

SETTLEMENT CONFERENCES AND JUDICIAL ROLE: THE SCAFFOLDING FOR EXPANDED THINKING ABOUT JUDICIAL ETHICS

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Canadian judges are participating more often in settlement processes, which vary in form across the country. As traditional judicial roles expand and give way to new ones, so must frameworks for ethical decision-making. Ethical reasoning in this new setting must integrate values which are both individual (internal) and contextual. In developing this argument, the authors explore (1) how mature and adaptive ethical reasoning skills are acquired as a matter of human psychology; (2) foundational ideas about judicial role found in existing Canadian ethical guidelines; (3) potentially transferable values from codes of conduct in the private dispute resolution field; (4) developing ideologies and styles of judicial mediation. The article concludes that judicial mediators can (and ought to) anchor their own internal compasses to broader principles and understandings about role, that these broader principles can be developed using the above sources of guidance, and that judicial action is needed to advance this task.

Les juges canadiens participent de plus en plus souvent aux processus de règlement dont la forme varie selon les régions. Alors que les rôles traditionnels de la magistrature prennent de l'ampleur et se transforment, il doit en être de même des cadres entourant des décisions éthiques à prendre. Dans ce nouveau contexte, le raisonnement éthique doit intégrer des valeurs tant personnelles (internes) que contextuelles. Dans l'élaboration de leur argumentation, les auteurs examinent (1) comment au plan psychologique, l'humain acquiert des capacités à raisonner avec maturité et de manière adaptative et éthique; (2) la façon avec laquelle sont exprimées dans les lignes directrices canadiennes sur la déontologie, les idées fondamentales relatives au rôle que doivent jouer les magistrats; (3) l'application des différents code de conduite au domaine des règlements privés des différends; (4) l'élaboration d'idéologies et de styles de médiation judiciaire. L'article conclut que les médiateurs judiciaires peuvent (et devraient) faire preuve d'une ouverture à l'égard des principes applicables et du rôle qu'ils ont à jouer. Ils poursuivent en mentionnant que ces principes plus larges peuvent être élaborés en utilisant les sources susmentionnées à titre de références et qu'une action judiciaire est requise pour faire avancer le droit dans ce domaine.

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1. Introduction

Today, judge-led settlement processes of one kind or another are commonplace across Canadian courts.¹ The initiation of judges into mediation processes – which began well over twenty years ago – was not uncontroversial. Responses ranged from opposition (generated by the belief that involving judges in settlement discussions offended the essential judicial role and undermined the administration of justice) to cautious optimism.² Although form and philosophy vary greatly,³ few Canadian courts and jurisdictions are now without some version of judicial

¹ Galanter traces the roots of judicial involvement in settlement processes in the United States; see Marc Galanter, “The Emergence of the Judge as Mediator in Civil Cases” (1986) 69:5 *Judicature* 257. It is worth noting that judicial roles in settlement processes vary across cultural and institutional contexts and – in some countries – are commonplace; see e.g. Nobuaki Iwai, “The Judge as Mediator: the Japanese Experience” (1991) 10 *CJQ* 108. For a very recent international comparative review, see Tania Sourdin and Archie Zariski, eds, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Rozelle DC, Australia: Thomson Reuters, 2013).

² This debate was noted twenty years ago, in the American context, by Michael R Hogan, “Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation” (1991) 27:3 *Willamette L Rev* 429. For general criticisms of the rise of court-connected alternative dispute resolution (ADR), see Judith Resnick, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication” (1995) 10:2 *Ohio St J Disp Resol* 211, and for early concerns about the trend towards “managerial judging” see Judith Resnick, “Managerial Judges” (1982) 96:2 *Harv L Rev* 374. Justice Rooke also notes this debate in his evaluation of the Alberta JDR program; see Justice John D Rooke, *Improving Excellence: Evaluation of the Judicial Dispute Resolution Program In The Court of Queen’s Bench of Alberta*, (June, 2009), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving_excellence.pdf> at 335. See also James Alfini, “Risk of Coercion Too Great: Judges should not mediate cases assigned to them for trial” (1999) 6 *Disp Resol Mag* 11. While fully supportive of the expansion of judicial mediation, Chief Justice Winkler also identifies the operational and infrastructure adjustments that are needed to accommodate such an expansion; see The Honorable Warren Winkler, “Some Reflections on Judicial Mediation: Reality or Fantasy?” in *The Advocates’ J* (Winter 2010) at 3.

³ Justice Lawrie Smith, “Seeing Justice Done: From Judicial Mediation to the Judicial Settlement Conference” (2008) *Judicial Settlement Conferences*, materials (National Judicial Institute) (permission to reference is outstanding). Smith’s paper describes fundamental differences between facilitative, interest-based models and evaluative models, from province to province. For example, Quebec’s *Code of Civil Procedure*, RSQ c C-25, Section IV “Settlement Conference,” s 151.16, embraces an interest-based process: “The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions.”

mediation.⁴ Leadership has come from within.⁵ Julie Macfarlane's survey for the Canadian National Judicial Institute identified settlement conferencing skills as a priority for almost half of the judges surveyed, signalling "a real appetite among some sectors of the bench for casting themselves as settlement specialists."⁶ In concluding his earlier study of the judicial dispute resolution (JDR) program in Alberta, Associate Chief Justice Rooke reflects on this evolution as a "profound amendment to the judicial role:"⁷ "It is now beyond question that active judicial participation in settlement procedures, broadly or narrowly defined, is a part of the dispute resolution program in the Court[s]."⁸

Theoretical models of mediation are diverse enough to accommodate a variety of styles and orientations to judicial settlement conferences. Most would agree that there is no "one model" of judicial settlement conferencing, or that there ought to be. On the other hand, it is important that judge-led mediation be distinguished from mediation in the private sphere. Judicial mediation *feels* different to participants and to judge-facilitators, for reasons which we will explore in this paper. This essential difference generates both opportunity and obligation – the opportunity to creatively design process, from the ground up, and the obligation to do so in a principled and thoughtful way. As Pirie and Landerkin invite, "... the

⁴ For a general discussion of developments in the courts, see "Dispute Resolution" in *Canadian Court Communique*, J Ass'n of Can Ct Admins (Winter 2011). See also Rooke, *supra* note 2, and Justice John A Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, Version 1.1 (January 2004), online: Canadian Bar Association <<http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf>>, accessed on March 25, 2012. For a discussion of what has been occurring in the family law setting in particular, see The Honourable Judge TJ Gove, "Judge-Mediated Case Conferences in Family Law: Looking for the Best Attainable Outcome" (1999) 57:6 Advocate 855; Hon Nancy A Flatters, "Family/Child Judicial Dispute Resolution (JDR): An Overview of One Canadian Court's Settlement Conference Approach to the Pretrial Resolution of Family and Child Welfare/Protection Matters" (2003) 41:2 Fam Ct Rev 182.

⁵ Justice Georgina Jackson, "The Mystery of Judicial Ethics: Deciphering the 'Code'" (2005) 68 Sask L Rev 1; Justice Georgina Jackson, "Judicial Ethics and Judicial Mediation" [unpublished paper for National Judicial Institute, on file with the authors].

⁶ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 234.

⁷ Rooke, *supra* note 2 at 44.

⁸ Justice John D Rooke, *The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench*, (Spring 2010), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/clearinghouse/hosted/22471-multidoor_courthouse.pdf>, accessed March 25, 2012.

ideology of mediation in the courts, with its own unique goals and procedures, needs to be carefully developed.”⁹

This obligation extends beneath what we conventionally think of as “best practices” (operational decisions about how a process will be run) to broader theoretical frameworks for ethical decision-making. In practice, these impulses cannot always be separated – good process management informs ethical reasoning, and vice versa. Already, we would suggest, the ties between these spheres are closer together for the judge-facilitator than for other conflict resolution professionals. An early American survey showed that the extent to which judges used certain mediation techniques was determined chiefly by their views on whether such techniques were “ethical.”¹⁰

The way this debate is being advanced in Canada is through the integration of ethics into all judicial training sessions on judicial settlement conferences (commonly referred to as JSCs) – the advancement of principled dialogue, rather than the development of sets of rules. This, we submit, is the right approach – it supports the cognitive learning essential to the creation of ethical identity. That is not to say that rules don’t have their place. Certainly, in some situations, an ethical principle will present itself with unmitigated clarity – so that the answer ought to look like a rule. For example, almost all would agree that a JSC judge ought not to sit at trial should the case not settle.¹¹ Another example of a dilemma that might invoke a more rule-based response is the conflict of interest dilemma, where the judge has a significant prior connection. More often than not, these types of problems will warrant a more black-and-white approach.

At the heart of ethical decision-making, however, is an individual journey blending intuition and intellectual analysis. This journey is not undertaken through the study of rules (or even “best practice” responses in

⁹ The Honorable Hugh F Landerkin, QC and Andrew J Pirie, “Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?” (2003) 82 Can Bar Rev 249 at 262.

¹⁰ Dale E Rude, Lawrence F Schiller and James A Wall, “Judicial Participation in Settlement” [1984] Mo J of Disp Resol 25.

¹¹ For example, see recommendations 2 and 3 in Appendix #4 “Judicial Ethics Relating to Judicial Participation in Settlement-Promoting Activities” in Agrios, *supra* note 4. In an interesting analysis of the Agent Orange settlement in the US, the author concludes that this type of rule would help prevent the problems that eventually emerged from judicial involvement in the settlement of that case; see Peter H Schuck, “The Role of Judges in Settling Complex Cases: The Agent Orange Example” (1986) 53:2 U Chicago L Rev 337. Such a rule is also proposed by Hon John C Cratsley in “Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet” (2006) 21:3 Ohio St J Disp Resol 569.

hypothetical situations) but by raising our capacities to engage in what Menkel-Meadow calls “moral dialogue”¹² and Waldman and Riskin call the adoption of “mindful practice.”¹³ The risk of calling this a matter of ethics is that it invokes caution. Where judges may be feeling unmoored inside their new roles, however, “ethics” invites us to ask questions about the process’s impact on people, and the boundaries of acceptable practice. An ethical framework for the judge’s role in the settlement conferencing context therefore requires a careful construction, one that accommodates both individuality (introspection) and community (process-driven) values. It requires a sustained process of engagement and learning.

Rather, therefore, than offer a set of rules or a rigid framework for judicial ethics in the evolving new context of facilitative roles, we aim instead for “scaffolding” to support further dialogue in this area. In both literal and metaphorical senses, scaffolding functions as a temporary framework to support a process of construction. In the field of educational psychology, “instructional scaffolding” models reject older models of teaching which presume the transmission of knowledge as a unilateral activity. They embrace teaching through dialogue, and presume that deeper learning occurs when new information and thinking is grafted onto an existing knowledge base.¹⁴

The image of scaffolding invokes four key elements that we use to construct our analysis. Broad and adaptive forms of ethical reasoning offer, first, the right *material* for building such a structure. We consider aspects of such reasoning that help one understand and approach ethical issues, including the perspectives of eminent cognitive psychologists. Second, we look at the ways in which ethical reasoning can and should be guided by “first principles,” essentially the *original foundations* of judicial ethics upon which new considerations can be grafted. We note ways in which the legal profession, by comparison – often guided by the judiciary – has sought to have its ethical models, and codes of conduct, informed by “first principles” of lawyering. And we borrow – slightly – from the legal

¹² Carrie Menkel-Meadow promotes the concept of “moral dialogue” throughout her work; see e.g. Carrie Menkel-Meadow, “The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft” (1999) 31:1 McGeorge L Rev 1 at 18, where she also attributes the concept to the writings of David Luban and Warran Lehman. See David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988); Warren Lehman, “The Pursuit of a Client’s Interests” (1979) 77 Mich L Rev 1078.

¹³ Ellen Waldman, “Mindfulness, Emotions, and Ethics: The Right Stuff?” (2010) 10:2 Nev LJ 513; Leonard L Riskin, “Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation” (2010) 10:2 Nev LJ 289.

¹⁴ Kathleen Hogan and Michael Pressley, eds, *Scaffolding Student Learning: Instructional Approaches and Issues* (Cambridge, MA: Brookline Books, 1997).

profession's adaptive treatment of ethical lawyering in the context of the role-adaptation of lawyers in the contexts of mediation and alternative dispute resolution. This leads us to the third element of our analysis, at the *base* of the scaffolding: the state of the debate about codes of conduct in the dispute resolution field, and procedural values currently guiding decision-making in that context. Finally, we consider the ways in which these principles, perhaps adapted, can continue to guide judicial behaviour in the modified judicial role of conferencing: the *ties* that allow new procedural values to be grafted onto an existing framework for judicial ethics. In the end, we avoid answers in favour of broad questions, leaving the dialogue to be continued by those with ownership in it. But if our premise is right (that ethical reasoning begins by anchoring your own internal compass to principles informed by role and context) then the questions are indeed as important as the answers.

2. *The Material: Ethics as Aspirational, Acquired and Identity-Based*

"Ethics" is not easily defined, a label that is as open to debate for judges as it is for lawyers.¹⁵ Its ambiguity – and its capacity for adaptation and growth – arises from an internal duality. In one dimension, "legal ethics" addresses constraints on conduct (which need to take the shape of rules for the sake of enforcement), and in another dimension it envisions moral or ethical aspirations to govern decision-making and behavior.¹⁶ At the heart of our argument is the proposition that the first dimension of ethics (constraints, and rules) will not support mature, sustainable growth for judicial ethics in facilitative roles such as settlement conferencing. Facilitative, consensus-based processes are themselves aspirational; they work more through subtlety, nuance and art than they do through the application of procedural rules (something that will be explored further in parts 4 and 5 of this paper). And so they require engagement in ethical thinking of the second variety described above, where sources of regulation will be more internal than external, guided by the interaction of norms and intuition. Even in conventional settings, this requires a strong sense of role and purpose. Lawyers' ethics offers a parallel perspective:

¹⁵ See, for example, Alice Woolley *et al*, eds, *Legal Ethics and Professional Regulation*, 2nd ed (Markham: LexisNexis Canada, 2012).

¹⁶ *Ibid* at 7 the authors note, with respect to legal ethics, that "[L]awyers' ethics addresses the constraints on lawyer conduct ... It also addresses the moral or ethical aspirations of the practicing lawyer – the type of decision-making practices and decisions which an ethical lawyer will employ and make. At the level of moral aspiration, of course, there is more controversy, and less agreement, as to what lawyers' ethics requires ..."

Developing those intuitions requires the lawyer to have a strong commitment to a principled conception of the lawyer's role, to know to the point of sensing, what being a lawyer means, and does not mean.¹⁷

Although intuitive in function, this dimension of ethical reasoning can – and, we suggest, must – be influenced by a purposeful discussion about values and objectives, to be seen as a teachable skill. As a starting point, it is useful to be reminded about the psychology of ethical reasoning and its connection to professional identity.

A) How the Capacity for Ethical Reasoning is Acquired

There was a great deal of debate during the latter half of the twentieth century about the nature and essence of what has now come to be known as “applied ethics.” Is the ability of a person to live and work “ethically” in the world a function of socialization or some more intellectual, developmental process?

James Rest, a leading commentator on the subject and a strong proponent of the cognitive dimension of ethical reasoning, described the issues this way:

Preparing professionals to discern the right course of action in problematic contexts has become an immense enterprise. One estimate of the number of ethics courses taught annually in colleges and universities is 10,000.

If courses in ethics are worth curricular space and student time, then at least three assumptions must be true:

1. Some ways of deciding what is right (making ethical decisions) are more justifiable than others. Given some moral problem, we do not assume that every conceivable action or reason is as good as every other.
2. There must be some agreement among “experts” on what the more justifiable ethical positions are. Although there might not be complete agreement on one unique line of action, nevertheless, presumably fair-minded people familiar with the facts must agree that some positions are defensible but that others are less so. Defensibility cannot be completely idiosyncratic.
3. Ethics courses influence students in some positive way. The way students live their lives as professionals is constructively influenced by ethics courses.

If any of these assumptions is not true, then there is not much point in having applied ethics courses.¹⁸

¹⁷ *Ibid* at 10.

¹⁸ James R Rest and Darcia Narvaez, “Preface” in James R Rest and Darcia Narvaez, eds, *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ: Lawrence Earlbaum Associates, 1994) at ix.

Associated with Rest's hypotheses are research findings that support the view that moral reasoning can be learned in educational contexts. Pascarella and Terenzini noted evidence "for the efficacy of different educational techniques and educational missions on the development of principled reasoning."¹⁹ In a similar vein, particularly relevant to the context of judicial education generally, they also found that:

Such evidence suggests that growth in moral reasoning is not always achieved most efficiently through the process of self-discovering ... Rather, the impact of moral problem solving with one's peers may be an even more powerful inducement to growth in principled thinking if one is first taught the basic component skills of moral reasoning ...²⁰

While this viewpoint provides at least a basic justification for courses in ethics at educational institutions and the consideration of judicial ethics in judicial education programs, it also reveals an important foundational point. If ethics can be taught and learned, one dimension of ethics must be "cognitive." This is a heartening statement, encouraging each of us to not just to "do better" but to learn how to "be better" so that we can "do better." This is consistent with Rest's other writing and research. In his seminal work, Rest builds upon the theories of Piaget and Kohlberg²¹ to support the view that from an early age people "learn" to think ethically and develop analytical skills to do so.²² This view is sometimes referred to as the "cognitive-developmental approach" to moral development, where the most sophisticated cognition leads to "principled morality," and is said to have

¹⁹ Ernest T Pascarella and Patrick Terenzini, *How College Affects Students: A Third Decade of Research* (San Francisco: John Wiley and Sons, 2005) at 367. Though these studies identified the beneficial effects of education in the field of moral reasoning at the college level, they also appear to offer some insights about education in moral reasoning more generally.

²⁰ *Ibid* at 355.

²¹ Lawrence Kohlberg, *The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981); *The Psychology of Moral Development* (San Francisco: Harper & Row, 1984); and F Clark Power, Ann Higgins and Lawrence Kohlberg, *Lawrence Kohlberg's Approach to Moral Education* (NY: Columbia University Press 1991).

²² A famous example is the following problem, known as the Heinz dilemma: Heinz's wife is dying of cancer and needs a drug that an enterprising druggist has invented. The druggist demands such a high price that Heinz cannot raise the money. Heinz's dilemma is whether he should steal the drug to save his dying wife. The research of Kohlberg and others confirmed that, with maturation, people begin to think in increasingly complex ways about the ethical dimensions of the problem, apparently through a fairly linear progression of what are sometimes referred to as "stages of moral development."

led Rest and others to significantly influence the “cognitive revolution” in the field of psychology.²³

For our purposes, what is more important about the work of Rest and his colleagues is that it is necessary to get beyond an understanding of the stages of moral development and try to discover the framework that enables us to identify, understand and thoughtfully resolve ethical dilemmas. His research led to the conclusion that there are four components to moral reasoning:

- i) interpreting the situation (moral sensitivity);
- ii) determining the ideal moral course of action (moral judgment);
- iii) selecting among valued outcomes with the intention of following the moral course of action (moral motivation); and
- iv) having sufficient perseverance and implementation skills to follow through on the chosen course of action (moral character).²⁴

From a purely philosophical level, the exercise of reflection inherent in this approach has value. Frankfurt put it clearly in 1988: “We are able to reflect upon our value choices and we should do so because it is important to us what we believe in.”²⁵

From a more outcome-based perspective, and returning to the point that moral reasoning can be taught and integrated into a course of action – Rest’s ultimate objective – Pascarelli and Terenzini concluded:

Consistent with our previous synthesis, we found extensive evidence of a positive relationship between principled moral reasoning and the likelihood of principled behaviour.²⁶

²³ James R Rest, “Background: Theory and Research” in Rest and Narvaez, *Moral Development*, *supra* note 18 at 2-3. Rest describes this approach as “[turning] the socialization view upside down. Instead of starting with the assumption that *society* determines what is morally right and wrong, Kohlberg said it is the *individual* who determines right and wrong.”

²⁴ James R Rest, *Development in Judging Moral Issues* (Minneapolis: University of Minnesota Press, 1979).

²⁵ Harry G Frankfurt, “The Importance of What We Care About” in Harry G Frankfurt, ed, *The Importance of What We Care About: Philosophical Essays*, (Cambridge (UK): Cambridge University Press 1988) at 80.

²⁶ *Supra* note 19 at 367.

The question for us, then, is “How can this approach be applied to judicial ethics, particularly in the context of judicial settlement conferencing?”

B) Ethics Rooted in Professional Identity

As a starting point, it is important to recognize that ethics must be rooted in professional identity and that professional identity is profoundly associated with “professional role.” Indeed, the better and more complete understanding of professional role, the easier it is to articulate the professional’s “identity” and to identify the ethical dimensions of that profession – both the ethical imperatives and the subtle questions at the margins. In some professions, an articulation of “professional role” is straightforward. In some professions it is both complicated and controversial. With respect to the legal profession, for example, there is much controversy regarding the professional role of the lawyer.²⁷ To what extent can the role of the lawyer be described as “loyal advocate on behalf of one’s client”?²⁸ To what extent is the lawyer’s role that of a “minister of justice”?²⁹ To what extent is the tension between and among conflicting conceptions of the lawyer’s role an intelligent merger of these conceptions in the form of “integrity,” or “sustainable professionalism”?³⁰

This debate about the professional role is important. The embrace of a “dominant” role perspective profoundly informs professional identity and the ethical imperatives and aspirations associated with that professional identity. For example, a thoughtful articulation of the professional role of the lawyer helps to answer questions about the foundational importance of the ethical principle of lawyer-client confidentiality and the circumstances in which this principle should give way to “the interests of justice.” It should not be surprising that a parallel debate would arise in the judicial realm in relation to the ethical subtleties surrounding judicial mediation. Nor should it be surprising that this debate is at the core of judicial identity, itself informed by as clear an articulation as possible of the judicial role in this less conventional context of judicial work. In this setting, Tanovich’s

²⁷ In Woolley *et al*, *supra* note 15, at 16-65, the authors set out three competing visions of the lawyer’s role, through reference to the lawyer’s obligations of ethical adherence to “loyalty,” “justice” and “integrity.”

²⁸ We examine the articulation of the lawyer’s professional role associated with loyal advocacy, the dominant paradigm, in the following paragraphs of this paper.

²⁹ See e.g. *Rondel v Worsley*, [1967] 1 QB 443 (CA), *aff’d* [1969] 1 AC 191 (HL), *per* Lord Denning MR. See also David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal LJ 267.

³⁰ Trevor CW Farrow makes the argument for a more nuanced understanding of the professional role in “Sustainable Professionalism” (2008) 46 Osgoode Hall LJ 51.

advice that “a reconstructed role morality requires considerable reflection and contextual thinking” is well-placed.³¹

Contextual thinking (infused with a consideration of professional role) is essential to the day-to-day application of ethical principles. Essentially ethical dilemmas arise when a person must contemplate two or more different and apparently conflicting courses of behaviour on the basis of competing values or interests or principles that are generated by competing aspects of the person’s professional role and/or his or her personal circumstances. In some cases one or more of these competing values may be illegitimate, in the sense of being “wrong” or dishonourable.³² More common circumstances, and more directly related to our consideration here, are those where the competing values or interests or principles are legitimate in themselves, but are or appear to be in conflict with one another. The previous section of this paper urged an examination of these dilemmas from a cognitive perspective. That is, there tend to be ways of approaching even the most emotionally charged ethical dilemma that invite an intellectual consideration of the situation and an intellectually reflective way of addressing it. In many circumstances this can be achieved through an appreciation of first principles and their application in context. These “first principles” nearly always articulate a more complete understanding of the professional role itself, leading to a greater understanding of professional identity and ultimately the ethical expectations of that professional identity in particular contexts.

The identification of these first principles is not always obvious, and their application can be subtle. An example from the legal profession is instructive in this respect. The Canadian legal profession has been faced with a significant challenge in dealing with ‘conflict of interest’ issues in the last twenty years. The challenge presented by conflicts is the tension between competing values, some of which are client interests, some of which address the interests of the administration of justice and some of which are responsive to the interests of the legal profession itself. Each of these values is legitimate in itself, but it is not uncommon for them to collide. In *Martin v Gray*,³³ a seminal case now twenty years old in which a young lawyer involved in a civil litigation matter had transferred to the law firm of the adversary in litigation, the Supreme Court of Canada articulated what Sopinka J described as the public policy values related to these three competing interests. He described them as follows:

³¹ Tanovich, *supra* note 29 at 278.

³² A lawyer’s desire to misappropriate a client’s money for his or own purposes might be regarded as a conflict of values in this very general sense, but is really an example of moral failure, not to an “ethical dilemma.”

³³ *MacDonald Estate v Martin*, [1990] 3 SCR 1235.

In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above.³⁴

Following an extensive review of the law, Sopinka J gave priority to the first value, but not without suggesting approaches, prospectively, that could give greater consideration to the values of “client choice of counsel” and “lawyer mobility.” His judgment is a thoughtful consideration of the importance of the three values that were at stake in the case, essentially in the form of a pragmatic balancing act.

A decade later, the Supreme Court had the opportunity to consider similar questions in another conflict of interest case, *R v Neil*.³⁵ In this case a lawyer had egregiously violated his obligations to the law firm’s client (through the acquisition of both confidential and non-confidential information that he used to the client’s disadvantage in order to advance the interests of another client). While acknowledging the correctness of *Martin v Gray*, Binnie J, writing for the Court, took a different approach. He grounded his analysis on what we might call a “first principle for lawyers.” The test did not turn, as it appeared to do in *Martin v Gray*, on whether a lawyer might have access to, or be perceived to have access to, client information that could be used in ways that would be detrimental to that client. Binnie J cast the obligation on a higher plane. He concluded that the preservation of client confidences was one important aspect of the larger principle – the lawyer’s duty of loyalty to his or her client.³⁶ While the specifics of his conclusion have been controversial, his reliance on

³⁴ *Ibid* at 1244.

³⁵ 2002 SCC 70, [2002] 3 SCR 631[*Neil*].

³⁶ In so doing, Binnie J relied at para 12 of *Neil*, *ibid*, on Lord Brougham’s famous formulation of the duty of an advocate:

“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion. (*Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8).”

“first principles for lawyers” is not.³⁷ The approach has provided insights for this specific area of lawyers’ ethics³⁸, and the general approach offers insights for the examination of ethical obligations in related fields.

3. *The Original Structure: First Principles for Judges*

In any consideration of judicial ethics Canadian judges are guided by the Canadian Judicial Council’s (CJC) *Ethical Principles for Judges*.³⁹ These are the “first principles” for judges. Indeed, it is fair to say that in almost any conventional judicial context the five key principles of judicial ethics articulated in this document – independence, integrity, diligence, equality and impartiality – are the touchstones for ethical behaviour and ethical judgment. As has already been noted in this paper, the nature of the judge’s role is significantly different in the context of settlement conferencing. We offer a few observations about the nature of this role in the following section. Nevertheless, even in a new and different judicial role, the five ethical principles for judges must remain touchstones for ethical behaviour and ethical judgment.

For a judge to function ethically in any professional context requires that he or she be able to identify ethical dilemmas when they arise (sensitivity), be able to identify a course or courses of action (judgment), be able to choose most appropriate course of action (motivation) and be able to follow through on the chosen course (character). This is all the more important and more challenging in the new and less conventional role of a judicial settlement facilitator. We suggest that these decisions can best be made by judges who are familiar with i) first principles that must guide their behaviour, and ii) the particular role assumed by judges in a particular context (here the context of settlement conferencing) – so familiar that they are second nature.

One possible way of thinking of this level of understanding is to see it as a form of “strategic thinking about ethics.” The gurus of strategic planning for organizations commonly argue that strategic plans have little meaning unless those within the organization internalize, to the point of being constantly guided by, the key objectives of the plan itself. In a similar way, the guiding principles of an ethical framework – in this case *Ethical*

³⁷ The foundational features of conflicts of interest are now articulated as a duty of “loyalty.” See The Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2012) Rule 2.04, definition of “conflict of interest.”

³⁸ 3464920 *Canada Inc. v Strother* 2007 SCC 24, [2007] 2 SCR 177.

³⁹ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: CJC, 1998), online: CJC <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

Principles for Judges – will have greater meaning and offer more significant guidance if they are internalized by judges as part of their way of working, their way of “being” judges. When an ethical dilemma then arises, it becomes second nature to see the dilemma through the lens of the *Ethical Principles* and be guided by them.

Here is an example of this highly-tuned sense of judicial ethics in a conventional context from our own experience. One of us appeared in Queen’s Bench Chambers many years ago in Saskatchewan and observed a contested matter being argued where one of the litigants was self-represented. At the end of the argument the judge reserved the matter. As he was leaving chambers the self-represented litigant, anxious to know when he would learn the result, called out “Where can I call you?” The judge replied sternly, “You can’t call me!” One might initially think that this exchange could and should have been handled differently. On reflection, and seen through the judge’s eye, it is a different story altogether. The judge immediately understood that this litigant’s inquiry, heartfelt though it may have been, was ethically problematic. And his message was equally immediate, firm and clear in its communication both to the litigant and to his opponent, “I am impartial in my decision-making, and there is no unilateral contact, no ‘special pleading’.” Perhaps the judge could have explained why the hapless litigant couldn’t be allowed to make such a call, but that is not the main point. The judge knew instantly what might be compromised by such an apparently innocuous request, and knew that he had to make clear to all that he could not countenance it. He acted – instinctively – in accordance with the highest ethical standards for judges.

How does one come to embrace – to “live” these ethical principles for judges so that he or she will have ethical sensitivity, and will be able to immediately recognize and size up an ethical dilemma? There is no simple answer. But it begins with a genuine desire to appreciate the tenets of ethical behaviour for judges as being far more than a few sentences written down in a book. One way of thinking about the principles of judicial ethics in a meaningful way is to appreciate, as nearly all judges do, that they are about far more than the judge himself or herself. They are principles that are fundamental to the administration of justice and the rule of law in our society and, consequently, are fundamental to our society as a whole.⁴⁰ For

⁴⁰ In a seminal report, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa: Canadian Judicial Council, 1995) Martin Friedland began at 1 with the following observation: “Independent and impartial adjudication is essential to a free and democratic society. As a Canadian Senator stated in debate in 1894: ‘The safety and happiness and peace of every community depend largely on the confidence that the people have in the judiciary. People should feel that their rights are safe under law, and that the judiciary give wise and impartial judgments.’”

these reasons, a deep commitment to principles of judicial ethics is equally important for judges in their role in settlement conferencing for the sake of the individual judge and for the institution of the administration of justice itself.

That having been said, there remains the very real question whether *Ethical Principles for Judges* alone, written as it were for a different and more conventional judging context, offers adequate guidance to judges in the settlement conferencing context. Some work was initiated by the CJC in an effort to develop for judicial consideration a modified set of ethical principles applicable to the settlement conferencing context.⁴¹ This initiative is best described at the present time as “quiet.” As some of the examples and challenges discussed below highlight, it is not obvious that the existing *Ethical Principles* provide adequate guidance for judges in a new and often ethically complex environment.

Part of this stems from a less clear and less uniformly agreed upon sense of role of the judge in settlement conferencing; practically speaking, what JSC judges do in Alberta and in Quebec is vastly different on the basis of what appears to be a difference in perspective relating to the judicial role in settlement conferencing. Part of this stems from the way in which judicial ethics may appear to be grafted onto mediation ethics. Part of this may be further complicated by the very significant weight that the requirements of judicial integrity and judicial independence introduce into the conferencing process. In the same way that the judge’s participation in settlement conferencing introduces a *gravitas* that assists in settlements being achieved, might the ethical dimensions of that same *gravitas* also burden the judge and the process itself? Unless role and context – either the interpretation and application of the existing *Ethical Principles* or the articulation of additional principles applicable to this unconventional judging role – are understood in a precise and organized way, “getting it right” ethically will be a daunting challenge for judges.

A common dilemma for judges in settlement conferencing will bring this intersection of challenges into focus and also highlight two limitations of *Ethical Principles* in guiding a judge through the ethical thicket. Consider the question of caucusing with the parties. Some judges caucus independently with each party in the course of assisting their efforts to achieve a mediated resolution of their dispute. Other judges never caucus,

⁴¹ In 2008-09, the Independence Committee of the CJC asked Chief Justice Winkler of the Ontario Court of Appeal and the late Chief Justice Brenner of the Supreme Court of British Columbia to develop draft *Ethical Principles for Judicial Mediation*. These draft principles were considered, but the discussion paper was apparently not adopted, and no further work has been undertaken by the CJC to date.

citing the principles of “integrity” and “impartiality” as constraints. What are the process and ethical considerations on both sides of this debate? What are the considerations which favour caucusing, and how would caucusing (if justified) be managed “ethically”? Without a debate about broader, contextual considerations, *Ethical Principles* cannot answer this question. Associated with this dilemma is the role that confidentiality plays in the settlement conferencing process. Generally speaking, *Ethical Principles* speaks to confidentiality in the traditional role of the judge. Among other things, it is critical to the integrity of the judicial decision-making process and to the integrity of the judiciary itself, that judges maintain confidentiality about their work and deliberations. With respect to settlement conferencing, however, the judge’s role is profoundly different. As with caucusing – and often associated with it – the question of confidentiality of information is introduced into the judge’s universe in an entirely different way. Whereas judges performing the role of judging have an obligation to protect their deliberations from the eyes and ears of others, in the role of facilitation the resolution of disputes, access to confidential information from one or other party is often a critical dimension of the process. *Ethical Principles*, written as it was for a different judicial role, does not appear to adequately address the ethical challenge associated with the management of such information.

4. *At the Base of the Scaffolding: Considerations of Role in Consensus-Based Processes*

The first point is that, while judicial work in settlement conferencing is significantly different from the more conventional work of judges, and while the ethical principles may need to be applied in different ways, it is critical – perhaps even more critical – that judges incorporate ethical principles to the point that they are virtually second nature. Second, it is important for judges to have a clear understanding of the different role they are undertaking in judicial conferencing and judicial mediation, as well as the dimensions and objectives of that role. Third, once the dimensions and objectives of the role are understood, it becomes possible to identify ethical issues generated by the demands of that role, what we might refer to as the ethical implications of “role behaviour.” What in the conventional judicial role might be inappropriate inquiries made of the judge by one party to litigation may be entirely appropriate in the role of judicial conferencing, but may generate new ethical issues that are foreign to the conventional role of a judge. Nevertheless, with thought and planning, many ethical issues can be identified and accounted for in advance. In the same way that a good advocate will know or anticipate, and have a plan to deal with, problematic ethical features of a challenging client representation, so too can judges recognize and develop strategies in advance to deal with many of the ethical challenges of these evolving judicial roles.

Mindfulness about the judicial role in the settlement conferencing context requires a hearty analysis of process objectives. Before we get there, however, a mindful judge begins by noticing – simply – the impact of his or her own participation on the process. Consider the research about judge-led settlement processes. Without getting into a comparative evaluation of the benefits and drawbacks of judge-led and private mediation, these facts are undeniable: judge-led processes have high settlement rates (approximating 80%⁴²), and lawyers view judges as carrying a significant amount of weight in the facilitative role. In his research of Alberta's JDR program, Rooke discovered that 90% of lawyers surveyed believed that the chances of settlement were increased by virtue of the judge's involvement, in contrast to other settlement processes such as lawyer-lawyer negotiation and private mediation.⁴³ Some lawyers resist the influence of the judge in the facilitator's chair, and others seek it out – but without much exception, all view judges as carrying significant influence in that role.⁴⁴

What gives rise to such influence, or to the anticipation of influence? Some judges will be skilled facilitators, earning their reputation through the application of effective process and technique. Generally, however, judges enter the settlement conferencing room carrying a measure of

⁴² Louise Otis and Eric Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Disp Resol LJ* 351; Special issue on Dispute Resolution, *Canadian Court Communique*, J Ass'n of Can Ct Admins (Winter, 2011).

⁴³ Rooke, *supra* note 2. Lawyer perceptions of the judge's role will flow from the mediation model in use and the degree to which it is "evaluative" – a discussion introduced later in this paper. In his study of Vancouver lawyers in the early 90s, Epp determined that lawyers viewed it as "effective" when the judge-mediator provided suggestions or opinions; see John Arnold Epp, "The Role of the Judiciary in the Settlement of Civil Actions: a Survey of Vancouver Lawyers" (1996) 15 *Windsor YB Access Just* 82. Inside a rights-based litigation system, however, and with evaluative mediation models being popular as judicial settlement processes were first established, it is hard to take such pronouncements at face value. At this point in the evolution of court-based dispute resolution programs, a critical analysis is warranted.

⁴⁴ See also Marc Galanter and Mia Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46 *Stan L Rev* 1339; and Wayne D Brazil, "Hosting Settlement Conferences: Effectiveness in the Judicial Role" (1987) 3 *Ohio St J Disp Resol* 1. There is an obvious link between the influence that lawyers believe judges carry into the mediator's role, and their inclination towards using judge-led mediation. In the following study, researchers found that lawyers were even more favorably inclined towards judicial participation in settlement (and wanted more intervention) than judges themselves; see Dale E Rude and James A Wall Jr, "The Judge's Role in Settlement: Opinions from Missouri Judges and Attorneys" (1988) *J Disp Resol* 163.

power already – an influence originating in the institution they represent. Otis and Reiter note the following features of the role:

- (1) an automatic perception that judges come from a place of impartiality and independence;
- (2) moral authority that comes from the deference (credibility, respect); and
- (3) an investment in the preservation of systemic integrity.⁴⁵

Built into our court-based system of justice are procedural values that create expectations – about accessibility, the right to tell one’s story and have it be heard, and the right to assistance in the development of fair outcomes. For even the most uninformed litigant our justice system is a trusted “place to go” for intervention when resolution has not otherwise been possible. This has larger implications specifically for judicial settlement conferencing. In the most recent Viscount Bennett Lecture at the University of New Brunswick in October of 2011, Justice Thomas Cromwell noted the contributions to access to justice that are made by “dispute resolution processes, including those available through the courts.”⁴⁶ As the face of the institution, judges end up as a repository for such expectations – which translates, in the facilitator’s role, into power and influence.⁴⁷

Clearly, then, there are benefits that vest in the judicial mediator role by virtue of the judge’s office. There are also risks. As noted by Otis and Reiter:

⁴⁵ Otis and Reiter invite thoughtful explorations of “systemic integrity.” How is “systemic integrity” preserved at the appellate level, for example? The authors suggest that the settlement of a file which has already been decided by a lower court might even be less disruptive than the result on appeal – from the perspective of the court; see Otis and Reiter, *supra* note 42. In this way, “integrity” will be multi-layered and will require exploration from the different vantage points of those invested in the system of civil justice.

⁴⁶ Hon Thomas Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” (The Viscount Bennett Memorial Lecture, delivered at the Faculty of Law, University of New Brunswick, 27 October 2011), published in (2012) 63 UNB LJ 38 at 39.

⁴⁷ In advocating for narrower, evaluative approaches for settlement conferencing, Smith, *supra* note 3, worries that “loosening” the role of the judge will lead to an erosion of this important ethos, a devaluation of the adjudicative process which might undermine all features of the judicial role.

Though a judge-mediator does not speak “judicially” during a mediation session, the judge’s position in society is such that it would be difficult for the parties to make this distinction, and consequently they could easily—and understandably—misinterpret what the judge says during mediation as the definitive position of the court on an issue. This is clearly an area requiring a high degree of caution and restraint, and a keen sensitivity to the relationship between the two systems.⁴⁸

Mindfulness begins with sensitivity to one’s potential influence as a judge-facilitator. From there, it requires some thought about “role” itself: What are your objectives inside this settlement process, and how do you plan to use the process to advance those objectives? Riskin’s early work on principal orientations to mediation is still a useful starting point on this question. Although an array of conceptual models for mediation now occupy the field, Riskin’s distinction between evaluative and facilitative styles remains one of the most influential frameworks for thinking about settlement processes. It seems to capture fundamental differences between judicial mediation models such as Alberta’s (evaluative) JDR and Quebec’s (interest-based) settlement conferences, for example. Evaluative processes typically focus on narrow legal rights, where the mediator assesses and “signals” likely outcomes in litigation,⁴⁹ whereas facilitative processes tend to focus on party-generated solutions after considering a broad set of interests.⁵⁰ Riskin describes the orientations as driven by the following assumptions:

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology– and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

⁴⁸ Otis and Reiter, *supra* note 42 at 369-70; Cris Currie would probably identify the risk as one of “authority bias,” on the theory that mediators with more power inherent in their status or position are more apt to be directive in their style; see Cris M Currie, “Mediating Off the Grid” (2004) 59(2) *Disp Resol J* 8.

⁴⁹ Edward J Brunet, “Judicial Mediation and Signaling” (2003) 3 *Nev LJ* 232. Brunet has strong concerns with “muscle mediation” and signaling, and asserts that the evaluative model is more popular in the judicial setting than the facilitative one.

⁵⁰ In his original article, Riskin developed a grid with two axes. Along one axis is the mediator’s orientation towards facilitative or evaluative interventions. Along the other axis is the mediator’s inclination to define the problem narrowly (litigation issues, or litigation issues plus business interests) or broadly (including a consideration of personal, professional, relational or community interests). The second of these axes has proven less useful for categorizing mediation, but demonstrates that even Riskin’s initial spectrum was not meant to be one-dimensional – and that there are competing and sometimes conflicting orientations that motivate a mediator’s navigation through any particular process; see Leonard Riskin, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1(7) *Harv Negot L Rev* 7.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.⁵¹

Over time, Riskin's analysis has been criticized for its simplicity – its failure to identify the more salient or dynamic features of mediation.⁵² Mediation theory has expanded over the past twenty years (for example, with the growth of transformative,⁵³ narrative⁵⁴ and other theoretical approaches⁵⁵) and newer grids try to integrate such developments. Hyman, for example, offers a system based on four cognitive frames: (1) processes that favor traditional distributive approaches; (2) processes that focus on value-creation (interests); (3) processes with a primary concern for relationships; (4) processes that concentrate on the creation of a higher level of understanding between or among the parties.⁵⁶ Riskin himself revised his grid system in later years to make room for different levels of nuanced decision-making inside a mediation process.⁵⁷

Riskin's evaluative/facilitative continuum cannot, then, accurately catalogue current mediation types. Yet its simplicity is precisely what brings larger questions of role and ethics into focus. Private mediators may have the luxury of beginning with a professional or contextual "blank slate" – authoring their own processes and choosing unconstrained among a complex array of models and styles.⁵⁸ By virtue of their institutional roles, however, judicial mediators inherit a different starting point, requiring an answer to this fundamental "first question" ("Am I evaluating, or am I simply facilitating?") which flows from the relationship between their contrasting roles as mediator and adjudicator. This, we suggest, is a question which JSC judges must address, consciously and intentionally, as

⁵¹ *Ibid* at 24.

⁵² Currie, *supra* note 48.

⁵³ Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: Jossey-Bass, 2004).

⁵⁴ Bernard Mayer, *Staying With Conflict: A Strategic Approach to Ongoing Disputes* (San Francisco: Jossey-Bass, 2009) at 87-118.

⁵⁵ For example, Cheryl A Picard and Kenneth R Melchin, "Insight Mediation: A Learning-Centered Mediation Model" (2007) 23(1) *Negotiation J* 35.

⁵⁶ Jonathan M Hyman, "Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation" (2010) 34 *Wash UJL & Pol'y* 11.

⁵⁷ Leonard L Riskin, "Decisionmaking in Mediation: The New Old Grid and The New New Grid System" (2004) 79 *Notre Dame L Rev* 2.

⁵⁸ Few private mediators – outside of commercial mediation or some forms of labour mediation – tend to choose evaluative models.

they embark on JSC work. Although we invite thinking on this, we do not pass judgment on which style is superior,⁵⁹ nor would we presume that either model operates undiluted in real life.⁶⁰ As Jarrett recently put it, “Theory development must avoid creating a mistaken one-shot image of mediation, analogous to a photographer attempting to pass off a snapshot photograph as a faithful representation of a moving image.”⁶¹

The “snapshot” brings ethical shadows into focus as well as clearer images of the JSC role and is therefore useful to ground the current discussion, but we would not presume that it fully captures the “moving image” of each JSC.

In other ways, the Riskin grid signifies how each of these two paradigms relates to traditional judging roles. The evaluative framework fits more closely with adjudicative activity: the act of evaluating is the same, although the JSC still calls for a different set of communication skills than those which would be employed from the bench. A facilitative and interest-based framework aligns itself instead with emerging “therapeutic” models for judicial activity, such as Problem-Solving Courts in the criminal setting – which reposition the judge and judicial process to consider the broader social, personal, family, and economic surroundings of a dispute.⁶² These two fundamental mediator orientations have huge

⁵⁹ Much has been written on this, with many theorists taking sides. See Joseph B Stulberg, “Facilitative Versus Evaluative Mediator Orientations: Piercing the ‘Grid’ Lock” (1997) 24 Fla St UL Rev 985. Kovach and Love argue strongly that mediators ought not to adopt evaluative frameworks; see Kimberlee K Kovach and Lela P Love, “Mapping Mediation: The Risks of Riskin’s Grid” (1998) 3 Harv Negot L Rev 71. See also Kimberlee K Kovach and Lela P Love, “‘Evaluative’ Mediation is an Oxymoron” (1996) 14(3) *Alternatives To the High Cost of Litigation* 31; and Lela P Love, “The Top Ten Reasons Why Mediators Should Not Evaluate” (1997) 24 Fla St UL Rev 937.

⁶⁰ Riskin does not promote his old or new grid as a tight categorization of mediator style. He concedes that mediators move along spectrums or grids from mediation to mediation, and even from moment to moment within the same mediation. Some might go as far as arguing that mediation is always simultaneously evaluative and facilitative; see e.g. Susan Oberman, “Mediation Theory vs. Practice: What are we Really Doing? Re-Solving a Professional Conundrum” (2005) 20(3) *Ohio St J Disp Resol* 775.

⁶¹ Brian Jarrett, “The Future of Mediation: A Sociological Perspective” [2009] *J Disp Resol* 49 at 57.

⁶² National Judicial Institute, *Problem-Solving in Canada’s Courtrooms: A Guide to Therapeutic Justice* (Ottawa: NJI, 2011). In his recent discussion of the emergence of problem-solving courts across many countries, including Canada, King describes the difference from mainstream judging this way:

1. “...using processes appropriate for the parties and the resolution of the dispute.”
2. “... an endeavour to promote greater participation in the fact-finding and decision-making process.”

role implications – not just for the mediator, but also for the parties and their lawyers. Everyone will be expected to contribute in different ways inside each of these two processes. Intentional and strategic thinking on the part of the JSC judge on this question is therefore the first step towards process transparency. Different ethical implications about the judge's role will follow.

A) Guidance from the Dispute Resolution Field

The idea that mediation-type processes will require the articulation of new ethical norms is not new; Menkel-Meadow identified this need over fifteen years ago.⁶³ For at least two decades, academics and practitioners in the dispute resolution field have wrestled with large questions about regulation, accountability, and the articulation of ethical obligations. Most professional associations for mediators have adopted codes of conduct, but the hammering out of ethical principles is clearly a process that is still ongoing. Shapira describes the dilemma:

Drafting a code of ethics for mediators is a complex task. On the one hand there is no consensus on the right or best mediation style and thus it is important to make the code flexible in order to cater for different styles of mediation. On the other hand, since mediator conduct affects the parties, there is a need for some degree of direction as to mediator behavior. The challenge is to create guidelines which are specific enough in order to be capable of directing the mediator but at the same time leave him some flexibility in the process.⁶⁴

3. "... promote a more comprehensive resolution of the legal problem by addressing underlying issues."

4. "... broader view of defendants, seeing them in terms of their personal, family, economic and social context."

5. "... requires the judicial officer to exercise interpersonal skills such as promoting the involvement of parties and other relevant people and agencies in the processes of fact-finding and decision-making, actively listening to them, appreciating and respecting the emotional and other psychological dimensions of the process, expressing empathy where appropriate and acting as a role model for other justice personnel involved in the process."

Michael S King, "Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts and Mainstream Courts" (2010) 19 JJA 133 at 144.

⁶³ Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 S Tex L Rev 407 at 414. In the context of evolving judicial roles, see also Erin Ryan, "ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives" (2000) 113 Harv L Rev 1851.

⁶⁴ Omer Shapira, "Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics" (2008) 8(2) Pepperdine Disp Resol LJ 243 at 252.

Shapira's points, and the debate following the publication of Riskin's initial grid, reveal how elusive the mediation process is, an elusiveness which is arguably part of its magic. What makes mediation hard to define is precisely what makes it work: as a process, it is uniquely adaptable. In an effort to preserve this quality, code drafters have generally chosen to focus on broad, fundamental principles.⁶⁵ At a 2007 academic gathering on the topic of "ethics and ADR," Riskin divided ethical pronouncements about mediation into two categories: minimal standards ("the least we can do to avoid behaving unethically") and aspirational goals ("how we ought to behave in relationship to others").⁶⁶ Minimal standards are arguably driven by basic consumer protection considerations (an example Riskin gives is *the Model Standards of Conduct for Mediators* rule that the mediator provide true and complete information about mediation fees). Beyond some basic protective "rules," however, mediation codes are generally constructed with aspirational language.

Exactly what values make their appearance in various codes differs across organization and context, but a meta-analysis shows a concentration on these values: party self-determination, impartiality and informed decision-making. Whether these are indeed the right "first principles" for settlement processes – and how they transfer to the JSC regime – depends, arguably, on what is underneath each and how they relate to one another. For example, what does "self-determination" mean when parties are moving through a process influenced by several actors (other parties inside and outside the settlement conferencing room, or the judge-facilitator, for example) and by other outside forces (assessment of legal rights and litigation process, access to financial resources and so on)? The American *Model Standards* for mediation, adopted by many organizations in 2005, define self-determination as "the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome."⁶⁷ In this way, the *Model Standards* link self-determination with informed decision-making, assuming that each is an essential feature of the other. On the other hand, the *Model Standards'* treatment of "impartiality" is superficial. Little attempt is made to solve longstanding controversies in the mediation field about how to balance

⁶⁵ This strategy has been criticized. Yang cites arguments that the ethical standards for mediators are too broad and diffuse, and – in particular – suffer from the absence of a hierarchy of values to assist in the resolution of tensions between ethical values; see Andrea C Yang, "Ethics Codes for Mediator Conduct: Necessary But Still Insufficient" (2009) 22 Geo J Legal Ethics 1229.

⁶⁶ Leonard L Riskin, "Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior" (2009) 50 S Tex L Rev 493.

⁶⁷ Laura Weidner, "Model Standards of Conduct for Mediators (2005)" (2006) 21(2) Ohio St J Disp Resol 547.

impartiality with the need to intervene where there are misuses of power. Similarly, little attempt is made to address the wide differences across models which invite (or require) different levels of intervention by the mediator. Presumably, impartiality must be conceived very differently in each process.

Procedural “first principles” will emerge from the foundation of the process itself, and so must adapt to different value systems. What kind of mediation model attracts you? Is your process focused on party interests – favoring emotional, psychological, relationship-oriented goals – inviting a classic mediation “facilitative” style? Or does your process fall closer to the evaluative end of the spectrum – influenced by risk analysis, an assessment of legal outcomes, and the brokering of a deal somewhere – anywhere – within the range of legitimate possible outcomes? Both ends of this spectrum, at their best, preserve fundamental process principles: informed decision-making, party self-determination, impartiality. However, the weight placed on these different objectives – how these values come to life – may differ depending on the judge’s conception of the most suitable process and role.⁶⁸

B) An Illustration

Let us return to the question raised above, about caucusing. Mediators caucus for a number of reasons: to ensure that parties are making informed decisions; to explore parties’ alternatives and the strength of their risk analysis; to test the feasibility of compromise. Some of these principles are attached to the goal of producing an agreement, and others to ‘integrity’ concerns about parties’ behavior inside the process. Either set of goals might justify caucusing, even when measured against judicial principles of impartiality. The analysis would need to consider, though, ways that

⁶⁸ Some have argued that too delineated a set of ethical rules has the effect of stifling the development of mediation processes; better that they be flexible and contextually grounded and consequently more responsive to the wide variety of circumstances of social conflict than formulaic, top-down approaches. Honoroff and Opatow conclude:

... the difficult ethical questions (usually arising from a fact pattern where two abstract ethical mandates appear to conflict) can be better handled by leavening deductive argument based on principles with effective practice that anticipates and effectively avoids the problem. Push a little on how one does that and the experienced mediator will often relate a deep understanding of the particular context of the dispute. We believe that it is in the exploration of that context, of the understanding of the parties, and of the meaning of effective practice, that the details of ethical principles emerge.

Brad Honoroff and Susan Opatow, “Mediation Ethics: A Grounded Approach” (2007) 23(2) *Mediation J* 155 at 169-70.

impartiality can be preserved inside the caucusing exercise. One way to accomplish that is transparency about how to handle confidential information disclosed during caucus.⁶⁹ Two judges who decide to caucus, but with different orientations to the process, may seek to protect fundamental principles using different techniques, each letting the values of party self-determination and informed decision-making be infused by the process's essential orientation. It should be noted that facilitative mediators would be less likely than evaluative mediators to caucus. Let's assume, however, that a caucus has led one side to disclose information about their concerns that they have asked not to be revealed.

An interest-based mediator will want to pursue what underlies the party's "position" that the information (if useful to reveal) must remain confidential. What are that party's basic motives and concerns? What concern has led her to refrain from openness in the joint process? Will revealing (or not revealing) that information to the other side advance her underlying goals? If the conversation is reframed to focus on "how to move forward" in the future, will it encourage openness about things the parties have so far been holding back? Such a mediator will help that party to make informed decisions which are tied to her individual interests, and to those interests which may be shared by the other party.

An evaluative mediator, who defines his role as offering an opinion and moving the parties towards compromise, may lean a different way in managing this dilemma. Using the rights-based litigation regime as a touchstone, such a mediator may remind the parties that they must decide what to keep confidential (subject to disclosure rules) and manage their own negotiation strategies. This mediator might refocus the parties on the development of offers and counter-offers, and may – if uncomfortable – ask that the parties present these to each other in joint session, rather than carrying messages back and forth in caucus. On the other hand, this mediator might continue to move back and forth between caucuses, making careful decisions about how to "signal" areas of common ground. Brunet envisions this as a process of "filtering and redistributing" information, and views it as an essential (but downplayed or not often admitted) feature of mediation in complex litigation environments.⁷⁰

⁶⁹ For an in-depth discussion about confidentiality in judicial mediation generally, see Louise Otis and Catherine Rousseau-Saine, "Confidentiality in Judicial Mediation: Lessons from (and for) Canada" in Sourdin and Zariski, *supra* note 1 at ch 10.

⁷⁰ Edward Brunet, "Reevaluating Complex Mediation Generalizations" (2011) 18(1) *Conn Ins LJ* 279.

Undertakings or expectations of confidentiality may take shape differently inside each of these two styles of mediation.⁷¹ In both settings, the judge-facilitator seeks to preserve party self-determination, informed decision-making and impartiality, instinctively using different strategies to stay consistent with his or her overall process orientation.

In considering these two approaches it becomes evident that the words “ethics” and “ethical” are not ideally suited to describe the choices facing the judicial mediator. In this case, it is not that one mediator’s behavior, influenced by one set of objectives, is “ethical” and the other mediator’s behavior, influenced by another set, is not. The question of ethics is engaged, rather, as the mediator seeks to make mindful and principled choices *in the context of* the process that is unfolding. Here, the debate becomes both important and murky. Since no one has fully examined the strengths and weaknesses of various styles of judicial mediation, it is difficult to advance claims about “what works” and draw boundaries around “right” and “wrong” behavior in the judicial mediator’s role.

Perhaps – as leaders in the broader mediation field might argue – the diversity of JSC models across the country is itself a feature worth preserving. “Ethics” in the narrow sense may not even be the right label for this dialogue. On the other hand, it could be seen as a meaningful frame of reference for critical thinking about the objectives and impact of judges in the JSC role, an invitation to i) assess and debate the strengths and weaknesses of the various approaches, and to ii) develop guidelines for judges that are applicable to the type of judicial mediation undertaken. While some principles may be applicable to all contexts of judicial mediation, others may be context-specific. Articulating these principles would strengthen the process of judicial mediation, make it more transparent for all participants and enable the judicial role to be undertaken in ways that are befitting the institution of the judiciary.

⁷¹ Jarrett argues that impartiality has radically different applications across mediation models as well. Although others would disagree, Jarrett suggests that impartiality may be a goal of facilitative mediators, but is not transferable to evaluative mediations or those which seek transformation of people, communication and/or relationships; see Jarrett, *supra* note 61 at 73. Waldman argues that autonomous decision-making can be a value under both a facilitative model or an evaluative one, but that evaluative mediators presume that autonomous decision-making ought to be informed by outside (rights-based) norms; see Ellen Waldman, “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence” (1998) 82 Marq L Rev 155.

5. *Tying the Scaffolding To The Original Structure: Linking Contextual Principles to Judicial First Principles*

Let us return to “first principles,” the CJC’s five obligations of independence, integrity, diligence, equality and impartiality. How general ethical obligations gain meaning in the JSC context is still emerging. Writing about criminal justice and problem-solving courts, King argues that the standard judicial principles of integrity, impartiality and independence can accommodate new therapeutic roles and processes, especially if they are expanded to include an “ethic of care.”⁷² Some Canadian judicial writers have begun to explore the same on the civil justice side. Rooke suggests that the broad commitment to “impartiality” might mean the following things, in the context of judicial dispute resolution: to “ensure there is no undue ... imbalance of power;” to “ensure that each party has independent legal advice, or the opportunity to obtain it;” and to not “get involved in the substantive fairness.”⁷³ For Otis and Reiter, the judicial principle of “integrity” and the process principle of “party self-determination” essentially mean, in the JSC context, “party consent.” They argue that if settlement processes invite parties to become “architects of the social order in which they will live,”⁷⁴ then voluntariness is paramount, regardless of how parties become engaged in the process in the first place (in Quebec, judicial mediation is “opt-in”). If voluntariness is a foundational dimension for party self-determination, then any techniques used by a judge – whether inside a facilitative, interest-based process or an evaluative, rights-based one – must respect this fundamental goal.

What does emerge from this discussion is the degree of circularity and interconnectedness of these process-based principles. As a way of addressing this challenge and developing an organized approach, Exon (and others) suggest that mediator codes of conduct ought to prioritize principles across a hierarchy. Her explanation:

The complexity ... lies in the process of determining the most important value. Party self-determination is touted as the fundamental principle of mediation and therefore may be considered the most important value. The notion of informed decision-making, balance of power, and balanced process are inherent parts of party autonomy because arguably a party cannot decide on a final resolution for a mediated dispute unless the party fully comprehends the consequences of that decision. In such a

⁷² King defines “ethic of care” as “an approach that is mindful of the effect of judicial action on the wellbeing of those taking part in or otherwise affected by judicial processes,” *supra* note 62 at 151.

⁷³ Rooke, *supra* note 2 at 343-44.

⁷⁴ Otis and Reiter, *supra* note 42 at 377.

scenario, a mediator could sacrifice her impartiality to ensure that the parties are fully informed of the consequences of their decision so that no party takes advantage of any other party. This is just one example of how an evaluative mediator could direct and guide the parties without the fear of violating the ethical requirements of impartiality.⁷⁵

In the mediation literature, party self-determination does indeed emerge as a “bedrock” principle. Like Exon, Oberman views other goals as supplementary – components – of self-determination. For example, she groups “informed decision-making” and “capacity issues” (such as the capacity to make autonomous decisions, to negotiate effectively, and to carry out agreements) – and possibly process transparency – underneath self-determination.⁷⁶

At this moment in the analysis, the drafter of an ethical framework for judicial mediators faces a unique task. Not only do process principles need to be articulated in a way that gives them meaningful content and opens up the possibility of resolution where they collide, but they also need to be reconciled with judges’ overarching ethical commitments. On the surface, we share King’s optimism. Shouldn’t “integrity” and “diligence” comport with operational best practices in mediation? Yet a deeper look at how these layers of ethical reasoning interrelate reveals the potential for significant tension. “Integrity” or “diligence” in the judicial office might mean the pursuit of effective solutions for litigants. On the other hand, if “integrity” in the judicial office is interpreted to mean a commitment to judicial application of the rule of law (an assumption that tends to surround evaluative mediations), then what are the implications for a process framework which purports to meaningfully value party self-determination? How are larger principles of judicial ethics engaged or implicated as process principles are fleshed out? What *are* the bedrock principles of JSCs?

6. Next Steps in the Process of Constructing an Ethical Framework

Reference to codes of ethics for mediators is useful for teasing out process principles for JSCs, but here the comparison ends. Codes of ethics for private mediators have been criticized for their bare focus on procedural principles, leaving private mediation at least slightly unmoored: “These

⁷⁵ She also notes approaches offered by others, including having the mediator weigh and determine priorities among values based on case-specific contextual factors; see Susan Nauss Exon, “The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation” (2008) 42 USF L Rev 577 at 618.

⁷⁶ Oberman, *supra* note 60.

standards fail to offer a broader sense of purpose. They fail to provide the mediator with an inspirational or aspirational compass.”⁷⁷ The judge’s role, in contrast, is already imbued with that broader sense of purpose. The judicial office provides a unique and rich starting point for the exercise of moral sensitivity, judgment, motivation and behavior in the facilitator’s role.

Strategic thinking about ethics requires each judge-facilitator to explore – analytically and instinctively – the relationship between broad ethical principles and role-specific process goals. A commonly identified goal in informal settlement processes is process transparency: the importance of parties’ knowing the features of the process in which they are engaged, and each person’s role within it. If a component of “integrity” is indeed process transparency, then the current debate is more than esoteric. It invites each judge-facilitator to be able to explain his or her role in settlement processes, and to internalize the ethical principles in ways that meaningfully attach to that role.

The principle of process transparency also invites further debate at the institutional level. As we have seen, facilitators can choose from a wide range of models for settlement processes. In the Canadian JSC context, sometimes this is left for individual judges to decide, and sometimes a policy decision is made at the program level (for example, evaluative models are more visible in Alberta and interest-based ones in Quebec). If process transparency is a goal, then upon whom does the obligation fall to inform parties about the features of the settlement process into which they are entering (often voluntarily, but sometimes not)? The process of defining conduct rules for mediators has been slowed down – but also enriched – by the competing policy interests that occupy the field. To some degree, the same tension exists here. There is a public interest in identifying collective goals and parameters for a process, yet the process by nature requires fluidity, flexibility and trust in the facilitator’s in-the-moment judgment to work most effectively.

At a more fundamental level, it might also be asked whether the existing *Ethical Principles* are up to the task of guiding judges in this critically important but ethically complicated environment. Judicial proponents of settlement conferencing have encouraged greater engagement by all actors in the justice system to assist judges in shaping this new judicial environment.⁷⁸ This would appear necessarily to include

⁷⁷ Alfani, *supra* note 2 at 836. Though the ethical challenges presented for judges in settlement conferencing may be acute, the “aspirational” nature of *Ethical Principles for Judges* at least provides a defence to this criticism.

⁷⁸ Winkler, *supra* note 2.

a consideration of a richer and more context-specific articulation of ethical principles in settlement conferencing. Brian Finlay and David Sterns suggest that one of the un-clarified dimensions of judicial settlement conferencing is the ethical parameters. As they state it: “The legal profession is uncertain as to what ethical rules apply in a judicial mediation and whether these differ from the rules in a private mediation.”⁷⁹ While we do not necessarily disagree, we have also suggested that the problem may be less related to uncertainty about ethical rules and more closely related to lack of clarity in the objectives and processes of judicial mediation that serve to inform the ethical principles that guide judicial mediators’ behaviour.

At different levels, there are compelling arguments that ongoing dialogue about ethical principles in the JSC context will lead us to the right place. Pirie and Landerkin were moving in this direction ten years ago when they wrote:

Judges should seek to obtain, if they have not already, a sense of “presence” or “gravitas”. By this, we mean a judge should be a centred, integrated, congruent person, being connected to his or her governing values and beliefs and highest purpose. “Mindfulness” can describe this quality. We may define “mindfulness” as “living in harmony with one’s self and the world.” Such a judge brings the “Hawthorne Effect” into the settlement conference. The judge’s presence by itself impacts favourably on the settlement process, regardless of input by the judge.⁸⁰

Nevertheless, there is no doubt that, though they may seek assistance, the ultimate decisions regarding ethical principles and standards in the context of judicial settlement conferencing must reside with the judiciary. That said, it is our sense that i) the growth of judicial settlement conferencing, ii) the variation in form across the country and even among judges in the same courts, and iii) the importance of judicial mediation proceeding in ways that offer benefits to litigants while preserving the public’s

⁷⁹ Brian Finlay and David Sterns, “The judicial mediation debate” *Lawyers Weekly* (2 September 2011), online: The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1485>> noting as well that the Ontario Bar Association has responded to Chief Justice Winkler’s call to engagement by establishing a Judicial Mediation Taskforce.

⁸⁰ *Supra* note 9 at 296. The Hawthorne Effect is a foundational concept in psychological research, “referred to by researchers to account for outcomes which are believed to depend on the fact that the subjects in a study have been aware that they are part of an experiment and are receiving extra attention as a result;” Frank Merrett, “Reflections on the Hawthorne Effect” (2006) 26(1) *Ed Psych* 143 at 143. In organizational behavior studies, this concept is used to help explain people’s tendency to adopt more positive behavior as they participate in a process where they know they are being observed.

confidence in judges for impartiality, independence and fairness, represent a call for judicial action. As Schmitz recently observed:

... no judicial ethical issues may be more timely or important for the administration of justice than those currently swirling around judges' participation in court-based mediation – a phenomenon that has taken hold and grown, albeit unevenly, across the country.⁸¹

Our argument is that this must begin with the identification of 'first principles' of judicial ethics in court-based mediation, based upon identified and articulated (though potentially varying) objectives, and build from there. As important as this work might be, it will be no easy task. Unlike private mediators, judges have the unique responsibility of considering all aspects of the institution of the judiciary in constructing appropriate ethical principles for their settlement processes. Against this backdrop, judges still need room to employ creativity in the design of JSC processes, to ensure such processes are responsive to situational factors. Though daunting, the quest to articulate and reconcile the tension between centralizing, universal principles on the one hand and context-specific principles on the other is also an opportunity for leadership in the larger fields of justice and dispute resolution. It begins, simply, with careful deliberation about the kind of impact – the kind of Hawthorne Effect – judges wish to have on the settlement process. What is profoundly important is not so much the answer, but how one engages with the question. From the perspective of the individual judge well as from the perspective of the judiciary as an institution, there can be no doubt that judicial ethics must be a central part of this thinking.

⁸¹ Cristin Schmitz, "Ethics, Judges and Mediation" *Lawyers Weekly*, (2 September 2011), online The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1487>>.