawyers' duty, to "do their best efforts to avoid disputes and, if necessary, to solve them."

Regarding the aforementioned conflicts of interest, it should be noted that Article 14.1 of the new Code of Professional Ethics of the Mexican Bar Association establishes the duty of the lawyer to "refrain from . . . serving professionally in any way to those with conflicting interests in the same business . . .", a prohibition that, of course, should not be required to a lawyer acting as Mediator, without providing legal advice to the parties in the same conflict.

2. Analysis of the Code of Ethics for Mediators of the Mexican Mediation Institute

After analyzing the ethical principles governing Mediators' performance and some practical problems related to their performance, it is time to analyze the main rules in the Code of Ethics for Mediators (hereinafter the "*Code*") of the Mexican Mediation Institute (hereinafter the "*Institute*"), since it is the most comprehensive Code on the subject in our country⁵.

The Code is divided into three sections. The first one contains general provisions, the second one relates to the Mediator's relationship with the parties, and the third one contains additional provisions.

Article 1 of the general provisions establishes that the Code governs the performance of Mediators accredited to the Institute, including the relationship between Mediators and the parties. Although the Code does not expressly state this, we believe the Institute itself and its officials and employees are subject to the ethical standards contained in the Code.

As the first Mediators' ethical standard, Article 2 of the Code states that in order to be able to act, they must **consider themselves qualified** to conduct a mediation process and to understand the substantive matter of the dispute. This implies having academic preparation and professional experience both regarding the mediation process and the substantive subject matter of the dispute.

⁴ Proposed by barrister Enrique A. Hernández-Villegas, also Vice-President of the Mexican ICC Mediation Committee.

⁵ There are also, among others, the Code of Ethics of the National College of Certified Mediators, A.C. and the Foundations for Mediation of the College of Mediators of Nuevo Leon, A.C., which contains some basic ethical standards.

It would be ideal that the Institute conducts tests of knowledge about the mediation process for accreditation of Mediators in order to ensure this ethical standard. In accordance with this first standard, if Mediators do not have such knowledge and experience, their duty is to excuse themselves from acting in the process and to request the parties and the Institute to be replaced. Even though this ethical standard does not expressly state it, it compels Mediators to request assistance from experts in the substantive matter of the dispute, when the specialization of such subject requires technical knowledge which Mediators do not have. Even if the Code does not expressly establish it, it is a fundamental requirement of the mediation process that Mediators act personally and not through partners or assistants, since the appointment as a Mediator is a **highly personal activity**, *i.e., intuitu personae*.

The principle of **self-determination** that should govern the mediation process is contained in Article 3 of the Code. According to this principle, the parties will to reach a negotiated settlement of their dispute is the basis of mediation. Therefore, it is the ethical duty of Mediators to respect the decision of the parties, if they decide to temporarily or definitively suspend the mediation.

According to the **impartiality** principle set forth in Article 4 of the Code, Mediators shall conduct themselves impartially, *i.e.*, in a **neutral** manner. Therefore, Mediators must refrain from acting on matters in which they have a **conflict of interest**. In the event that such conflict of interest arises after the mediation process has begun, Mediators are compelled to withdraw from the case requesting the Institute to be replaced. Professionals will be prevented from acting as Mediators if they have had professional or business ties with any of the parties, or if they have had a friendship or a family relationship with them, since that situation could affect their objectivity. This ethical duty of impartiality implies that Mediators avoid behaviors that have the appearance of bias towards one of the parties. In order to maintain its neutrality, Mediators are compelled to refrain from offering professional advice to the parties and if it deems it convenient or necessary, they should recommend to the parties to get such professional advice from the Institute or from third parties. This duty also prevents Mediators from providing professional advice, directly or indirectly, to any of the parties, even for a reasonably long period after the end of the mediation. In this way, the ethical standard analyzed compel Mediators to carry out, in relation to the parties to the conflict, exclusively the acts necessary to conduct the mediation, being prohibited the performance of any other act.

The principle of **confidentiality** governing Mediators' performance is provided in Article 5 of the Code, according to which they are prevented from divulging the information and documentation received from one of the parties to the other parties as well as to any third party. For this, Mediators shall discuss with each of the disputed parties what information is protected by this principle. Of course, all the proposed solutions analyzed by the parties, as well as the agreements reached during the mediation, are protected by the principle of confidentiality. In case the parties decide that the very existence of the mediation process is subject to confidentiality from Mediators, they must keep it. The Mediator who reveals confidential information of the mediation process to the Institute does not violate the principle of confidentiality since this is also subject to the duty of confidentiality.

Article 6 of the Code states that the mediation process must be carried out in accordance with the principles of **self-determination, impartiality, equity and justice**. **The principle of Quality of the Process** contained in this article also compel Mediators to take into account in their conduction, the General Principles of Law and the uses and practices of the type of business in which the dispute arises, provided that such uses and practices do not contravene public policy or

general interest provisions. The principle of Quality of the Process implies the Mediators' ethical duty to conduct the process efficiently and in a timely manner, avoiding it may be intentionally delayed by any of the parties. This same principle compels Mediators to foster mutual respect among the parties and to suspend or postpone the mediation process when they consider that it is being used to encourage an illegal or unethical behavior.

The last article of the Code's first section compels Mediators to behave in an **objective** and **honest** manner before the parties, especially regarding their knowledge and experience of the substantive subject matter of the dispute, and prohibits them from guaranteeing the parties a successful outcome of the mediation process.

The second section of the Code containing the ethical standards governing the Mediators' relations with the parties, starts with Article 8 which compels Mediators to inform the Institute and the parties of any current or potential conflict of interest of which they are aware. The Code recognizes the possibility that the parties and Mediators agree to continue the mediation, despite the existence of such a conflict of interest. We think that this exception within the Code should not exist since it jeopardizes Mediators' neutrality and impartiality, which are fundamental elements of the mediation process.

In respect of **fees**, Article 9 compels Mediators to inform the parties in writing, before starting the mediation process, the way their fees will be determined, stating if possible the amount and form of their compensation. Although the Code does not require it, it is advisable that the pact of fees be also signed by the parties. For the determination of fees, the Code indicates that Mediators must take into account the fees established by the Institute, the type and complexity of the dispute and the Mediators' knowledge and experience. In our opinion, the following additional elements should be taken into account to estimate the amount of fees: importance of services, quantum of the case, success achieved and its significance, novelty or difficulty of the legal issues debated, economic capacity of the client, local custom of the forum, resulting liability for the lawyer, time spent, lawyer's degree of participation in the study, approach and development of the process, and the possibility of being prevented from intervening in other matters or confronting disputes with third parties. Even though the Code does not establish it clearly, in view of the social commitment of the professionals to make the mediation process accessible as an effective extra-judicial means for the settlement of disputes, it is the Mediators' duty to give their fees up in order to make the mediation process accessible to those with limited resources. As to the form of payment, it is acceptable that Mediators require the parties to deliver to the Institute a reasonable deposit to cover their fees. It is not acceptable to establish a *Pacto de Cuota-Litis*, since this would create an illegitimate interest of the Mediator in the settlement of the dispute through mediation.

Article 10 of the Code establishes the Mediators' duty to know exactly the procedural stages of mediation and the objectives and principles that govern the process. This article also establishes the Mediators' obligation to narrow the controversial points between the parties, to understand their claims and to encourage proactive attitudes which allow to analyze different options for the solution of such disputes. It is the Mediators' ethical responsibility to avoid the abuse by one party to the other party.

The Third and last section of the Code related to Additional Provisions includes Articles 11 and 12, which respectively provide for the possibility for parties to be represented or advised by

legally authorized persons and the obligation of the Mediator to acknowledge the parties' freedom to agree on the rules of the process, including its amendment or repeal, by simply notifying the Mediator and the Institute.

Mexico City, March 23, 2017