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Safeguarding Self-Determination in Family Mediation: Ethical Challenges of Power Imbalance and Violence**

The paper explores the ethical dilemmas in family mediation with particular focus on issues of power imbalance and domestic violence. Mediation is presented as a voluntary process grounded in party autonomy and self-determination, yet the study reveals that disparities in resources, knowledge, cultural background, and emotional capacity often undermine these foundational principles. The scope of analysis is broad, examining both structural imbalances – such as financial inequality, legal representation, and informational asymmetry – and personal dynamics, including fear, persuasion, or moral superiority, that may distort the exercise of free will. The discussion situates these challenges within comparative ethical frameworks, referencing the Georgian Law on Mediation, the Code of Ethics for Mediators, and the U.S. Model Standards of Conduct.

A central conclusion is that not every imbalance of power justifies the termination of mediation. Instead, termination should remain an ultima ratio, employed only when the mediator's strategic interventions cannot restore equality of conditions. The study highlights various tools available to mediators, including private caucuses, involvement of independent professionals, and structured questioning, which may help mitigate imbalances and preserve informed decision-making. However, the presence of violence introduces a distinct and non-negotiable ethical threshold. The research emphasizes that mediation cannot proceed when fear, intimidation, or abuse deprive a party of genuine autonomy. In such contexts, confidentiality is limited by overriding duties to protect health, life, and the best interests of the child.

Ultimately, the paper argues that mediators are not passive facilitators but bear a dual responsibility: to uphold neutrality and impartiality, while also safeguarding the ethical integrity of the process. By balancing these obligations, mediation can remain both a credible and ethically defensible alternative to adjudication.

Key words: *Mediation, Family mediation, Ethics, Power imbalance, Domestic violence, Self-determination, Neutrality, Confidentiality*

1. Introduction

Mediation has become a widely recognized method of alternative dispute resolution, valued for its flexibility, confidentiality, and emphasis on consensual outcomes. Unlike adjudicative processes,

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which impose binding judgments, mediation rests upon the principles of voluntariness, party self-determination, and autonomy. These features render mediation particularly suitable for disputes of a personal or relational nature, such as those arising in the context of family law, where the preservation of ongoing relationships and the protection of children's welfare are often of paramount concern. However, precisely because mediation relies so heavily on the free will of participants, the process is uniquely vulnerable to ethical dilemmas when an imbalance of power between the parties or the presence of domestic violence undermines the possibility of meaningful self-determination.

The concept of power imbalance in mediation extends far beyond mere economic inequality. Disparities may stem from differences in legal knowledge, rhetorical ability, social standing, or cultural authority, and in many cases they manifest as asymmetries in psychological resilience or emotional stability. In family law disputes, these disparities often acquire acute significance, since one party's ability to dominate negotiations may directly affect not only the interests of the weaker party but also those of children and other dependents.[1] Where coercion, intimidation, or fear are present, voluntariness is compromised, and mediation risks devolving into a forum of capitulation rather than genuine consensus. This raises the critical ethical question of whether, under such conditions, mediation can or should proceed.

Particularly complex dilemmas emerge when mediators encounter circumstances of domestic violence. While mediation practice standards emphasize the mediator's neutrality regarding the substantive outcomes of disputes, neutrality does not extend to the safety of participants or the protection of children. The recognition of domestic violence – defined not only as physical abuse but also as patterns of control and intimidation – triggers obligations of training,[2] screening, safety planning, and in many jurisdictions, mandatory reporting. The challenge for mediators lies in balancing the principle of confidentiality, which constitutes a cornerstone of mediation, with the imperative to prevent harm and safeguard vulnerable parties.

Legal frameworks across jurisdictions adopt varied approaches to these dilemmas.[3] In some systems, such as Georgian law, mediation is expressly prohibited in cases involving domestic violence, while in others, participation is permitted provided that mediators are specially trained and appropriate safeguards are in place. The United States Model Standards of Conduct for Mediators, for instance, authorize mediators to withdraw from the process when continuation would jeopardize fairness, safety, or the integrity of the process. These divergent approaches highlight a broader tension

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1 On power imbalance in family law disputes see: *Ribot J.,* Mediated and Non-mediated Separation Agreements, Some Comments on the Spanish Regional Laws on Family Mediation, in: *Martin-Casals M.,* The Role of Self-determination in the Modernisation of Family Law in Europe, International Society on Family Law, Peticio, 2006, 177; *Parkinson L.,* Family Mediation, Appropriate Dispute Resolution in a New Family Justice System, 2nd ed., 2011, 264-271.

2 On this issue see: *Irving H.H., Benjamin M.,* Family Mediation, Contemporary Issues, Sage Publications, United States of America, 1995, 205.

3 *Kuźmicz M.M.,* Equilibrating the Scales: Balancing and Power Relations in the Age of AI, AI & Society, Springer, 2024, 1-18 <https://doi.org/10.1007/s00146-025-02300-2> [16.05.2025]. The paper explores how legal tools can address power asymmetries to preserve autonomy- and when more drastic measures may be necessary. It discusses mechanisms like financial support, information obligations, rights, participatory design, and law enforcement to counterbalance dominance

between the autonomy of mediation as a process and the public interest in preventing coercion and violence.

This paper examines these dilemmas in depth, focusing particularly on family mediation. It considers the nature and consequences of power imbalance, the principle of party self-determination, the limits of mediator intervention in providing information, and the ethical challenges surrounding confidentiality and disclosure in cases of suspected domestic violence. By situating these issues within both domestic legislation and international standards of practice, the study seeks to illuminate the extent to which mediation can remain an ethically viable forum for dispute resolution under conditions of inequality and potential harm. Ultimately, the analysis underscores that while mediation aspires to embody autonomy and voluntariness, its legitimacy depends upon careful safeguards to ensure fairness, safety, and genuine consent.

2. Challenges Related to Power Imbalance

Power imbalances is an unavoidable part of life, and hence an unavoidable part of mediation.[4] Generally, power is the ability to achieve specific desired outcomes and derives from control over resources or events.[5] Mediation, by its very nature, is a voluntary process founded upon personal recognition, party self-determination, and autonomy.[6] Consequently, situations that involve an imbalance of power between the parties may present the mediator with serious ethical challenges. The divergence of power (asymmetry) may in certain instances be so radical that achieving procedural fairness, equality, or the aim of informed decision-making by the parties becomes unattainable. In such circumstances, even the voluntariness of participation in mediation may be called into question. At such moments, mediation may prove unequivocally detrimental to one of the parties and to the practice of mediation as a whole. This gives rise to the critical question of whether the mediation process can be continued and, if so, to what extent.[7]

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4 *Dunlop N.,* Mediation Power Imbalances: Weighing the Arguments, October 12, 2018, <https://mediate.com/mediation-power-imbalances-weighing-the-arguments/?utm_source=chatgpt.com> [16.05.2025].

5 *Kuźmicz M.M.,* Equilibrating the Scales: Balancing and Power Relations in the Age of AI, AI & Society, Springer, 2024, 15 <https://doi.org/10.1007/s00146-025-02300-2> [16.05.2025].

6 *Nolan-Haley J.M.,* Court Mediation and the Search for Justice through Law, Washington University Law Quarterly, Vol. 74-47, 1996, 57; *Boyle A.,* Self-determination, Empowerment and Empathy in Mediation: Rehumanising Mediation's Effectiveness, The Newcastle Law Review, Vol.15, January 2020, 38; Joint Committee of Delegates, 1994, Standard 1; American Bar Association, 2001, Standard 1; *Kovach, K.K., Love, L.P.,* "Evaluative" Mediation is an Oxymoron. Alternatives, CPR Institute for Conflict Resolution. Vol.14, Iss. 3, 1996; *Folberg J., Milne A. L., Salem P.,* Divorce and Family Mediation, Models, Techniques and Applications, The Guilford Press, New York, London, 2004, 429; *Capulong E.R.C.,* Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines, Ohio State Journal of Dispute Resolution, Vol. 27:3, 2012, 641-682, <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1084&context=faculty_lawreviews> [25.08.2025].

7 For the discussion on this issue see: *Brandon M., Field R.,* An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, The Arbitrator & Mediator, 39(1), 2020, 33 and the following.

Conversely, under conditions of asymmetrical power, mediation may, in certain respects, prove especially beneficial, insofar as it provides an environment that supports the autonomy of the parties and the expression of free will, thus operating as both a facilitating and encouraging mechanism.[8] At the same time, it must be acknowledged that power asymmetry, in many cases, inherently and naturally characterizes human relations. Therefore, not every imbalance of power can be considered as constituting an unconditional ground for termination of the mediation process. Termination of mediation represents the ultimate recourse (*ultima ratio*), which is to be employed only where, notwithstanding procedural fairness and the mediator's strategic and tactical interventions, ensuring equal conditions for self-determination remains unattainable.[9] Where the imbalance of power is manageable and the ethical integrity of the process is preservable, safeguarding the mediation process must remain the paramount objective.[10]

2.1. The Nature of Power Imbalance

In family law disputes, disparities of power between the parties merit particular consideration, as the consequences of such matters often extend beyond the parties themselves and directly affect the well-being of others. *"In such a case, it must be assessed how fundamental the power imbalance is, and the comparative risks and advantages of considering the matter in mediation as opposed to other dispute resolution processes must be weighed."*[11]

For purposes of assessing the mediability of a case, it is of primary importance to identify the source of power advantage.[12] Such advantage may derive from lacking good-faith, strength of legal case, financial resources, property,[13] or the ability to obtain costly expert or legal services, including for the purposes of litigation.[14] A party deprived of such resources – for instance, where one party is represented by a qualified attorney,[15] while the other is limited to a single free legal consultation from

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8 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 98.

9 On the Prerequisites for the Termination of Mediation see: *Davis A. M., Salem R. A.,* Dealing With Power Imbalances in the Mediation of Interpersonal Disputes, Mediation Quarterly Issue: 6 Dated: December 1984, 17-26.

10 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 87.

11 Ibid, 94.

12 For a detailed discussion on this issue, see: Gewurz I.G., (Re)Designing Mediation to Address the Nuances of Power Imbalance, 19 Conflict Resol.Q. 2001, 135-162.

13 How power imbalance can affect the divorce mediation process, On Behalf of Canfield Madow Law Group, PLLC | Jan 9, 2025. Article is focused on divorce mediation and underscores how financial disparity can pressure weaker parties into unfavorable terms – highlighting the need for mediator assistance before outcomes become unjust.

14 About other sources of power imbalance see: *Dunlop N.,* Mediation Power Imbalances: Weighing the Arguments, October 12, 2018, <https://mediate.com/mediation-power-imbalances-weighing-the-arguments/?utm_source=chatgpt.com> [16.05.2025].

15 On the ethical dilemmas arising from a party's participation in mediation without legal representation, see: Nolan-Haley J.M., *Court Mediation and the Search for Justice through Law*, Washington University Law Quarterly, Vol. 74-47, 1996, 69.

a public service center – will be less likely to experience negotiations under conditions of equality or within a secure environment. The sense of vulnerability is further aggravated in adversarial proceedings, where the presentation and evaluation of legal evidence determine the outcome of the case. In such circumstances, the party may become motivated to avoid the financial burden of litigation and thereby be "compelled" to reach compromise through mediation.[16]

Mediators must be aware of a lack of good faith by any participant which can also be seen as a power imbalance. This can constitute a reason to terminate the mediation. Name calling during the mediation and/or in private session needs careful intervention to make sure the receiver of such language or putdown is not unnecessarily impacted by such behaviour and use of language. The impact of language on each party in the communication exchange needs to be something that is constantly monitored and assessed by the mediator.[17]

The imbalance may also arise from a lack of time or other resources. Where a party, fearing the absence of sufficient time or alternatives,[18] adopts an unconsidered decision,[19] mediation cannot tolerate such an outcome.

Similarly, an imbalance may emerge from disparities in knowledge, intelligence[20] information, or precise data. A party with expert knowledge or business experience in the field relevant to the dispute naturally enjoys an advantage in negotiation and in anticipating the outcomes of litigation.

In addition, one party may possess an advantage owing to a stronger legal position that is reinforced by statutory law and consistent judicial practice, thereby ensuring greater prospects of success in litigation. This factor may compel the weaker party to reach compromise during mediation, while the stronger party may exploit this position to demand substantial concessions.

Another source of imbalance may be the conviction of moral or legal superiority. A party firmly persuaded of its own correctness and moral advantage is more inclined to persuade the other side and exert influence by moral arguments, perceiving agreement on particular terms as a matter of principle. Such a party is more inclined toward inflexibility and regards the compromise of the opposing party as a moral imperative. Similarly, personal qualities and skills in negotiation and argumentation may create imbalance.[21] Eloquence, logical reasoning, empathy, analytical capacity, and determination may obscure the weakness of one's legal position. A persuasive negotiator or a representative with advanced advocacy skills may gain advantage over a less perceptive counterpart, while a negotiator lacking rhetorical ability may surrender genuine interests when confronted with a party possessing

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16 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

17 *Brandon M., Rachael Field R*., An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, Resolution Institute, March, 2020, 47.

18 On this issue see: *Picard C.A.,* Mediating Interpersonal and Small Group Conflict, The Golden Dog Press, Ottawa Canada, 2002, 131.

19 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 97.

20 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, 2007, 233.

21 *Davis A. M., Salem R. A.,* Dealing With Power Imbalances in the Mediation of Interpersonal Disputes, Mediation Quarterly Issue: 6 Dated: December 1984, 17.

debate-level rhetorical skill. Such an outcome cannot be regarded as an expression of genuine autonomy.

The factor of fear also deserves emphasis. It is unacceptable for a woman, in divorce proceedings, to take destructive decisions concerning property or custody under fear of an abusive spouse. A compromise under such conditions is not genuine settlement but capitulation induced by fear, which would not occur absent violence or fear of retribution. Similarly, the ability to inflict pain or irritation may shape the dynamics of negotiation. A party threatening to prolong proceedings in a harmful or unpleasant litigation process may provoke the other side to avoid court in light of its negative consequences.[22] Yet, long adversarial proceedings may bring grave harm even to the party with the stronger legal position, including breaches of confidentiality, reputational damage, discrediting of professional standing, deterioration in quality of life, and emotional trauma.

Even where a party lacks a strong legal position, considerable resources, or the real capacity to cause harm, that party may attempt to create the perception of advantage by convincing the other that it enjoys such benefits and could wield its power effectively.[23] Finally, informational imbalance must be addressed. Where one or both parties are unable to comprehend the consequences of agreement or non-agreement, this stands in contradiction with the very aims of mediation. If the mediator, within the scope of ethical competence, is unable to ensure party self-determination, termination of the mediation process becomes the necessary recourse. The mediator cannot personally ensure or guarantee self-determination. Code of Ethics of Mediators of Georgia only reinforce the mediator's duty to promote self-determination through competent, proper, and conscientious conduct of the process, which implies the use of various strategic-tactical and procedural-methodological mechanisms for the purpose of encouraging self-determination.[24]

In this broader context, religious and cultural considerations assume particular significance. In certain cultures, for example, consent to divorce is granted by the husband.[25] The mediator must be acutely aware of their own cultural foundations as well as those of the parties, and of the divergences between them, without adopting the role of judge in such matters.[26] Equally pressing is the question of how a mediator should act when parties from, for instance, an Asian cultural background reach an agreement that is troublingly vague, or how the mediator should respond when presented with a manifestly one-sided settlement, such as when an unemployed woman renounces her entitlement to financial benefits in favor of her husband during divorce proceedings.[27]

Scholarly discourse has raised concerns that mediation does not always serve the best interests of women, who typically possess fewer economic resources and are more inclined than men to reach

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22 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

23 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94-95.

24 Article 4 of the Code of Ethics of Mediators of Georgia – Promotion of Self-Determination.

25 *Abramson H.,* Crossing Bor ossing Borders int ders into New Ethical T o New Ethical Territory: Ethical Challenges y: Ethical Challenges When Mediating Cross-Culturally, S. Tex. L. Rev., Vol. 49, 921, 2008, 924.

26 Ibid.

27 Ibid.

compromise for the sake of their children, thereby becoming more vulnerable to opportunistic manipulation.[28] Some commentators argue that women are exploited in mediation, just as there are cases in which women and men alike have suffered harm at the hands of courts or unscrupulous attorneys. Yet, there exists little empirical evidence suggesting that women perform worse in mediation than in adversarial litigation. On the contrary, the majority of studies indicate that men and women alike express comparable satisfaction with mediation as a dispute resolution process. Moreover, women frequently report that mediation is beneficial, as the opportunity to confront their spouse within this framework enhances their sense of agency and knowledge.[29]

2.2. Party Self-Determination

The essence of mediation lies in the fact that it is not a process binding the will of parties in conflict, but rather one that grants them the opportunity to adopt, of their own accord, the most appropriate resolution to their conflictual situation. In this context, party self-determination must be ensured in order to safeguard against any illegitimate influence upon their free will, whether from the mediator or from the opposing party involved in the process.[30] The parties must be guaranteed a free environment within mediation, one in which they are able, independently and without fear or undue influence, to reach a decision based upon their own volition and through the process of negotiation.[31]

Party self-determination (*self-determination*) has been recognized as a fundamental principle of mediation.[32] Although this principle has long been acknowledged as one of the foundational values of mediation, to this day there is no universal consensus regarding the precise scope and substance of the principle itself.[33] Where a decision is adopted on the basis of relevant information and with an understanding of its content, such a decision may be deemed an informed decision, and the

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28 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 16.

29 Ibid, 17.

30 On defining the ethical limits of acceptable deception in mediation, see: *Cooley J. W., Defining the Ethical Limits of Acceptable Deception in Mediation*, Pepp. Disp. Resol. L.J., Vol. 4, Iss. 2, 2004, <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/8> [15.06.2025]. In this source, deception is generally defined as 'a persuasive activity in which the art of selective presentation is used,' and it is influenced by two main behaviors: concealing the real and presenting the false.

31 *Kandashvili I.,* Judicial and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia, Tbilisi, 2018, 72, (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf> [15.06.2025].

32 *Bartlett F., Mortensen R., Tranter K.,* Alternative Perspectives on Lawyers and Legal Ethics, Reimagining the Profession, Routledge Research in legal Ethics, London and New-York, 2011, 207; *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12; Model Standards of Conduct for Mediators, 2005, Standard I (1); *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, Wash. L. Rev., 2014, 1040; *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 9 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

33 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 10 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

manifestation of will by the party may be considered an informed expression of will.[34] Critics, however, question the use of mandatory mediation, particularly in disputes where the parties are unrepresented by counsel. In such circumstances, the concern arises as to whether these parties, without legal representation, are able to make an informed choice with respect to the proposed conditions and whether they are sufficiently shielded from the influence of the opposing party.[35]

Since, in court-annexed mediation, the achievement of agreement by the parties is from the outset an expectation of the judiciary, such expectation often extends to the mediator as well. This institutional "pressure" creates risks for the autonomy of the parties' will and the full realization of their right to self-determination, and it undermines the mediator's central obligation – namely, to encourage and safeguard the process of party self-determination.[36] In family disputes, the mediator bears obligations both toward the parties and toward the quality of the process. Any external pressure existing outside the mediation process must not influence the mediator or compel them to persuade the parties to settle.[37]

Party self-determination, mediator neutrality, and the mediator's limitation in providing professional advice are interdependent elements, which often shape the boundaries of the mediator's role and involvement in the mediation process.[38] Any interference by the mediator in the right of self-determination must remain strictly limited and be duly justified. The principle of self-determination must extend to all aspects of mediation, and any intervention in this right can be legitimate only where justified by a legitimate purpose.[39]

The principle of party self-determination is also recognized in the Law of Georgia on Mediation, Article 3[40] of which declares that mediation is founded, inter alia, upon the principle of self-determination of the parties.[41] The provision is declaratory in character and does not specify the concrete forms in which such self-determination may be expressed. Nonetheless, the principle finds reflection throughout various articles of the law. Article 8 of the Law of Georgia on Mediation establishes the rules governing the conduct of mediation. The article provides that the mediator may conduct mediation through both joint sessions with the parties and through individual communication. This arrangement serves precisely to ensure that the party, whether in joint or separate meetings with the mediator, is able to engage in self-determination and to reach a decision in accordance with their

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34 Ibid, 12.

35 Ibid, 4.

36 Ibid, 10.

37 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts (AFCC), 2000, Standard I (A) and (E).

38 *Chitashvili N.,* The Scope of Regulation of Mediation Ethics and the Addressees Bound by Ethical Standards, Journal of Law, №1, 2016, 30 (in Georgian) https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf [16.05.2025].

39 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 11-12 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

40 Law of Georgia on Mediation, Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 3.

41 For a more comprehensive discussion of these principles, see: *Chitashvili N., Bichia M., Barnabishvili G., Gatserelia A., Egnatashvili D.* in: *Kandashvili I. (ed.), Commentary on the Law of Georgia on Mediation*, "Universali", Tbilisi, 2024, 56-96 (in Georgian).

own interests. The same article also states that, for the purpose of conducting effective mediation, the mediator is authorized to request the parties to provide any additional information during the process. This rule constitutes another practical means of ensuring party self-determination under conditions in which the mediator lacks the authority to offer advice or express personal opinions. The principle of self-determination obliges the mediator to invite the parties to present additional information, thereby strengthening their ability to adopt decisions that are free, independent, and informed.[42]

The principle of self-determination is likewise reflected in the first standard of the 2005 Model Standards of Conduct for Mediators of the United States.[43] This standard defines self-determination as the act of reaching a voluntary and coercion-free decision, in which each party exercises free and informed choice with respect to both the process and its outcome.[44]

Within doctrine, it is widely accepted that the right of party self-determination is considerably broader than the principle of freedom of contract existing within civil law. Satisfaction derived from a mediated settlement, from the opportunity to express and understand emotions, and from the exercise of self-determination itself reflects the parties' gratitude toward the neutral third person who has assisted them in reaching a decision that embodies their free will. Thus, the promotion of party self-determination by the mediator entails not merely securing the parties' consent to the terms of the agreement, but also ensuring that they are able to identify and realize their authentic will.[45]

Since the substantive aim of mediation is to provide the parties with the possibility of a free, genuine, and value-reflective choice, the existential foundation of mediation lies in ensuring that party agreements are grounded in deeply understood values and preferences and remain unimpeded by external factors that may restrict or obstruct the free manifestation of will.[46] Among such external obstacles is the imbalance of power, the identification and neutralization of which constitutes a core responsibility of the mediator. In family cases, the principle of party self-determination assumes particular importance. The prevention of uninformed decision-making represents one of the mediator's foremost duties.

2.3. The Scope of the Mediator's Duty to Inform the Parties

Where a party lacks adequate knowledge concerning the subject matter under mediation, to what extent is the mediator authorized to provide that party with relevant legal, financial, or technical

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42 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 14 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

43 Model Standards of Conduct for Mediators, American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, adopted in 1994, revised in 2005, https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf [16.06.2025].

44 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 10 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

45 *Chitashvili N.,* Specific Features of Certain Ethical Obligations of the Lawyer-Mediator and the Necessity of Regulation, Journal of Law, №2, 2016, 50 (in Georgian).

46 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 96.

information, or even to offer advice?[47] In such circumstances, the mediator's duty of neutrality and impartiality[48] stands in tension with the duty to facilitate informed decision-making by the parties.[49]

If the imbalance between the parties is generated by informational deficiency, the mediator must indicate the necessity of obtaining additional consultation[50] and of involving independent specialists in the process.[51] Alternatively, and upon the request of the parties, the mediator may, within the scope of their knowledge and competence, provide relevant information while respecting the principle of impartiality and professional ethics.[52] For instance, *"if in a divorce case a parent refuses to pay child*

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47 The standards distinguish between advice individually provided by the mediator (whether legal or therapeutic in nature) and the provision of general information to the participants. *"In accordance with the standards of impartiality and the preservation of party self-determination, a mediator may provide participants with information for which the mediator is qualified by training or experience."* Accordingly, a mediator who is also a lawyer may provide legal information to the participants, while a mediator whose professional background is in mental health may provide information within their field of qualification. In all such cases, impartiality and neutrality must be maintained.See: *Schepard A.*, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Family Law Quarterly,* Vol. 35, 2001, 14-15.

48 *What is neutrality, and how does it change depending on the context? To what extent should the parties control the structure of mediation or the role of the mediator? How transparent should the mediator be in relation to how they are perceived by the parties and the likelihood of reaching a settlement? Can a mediator deceive the disputing parties or distort information if such distortion may increase the chances of reaching an agreement? Each of these questions relates to the ethics of the mediator's role and serves as an example of how complex and responsible this field of work is. See: Peppet S. R., ADR Ethics, Journal of Legal Education, Vol. 54, 2004, 77, <https://scholar.law.colorado.edu/articles/501> [15.06.2025]; Smith-son J., Barlow A., Hunter R.,* Ewing J., *The Moral Order in Family Mediation: Negotiating Competing Values, Conflict Resolution Quarterly, Vol. 35, No. 2, 2017, 174,* <https://onlinelibrary.wiley.com/doi/epdf/10.1002/crq.21195> *[15.06.2025].*

49 *Chitashvili N., The Scope of Regulation of Mediation Ethics and the Subjects Bound by Ethical Standards, Journal of Law, No. 1, 2016, 31* (in Georgian) <https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf> *[16.05.2025].*

50 Mediation Council of Illinois, Standards of Practice for Mediators, 1999, Standard I Competence, (F) <https://www.mediationcouncilofillinois.org/sites/default/files/MCI%20Professional%20Standards%20of%20Practice_0.pdf> [16.05.2025].

51 Article 4, Paragraph 5 of the Code of Ethics for Mediators of Georgia**:** The mediator is authorized, when necessary, to encourage a party participating in the process to seek additional advice, including from another independent professional; Article 8, Paragraph 8 of the Law on Mediation**:** In order to conduct the m during the mediation process. The Standards of Ethics of Professional Responsibility for Certified Mediators **of the** State of Virginia consider the involvement of both legal and non-legal qualified experts, such as accountants, financial specialists, child psychologists: the mediator should encourage the mediation party to obtain independent expert consultation or information when necessary for making an informed decision or for the protection of the party's rights. *Standards of Ethics of Professional Responsibility for Certified Mediators*, § F(1) (Judicial Council of Virginia, 2005), <http://www.courts.state.va.us/soe/soe.htm> [1.06.2025]. For the obligation to inform about the possibility of obtaining qualified consultation from various specialists, see: *Model Standards of Practice for Family and Divorce Mediation*, 2000, Association of Family and Conciliation Courts, Standard III A (4). On the involvement of "private third parties" and independent specialists (accountant, real estate agent, lawyer, etc.), see: *Irving H.H., Benjamin M., Therapeutic Family Mediation: Helping Families Resolve Conflict*, Sage Publications, London, 2002, 149.

52 *See Article 3, Paragraph 3 of the Code of Ethics for Mediators of Georgia.*

support on the grounds that the other spouse initiated the divorce, the mediator is entitled to inform the parties that the initiation of divorce proceedings is not, as a matter of law, a significant circumstance on the basis of which a judge may release a parent from the obligation to pay child support."[53]

The U.S. Model Standards of Practice for Family and Divorce Mediation consider it permissible for a mediator to provide information[54] within the limits of knowledge acquired through training and experience, but only with the qualification that such information must not constitute legal advice.[55] These standards empower the mediator to withdraw from the process if the parties intend to adopt an uninformed decision, or if one party seeks to misuse mediation in order to gain unfair advantage over the other. In contrast, the Alabama Code of Ethics anticipates that *"the mediator shall discuss with the parties the possible and likely judicial outcomes concerning property division in divorce cases."*[56] At first glance, it may seem that the mediator should be able to decline to endorse a mediated settlement where its formulation disregards the law.[57] Mediators are obligated to conduct the process in such a manner that all parties are treated with respect and are afforded the opportunity to reach agreement without coercion. The debate, however, centers on whether the mediator also bears responsibility for the substantive fairness of the outcome.[58]

If the mediator is to encourage a process grounded in party autonomy and self-determination, it follows that the mediator must ensure that decisions are reached under conditions of sufficient

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53 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 101.

54 According to the Model Standards of Conduct for Mediators in the United States, a mediator is not personally responsible for ensuring that each party makes a free and informed choice regarding specific decisions. However, when necessary, mediators are obligated to remind the parties of the importance of consulting other professionals to enable them to make an informed decision. Similarly, under the Code of Ethics for Mediators of Georgia (Article 4.3), the promotion of the principle of self-determination entails that the parties must be provided with the opportunity to voluntarily and knowledgeably make decisions consistent with their interests, both in relation to the substantive issues of the dispute and the procedural aspects of mediation. Moreover, the mediator is not required to guarantee the voluntary and informed decision-making of the parties, nor to continue the process if they consider that proceeding with mediation would be unreasonable or unjustified (Article 4.5). The mediator is authorized, as necessary, to encourage the parties involved in the process to seek additional advice, including from other independent professionals.

55 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q., Vol. 35, 2001, 8: The standards neither require nor prohibit mediators from providing any specific type of information, such as a lawyer-mediator's assessment of the likely outcome of a claim or a therapist's evaluation of the potential emotional benefits or harms to a child. The standards leave such practical matters, on which the mediation community has not yet reached consensus, open to the marketplace, where consumers choose mediators reasonably and with information about their approach to mediation. When consensus is reached, the old standards may be revised and new ones developed.

56 *Chitashvili N.,* The Scope of Regulation of Mediation Ethics and the Addressees of Ethical Standards Enforcement. *Journal* of Law, No. 1, 2016, 24-47 (in Georgia) <https://tsu.ge/assets/media/files/8/Publications/Sam-Jurn-N1-2016G.pdf> [15.06.2025],

57 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 6 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

58 Ibid, 5.

knowledge and awareness. Frequently, the need for legal information within mediation is considerable. If the expectation arises that such information be provided by the mediator, then *the mediator's role may become significantly closer to the professional obligation of legal representation. In such cases, the roles of mediator and representative overlap, giving rise to serious ethical dilemmas.*[59] While the mediator is indeed under an obligation to encourage the parties to seek objective consultation from other professionals (including lawyers), the dilemma becomes acute where the parties explicitly decline to exercise their procedural opportunity to obtain informed advice. In such circumstances, the question arises as to whether the mediator has either the right or the duty to provide the relevant information directly.

The mediator's role must be confined to encouraging and facilitating the parties in obtaining independent and qualified legal advice regarding the matters under discussion from attorneys or other specialists. According to the U.S. Model Standards of Conduct for Mediators,[60] the mediator cannot personally guarantee that each party will make free and informed choices with respect to particular decisions. However, when necessary, mediators must remind the parties of the importance of consulting other professionals in order to make informed choices. Similarly, under the Code of Ethics for Mediators of Georgia (Article 4.3), the promotion of self-determination requires that the parties be afforded the opportunity to make voluntary and informed decisions in accordance with their interests, both regarding the substantive issues in dispute and the procedural aspects of mediation. At the same time, the mediator is neither obliged to guarantee such voluntary and informed decision-making nor to continue the process where they consider continuation to be unreasonable or unjustified (Article 4.5). The mediator is, however, authorized, where necessary, to encourage a party to seek additional advice, including from another independent professional.

In international practice, the question also arises as to whether mediators who assist parties in obtaining neutral and impartial legal information or advice from attorneys – helping them to analyze alternative dispute resolution options outside mediation, such as litigation or arbitration, to assess the strengths and weaknesses of their legal positions and factual circumstances, to make an informed, mutually agreed, and voluntary decision, and to formulate a clear, detailed, and enforceable mediation agreement – may thereby be regarded as engaging in the practice of law. In response to this question, the American Bar Association, through resolution, has declared that mediation does not constitute the practice of law.[61]

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59 New York County Lawyers Association Ethics Opinion 685-1991, <https://www.nycla.org/resource/ethics-opinion/ethics-opinion-685-1991-dual-practice-conflict-of-interest/?utm_source=chatgpt.com> [16.05.2025]; CPR-Georgetown Model Rule for the Lawyer as Third-Party Neutral (2002); Virginia Legal Ethics Opinion 1759, <https://www.vacle.org/opinions/1759.htm?utm_source=chatgpt.com> [16.05.2025]; JAMS Mediator Ethics Guidelines, <https://www.jamsadr.com/mediators-ethics/?utm_source=chatgpt.com> [16.05.2025].

60 The Model Standards of Conduct for Mediators, issued by the AAA, ABA, and ACR in 1994 and revised in 2005, Standard I A (2). This document was originally adopted in 1994 by the three U.S. organizations involved in arbitration, law, and conflict resolution. In September 2005, the same organizations made amendments to the document to align it with contemporary mediation practice.

61 *Chitashvili N.,* The Specificity and Necessity of Regulation of Certain Ethical Obligations of Lawyer-Mediators, *Journal of Law,* No. 2, 2016, 32 (in Georgian) <https://tsu.ge/assets/media/files/8/Publications/

Article 3, paragraph 3.3 of the Georgian Code of Ethics for Mediators[62] sets forth the boundaries of information-sharing. Specifically, the mediator must facilitate the parties in making maximum use of their own resources and in formulating settlement terms independently. At the same time, the mediator is prohibited from providing legal or other professional advice beyond the scope of their competence, or from evaluating alternative outcomes of the dispute or the circumstances of the case, except where explicitly requested by the parties. Even in such instances, the mediator is authorized to share knowledge and information relevant to the case, but strictly in accordance with the principle of impartiality.

2.4. Mediator's Impartiality

In cases where there is an evident disparity between a strong and a weak party, the mediator may face the risk of unconscious bias. If one party employs manipulative tactics in order to pressure the other into hastily signing a mediated settlement, the mediator must not abandon impartiality by attempting to defend the weaker party's rights. Rather, the mediator should explain to the pressuring party that making decisions without proper consultation and adequate consideration contradicts the fundamental principles of the process itself.[63] Consequently, the mediator's strategy should not assume the effect of protecting one party's rights, but instead must be justified by the rationale of respecting the process and ensuring its proper and fair conduct. By doing so, the mediator upholds the principle of impartiality while simultaneously fulfilling the duty to promote self-determination and informed decision-making.[64]

The standards of conduct further imply that the mediator must refrain from using language, phrases, or suggestions – especially in the form of advice or instruction – that may be perceived as

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Sam-Journ-N2-2016G.pdf> [16. 05.2025]. Contrary to this view, there are differing opinions in the doctrine, for example, see *Kandashvili I.,* Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on Mediation, Tbilisi, 2018, 248, (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf≥ [23.05.2025]: "Great importance is attached to whether mediation generally constitutes a legal activity or is an ordinary service, because if mediation is classified as a legal service, then the ethics applicable to lawyers should apply to mediators. In this regard, it is preferable to classify mediation as a legal activity, since ultimately, through mediation, an enforceable act subject to legal norms is created. However, this is a complex issue that, in addition to requiring separate scientific research, necessitates open discussions within the legal profession, which currently do not take place in Georgia, and the issue is not on the agenda of representatives of the legal profession at all. Nevertheless, alongside the introduction of mediation, it is imperative to have discussions on this matter."

62 Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 3, Clause 3.3, <https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf> [20.05.2025].

63 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 107, (comments of Bill Eddy).

64 According to Article 1875 (1) of the Civil Procedure Code of Georgia, the duration of court mediation is 45 days, but no fewer than 2 sessions. The requirement of at least two sessions is explained by various reasons, including the fact that even if the parties wish to settle during the first session, attendance at a second session will be necessary to allow them time to fully understand and consider the terms of the agreement before the final signing of the mediation settlement.

favoring one party, indicating a preference, or creating the impression of conferring an advantageous position on one party at the expense of the other.[65]

The Model Standards of Conduct for Mediators grant the mediator the authority to decline participation or to withdraw from the process at any stage, if they find themselves unable to maintain impartiality. The Joint Commission for the Reform of the Model Standards considered whether it would be prudent to add a condition to this right of withdrawal, namely, that "withdrawal should be permissible only on the condition that it does not cause harm to the interests of either party." Ultimately, the Commission determined that it was not advisable to impose such a precondition.[66]

The principle of impartiality is reinforced in Rule 2 of the Model Standards, which stipulates that the mediator must conduct the mediation impartially and avoid any conduct that might create an appearance of bias. This means that the mediator must not act with prejudice or allow preconceived beliefs – whether based on personal characteristics, background, values, convictions, behaviors demonstrated during mediation, or any other factor – to influence the process.[67] According to the Model Standards, a mediator who, for personal or other reasons, cannot remain impartial has the option to decline or cease to perform the role of mediator. At the same time, partiality or the perception of bias may arise at any stage of the mediation, in which case the parties have the right to request the mediator's recusal, and the mediator has the right to withdraw voluntarily.[68]

2.5. Addressing Power Imbalances Between the Parties

Private caucuses represent the most effective format for screening issues of domestic violence and power imbalance, for examining the history of the parties' relationship and the causes of conflict, for conducting reality testing, and for developing proposals tailored to the parties' interests. Accordingly, individual meetings serve as one of the most effective instruments for both assessing the negotiation capacities of the parties and balancing disparities in their respective power.[69]

Given that in some cultures the emphasis is placed more on maintaining relationships than on regulating contractual details, the mediator must frame questions in such a way as to highlight the importance of ensuring that the parties are aware of potential ambiguities. Nonetheless, if the mediator considers that the quality of the process is jeopardized, particularly in relation to self-determination, they retain the right to refuse to accept such agreements. The mediator, however, must remain vigilant to the risk of becoming culturally imperialistic. Mediators must avoid accusations of cultural imperialism, except in those rare instances where the mediator consciously decides to adopt such a stance.[70]

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65 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 16 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

66 *Chitashvili N., The Scope of Regulation of Mediation Ethics and the Subjects Bound by Ethical Standards, Journal of Law, No. 1, 2016, 32-33 (in Georgian)* <https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf> *[16.05.2025].*

67 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 15 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

68 Ibid, 16.

69 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 104.

70 A critically important strategic tool for the mediator is identifying the circle of relevant individuals to be involved in the process and ensuring their participation. Third parties and personal representatives of the

"Invite every good fairy and every wicked witch to the mediation!" Why did Sleeping Beauty sleep for one hundred years? Because she pricked her finger on a spindle. This was the curse imposed by the offended wicked witch, whom the princess's parents failed to invite to their daughter's grand celebration.[71]

One of the mediator's most critical strategic tools is determining the relevant circle of persons to be invited into the process and ensuring their appropriate involvement. Third parties and personal representatives of the parties are considered one of the most significant and active elements of family mediation. Consequently, it is often necessary, for a variety of strategic reasons, to invite to the mediation all those individuals whose involvement – whether constructive or disruptive – may play a role in reaching a settlement. Among these participants may be specialists capable of facilitating self-determination and informed decision-making, such as lawyers, psychologists, financial experts, or real estate agents. These individuals may be engaged either as party representatives or as independent specialists in the capacity of third parties.

The Model Standards, of course, cannot guarantee that any given mediator will meet these ideals. Nor can they resolve entrenched structural inequalities between participants. Such responsibilities ultimately fall to legislative bodies or the courts.[72] What the Model Standards can provide, however, is assurance to both the public and the legal community that the profession of family mediation accepts the responsibility to foster conditions of equal opportunity within mediation, and thus to contribute to the prevention of fundamental injustices in negotiated settlements. By preserving the mediator's neutral role, the standards promote good practice in mediation, thereby reducing (though not eliminating) the risk of abuse of the process by parties acting in bad faith.[73]

2.6. Termination of Mediation

"Any imbalance harms not only the parties but also the ethical integrity of the process itself."[74] As a rule, if the principle of proportionality of power between the parties is fundamentally undermined, mediation is deemed incapable of providing equal opportunities for the exercise of self-

parties are considered one of the most essential and active components in family mediation processes. Therefore, for various strategic purposes, it is necessary to invite all individuals to the mediation process who may play a certain role – positive or negative – in reaching an agreement. Among these individuals, on the one hand, may be specialists who can facilitate self-determination and informed decision-making (such as a lawyer, psychologist, financial advisor, or real estate agent). These individuals may be invited either as party representatives or as independent experts – third parties. Abramson H., Crossing Bor ossing Borders int ders into New Ethical T o New Ethical Territory: Ethical Challenges: Ethical Challenges When Mediating Cross-Culturally, S. Tex. L. Rev. 921, 2008, 941-942.

71 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 105, with further reference to: *Mosten F.S.,* Collaborative Divorce Handbook, Toolbox of Strategies for Collaborative Afreement, Jossey-Bass, 2009, 77-104.

72 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 16.

73 Ibid, 17.

74 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 107, (comments of Bill Eddy).

determination, and continuation of the process departs from its essential purpose. In such circumstances, the leading recommendation among commentators on ethics is for the mediator to terminate the process on their own initiative.[75]

Termination of mediation constitutes the ultimate measure (*ultima ratio*), employed only where procedural fairness, together with the mediator's strategic and tactical interventions, cannot secure equal conditions for the parties' self-determination. If, however, the imbalance of power remains manageable and the ethical integrity of the process can be preserved, then rescuing the mediation remains the primary objective.[76]

Where various forms of imbalance exist, the mediator must evaluate whether the risks of continuing negotiations outweigh the potential benefits of a mediated settlement.[77] If, within the scope of the mediator's ethical competence, self-determination of the parties cannot be assured,[78] termination becomes the necessary course of action. Article 2, paragraph 6 of the Georgian Code of Ethics for Mediators enumerates specific grounds for potential bias, including stereotypical assumptions, which extend to attitudes arising from the asymmetry of power between parties. Such attitudes may manifest in excessive pity or empathy toward the so-called weaker party or victim, or conversely in hostility or a punitive attitude toward the so-called stronger party or aggressor. Either stance undermines or casts doubt on the mediator's impartiality and neutrality.[79]

It must further be recognized that court litigation may often exacerbate existing disparities of power between the parties.[80] The addition of lawyers and court procedures simply exacerbates the power imbalance. Formal procedures and technical language increase parents' fear and anger, and leave them feeling alienated and less capable of full participation.[81]

Accordingly, determining the substantive and procedural advantages of each dispute-resolution process requires a deep contextual analysis of the conflict itself, in order to identify which procedural mechanism within the dispute-resolution continuum best aligns with the multifaceted needs of the

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75 Ibid, 87.

76 Ibid.

77 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 95-96.

78 A mediator cannot independently ensure or guarantee party self-determination; ethics codes merely reinforce the duty to support self-determination through competent, proper, and conscientious conduct of the process. This involves the use of various strategic-tactical and procedural-methodological mechanisms aimed at encouraging self-determination. See: Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 4 – Party Self-Determination, https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf [16.05.2025].

79 A mediator must decline to conduct a mediation if they believe that, due to preconceived notions (stereotypes) related to a participant's race, skin color, gender, origin, ethnicity, language, religion, aesthetic perception, political or other beliefs, social status, property or class status, place of residence, or any other characteristic, they are unable to conduct the process impartially. See: Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 2, Clause 2.6, https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf [16.05.2025].

80 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 98.

81 *Irving H.H., Benjamin M.,* Family Mediation, Contemporary Issues, Sage Publications, United States of America, 1995, 380.

parties. For parties with autonomy and a stable, self-sustaining capacity for voluntary choice, mediation is often regarded as "the most ethically viable process."[82] One study reported that compared to couples that used attorney negotiation to reach agreements, mediation made a greater contribution toward reducing couples' postdivorce verbal and physical abuse.[83]

3. Dilemmas Concerning Issues of Violence

A particularly complex scenario arises when, in the course of negotiations, the mediator discovers circumstances that give rise to reasonable suspicion of past or ongoing violence against women or minors. Such discoveries confront the mediator with profound dilemmas regarding the extent to which continuation of the process is permissible, and if so, where the appropriate limits lie.

3.1. Scope of Confidentiality

Confidentiality is one of the most fundamental principles of mediation, and its "closed nature" distinguishes it from other forms of formal proceedings.[84] This principle is especially attractive in

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82 Ibid, 100.

83 *Ellis D.,* Family mediation pilot project. North York, Ontario, Canada: Hamilton Uni- fied Family Court, 1995; *Ellis D., Stuckless N.,* Mediating and negotiating marital conflicts. Thousand Oaks, CA: Sage, 1996 cited in: *Folberg J., Milne A.l., Salem P.,* Divorce and Family Mediation, Models, Techniques, and Applications, The Guilford Press, 2004, 93.

84 See: *Kandashvili I., Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on the Example of Mediation,* Tbilisi, 2018, 77–78 (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf> [16.05.2025]. In mediation doctrine, the privilege of confidentiality is not considered an absolute right. When a case proceeds to court, the applicable standard is that any evidence relevant to the case and potentially influential on the outcome must be admissible and accessible, as there is a public interest in achieving true justice – a goal that, in certain instances, depends on the court being fully informed. In mediation, the standard holds that the confidentiality privilege protects information disclosed or evidence exchanged during the process. However, there are certain exceptions where the disclosure of confidential information becomes mandatory. In such cases, it is essential to maintain a balance between two major interests: the privilege of confidentiality in mediation, and the public interest. It is important to distinguish between the concepts of privilege and confidentiality – although they are often mistakenly conflated. Mediation participants must clearly understand where the boundary between these two concepts lies: specifically, not all confidential communication is protected by privilege, but all privileged communication is confidential. Attention should also be paid to the fact that even if parties exchange information under a confidentiality clause, circumstances may still arise that require them to disclose such information before a court.
See: *Kandashvili I., Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on the Example of Mediation*, Tbilisi, 2018, fn. 427 (in Georgian) with further reference to: *Nelson M.R., Nelson on ADR,* Thomson Carswell, 2003, 27. Disclosure of information protected by confidentiality during the mediation process is possible if the specific case falls under exceptions that make disclosure mandatory. These include: a) Where such an obligation is prescribed by a specific law related to the mediation process (e.g., any information concerning the best interests of a minor cannot remain confidential, as the minor's legal interests are protected by law); b) Where the disclosure of confidential information is directly related to the realization of a party's legal interests (e.g., if a party suffers harm during the mediation process due to specific actions of the mediator or an attorney, the party is free to disclose confidential information obtained during mediation for the purpose of protecting their rights); c) According to Section 6(4) of the *Uniform*

disputes of a personal nature (family relations, disputes between business partners, individual employment conflicts, and similar matters) or in disputes involving trade secrets, reputational risks, or other sensitive issues, where it may be in the interests of the parties to prevent publicity or disclosure of information.[85]

Within the context of the mediator's ethical duties, this principle encompasses two dimensions: first, the mediator must maintain the confidentiality of the mediation process vis-à-vis third parties; second, when meeting parties separately, the mediator must preserve as confidential any information disclosed in caucus that the disclosing party wishes to keep private. Moreover, the mediator is obliged to inform the parties of any limitations to confidentiality, such as mandatory disclosure obligations concerning child abuse or disclosure of plans to commit a crime.[86]

The duty of confidentiality ceases to apply if information has been made public, if the parties waive its confidentiality, if disclosure is necessary to protect the mediator from liability for ethical violations, or if it relates to preventing imminent death, serious bodily harm, or significant financial loss through criminal or fraudulent acts. Many national mediation laws recognize such exceptions, thereby prioritizing the protection of public interest through statutory limitations.[87]

If, during mediation, it becomes evident that the process is being used to plan future criminal conduct, the mediator is obliged to persuade the participant to desist, or to adjourn or terminate the mediation. Under the Model Standards of Conduct for Mediators, however, there is no obligation to report disclosed criminal intent to law enforcement authorities. The rationale lies in the fact that, in some jurisdictions, neither law nor party agreement explicitly defines such exceptions to confidentiality; in those contexts, the mediator would be deemed in breach of confidentiality by reporting without consent. Consequently, under these standards, disclosure by the mediator to investigative authorities of such information constitutes a violation of confidentiality, absent the party's consent. Nonetheless, this is not universally regulated across all codes of conduct, mediation rules, or domestic laws. For instance, under the Law of Georgia on Mediation, a mediator's notification of relevant authorities regarding impending serious crimes is not considered a breach of confidentiality.[88]

Within Europe, an important instrument governing the nature and scope of confidentiality in mediation is Directive 2008/52/EC of the European Parliament and the Council. The Directive

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Mediation Act, the following types of information are subject to disclosure: Information contained in a mediation agreement signed by both parties; Information that is public under applicable legislation; Information involving threats, violence, or criminal conduct; Information that prevents a crime; Information confirming misconduct by the mediator; Information confirming criminal conduct or professional misconduct by a party, their representative, or a third party.

85 *Orjonikidze E., Mediation Guide,* Tbilisi, 2021, 33 (in Georgian), <https://www.ge.undp.org/content/georgia/ka/home/library/democratic_governance/mediation-guide.html> [16.05.2026].

86 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 22 (in Georgian), <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

87 *Chitashvili N.,* Specific Features of Certain Ethical Obligations of the Lawyer-Mediator and the Necessity of Regulation, Journal of Law, №2, 2016, 41 (in Georgian).

88 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 28-29 (in Georgian), <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

requires that mediation remain confidential both during its proceedings and thereafter. Accordingly, courts may not compel mediators to testify in civil or commercial disputes concerning information obtained in mediation. The Directive, however, also provides for exceptions. Notably, while the initial draft contained no exceptions, the final adopted version includes Article 7, which enumerates specific exceptions, namely, where: (a) there is a need to protect public interest; (b) enforcement of a mediated settlement requires disclosure; (c) disclosure would prevent wrongdoing or criminal conduct; (d) the protection of the interests of a minor requires disclosure; or (e) both parties consent to disclosure.[89]

3.2. Disclosure of Domestic Violence

Instances of participant abuse and threats to children present significant challenges for the mediator in safeguarding the process and ensuring the security of those involved. Standards of practice rest on the general principle that mediators remain neutral with respect to the substantive outcome of any agreement reached, provided that such agreement is voluntary. However, mediators are not neutral regarding the safety of clients and their children.[90] The standards define "domestic violence" more broadly than merely physical violence, extending also to "issues of control and intimidation," and explicitly state that certain cases are inappropriate for mediation due to safety risks, coercive control, or intimidation. What the standards require is a fourfold approach to domestic violence: training, screening, safety planning, and reporting.[91]

According to the standards of family and divorce mediation practice in the United States,[92] the mediator must be capable of recognizing possible signs of domestic violence in family law matters, in order to guide the process accordingly. Participation of a mediator in family law cases involving domestic violence is permissible only if the mediator has received appropriate, specialized training.[93] The standards acknowledge that not all cases are suitable for mediation when factors of safety, control, or intimidation are present. They impose a clear obligation upon the mediator to undertake all reasonable measures to screen for and assess domestic violence before any settlement is signed.[94]

Under Georgian legislation, [court-annexed] mediation is not permitted in cases involving violence against women and/or domestic violence.[95] Furthermore, Article 10(4)(a) of the Law of

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89 Ibid, 23.

90 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, 2001, Vol. 35, 20.

91 Ibid 20-21.

92 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts, 2000, Standard IX – The Mediator's Responsibility Regarding Child Abuse or Neglect**.** A. As used in these Standards, *child abuse or neglect* is defined by the applicable state law. B. A mediator should not undertake or continue mediation in cases where the family situation includes child abuse or neglect, unless the mediator has appropriate and adequate training. **C.** If the mediator has a reasonable basis to believe that a child is abused or neglected within the meaning of the child abuse and neglect laws of the jurisdiction, the mediator should adhere to the applicable child protection laws. 1.The mediator should encourage the participants to explore appropriate services for the family. 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

93 Ibid, Standard X (B).

94 Ibid, Standard X (C).

95 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, No. 1106, 14/11/1997, Article 1873 (1)(a), <https://matsne.gov.ge/ka/document/view/29962?publication=149> [20.05.2016].

Georgia on Mediation[96] stipulates that the duty of confidentiality does not apply when disclosure of information is necessary to protect a person's life or health, ensure liberty, or safeguard the best interests of a minor. Similarly, under Article 91 of the Law of Georgia on the Elimination of Violence Against Women and/or Domestic Violence, Protection and Assistance of Victims of Violence,[97] the detection of domestic violence and appropriate response are entrusted to law enforcement agencies, judicial bodies, and victim identification groups established under the law. The obligation of first-line identification and reporting of domestic violence also rests with medical institutions, and in the case of minors, with educational and childcare institutions, guardianship and custody authorities, and other entities designated under Georgian law.

A systematic analysis of these legal provisions indicates that the mediator is under an obligation to terminate the mediation process and notify the court of any established fact or reasonable suspicion of ongoing or past violence. It is important to emphasize that the mediator may not personally witness an act of violence during the mediation; rather, they may become aware of it only through the confidential disclosure of a party. The critical question, therefore, is whether the duty of notification extends to such situations as well. Given that exceptions to confidentiality apply to information whose disclosure has preventive value for the protection of a person's health or the best interests of a minor, information concerning a reasonable suspicion of violence must also be subject to disclosure.

The mediation of family law disputes in which a history of violence has been revealed must be deemed impermissible, as the vulnerable party – the victim – will be deprived of the ability to engage in free negotiation and exercise self-determination, given the asymmetry of power and the unequal psycho-emotional conditions in which the victim stands vis-à-vis the abuser.[98] Of particular significance here is the factor of fear. It is unacceptable for a woman in divorce proceedings to make detrimental decisions regarding property or child custody under the influence of fear of her abusive

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96 Law of Georgia "On Mediation", Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 10 outlines the exceptions under which participants in mediation, including mediators, are permitted to disclose information. According to this Article, disclosure is allowed if: a) It is necessary to protect a person's life or health, ensure their freedom, or safeguard the best interests of a minor; b) The information is disclosed to prove the fact of reaching a mediation settlement when the other party disputes or denies this fact; c) A party is obligated to fulfill a legal duty undertaken before the commencement of mediation and must disclose information that became known during the mediation process to the other party, provided that the disclosed information is limited to the minimum necessary; d) Disclosure of the information is required by a court decision or another decision with binding legal force;e) Disclosure of the information is necessary for the investigation of a particularly serious crime. In such cases, the information shall be disclosed in the most limited scope possible, and the relevant party shall be notified in advance; f) Disclosure of the content of the mediation settlement is necessary for its voluntary or enforced execution; g) A legal or disciplinary dispute is brought against the person who discloses the information, and the dispute arises from the mediation process, and disclosure of the information is necessary to protect that person's legal interests; h) The information disclosed under confidentiality during the mediation process was already known to the party before the mediation, was obtained through other lawful means, or has otherwise become public.

97 Law of Georgia on the Elimination of Violence Against Women and/or Domestic Violence, Protection and Assistance to Victims of Violence, Legislative Herald of Georgia, No. 3143, 09/06/2006, Article 91, https://matsne.gov.ge/ka/document/view/26422?publication=21 [15.06.2025].

98 Further discussion on this issue can be found in: *Steegh N.V.,* Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence, Wm. & Mary J. Women & L., Vol. 9, 2003, 145-206.

spouse. In such circumstances, a compromise reached during mediation may in reality amount to nothing more than a capitulation born of fear – fear of further violence or anticipated retribution – that would not otherwise occur in the absence of such coercion.[99]

3.3. Addressing Domestic Violence Revealed in Mediation

When domestic violence is uncovered during mediation, the mediator is obliged to take all necessary measures to ensure the safety of the parties and of the mediator personally. In such cases, it is justified – even absent the consent of all parties – to conduct individual sessions, to permit the presence of a victim's friend, representative, attorney, or legal advisor during sessions, to encourage the involvement of legal counsel in the mediation process, and to connect the parties with appropriate community services. The mediator also retains the discretion to adjourn or terminate sessions to ensure safety. It is the mediator's responsibility to facilitate agreements between parents that allocate parental responsibilities in a manner conducive to the physical safety and psychological well-being of both parents and children.[100]

"If violence is perpetrated by both parties against one another, and no clear power imbalance exists, and the case does not involve minors, then the parties may equally possess the capacity for free negotiation and autonomous decision-making. If, however, one party exhibits fear, self-denial, submissive behavior, or patterns of obedience, mediation cannot proceed under such conditions of inequality, and the matter must be referred back to judicial proceedings."[101]

For the purposes of examining the nature, character, and severity of the violence, the mediator's ability to frame appropriate questions is of paramount importance. The aim is to assess whether the alleged victim possesses sufficient emotional resources to negotiate independently and effectively, and whether continuation of mediation is admissible at all.[102] If, in the mediator's judgment, the alleged victim demonstrates these capacities, then mediation may provide both parties with the resources for free and autonomous decision-making. The mediator, however, must be certain that any agreement reached in mediation is not so unjust as to be alarming – whether because it was made under the threat of physical violence or because its substantive terms are so egregiously unfair that no reasonable person would consent to them.[103]

An expert opinion from a competent authority or psychologist may be considered supplementary information assisting the mediator in evaluating the existence of violence and the psycho-emotional state of the parties.

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99 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

100 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts, 2000, Standard X (D, 1-6).

101 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 91.

102 *Girdner L. K.,* Mediation triage: Screening for Spouse abuse in Divorce Mediation, *Mediation Quarterly,* Vol. 7(4), 1990, 374.

103 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 15.

The mediator's recommendation to involve an authorized representative of the State Care and Assistance Agency for Victims of Trafficking, or a psychologist, in the mediation process may be grounded in Article 8(8) of the Law of Georgia on Mediation, which authorizes the mediator to request from the parties any additional information necessary for the effective conduct of mediation. An expert conclusion may thus assist the mediator in assessing both the existence of violence and the psychological state of the parties. Such measures may prove indispensable, as mediators may lack the requisite knowledge and competence to evaluate correctly the existence of violence, the reality of risks to the best interests of the child, or threats to the health and vital interests of the alleged victim.

In this regard, particular relevance attaches to Rule IV(B) of the U.S. Model Standards of Conduct for Mediators, which provides that if, in the course of mediation, it becomes apparent that the mediator is unable to conduct the process competently, the mediator must promptly raise the issue with the parties and take appropriate measures, including seeking assistance or withdrawing from the process.[104] If the parties refuse the mediator's proposal to involve such professionals, this furnishes the mediator with strong grounds for terminating the process, on the basis that in court proceedings the judiciary itself would be obliged to ensure that all necessary measures are taken to protect the best interests of the child.

3.4. Termination of Mediation

Article 3(5) of the Georgian Code of Ethics for Mediators permits termination of the process by the mediator where a valid reason exists. The impossibility of ensuring the best interests of the child, or of safeguarding the health and safety of one or both parties, constitutes a legitimate interest that undoubtedly justifies deeming continuation of mediation unreasonable under Article 9(1)(e) of the Law of Georgia on Mediation. The protection of the child's best interests, as well as the safeguarding of personal liberty, health, or life, are also expressly recognized under the Law of Georgia on Mediation as legitimate exceptions to the principle of confidentiality.[105]

Under Standard VI(B) of the U.S. Model Standards of Conduct for Mediators, where a mediator becomes aware of domestic violence or harassment between the parties, the mediator must take appropriate measures, which may include postponing, withdrawing from, or terminating the mediation.

Similarly, Article 5(5.2) of the Georgian Code of Ethics for Mediators provides that the mediator must refuse to facilitate or endorse any mediated settlement that is manifestly unlawful or contrary to moral norms. This provision extends equally to family law disputes in which the existence of violence renders it impossible for one party to exercise free will.

An important and unresolved issue concerns situations where the mediator fails to detect such violence, and a settlement is nonetheless confirmed. Would the victim thereafter possess the right to annul such an agreement under the Civil Code on the grounds of invalidity of contracts entered into

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104 It may involve the invitation of a specialist or competent person as a third party in the process.

105 Law of Georgia on Mediation, Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 10, Paragraph 4, Subparagraph "a", <https://matsne.gov.ge/ka/document/view/4646868?publication=2> [16.05.2025].

under duress?[106] While the resolution of this question lies beyond the scope of the present work, it constitutes a fertile subject for future scholarly inquiry.

4. Conclusion

The analysis of ethical dilemmas in family mediation reveals that power imbalance and domestic violence represent some of the most significant challenges to the legitimacy of mediation as a dispute resolution mechanism. Mediation is normatively premised upon party autonomy, voluntariness, and self-determination. Yet these values, while foundational, are not immune to erosion when parties enter the process with unequal capacities, whether material, informational, emotional, or cultural. If left unaddressed, such disparities may distort genuine decision-making, reduce the weaker party to mere compliance, and compromise both the fairness and credibility of the process.

The findings suggest that not all forms of imbalance necessarily undermine mediation to the point of requiring termination. In fact, mediation may sometimes provide a more balanced and secure environment than adversarial litigation, precisely because the process is less formalistic, more flexible, and designed to empower parties to articulate their own interests. Minor or manageable asymmetries – such as differences in rhetorical skills or confidence – can often be mitigated through the mediator's procedural strategies, including private caucuses,[107] reframing, the involvement of external experts, and reality testing. In such cases, mediation can serve as a constructive platform for negotiation, enhancing agency and promoting fair settlements even where inequalities exist.

Nevertheless, a clear ethical boundary emerges when imbalance reaches a level that precludes the genuine exercise of self-determination. If one party acts under duress, misinformation, or psychological pressure that cannot be neutralized by the mediator's interventions, continuation of mediation no longer serves its fundamental purpose. At this juncture, termination of the process becomes not merely an option but an ethical obligation. The principle of ultima ratio applies here: termination should be reserved for cases where the mediator, despite employing all available procedural tools, cannot safeguard voluntary and informed, full participation.

In contrast, the presence of violence – whether actual, threatened, or perceived – constitutes an irreducible barrier to ethically sound mediation. Domestic violence and intimidation fundamentally alter the relational dynamics between the parties, engendering fear and compliance rather than free consent. In such situations, the very foundations of mediation – voluntariness, equality, and respect for human dignity – are undermined. Agreements reached under such conditions cannot be characterized as authentic settlements but rather as capitulations born of coercion. Consequently, mediators are ethically and, in many jurisdictions, legally required to terminate mediation where violence is

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106 Law of Georgia "Civil Code of Georgia", Legislative Herald of Georgia, 786, 24/07/1997, Article 85, <https://matsne.gov.ge/ka/document/view/31702?publication=117> [16.05.2025].

107 *Folberg J., Milne A.l., Salem P.,* Divorce and Family Mediation, Models, Techniques, and Applications, The Guilford Press, 2004, 315. See also, Handling Power Imbalances in Mediation, Schreiber ADR, July 17, 2025, <https://www.schreiberadr.com/handling-power-imbalances-in-mediation?utm_source=chatgpt.com> [16.05.2025].

discovered or reasonably suspected. Exceptions to confidentiality, particularly where the safety of children or vulnerable parties is at stake, further reinforce this duty.

The comparative framework examined – drawing on Georgian legislation, the Georgian Code of Ethics for Mediators, and the U.S. Model Standards of Conduct – underscores a shared recognition of the delicate balance between neutrality and intervention. On the one hand, mediators are prohibited from assuming the role of legal representatives, offering binding advice, or dictating outcomes. On the other hand, they are entrusted with safeguarding the procedural integrity of mediation by preventing manipulation, ensuring access to relevant information, and encouraging parties to obtain independent professional consultation. This dual responsibility challenges simplistic conceptions of mediator neutrality, highlighting instead a more complex role that blends facilitation with ethical vigilance. "Ideally, ethical choices, made by mediators, need to be evaluated through reflective practice in and on action in the best interest of their clients. This is a lifelong learning process. As advances are made over time in terms of the knowledge and skills that inform mediation practice, it is likely that deeper ethical understandings will inform the management of power in the facilitative mediation process."[108]

Moreover, the study illustrates that mediators are not merely process managers but guardians of ethical legitimacy. Their responsibilities extend to preventing uninformed or coerced decision-making, upholding the principle of self-determination, and ensuring that the outcomes of mediation respect both individual autonomy and the best interests of children. This re-conceptualization of the mediator's role challenges the conventional dichotomy between facilitation and evaluation, suggesting that effective mediation requires a more nuanced appreciation of the mediator's duty to intervene where fairness and justice are imperiled.

The broader implications of these findings are twofold. First, they call for the continued refinement of ethical codes and legislative frameworks to provide mediators with clear guidance when confronting dilemmas of imbalance and violence. The absence of such clarity risks inconsistent practice and potential harm to vulnerable parties. Second, they highlight the importance of specialized training for mediators, particularly in identifying and responding to domestic violence, recognizing subtle forms of coercion, and employing culturally sensitive strategies that respect diversity without tolerating injustice.

Ultimately, mediation can retain its status as a credible and ethically defensible dispute resolution mechanism only if it remains uncompromisingly committed to its foundational principles while adapting to the complex realities of family disputes. Neutrality, impartiality, and party self-determination cannot be treated as abstract ideals detached from context; rather, they must be operationalized through vigilant practice, continuous ethical reflection, and a readiness to terminate the process when fairness becomes unattainable.

In sum, the conclusion affirms that power imbalance, while often a natural characteristic of human relationships, becomes problematic when it undermines informed consent and authentic autonomy. Where manageable, such imbalances should be addressed through mediation's procedural tools; where unmanageable, they necessitate termination. Violence, however, remains a categorical exclusion,

[108] *Brandon M., Rachael Field R.,* An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, Resolution Institute, March, 2020, 48.

demanding immediate cessation of mediation and referral to protective mechanisms. By acknowledging these distinctions and embracing their dual role as neutral facilitators and ethical guardians, mediators contribute not only to the resolution of individual disputes but also to the preservation of mediation's integrity as a practice grounded in justice, dignity, and respect for human rights.

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