

Creating and Controlling the Ethical Framework of Mediation

Gabriel - Cristian CONSTANTINESCU

Mediator, Bucharest, Romania

E-mail: mediator.constantinescu@gmail.com

Abstract *The mediator can play an active role in creating the ethical framework in the conflict mediation. A pyramidal hierarchy of ethics principles in mediation is proposed: mediator's ethics/legality and morality of the negotiation subject/ethics in the communication between negotiators/ethics of the procedures, techniques and tactics of negotiation. Exercising a triple role (personal example of ethics, generator of negotiation ethics rules, guarantor of minimal ethical framework), the mediators can become the creators of the mediation ethical framework. This ethical framework created by the mediator can be controlled through techniques systematized in a methodology for neutralizing unethical impulses of the negotiators involved in mediation. The proposed method selects a range of possible interventions depending on the orientation of negotiators identified by the mediator - to objective or to relationship. The mediator can use these techniques without exceeding its role of neutral and impartial person. The pro-active attitude of the mediator in the mediation ethical framework construction is identified as the key to reach equitable agreements and the future commitment of the parties.*

Key words Mediation ethics, ethics principles, mediation ethical framework, neutralizing techniques, mediator's role

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1. Mediation as an assisted negotiation

The definition of mediation given by Gollan and Folberg, that the mediation is a negotiation process assisted by a neutral person, became probably the most often cited by the scholars and practitioners of mediation (Gollan and Folberg, 2006). It highlights the basic parameters of mediation: negotiation of a conflict and neutral assistance of a mediator, but also highlights the sense of the mediator's involving: the mediator influences by his or her *presence* the process of negotiation.

Negotiation, as an act of communication to reach an agreement, is not specific only to the disputes involving companies in the commercial sphere, but also to the mediation in disputes between individuals. The distinction between the two categories of parties involved in the conflict is the professional pattern taken by negotiation in business disputes, unlike common negotiation between individuals - often instinctive and less sophisticated. This is why, in this material, the commercial negotiation - with a validated mechanism by a larger number of researches, will be more used more as example.

Establishing a mediation framework based on ethical standards and clear rules of conduct of mediation, the mediator can increase the control over the morality and the legality of negotiations and can build firstly a trust in the mediator, and then a trust between the dialogue partners that are engaged in the negotiation.

2. Creating the ethical framework of mediation. Pyramid of ethics principles in mediation

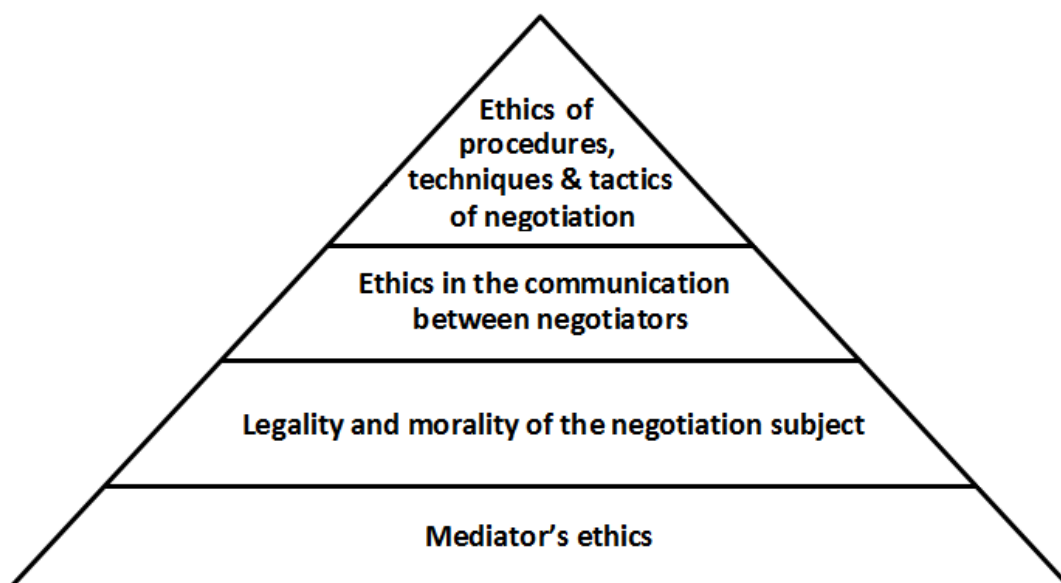
In the commercial negotiations, the principle of legality and morality is not resumed just to the business ethics; it also regards the ethics of interpersonal communication. Negotiation - the tool that business person can use it more skilfully than the simple individuals during a civil litigation, involves appealing to a wide range of strategies, tactics and techniques. Some of these procedures or techniques rely on manipulation and can

escape to the control of the partner of communication and negotiation. Therefore, there is a need to have a minimum level of ethical standards, during the negotiation between parties.

A study of P. Kaufmann and L. Stern address the conflict from the ethical perspective of the perceived rules by the parties on dispute. Thus, in absence of a conflict it is expected that the parties embrace a set of rules that characterize the business and communication relationship between them, but during a trade dispute, their perceptions on the other party's behavior changes. Perceptions of the other party as "unfairness" persist even after the conflict episode has ended, and even after mediation the perception of integrity of the other party and solidarity become affected (Kaufmann and Stern, 1988).

Mediation ethics acquires multiple meanings. We can build a pyramid of ethics principle in mediation, schematized in Figure 1. The hierarchy sits at the bottom the ethics principles that can be easiest controlled and enforced by the mediator - those of his or her profession, and advance towards to the top till the ethics principles most difficult to be imposed and controlled by both the mediator and the parties - the negotiation methods used by the parties in dispute.

Figure 1. Pyramid of ethics principles in mediation



i. Mediator's ethics

The observance of professional ethical and deontological principles by the mediators is the foundation of mediation ethics, as a guarantee of the quality and fairness of this process. These principles must be presented from the beginning to the parties in dispute, as a benchmark for an ethics framework.

ii. Legality and morality of the negotiation subject

Legality of negotiation subject is a juridical requirement of mediation but, given the private, confidential, but flexible feature of this procedure, it cannot be presumed in any case. Nevertheless, this legality can be primarily under mediator's control. The moral norms are conventional, informal, unwritten and are adopted by adhesion, and not by imposition. Regarding the morality of the subject of negotiation, the mediator may set a minimum framework of morality from the outset, calling generally accepted by society habits and rules of conduct and requiring the adherence to them of the negotiators, during the mediation, and this without exceeding his or her neutral status.

iii. Ethics in the communication between negotiators

Among the manifestations of the negotiators' interaction, the communication is most easily mastered by mediators, in terms of imposing a minimum set of ethical communication principles. Typically, from the onset of mediation, the mediator communicates and obtains the agreement of the parties on a minimum set

of communication rules, which he or she can then recalled them, during the mediation. To these rules, the mediator may additionally establish, with the adhesion of all participants, other rules in relation to the needs identified in the dynamics of mediation. These agreed rules are the easiest to be observed by the negotiators.

iv. Ethics of the procedures, techniques and tactics of negotiation

The vision of a mediation in which the negotiators are in a relational paradise is utopian. The real negotiations bring to the table methods of which ethics is difficult to control, as part of each party's skills to defend their own interests. Even in this context, the mediator can legitimately invoke the refraining from abusive use of methods beyond the control of the negotiation partner.

3. Mediator – the creator of the ethical framework of mediation

The negotiation is experiencing a tendency toward using unethical methods, which various studies appreciate with an incidence of between one quarter and two thirds, for the business relationships case. One of the most recent researches identified options for using unethical tactics in about two thirds of the negotiations, from an experiment on simulated business negotiations by email (Volkema and Rivers, 2012).

The diversity of unethical methods in negotiation is wide. Manipulation and fraudulence can take different forms: from the trivial so-called "white lies", use of half-truths or omissions, deterring, fake role play, bluff, empty promises and unfulfilled, to falsification of information. The non-verbal or paraverbal manipulation is possible, by a simulated body language or voice. Postponement can be used with unethical intentions. The threat creates obvious immoral pressure on the other, and can also take the form of blackmail, but it can reach up to verbal and physical violence. Bribery can be a form of immoral influence, subtle usable even on mediation. Their use may be the result of learning techniques but also the manifestation of a native instinct - often more difficult to control.

The risk of ignoring or running out of control the unethical methods used by negotiating parties in mediation is the effect of deception on the participants in mediation. Starting from a general inventory of the effects of human deception conducted by Meltzer (Meltzer 2003), we can formulate four negative effects that can have on the deception on the conduct of mediation:

- i. Adverse effects on trust and cooperation between the parties;
- ii. Mutual doubt on the personal value of the parties;
- iii. Possible disruption of mediation;
- iv. Suspicion, feelings of betrayal, feelings of persecution.

Many of unethical behaviors can be identified and avoided by negotiators by simply call of the common sense, without the need for the intervention of a third party to report the deviations. Ability to identify them it turns out natural, in general, based on the moral education received from the early childhood. R. Anton's research on behaviour in simulated business negotiations, exploring situations in which false statements that was made during the negotiations were regarded as unethical behavior, revealed a consensus of moral intuition expressed by negotiators and their ability to set a limit between ethical and unethical behavior in negotiation (Anton, 1990).

The effect of the third party intervention to correct or establish the ethics of negotiation is proved by many researches in recent years.

In a study by K. Aquino and Th. Becker, in an experiment of negotiation, as a consequence of setting an ethical climate by an external observer, the subjects gave up cheating the other party, comparing to the conduct of some parallel unethical negotiations – in which the propensity to cheat was pronounced (55% of subjects lying in negotiation, and 43% lying by omission of information). Climate and moral attributes contributed to the effect of neutralizing of the unethical impulses. The conclusion is that the presence of ethical standards in negotiation can influence the perceptions of negotiators on the morality of the negotiating tactics (Aquino and Becker, 2005).

In addition, another previous study of K. Aquino made to the observation that the existence of ethical standards in the negotiations leads to a reduced incidence of deception and more balanced agreements (Aquino, 1998). This coincides with the observation of Ross and Robertson, that the ethical codes and ethical transparency induce an effect on the behaviour of employees, with consequence in reducing the desire to appeal to lie at workplace, for example (Ross and Robertson, 2000).

The conclusion of the mentioned studies can serve as *working premise for the mediators*. Analysis of mediation and negotiation psychology researches lead to the conclusion that the establishment and maintenance by the mediator, of an atmosphere of negotiation which persuades the parties on compliance with ethical standards, during the mediation, has the effect of creating a balanced environment in which the parties have an increased chance to negotiate balanced, in the interests of a final deal suitable to both parties.

The issue of the mediator's involvement in the mediation process has been a concern of researchers since the early time of mediation. D. Kolb first imposed the metaphors "orchestrator" and "deal maker" for the two main types of mediators, depending on their involvement and the role that they incur in mediation (Kolb, 1984). Ch. Moore developed the theme of the mediator's involvement in his landmark-book, *The mediation process* (Moore, 2014). Moore reviews the arguments of the two main schools of mediation: the Procedural one, which considers that the mediator has rather a procedural role, respectively the Environmental one, for which the mediator can have a role in setting the mediation environment. Although Moore, personally, opts more for the process-oriented approach, he objectively recommends to the mediators to define their own place in a wider spectrum between the two schools approach the mediation. The mediator must to solely choose - according to his or her style and peculiarities of mediation - the level of intervention, the target person of the intervention and the situation which focus on the intervention.

The power of the personal example of the mediator in the induction of an ethical framework is the basic concept of a theory of Bowling and Hoffman, mediation psychology researchers, who tend to contradict a common perception that it is necessary that the mediator maintains an independence and a separation from mediated parties and from negotiated issue, as an illustration of his or her impartiality. Their theory emphasizes the active role that the mediator can play in what they call *ethical virtues of the mediator* - his or her personal traits that determine moral action and the correct guidance of the parties' behavior during the mediation (Bowling and Hoffman 2003). An argument for the active role of the mediator is formulated also by G. Gill-Austern, who, in an article criticizing the unsystematic nature of mediation, appreciates that the mediator must operate in a paradox: to be at the same time full participant and, in the same time, to suggest that his or her presence is without significance in the dispute resolution (Gill-Austern, 2000).

In the absence of a common code of ethical rules between the parties in dispute, which negotiate in the mediation, *the mediator can play a triple role*:

Role 1: Role of personal example of ethics, by explaining to the parties which participate at the mediation the professional ethical principles that he or she apply and by illustrating them their compliance during the procedure;

Role 2: Role of generator of negotiation ethics rules, by proposing a set of ethical rules to the parties, at the start of negotiation, that they agree to meet during assisted negotiation/mediation;

Role 3: Role of guarantor of minimal ethical framework, which permanently creates to the parties a stable confidence in the fairness of the mediation process, by techniques for maintaining an ethical framework throughout the mediation.

4. Control of ethical framework of mediation. Neutralization of unethical impulses

Remaining on his or her impartial role, the mediator can afford to apply his or her own techniques to neutralize unethical impulses during mediation.

As a practical, easy to apply solution, we present below a methodology adapted by us for mediators, starting by a set of neutralizing techniques designed to use negotiators by Denise Fleck, Roger Volkema and collaborators. Their techniques start from a synthesis of the findings of several studies, whose effect on reducing unethical behavior by their use was verified by the researchers. The neutralizing techniques explained by them assume an individual action of the negotiator. They involve the identification by the negotiator of the situation in negotiation, starting from the orientation type manifested by each negotiator: goal concern vs. relationship concern, respectively short-term orientation vs. long-term orientation (Fleck, Volkema *et al.*, 2014).

In our opinion, the role of neutralizer, that it should be played by the negotiator in negotiation, is more easily assumed by the mediator. The main advantage of the mediator is that he or she is the only person who has a complete general view on the conflict situation and, in particular, on the actual positions and interests

of the parties, by which he or she gets acquainted both from the joint discussion and from the preceding discussion or the private caucuses during mediation. Valuing this benefit, the mediator may become the builder of bridges for dialogue which contribute to overcoming barriers of perception and communication between the conflicting parties.

The method of unethical impulses neutralization by the mediator, below proposed for the mediators, assumes the empirical identification by the mediator of the attitude of each negotiator in the discussions during mediation: goal concern vs. relationship concern. Depending on the identified situation, the mediator may choose to use one of the techniques suitable. The expected result is a in an influence on the negotiator, for the purposes of neutralizing unethical impulses associated with each type of situation.

Based on the observations on the temporal construal - the temporal projected perception of things or events - the negotiators attending the mediation may be different in the way they see the things in the short-term, comparing to their long-term vision. The typical behavior highlighted by Trope and Liberman is to perceive the things more concretely on short-term and more abstractly on the long-term, but each person can perceive the things his or her very personal manner (Trope and Liberman, 2003).

This difference in perceptions of the negotiators who participate to the mediation is an argument to recommend to the mediators to equally use short-term orientated action and long-term orientated actions of neutralization of unethical impulses. Their combination has as result the increase of the neutralizing effect, by targeting the two registers of temporal perception. In addition, the mediator’s interventions in both temporal perception registers are a satisfactory way to address the mediator’s actions equally to all negotiators, whom temporal perceptions may vary. Calling both temporal perspective registers creates an extension of temporal prospect for all negotiators, stimulating the participants to focus both on the present (solving the conflictual situation) and on the future (maintaining a functional relationship after the dispute mediation). The main actions which could be chosen by the mediator for neutralization of unethical impulses of the negotiators are systematized in the Figure 2.

Figure 2. Mediator’s actions for neutralization of unethical impulses of the negotiators

Mediator’s actions	Negotiator’s identified orientation	
	Goal concern	Relational concern
Short-time perspective stimulation	<ul style="list-style-type: none"> ✓ Emphasize the achieved progress in mediation ✓ Suggesting new alternative solutions ✓ Identifying and highlighting areas of linked objectives of both parties 	<ul style="list-style-type: none"> ✓ Emphasize the interpersonal similarities of negotiators ✓ Emphasize the relational proximity of the organizations represented by negotiators
Long-time perspective stimulation	<ul style="list-style-type: none"> ✓ Identify and highlighting of common opportunities (in business, in parental concern - for a divorce mediation i.e.) for negotiators ✓ Questioning on the negotiators’ awareness of the legal implications of the failure of mediation 	<ul style="list-style-type: none"> ✓ Identify and highlight prospects for support and networking in the future, between the negotiators

Mediator’s action may focus on a single negotiator or on all negotiators, but for the multi-targeted action it is necessary to adapt his or her action to the identified attitude for each target-negotiator. Of course, all the neutralization actions of the mediator must be balanced by his or her impartiality.

The psychological bases of these types of techniques are in the “prospect (perspective) theory” of Tversky & Kahneman, who revealed that people are often more motivated by the potential losses than the potential gains (Tversky and Kahneman, 1981). Extending the reasoning, if a negotiator thinks that using unethical methods could affect future business, he or she will become reluctant to resort to this kind of method.

The expected effect of the mediator’s pro-active action to create and maintain an ethical framework under control is the neutralizing or reducing the impulses of the parties which negotiate in the presence of the mediator to resort to unethical methods.

5. Conclusions

Most of the mediation agreements take the form of a (new) contract between the parties. Mediation agreement resulting in the increased trust framework created by the mediator has a larger chance to be unreservedly accepted by both parties, and especially is likely to be implemented without fear of failure after signing it in the presence of the mediator.

The goal of any negotiation is to enforce the parties' commitment, not only to reach an agreement, as Richard Shell emphasizes (Shell, 2006). More than in a negotiation, in mediation *the parties' commitment it should be the concern of the mediator*. In addition, the parties can separate at the end of the mediation in a reasonable relational state, comparing to the start of the mediation. The resulting balanced state has a long term effect on the future relations between the parties in dispute. This effect is more appreciated in a mediation of a business dispute.

Aware of the active role which he or she can play it in the creating the ethical framework of mediation, the mediator can gain safety and can transmit confidence to the mediated parties. As a result, the mediation can be valued as a method of dispute resolution which provides not only a procedural framework, but also a favourable atmosphere to the identification by negotiating of an acceptable agreement, and especially engaging for both parties.

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