

1994

Easier Said than Done: Resolving Ethical Dilemmas in Policy and Practice

Linda Stamato

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Linda Stamato, *Easier Said than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. Disp. Resol. (1994)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1994/iss1/8>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice

*Linda Stamato**

— A Mediation Qualifications Board has been asked to respond to complaints filed against four certified mediators, the first filed under the Rules for Certified and Court-Appointed Mediators in Florida.¹

— A SPIDR Joint Committee drafted a code of conduct for mediators in civil disputes and presented it at a SPIDR Conference workshop in Toronto, Canada, in October, 1993.²

The above two instances evidence the recent attention given to ethics in the field of mediation and occur contemporaneously with Robert A. Baruch Bush's report examining the ethical dimension of mediation. Bush's provocative efforts add considerable weight and intelligence to the subject of conflicting values in mediation. His proposed standards can provide guidelines for mediation practice. Certainly, Bush's standards, along with the commentaries, add valuable material for training. The ultimate form his standards might take, however, is itself a subject of compelling interest. To my mind, promulgating rules for dealing with ethical dilemmas and rooting them formally in policy and procedure is not the right course. Not only would it be difficult to promulgate such rules, it would be undesirable.

Paradoxical as it may seem, the ethical dilemmas that Bush has identified and scrutinized so carefully do not provide a rationale for formal standards to govern practice. Instead, they underscore the importance of qualifications,³ the critical need for training, and, in mediation practice, for the exercise of judgment. Prioritizing values in the abstract and providing standards for mediators to follow with respect to those values is not the way to go. In the final analysis, I believe we need to find value and comfort in ambiguity.

* *Linda Stamato is the Deputy Director of the Center for Negotiation and Conflict Resolution at Rutgers, The State University of New Jersey. She is the author of a number of articles on mediation and negotiation and lectures frequently on these subjects. Trained in negotiation and mediation skills, Ms. Stamato has mediated a number of cases, involving large-scale public policy issues as well as disputes involving a few parties at high management levels in several large institutions.*

She is a member of the New Jersey State Board of Mediation and a member of the Standing Committee on Dispute Resolution of the New Jersey State Supreme Court.

1. Details remain confidential unless, or until, a complaint committee finds probable cause and formal charges are drafted. FLA. DISP. RESOL. CTR. NEWSLETTER, Fall 1993, at 7.

2. SOC'Y OF PROFS. IN DISP. RESOL. NEWS, Fall 1993, at 12.

3. That is, demonstrable knowledge and understanding of the process and commitment to the essential values of mediation.

This is not to argue against core principles. There is, I think, a consensus on these: responsible and fair dealing, disclosure of personal conflicts, good faith, diligence, impartiality, confidentiality, and, certainly, honesty and integrity. I take these ethical requirements to be the *sine qua non* of professional mediation practice; the primary representations to be made prior to, and, indeed, to be adhered to in the course of mediation. SPIDR attempted to codify these values in its Ethical Standards of Professional Responsibility, which were adopted by the SPIDR Board⁴ in 1986 and confirmed in 1991. What we in mediation practice are debating are program goals and priorities on the one hand and critical process qualities on the other, including the fundamental quality of mediation as a process responsive to, and driven by, the parties involved.

That Robert A. Baruch Bush should be at the epicenter of discussions such as these is hardly surprising; indeed, by now, this is just where one expects to find this Socratic challenger. While he often criticizes mediation as it is practiced, he respects the process, understands its demands, values its potential, and seeks solutions to its problems. Mediation could have no more forceful, passionate, learned, or earnest an advocate. Fortunately, it is Bush who has chosen to reflect on this important subject of ethics in mediation, and he has done well by it. His work is comprehensive and probing. He deconstructs conflicts in key areas and yields a product that, to my knowledge, has not been previously attempted in our field.

However critical Bush's research is to the mediation field, its merit will rest chiefly with how it is used. It is my judgment, and my hope, that Bush's insights will not find their resting place in policy and procedural requirements, but in education, training, and, ultimately, in the fleshing out of the context in which judgment is exercised. In mediation, there simply are no clear paths to follow in all circumstances and certainly no shortcuts to the right answer. In dispute resolution where the parties are central, the parties are the principle designers of the complex, dynamic process in which they are engaged.

Rejecting policy and procedural requirements does not make the challenge less demanding by any means. Indeed, the conferences and workshops convened to deal with ethical dilemmas suggest how very difficult such dilemmas can be. For example, the opening plenary session of SPIDR in November, 1992, dealt with standards for third party intervenors facing inequalities of bargaining power, unrepresented interests, and potential conflicts with law and public policy.⁵ In 1990, the ABA Mediation Conference considered ethical challenges to mediators

4. This effort by a SPIDR Ethics Committee, begun in 1983, culminated in the document that appears in the DISPUTE RESOLUTION FORUM, March 1987, at 3, and in the CODES OF PROFESSIONAL RESPONSIBILITY 327 (Rena A. Gorlin ed., 1990). The Ethics Committee reviewed and analyzed a variety of existing codes, including those of the Academy of Family Mediators, Association of Family and Conciliation Courts, as well as organizations in law and medicine. SPIDR has also generated an ethics manual, entitled MAKING THE TOUGH CALLS; evidently, a companion volume is currently in preparation.

5. See *When Should Mediators Refuse to Mediate?* SPIDR Panel Probes Ethics and Practices, 3 WORLD ARB. & MEDIATION REP. 289 (1992).

faced with power imbalances between parties, threats between parties, and agreements that appear to fall short of their potential or appear to be disadvantageous to one party.⁶ A number of mediation scholars and practitioners have pressed the ethical issue, among them Sarah Grebe, Michael Lang, and Karen Irvin.⁷ In their article entitled *A Model for Ethical Decision Making in Mediation*, these three authors reflect on the mediator's conflicting responsibilities to various professional codes, agency policies, clients, and their own personal values. As Bush frames the ethical issue, we face a confused picture which results from lack of clarity at the policy level about the goals and benefits of dispute resolution processes. Indeed, in Bush's report, and in a companion article in the Summer/Fall 1993 NIDR FORUM, entitled *Defining the Job of Mediators: ADR's Benefits and Mediators' Ethical Dilemmas*,⁸ Bush states that practitioners are confused, struggling, and in need of policy guidance about goals. So, he proposes to address the confusion concerning these dilemmas and offer solutions within the policy domain.

The apparent confusion may have a number of possible sources, one of which is the very complexity and appeal of the process itself. A party-driven process such as mediation will vary among different people and different issues. Mediation is a process in which individual parties attempt to meet their needs as they see and define them, and parties generally come to view their own needs more clearly as the process evolves. The character of the party-driven process depends upon whether parties are acting on their own or through surrogates, the nature of the dispute, the context in which the dispute arises, the prior history and relationship of the parties, the nature and influence of constituencies, the experience of the parties in other settlement or prior mediation attempts, and, finally, issues of personality or bargaining styles. Other elements that may add complexity are power imbalances between the parties, expressions of bad faith, and reluctance to participate fully in the process.

Do mediators need guidance in managing a process that is complicated by these elements? Yes they do. But not, I think, by having ethical values prioritized for them. Instead, by reflective, challenging discussion with colleagues, and through training and experience, mediators are more likely to become comfortable dealing with the dilemmas they face.

Consider one example: Accepting that self-determination as espoused by Bush is a primary value to be preserved and even enhanced in mediation, can a mediator ethically intervene in a manner that provides solutions that were not developed by the parties? Variations on this theme, Bush notes, were reported more often than

6. *ABA Mediation Conference Considers Research, Marketing, Ethical Issues*, 4 ALTERNATIVE DISP. RESOL. REP. 149 (1990).

7. Sarah Childs Grebe et al., *A Model for Ethical Decision Making in Mediation*, 7 MEDIATION Q. 133 (1989). This work builds on Grebe's earlier effort which focuses on this subject in the context of family mediation. See Sarah Childs Grebe, *Ethical Issues in Conflict Resolution: Divorce Mediation*, 5 NEGOTIATION J. 179 (1989).

8. Robert A. Baruch Bush, *Defining the Job of Mediators: ADR's Benefits and Mediators' Ethical Dilemmas*, NAT'L INST. FOR DISP. RESOL. F., Summer/Fall 1993, at 16.

any other ethical dilemma, and he offers several illustrations. However, in as many situations as Bush provides, one can imagine a mediator asking probing questions, presenting hypothetical situations, and introducing elements that may not have surfaced before. The mediator should also ensure that other affected, but absent, parties or interests are considered and suggest alternative solutions or options. Furthermore, the mediator should do all these things in an attempt to help the parties reach an agreement that is optimal for them, as they see it, because the feasibility and finality of whatever agreement is reached demands that the mediator focus on the parties' needs. While these actions might appear to contradict a basic commitment to self-determination, they may also serve to stimulate the participation level of the parties, their agents, or their surrogates. Actions that appear to violate a primary value (*i.e.* party self-determination), may, in a quasi-circular fashion, reinforce that value. Managing this complex dynamic is the mediator's challenge and opportunity; it is not a policy-maker's call. To me, there is a fundamental inconsistency between Bush's view of mediation as a process primarily defined by reference to its unique capacities to empower parties by assisting them in the exercise of self-determination, finding a resolution to their dispute, and promoting mutual recognition between the disputants,⁹ and a view of mediation that the policy-makers, not the parties, should prioritize values and, with order and consistency, provide an end to the confusion.

What is the role of policy in all of this? Bush argues that mediation policy-makers need to provide more help and guidance to mediators so that the benefits of the process in theory are manifest in fact. Bush also indicates that good training is costly training and good practice can also be time-consuming practice. In the public sector, pressure for low cost, efficient solutions are competing against quality practice. The public adoption and adaptation of what has been largely a domain of private practice influences the process and the practice of mediation. So far, implosion is more evident than explosion. As I see it, external forces have had more of an effect on the mediation process and the practice of mediation than mediation has had on outside culture. For example, requirements for eligibility and training to become a public sector mediator are more likely to be determined by public authorities, legislators, and agency or court administrators than they are to be set by the mediation profession, notwithstanding the profession's own standards of practice.

This trend of government officials determining standards is problematic to the extent that it is driven by values other than those that are central to mediation. On the one hand, external forces include efficiency considerations that can be easily measured, quantified, and filled into questionnaire blanks. On the other hand, external forces include limits on access to professional practice by legal and other gatekeepers. Qualitative elements such as the exercise of deliberate choice in the selection of mediators, orientation of the parties to the mediation process, and opportunity to shape the process and use it to resolve the issues in contention, are often "luxuries" which are at odds with a quick fix, multi-case processing approach

9. *Id.* at 20.

often taken by the public sector. Policy-makers should require rigorous training for mediators to be eligible to practice, both initially and to maintain status in programs. At the same time, policy-makers should reinforce the voluntary, participatory character of the mediation process in the programs they create and oversee.

The squeeze on resources may not allow all that the mediation process promises, especially in public contexts, but providing the best of what mediation can be within those constraints does rest with mediators. All the more reason, then, for the profession to retain responsibility for making decisions with respect to ethical or value dilemmas in the practice. In my judgment, responsibilities for policy-makers include program design, support, and evaluation consistent with the philosophical underpinnings of mediation. The conceptual, substantive training and practice components of mediation rest with the profession and with individual mediators, not the policy-makers.

That said, we need to recognize when and under what circumstances there will be conflicts as issues become murky, and to offer guidance to mediators in managing and resolving these conflicts. Bush's work is a solid start, suggesting the contours of initial and continuous training and the content for professional programs. Indeed, his descriptive vignettes constitute first-rate hypotheticals for simulation and role-playing as much as the commentaries provide material for seminars and conference-format discussions. Guidance, too, can come from experienced mediators facilitating discussions of hypothetical situations¹⁰ and from some of the other creative people in this field who offer a problem-solving process for dealing with ethical dilemmas.¹¹

What else might be said about assisting individual mediators through the ethical thicket? When one is in the trenches, it is difficult, if not impossible, to analyze problems fully and objectively. While most people do not want more rules telling them what to do, they do want assistance in perceiving the ethical implications of their decisions and in developing realistic, morally-centered approaches for resolving ethical dilemmas.¹² Clearly, the mediators in Florida have convinced Bush on this point. Making the distinctions necessary is much more difficult than might be expected because there are a multitude of competing interests, values, and crucial facts that may be unknown or ambiguous. Also, a mediator's actions might be likely to benefit one party at the expense of the other, so the mediator must attempt to foresee the likely consequences of any contemplated action.

10. James J. Alfini, presentation at the ABA Mediation Conference, in 4 *ALTERNATIVE DISP. RESOL. REP.* 149 (1990). *MEDIATION QUARTERLY* produced an issue entitled *Ethics, Standards, and Professional Challenges*, which contains several useful views on value dilemmas as well. 4 *MEDIATION Q.*, June 1984.

11. See, e.g., Grebe et al., *supra* note 7.

12. See Michael Josephson, *Teaching Ethical Decision Making and Principled Reasoning*, 1 *ETHICS*, Winter 1988, at 27. From *ETHICS*, too, comes inspiration to use the phrase "easier said than done" in the title of this article, for it is the subtitle of that journal and reflects the ethicist's experience.

Mediators need to be intellectually proficient in perceiving the ethical implications of conduct, in evaluating and predicting its likely consequences, and in devising practical means for implementing ethical decisions. What is required to assist them, it seems to me, is a structure or process that enables the mediator to systematically take into account the ethical issues involved in a decision, to avoid inadvertent unethical conduct, and to consciously choose which of the competing values to advance in a particular situation.

By challenging one another to examine and discuss ethical dilemmas, the mediation profession can contribute to the evolution of such a structure. Mediator training can provide a critical dimension to resolving ethical dilemmas by anticipating these ethical dilemmas and laying the groundwork for their resolution.

While I argue that we need to stem the rush to rules and standards at the policy level and recognize the essential ambiguity presented by ethical and value choices, I believe we need to be very concerned about the quality of practice. It is one thing to profess the virtues of mediation, quite another to live up to its ideals. So, I think it is essential that we monitor ethical performance through recurrent questioning and discussion. By raising concerns regularly and insistently, as Bush has done, we can effectively discharge the profession's responsibility for its practice.

I am uncompromising in my contention that one of the root causes of the confusion that Bush laments is the practice of mediation by untrained, unprepared, and perhaps also, uncommitted, people. If confusion reigns about mediation processes, it should not occur because mediators do not know what they are doing. This is not a value question. Mediators do not decide, arbitrate, or "value" cases. Mediators assist parties. Policy-makers need to decide whether the program they are creating is arbitration or mediation. Once given life, there should be no confusion as to what is being offered or what is being done. This distinction is not a value question, either.

In the end, we must define the mediator's job (and it would be hard to do better than Bush's definition), set program goals and requirements sufficient to allow for the effective practice of mediation, and leave it to the mediators to determine solutions to the ethical dilemmas they confront. Notwithstanding the risk of choice in ambiguity, I would place my bets highest on professional mediators to set the best standards. To ensure that they can and will, Bush's standards should become guides to effective training and practice in the mediation profession.