

Mediator Neutrality in Commercial Cases: What is the Standard?

Stanley A. Leasure

Finance and General Business Department
Missouri State University
901 South National Avenue
Springfield, MO 65897
USA

Abstract

Using a case recently decided by the United States Court of Appeals as an analytical framework, this article examines three ethical issues currently facing mediators: neutrality, impartiality, and disclosure. These ethical issues are important on several levels. Mediation is still a widely used dispute resolution process. However, ethical questions concerning mediator disclosure, neutrality, impartiality, and disclosure draw into question the legitimacy of the process itself and whether it merits the confidence required for it to remain a viable mechanism for dispute resolution.

Keywords: mediator, mediation, impartiality, disclosure, conflict, standard, confidentiality, neutrality

1. Introduction

Mediation is still a widely-used dispute resolution process. However, ethical questions concerning mediator neutrality, impartiality, and disclosure draw into question the legitimacy of the process itself and whether it merits the confidence required for it to remain a viable mechanism for dispute resolution. Widespread concerns about the ethical conduct of mediators draw into question the legitimacy of the process itself and whether it merits the confidence required for it to be a viable mechanism for dispute resolution. A recent article describes several threats currently facing mediation in stark terms: Some of my colleagues... have eloquently described mediation's descent from light to darkness. I will simply add to that list a few other storms threatening the landscape—assurances of confidentiality not honored, courts that look the other way when this happens, promises made in mediation and not kept, accusations of mediator coercion, participants acting in bad faith by using mediation as a fishing expedition, mediators failing to disclose conflicts of interest, and in some situations, giving inaccurate information to parties. (Citations omitted) (Nolan-Haley, 2015)

The Court of Appeals for the Federal Circuit considered the standard for mediator neutrality in a commercial case in the recent patent infringement case, *CEATS, Inc. v. Continental, et al.* The court's opinion is a tour de force on mediator neutrality generally and standards for mediator impartiality and disclosure of conflicts of interest in particular. Its application of the law and mediation standards is instructive on how mediation participants can assess mediator neutrality, impartiality, and freedom from conflict and why they should (*CEATS, Inc. v. Continental*, 2014).

In an attempt to settle the case without trial, the judge in *CEATS* appointed a mediator to conduct a mediation with the parties. The mediation was unsuccessful, and the case proceeded to trial. The jury rendered a verdict against *CEATS*. Subsequently, *CEATS* asked the trial judge to set aside the judgment because the mediator failed to disclose his relationship with a law firm for one of the defendants. The trial court denied its motion and *CEATS* appealed. Even though the Court of Appeals allowed the judgment to stand on other grounds, it concluded that the mediator had violated his obligations as the mediator in the case (*CEATS, Inc. v. Continental*, 2014). The Federal Circuit took the opportunity in *CEATS* to examine mediator neutrality, impartiality, and disclosure standards from several sources. These included standards adopted by professional organizations and commercial entities involved in dispute resolution as well as those set forth in the Uniform Mediation Act. The statutory provisions regarding recusal of federal judges and several important federal court cases involving mediator neutrality also played a role in the court's decision (*CEATS, Inc. v. Continental*, 2014).

Using the decision of the United States Court of Appeals in *CEATS, Inc. v. Continental*, 2014 as an analytical framework, this article examines three ethical issues currently facing mediators: neutrality, impartiality, and disclosure. Given that mediation is an important alternative to litigation as a way to resolve business disputes, these ethical issues are important on several levels. Most agree that mediator neutrality—in the context of impartiality and conflicts of interest—is critical if mediation is to remain a viable dispute resolution process. As such, a clear-eyed assessment of business executives, mediators, and attorneys of the neutrality standards to which mediators are, or should be held is not only appropriate but essential.

2. *Ceats V. Continental*

The genesis of the controversy surrounding mediator neutrality in *CEATS, Inc. v. Continental* is an unrelated arbitration case called *Karlseng v. Cooke* that began three years before CEATS sued Continental. Karlseng sued Cooke in Texas state court (*CEATS, Inc. v. Continental*, 2014). The law firm of Fish & Richardson (F&R) represented Karlseng. Rather than go to trial, Karlseng and Cooke agreed to submit the dispute to an arbitrator for binding decision. The trial judge appointed Robert Faulkner to serve as arbitrator. Faulkner was affiliated with the Judicial Arbitration and Mediation Service (JAMS), an alternative dispute resolution service provider. JAMS' arbitration rules required Faulkner to disclose "any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality" (JAMS International, 2011). Faulkner disclosed that he had previously participated in arbitrations and mediations involving F&R lawyers. Not long afterward, another F&R attorney, Brett Johnson entered the arbitration case on behalf of Karlseng. Faulkner did not disclose his acquaintance with Johnson to CEATS or its attorneys. In fact, during the arbitration, Faulkner acted as if he and Johnson had not previously met. Faulkner awarded Karlseng \$22 million. (*CEATS, Inc. v. Continental*, 2014).

After they had learned that Faulkner and Johnson were acquainted, Cooke's attorneys asked the trial court to allow discovery into the relationship between F&R and Faulkner. The trial court denied the request and confirmed the \$22 million arbitration award. On appeal by Cooke, the Texas Court of Appeals allowed discovery into the relationship. After the additional discovery was completed, the trial court again confirmed Faulkner's \$22 million award. Cooke appealed again. This time, the Court of Appeals set aside the arbitration award because Faulkner violated his duty as arbitrator by failing to disclose his relationship with the F&R attorneys. (*CEATS, Inc. v. Continental*, 2014).

Three years later, CEATS filed suit against the Continental defendants in the United States District Court for the Eastern District of Texas alleging that Continental infringed on CEATS' patents. An F&R partner was lead trial counsel for Continental. The court ordered the parties to mediate the dispute and appointed Robert Faulkner, the mediator. The parties attended mediation sessions before and during the trial but were unable to reach a settlement agreement. The jury found that CEATS' patents were invalid, and the trial court entered judgment for the Continental defendants (*CEATS, Inc. v. Continental*, 2014). CEATS' learned that Faulkner's arbitration award in *Karlseng v. Cooke* had been set aside as a result of his relationship with F&R. CEATS asked the trial court to set aside the final judgment in favor of Continental. The basis for its request was Faulkner's failure to disclose the facts surrounding his service as arbitrator in *Karlseng v. Cook*, including his relationship with F&R. The trial court denied that motion and CEATS appealed (*CEATS, Inc. v. Continental*, 2014). CEATS argued that Faulkner failed to make required disclosures and, the judgment should be set aside pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure (*CEATS, Inc. v. Continental*, 2014).

First, the court considered whether Faulkner had a duty to disclose his involvement as arbitrator in *Karlseng*. If so, the next issue was whether he breached that duty under the statutory standard for recusal of federal judges. That standard provides "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (28 U.S.C. § 455(a)). CEATS argued that these facts impacted the appearance of Faulkner's neutrality and impartiality as mediator. Continental claimed: (1) the F&R attorneys had no involvement in the case at the time of the initial mediation; (2) F&R did not represent Faulkner in the *Karlseng* litigation; and (3) no duty to disclose ever arose. (*CEATS, Inc. v. Continental*, 2014).

Several factors surrounding the relationship between Faulkner, Johnson and F&R seemed particularly important to the court: (a) F&R was defending Faulkner's disclosures in *Karlseng* at the same time he was serving as a mediator in the CEATS/Continental dispute; (b) the defense of Faulkner's arbitration award in *Karlseng* was ongoing at the time of the CEATS mediation; (c) Faulkner testified in *Karlseng* in defense of his arbitration award and his relationship with F&R, their clients and Johnson; (d) the decision finding that Faulkner had violated his disclosure obligations as the arbitrator in *Karlseng* was issued while his service as mediator in CEATS was ongoing. The court concluded Faulkner violated his duty as mediator by failing to disclose "all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality" in violation of his duty as mediator. The court stressed that mediators are important to the litigation process and that courts that refer litigants to mediation must be satisfied that the process will be "fair and effective." Likewise, the mediation parties must be confident in the process to participate openly in it. The court recognized a distinction between the role of a mediator and that of a judge but noted that mediators may have "a more intimate relationship" with disputing parties than do judges. The court stressed that mediation standards universally mandate disclosure of matters that reasonably create a presumption of bias (*CEATS, Inc. v. Continental*, 2014).

The court considered whether the breach warranted dismissal under Rule 60 (b)(6). The court applied a three-prong test established by the United States Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp.* Under *Liljeberg*, dismissal requires a showing of "extraordinary circumstance" in the form of either: (1) risk of injustice in the current case; (2) risk of injustice in other cases; or (3) risk of undermining public confidence (*Liljeberg v. Health Servs. Acquisition Corp.*, 1988). The court found that none of these factors was present and that the judgment in favor of Continental should stand notwithstanding the fact Faulkner had breached his duty as mediator (*CEATS, Inc. v. Continental*, 2014).

3. Mediator Standards

The Model Standards of Conduct for Mediators (Model Standards) and the Uniform Mediation Act (UMA) are two frequently cited sets of mediation standards. The Model Standards were jointly adopted by the American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution. They were last revised in 2005. The UMA was drafted by the National Conference of Commissioners on Uniform State Laws and last revised in 2003.

3.1 Model Standards of Conduct for Mediators

The stated goals of the Model Standards are to guide mediators, inform mediating parties, and promote public confidence in mediation. Under the Model Standards mediation is a process in which an impartial mediator assists disputing parties resolve their differences by facilitating communication and supporting voluntary decision-making (American Arbitration Association [AAA], American Bar Association, and Association for Conflict Resolution, 2005, p. 2). Standard II defines mediator impartiality as "freedom from favoritism, bias or prejudice." In addition, it gives mediation participants guidance on a number of important issues concerning impartiality including: (a) when a mediator is required to decline or withdraw from any mediation assignment ("cannot conduct it in an impartial manner"); (b) effect of partiality (must "not act with partiality" and must avoid "appearance of partiality"); and (c) giving and receiving gifts (do not give/receive gifts that raise questions of "actual or perceived impartiality") (AAA, et al., 2005, p. 4).

The manner in which mediators must deal with conflicts of interest is set forth in Standard III. Mediators must avoid actual or apparent conflicts of interest both during and after a mediation. The standard gives examples of both past and present activities that could create conflicts of interest if they "reasonably raise a question of a mediator's impartiality." Such activities include involvement with the subject matter of the dispute and personal or professional relationship with mediation participants (AAA, et al., 2005, p. 4). Mediators must "make a reasonable inquiry" to ascertain facts a reasonable person would "consider likely to create a potential or actual conflict of interest" (AAA, et al., 2005, p. 5). Standard III addresses the issue of disclosure. As soon as practicable, a mediator is required to disclose actual and potential conflicts reasonably known to the mediator (AAA, et al., 2005, p. 5). Facts learned by the mediator after accepting the assignment, which create a potential or actual conflict, must be disclosed. However, if the parties agree, the mediator may continue with the assignment, unless the conflict "might reasonably be viewed as undermining the integrity of the mediation" (AAA, et al., 2005, p. 5).

After the mediation concludes, the mediator may not establish a relationship with a participant so as to raise questions about the mediator's integrity. The mediator "should" consider time elapsed, nature of the relationship, and services offered in determining whether the relationship might create an actual or perceived conflict of interest, (AAA, et al., 2005, p. 5).

3.2 Uniform Mediation Act

Section 9 addresses disclosure of conflicts and sets forth the requirements of the UMA with respect to the protection of mediation integrity and knowing consent. (National Conference of Commissioners on Uniform State Laws, 2003, p. 38). Mediator disclosure requirements are set forth in UMA §9 (a)(1)-(2) (2001): "[F]acts that a reasonable individual would consider likely to affect the impartiality of the mediator" as well as the UMA's Official Comments §9 (a)(1)-(2) (2001): "This provides legislative support for the professional standards requiring mediators to disclose their conflicts of interest.... It is consistent with the ethical obligations imposed on other ADR neutrals" (National Conference of Commissioners on Uniform State Laws, 2003, p.38).

A mediator must make a reasonable inquiry to identify facts likely to affect the mediator's impartiality (e.g. interest in the outcome; relationship with a participant) before accepting an assignment. If any is found to exist, the mediator must disclose them to the parties as soon as practical (National Conference of Commissioners on Uniform State Laws, 2003, p. 39). Facts discovered after accepting the assignment must also be disclosed (National Conference of Commissioners on Uniform State Laws, 2003, p. 39). Mediation participants who violate Section 9(a) or (b) are precluded from asserting a Section 4 privilege against disclosure (National Conference of Commissioners on Uniform State Laws, 2003, p. 17). The Section 4 privilege prevents disclosure of mediation communications by mediation parties, mediators, and nonparty participants.

4. Selected Federal Court Decisions

Cases presenting issues a mediator confidentiality, impartiality, conflicts of interest or disclosure are often presented to Federal trial and appellate courts. In this section, several of the more prominent ones dealing with confidentiality, duty to disclose, conflict of interest, and neutrality will be explicated. Mediation confidentiality is a concern of the first from the perspective of the facts of the individual cases and the integrity of mediation writ large. *In re Grand Jury* is a good example. It stands for the principle that "Confidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute" (*In re Grand Jury*, 1998). Confidentiality is essential to the preservation of the integrity of the mediation process itself. An often cited case is the Second Circuit case, *Lake Utopia Paper Ltd.* The court discussed the incentivizing effect of mediation confidentiality: "The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion often leading to "settlement... of the proceeding." Those participating in mediation must be confident of its confidentiality "counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute" (*Lake Utopia Paper Ltd.*, 1979). Another federal court emphasized the importance Congress placed on confidentiality in alternative dispute resolution this way: Congress' view on the importance of alternative dispute resolution, and the need for confidentiality, is equally clear. The Alternative Dispute Resolution Act of 1998 requires each federal district court to authorize by local rule, the use of alternative dispute resolution processes in all civil actions. (citation omitted) The Act requires that ADR processes be confidential and prohibits disclosure of confidential dispute resolution communications (Fields—*D'Arpino v. Rest. Assocs., Inc.* 1999).

In *CEATS*, the court found a duty to disclose facts evidencing the mediator's potential conflict of interest and which drew his "neutrality" into question. (*CEATS, Inc. v. Continental*, 2014). The federal courts have emphasized the role of the mediator as being one in which two very important, but different characteristics are critical: [T]he success of mediation depends largely on the willingness of the parties to disclose freely their intentions, desires, and the strengths and weaknesses of their case; and upon the ability of the mediator to maintain a neutral position while carefully preserving the confidences that have been revealed (*Poly Software v. Su* 1995).

5. Conclusion

The ethical issues surrounding mediator neutrality, impartiality, and disclosure impact the mediation participants in which they arise. Particularly in the business context, mediation participants must be satisfied that: (1) appropriate standards of mediator ethics apply with respect to neutrality, impartiality, and disclosure; (2) they know what those standards are; and (3) they have confidence that those standards will be adhered to; (4) if the mediator breaches those standards, judicial relief will be available. If participants in business mediations do not find satisfaction with respect to one or more of these elements, may call into question the legitimacy of the mediation process itself. This, in turn, could result in a lack of confidence within the business community that mediation remains a viable mechanism for dispute resolution. For several decades, mediation has been seen as a viable alternative to litigation for the resolution of all types of disputes, including business disputes. Parties, through their attorneys or otherwise, must take steps to ensure that potential mediators have disclosed the facts necessary to determine neutrality and impartiality if mediation is to continue in a favorable light. The future of mediation may depend upon it.

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