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# “Embracing Limbo”: Thinking About Rethinking Dispute Resolution Ethics

Charles Pou, Jr.\*

*Engineering ethics is part of thinking like an engineer.*<sup>1</sup>

## I. Introduction

Over the past two decades, numerous authorities have called for improving the training and support systems that promote ethical behavior in alternative dispute resolution (“ADR”).<sup>2</sup> This improvement is seen by many as critical to the long-term well being of the field.

Robert Baruch Bush wrote in *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*:

[To] help mediators resolve [ethical] dilemmas . . . some system of practical guidance is necessary. Such a system should start with careful and systematic training of mediators . . . designed to sensitize mediators to the existence and importance of [ethical] dilemmas, not

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\* Charles Pou is a dispute resolution consultant and public policy mediator in Washington, D.C. His published works include articles on neutrals, quality, ethics, evaluation, and other dispute resolution and administrative law issues. He has also acted as a design consultant in numerous new conflict resolution programs and rosters. From 1985 to 1995, he directed the Dispute Resolution Program at the Administrative Conference of the United States, where he was a principal draftsman of the Administrative Dispute Resolution Act; he held leadership responsibility under that Act for ensuring the implementation of consensus-based decision-making methods by federal agencies.

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1. Michael Davis, Teaching Ethics Across the Engineering Curriculum, Presentation to the Online Proceedings of the International Conference on Ethics in Engineering and Computer Science (Mar. 21-24, 1999), at <http://onlineethics.org/essays/education/davis.html>. See, e.g., MICHAEL DAVIS, THINKING LIKE AN ENGINEER: STUDIES IN THE ETHICS OF A PROFESSION (1999).

2. For this paper, “ADR” includes consensus-building processes, but generally not arbitration.

only in general concept but in very concrete terms. Training should confront mediators with specific dilemma situations . . . should help mediators to understand why each situation presents a dilemma, and get them to struggle to find and justify a solution. As noted above, this type of training in identifying the ethical dimensions of mediation practice is very rare at present, if it exists at all. Yet it is probably the best strategy for helping mediators to achieve the standard of practice they want to meet . . . .<sup>3</sup>

Bush's lament on the shortage of effective ethics training tools and guidance, put forth over a decade ago, highlights a problem that still faces the dispute resolution field. The field still needs more, and more effective: (1) local and national support systems for improving mediators, provider organizations, and trainers' awareness and understanding of ethics concepts; and (2) methods for instilling skills that help mediators either avoid ethical dilemmas or handle them effectively once they arise. While some favor more detailed, context-specific practice standards, others advocate enhancing educational and support devices to promote ethical behavior and help neutrals identify and effectuate evenhanded, defensible responses in tough cases.

The recent Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium ("Symposium"), which brought together leading ADR professionals and advocates, revealed a receptivity to identifying and taking practical steps for improvement in this area.<sup>4</sup> In part, this paper seeks to reflect discussions at that gathering; it also offers, however, an overview of the present ethics situation relating to mediation and other ADR mechanisms, suggests what the field ought to strive for, and considers system options to aid mediators facing ethics dilemmas in their practice. Finally, this paper posits several specific steps that will help the field better address deficiencies and promote effective change.

## II. Brief Overview: The Current Ethics Landscape

### A. *Some Points of Agreement*

ADR professionals, generally, agree that ethics are important. Probably all agree that ethical behavior is a critical principle in

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3. Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 47 (1994).

4. See Symposium, *Dispute Resolution and Capitulation to the Routine: Is There a Way Out?*, 108 PENN ST. L. REV. 1 (2003). This paper occasionally paraphrases or quotes participant views, but generally refrains from attributing them to individuals.

consensus-based dispute resolution.<sup>5</sup> There is unanimity, moreover, on the value of training in a manner that allows neutrals to respond effectively to ethical dilemmas.<sup>6</sup>

There is also agreement on the fact that context matters. Mediation is hardly a uniform field, and practices vary from setting to setting.<sup>7</sup> Participants in the Symposium tended to agree that variations in ADR settings do, and should, have an impact on expectations about what mediator behavior is appropriate (or ethical or unethical), and about how the field should encourage ethical conduct.<sup>8</sup>

ADR professionals also recognize that—even in the same dispute context—there exists wide divergence in the thinking on and practice in handling ethics dilemmas.<sup>9</sup> Different mediators will propose entirely different responses to fulfilling their ethical commitments. Many think this is fine; others do not.<sup>10</sup>

Clearly, people seem to concur on very general principles. As a result, some experts see added points of agreement. However, upon closer inquiry the areas of agreement they cite often reveal divergent definitions, assumptions, and case-specific responses. For example, while all agree on the critical value of party self-determination, to some this concept includes the idea that parties must be fully informed, or otherwise, the "self" determination will later be revealed as false.<sup>11</sup> Others, however, eschew any mediator involvement beyond general questioning that would assure that the self-determination is so informed, and see anything more as improper interference.<sup>12</sup> Many observers believe that this indicates that, while the field has converged on a few broad principles, it has hardly come to terms with the implications of contextual divergence.<sup>13</sup>

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5. I hope to avoid the ongoing debate over whether mediation is, or should be, a profession, a movement, an industry, some combination, or something else. I would stipulate that, whatever mediation is or should aspire toward, those who practice it have some ethical duties to the parties before them, to the field, and probably to society at large.

6. See *supra* note 4 and accompanying text.

7. Nancy Welsh, *All in the Family: Darwin and the Evolution of Mediation*, 7 DISP. RESOL. MAG. 20 (2001). The article describes the extraordinary diversity of mediator practices, in varied settings and programs, by analyzing similarities and differences among practices in five mediation contexts: community, special education, dependency, labor management, and civil (non-family). *Id.*

8. See *supra* note 4 and accompanying text.

9. See *supra* note 4 and accompanying text.

10. See Ellen Waldman, *The Challenge of Certification: How To Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723 (1996) (discussing implications of the field's diversity in terms of mediator credentialing and training).

11. See *supra* note 4 and accompanying text.

12. See *supra* note 4 and accompanying text.

13. See, e.g., John Lande, *Mediation Paradigms and Professional Identities*, 4

## B. *Some Points of Contention*

Differences emerge when one asks:

1. To what extent have we identified adequate, practical ethics standards?
2. Have we found and implemented optimal methods for assuring that neutrals, program administrators, trainers, and other ADR professionals perform in an ethical manner?
3. Can professional ethics be taught? If so, what are the most effective approaches to training and education?
4. Does institutionalization (or “routinization”) threaten the fulfillment of the conception of standards and approaches? Can it be made to assist in realizing them?

Dispute resolution experts and practitioners have produced numerous standards of conduct, with varying degrees of specificity—mostly for neutrals and occasionally for other ADR providers. While these imply agreement on a few core principles (e.g., party self-determination, confidentiality, impartiality),<sup>14</sup> they are often assessed critically. Some detractors say, for instance, that most standards offer only the most generalized of principles, necessitating an analytical process to carry out generalized goals or even to balance competing priorities, rather than substantial guidance for handling the “real world”

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MEDIATION Q. 19 (1984). Also, as Ramona Buck suggests, there may well be agreement as to a few specific practices—e.g., that, prior to beginning the ADR process, ADR practitioners should describe or define the process they will be using before the parties agree to begin and indicate any previous relationships they may have had with any parties. Memorandum from Ramona Buck to Charles Pou (May 14, 2003) (on file with author).

14. Bush, *supra* note 3, at 9. The author provides a categorization of situations typically encountered by mediators that present ethical dilemmas:

1. Keeping within the limits of competency;
2. Preserving impartiality;
3. Handling conflicts of interest;
4. Maintaining confidentiality;
5. Ensuring informed consensus;
6. Preserving self-determination and maintaining non-directive behavior;
7. Separating mediation from counseling and legal advice;
8. Avoiding party exposure to harm as a result of mediation; and
9. Preventing party abuse of the mediation process.

*Id.* Many codes of ethics or mediator standards are arranged along more or less similar lines. For Bush’s full list, with subcategories, see *infra* Appendix A.

dilemmas of neutrals.<sup>15</sup>

Standards, while important, are beginning to be defined very differently by practitioners in different settings. The roles and approaches of mediators differ substantially, yet all describe themselves as "mediators." As we know, strong differences exist as to what constitutes a quality result and how to define quality practice. This multiplicity can lead individual mediators to view "self-determination" or "impartiality" as calling for very different reactions, depending on whether they are involved in, for example: a family dispute involving the long-term welfare of young children; a commercial case involving sophisticated business people with good lawyers; or an international dispute in which effectiveness and neutrality may not reside in the same person.

### C. *What Is the State of ADR Ethics?*

As the dispute resolution field continues to grow, we see an increased focus on standards, ethical and otherwise. Local, state, and national mediator organizations are not only developing mediator codes of ethics, but are also setting standards, or practice guidance, for mediator training, dispute resolution provider organizations, and, recently, continuing education relating to ethics.<sup>16</sup>

Few observers have described any obvious crisis in the morals and ethics of ADR professionals. Some even declare that ethics-related issues (like confidentiality, unauthorized practice of law, or advice to parties) receive excessive attention,<sup>17</sup> and that disclosure and market forces have brought about a decent balance because meeting party desires and assuring a durable, informed outcome are often self-reinforcing.<sup>18</sup> They caution that "ethicizing" decisions may impact negatively on a program's flexibility or a neutral's willingness to be creative in difficult cases.<sup>19</sup> Even given the diversity of styles now practiced, many believe that few mediators have strayed far from basic principles, or maintain that few mediators, unlike brain surgeons or criminal lawyers, are in a position to cause real harm to clients.<sup>20</sup>

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15. See *supra* note 4 and accompanying text.

16. MARY THOMPSON, *TEACHING MEDIATION ETHICS: ACTIVITIES FOR TEACHING ETHICAL COMPETENCE* (2002).

17. One article, for instance, criticized some commentators as fearful "that the sky will fall if we do not get immediate and final answers to some difficult questions in the field [like confidentiality]." Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79, 94 (2000).

18. See *supra* note 4 and accompanying text.

19. See *supra* note 4 and accompanying text.

20. See *supra* note 4 and accompanying text.

Whatever the validity of these views, it would be difficult to contend that the field has done a great deal to meet Professor Bush's challenge, much less done it well. Nor can it be said that ADR is an occupation where most practitioners are reasonably aware of applicable ethical standards, much less thoughtful or sophisticated about how to live up to them.

Based on personal observation and hearsay, a large number of basic mediator training programs treat ethics matters as not much more than a "fortieth hour" afterthought. Numerous ADR program administrators confirm this, and some decry that a good percentage of trainers who touch on ethics concerns are reticent about taking positions.<sup>21</sup> One counseled: "Trainers should wade in more deeply more often."<sup>22</sup> Moreover, several administrators who have worked closely with mediators, especially part-time or collateral duty ones, maintain that a good percentage do not even recognize when an ethics issue presents itself.<sup>23</sup>

Much of the above is anecdotal. What is not anecdotal is that mediation and ADR practice are extending into new arenas that will increasingly highlight striking ethical challenges—e.g., in-house corporate programs, more and more consumer disputes, all manner of governmental conflict, and other different settings. We will need to find better ways of sensitizing mediators—especially new or part-time government or corporate employees who serve as collateral duty mediators for their own or other entities—to their ethical obligations to the field and to parties. Moreover, efforts should focus on preparing neutrals to recognize dilemmas and to avoid or deal with them in "real time." Likewise, the growth of ADR provider organizations in government, activities of government lawyer mediators, and mediation by settlement judges within agencies will all raise ethics issues that, if mishandled, could harm their success and impair the field's credibility.

Finally, we should note that, by definition, *ethics are hard*. Often they involve the necessity of balancing professional duties with strong personal preferences or choosing between competing "good things." In any context, ethics discussions raise questions about goals a group or profession would like to achieve, standards against which to measure behavior, and mechanisms for controlling members' actions.<sup>24</sup> A large

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21. See *supra* note 4 and accompanying text.

22. See *supra* note 4 and accompanying text.

23. See *supra* note 4 and accompanying text. More than one observer expressed the conviction that some mediators go through their entire dispute resolution careers without facing an ethical dilemma. See *supra* note 4 and accompanying text.

24. Melvin Blumberg, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with

number of professions have faced serious challenges in their efforts to teach and enforce ethical behavior.<sup>25</sup> Dispute resolvers will be a rare breed if they prove to be considerably different.

### III. Have We Identified Adequate, Practical Standards?

#### A. *Current Codes*

Standards for the behavior of mediators and other third party neutrals are usually fairly short and offer limited help in specific situations. Most address the general categories listed by Professor Bush,<sup>26</sup> usually in fairly summary fashion and perhaps with some added commentary.

Some criticize these codes for being stale and not capturing the richness and diversity of actual practice.<sup>27</sup> Others criticize most of them as being rather like "pabulum."<sup>28</sup> Supporters reply that pabulum, in effect, can be quite nourishing,<sup>29</sup> and point out that many current ADR neutrals got started quite nicely on it. Indeed, experienced ethicists at the Symposium maintained that codes of ethics should not be expected to offer answers, but rather "a language for talking about ethics issues."<sup>30</sup>

In most practice situations, codes offer only a starting point. They often offer up competing "priorities" or "requirements" that necessitate an analytical process to balance, or even accommodate conflicting standards. An example: the ABA/SPIDR/AAA Joint Standards of Conduct ("Joint Standards") promote self-determination as "the fundamental principle of mediation."<sup>31</sup> This means that parties can

the Penn State Law Review).

25. *See generally*, J. ARRAS & B. STEINBOCK, *ETHICAL ISSUES IN MODERN MEDICINE* (4th ed. 1995) (presenting an introductory overview of professional ethics and challenges). As Joseph Herkert stated in his presentation at the Symposium, ethical issues in engineering present difficulties for professional engineering societies for at least four reasons: corporate influence, liability concerns, engineering and business cultures that value economic good over other kinds, and fear of tarnishing the image of the profession. Joseph Herkert, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review). The board of one large professional engineering organization, he recounted, approved establishment of an Ethics Hotline in 1996, axed it just over a year later, and in 1998 rejected a blue ribbon panel report's recommendation to reestablish it. *Id.*

26. *See* Bush, *supra* note 3; *infra* Appendix A.

27. *See supra* note 4 and accompanying text.

28. *See supra* note 4 and accompanying text.

29. An alternate definition for "pabulum" (or "pabulum") is "food for the mind." WEBSTER'S NEW WORLD DICTIONARY 968 (3d ed. 1994).

30. *See supra* note 4 and accompanying text.

31. AM. BAR ASS'N, AM. ARBITRATION ASS'N, & SOC'Y OF PROF'L IN DISPUTE RESOL., *MODEL STANDARDS OF CONDUCT FOR MEDIATORS* (1994). *See* Lande, *supra* note



structure their resolution however they want, for whatever reasons. But, does tension ever occur between this goal and the principle of informed consent or of confidentiality? A glaring example of this clear tension is found in the ABA's Standards of Practice for Lawyer-Mediators in Family Disputes, which simultaneously admonish the mediator not to intrude on the parties' right to determine their outcome for themselves and also oblige the mediator to watch over and ensure the fairness and reasonableness of the ultimate agreement.<sup>32</sup> A challenge, to say the least!

It is a fact that, in the ADR field, broad rules recognizing the importance of context and parties' expectations have proven valuable.<sup>33</sup> The "windshield wiper" principle from SPIDR's first Commission on Qualifications is one example.<sup>34</sup> Similar approaches are also likely to be relevant, even indispensable, to some questions involving the ethical duties of individual mediators and dispute resolution provider organizations.

### B. *Should Ethical Standards Be More Specific?*

Because codes tend to offer mostly general principles, something more is needed to "capture the richness" of day-to-day mediator interventions. As a next step, some advocate creating more detailed, or context-specific, standards—particularized for different areas or styles of practice—as vital to producing neutrals that will be more attentive to

13 (presenting a strong criticism of several provisions of the Family Dispute Code); John Lande, *Speaking for Mediation: How Can Mediators Educate the Public About Options for Mediation, Promote Individual Mediation Practices, and Enhance the Quality of Mediation Services?*, 17 *MEDIATION Q.* 23 (1987).

32. AM. BAR ASS'N, *STANDARDS OF PRACTICE FOR FAMILY MEDIATORS* (1983).

33. One innovative response to this ethical challenge is Nancy Welsh's suggestion that parties to mediated settlements have three days to review, discuss, consult, and think about any proposed agreement. See Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEGOT. L. REV.* 1 (2001). As with some FTC consumer protection rules, this "cooling-off" period would, she argues, provide some enhanced protection against ethical lapses or improvident results. *Id.* Ramona Buck has pointed out that in fact the Circuit Court for Prince George's County in Maryland (among a few other courts) has used this idea for a number of years in custody and visitation cases. Memorandum from Ramona Buck to Charles Pou (May 14, 2003) (on file with author). Mediated agreements there are held by the mediator for twenty-one days, during which time either party or their attorneys may reconsider and object to the agreement being submitted to the court. *Id.* Because of this provision, according to Buck, some attorneys are more willing to allow parties to go to mediation without them, knowing that they will have the opportunity to review the agreement. *Id.*

34. SPIDR COMM'N ON QUALIFICATIONS, *QUALIFYING NEUTRALS: THE BASIC PRINCIPLES* (1989) (concluding that the greater the degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory the qualification requirements should be).

their ethical obligations.<sup>35</sup>

Others prefer to devote attention to interactive education that promotes ethical behavior by enhancing mediators' awareness of existing codes and helping them identify and effectuate evenhanded, defensible responses to tough cases.<sup>36</sup> Those who believe that ethics is about teaching people to be morally autonomous individuals, as well as those who support “thinking like a mediator,” suggest that this approach improves our ability to avoid problems and permits us to respond creatively and constructively.<sup>37</sup> They assume that all, or nearly all, persons have a great deal to learn from and to teach each other in this area.<sup>38</sup>

Many Symposium participants believed that “some rules are needed”—i.e., that minimum standards, or “thou shalt not's,” are unavoidable in at least a few instances.<sup>39</sup> In particular, some singled out court and family settings.<sup>40</sup>

While it may be beneficial, in some contexts, to place some specific “overlay” or interpretation on selected standards sections, any major focus on “top down” rule rewriting risks being noninclusive, as well as navel-gazing and promoting inaction.<sup>41</sup> By contrast, a “thought process/education” approach recognizes the close relation between ethics requirements and “good practice,” because it is true that (1) much (but not all) of what one mediator might do to assure a durable, informed outcome may in fact enhance ethical behavior, and (2) “ethicizing” many tactical and strategic decisions inhibits a mediator's flexibility and creativity. In a sense, continuing efforts to devise very specific codes may lead to prescriptive edicts that promote “capitulation to the routine.”

### C. *Is Anything Critical Missing?*

Participants in the Symposium pointed out that mediator codes tend to say little or nothing about broader duties to society.<sup>42</sup> They tend to lack the “Do No Harm” clauses common in many other professional codes.<sup>43</sup> Some saw this as problematic; others thought that current codes

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35. See *supra* note 4 and accompanying text.

36. See *supra* note 4 and accompanying text.

37. See *supra* note 4 and accompanying text.

38. See *supra* note 4 and accompanying text.

39. See *supra* note 4 and accompanying text.

40. See *supra* note 4 and accompanying text.

41. David Sally, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review).

42. See *supra* note 4 and accompanying text.

43. See Vinton Cerf, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with

and practices reach those ends by different means.<sup>44</sup>

#### IV. Have We Found Optimal Methods for Assuring that Neutrals, Program Administrators, Trainers, and Other ADR Players Perform in an Ethical Manner?

The field needs to pay closer attention to ethics standards—not because we are unethical, but because such a focus protects consumers, promotes the integrity of these processes, and (not least) makes each of us abler practitioners.

One concern lies with those solo mediators in “low maintenance” programs<sup>45</sup>—and they exist—who deem that forty hours of training, a little CLE, and perhaps a law degree are about all they will ever need. One community mediation expert, by contrast, has written an article suggesting that mediation is neither art nor science, but rather a “craft.”<sup>46</sup> The article maintains that, as with most crafts, some of the most effective learning for mediators comes in the “guildhall” with other craftsmen.<sup>47</sup> This notion aptly emphasizes the value of a framework that encourages, or even requires, regular exposure to other mediators, models, and experiences. It could also help to see that there probably will be multiple responses worth weighing in any ethical dilemma. Such responses possibly promote what has come to be thought of as “reflective practice” or “mindfulness” in mediation.

Rather than seeking “the rules,” or detailed black letter principles that explain everything, the field should accept that handling many ethical issues facing mediators will never be simple and requires a thought process, rather than “looking up the answer.” Albie Davis, who was a member of SPIDR’s original Ethics Committee over a decade ago, has used a diagram, with Bush’s nine values arrayed at points around a circle, in an effort to capture the dynamic, shifting relationship among ethical values.<sup>48</sup> Referring to Bush’s list, Davis writes:

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the Penn State Law Review).

44. See *supra* note 4 and accompanying text.

45. See CHARLES POU, MEDIATOR QUALITY ASSURANCE: REPORT TO THE MARYLAND MEDIATOR QUALITY ASSURANCE COMMITTEE (June 2003). The report maps how the field has sought to define and assure competent practice and discusses some policy and practical issues. *Id.* The report categorizes quality assurance systems by employing a two-dimensional grid that displays the height of “hurdles” a mediator must meet at the outset to engage in practice and the amount of “maintenance,” or continuing educational activities and other support, expected later on. *Id.* The report describes prototypes of each approach, and discusses potential implications of selecting any given one. *Id.*

46. Craig Coletta & Anne DiDomenico, *Thoughts on Mediators as Craftspeople*, 4 ADR REP. 17 (2000).

47. *Id.*

48. *Id.*

The nine values are interconnected. Imagine that the line connecting them is a rubber band that has some give but also has its limits. If we overemphasize one value to the exclusion of the others, we risk breaking the elastic that gives mediation its meaning.<sup>49</sup>

This suggests, again, that ethical expectations will, and should, depend on case-specific factors. These might include:

1. the location of a particular mediation process (e.g., court-annexed, agency-based, or purely private);
2. the substantive nature of the dispute (labor-management/family/business/consumer/neighborhood/public policy);
3. the sophistication level of the parties, or their explicit expectations as to how a mediator will assist them;
4. the goal of the mediation process; and
5. which of the various different "styles" a mediator follows: Self-determination (facilitative) / Empowerment (transformational) / Efficiency (evaluative).<sup>50</sup>

Margaret Shaw has encapsulated nicely the potential importance of context in ethics-related decisions in response to a question regarding our responsibility as mediators to point out possible claims and defenses not raised by parties or their counsel:

Those for whom the principal goals of mediation are empowerment and recognition would certainly have little difficulty with the question, and shun intervention. The values of empowerment and recognition have less to do with the substantive outcome of a dispute than with process. Nor would the question pose much of a dilemma for those who, on the other hand, reject the "transformative" approach in favor of a concern about outcomes, and the risk that parties may forgo legal entitlements and settle for less than they might get through litigation. Some kind of mediator intervention would seem to be a given for these folks, although they might debate whether to intervene in a joint or separate session and, if in a separate session, with whom.

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49. *Id.*

50. See *infra* Appendix B (setting forth at greater length some of these variations in mediation settings, without indicating which ones may affect ethical decision making in a specific case).

Those of us who fall somewhere between these two extremes struggle harder. At the heart of what we are trying to do is to balance the goals in mediation of self-determination and informed decision-making.<sup>51</sup>

One point that can be drawn from Shaw's comment is that, once again, context matters and many ethical dilemmas will not have a single, "right" response. There may be some distinct "no-no's," but often the mediator will have to think through several potential approaches to arrive at an evenhanded, defensible response for the specific situation. And, as with the evolution of any situation, there will often be a broad range of possible mediator behavior that allows one to respond with a surprising degree of nuance.

A related point is the vital role of disclosure in shaping the expectations of parties and managing the acceptability of certain kinds of mediator behavior. The fact that one of us follows an "evaluative" model, while another takes, by contrast, a "transformative" approach, does not necessarily make one a "better" or "truer" mediator than the other. We do, however, have an obligation to be aware of our own preferences, to disclose them upfront to prospective clients, and to ensure that we obtain their *informed* consent before going too far. As long as we acknowledge and internalize these imperatives, it may be that neutrals can all work effectively, if diversely, under existing standards.

#### V. If Institutionalization or "Routinization" Threatens the Fulfillment of Ethical Standards and Strategies, How Can It Be Altered To Assist in Realizing Them?

##### A. *What Should We Do?*

While routinization obviously poses some threats, such as capitulating to the agendas of others, it also offers some clear opportunity for systematic improvement.<sup>52</sup> A confident mediator who knows her

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51. Response from Margaret Shaw to a hypothetical posed in the ABA's *Dispute Resolution Magazine* (on file with author).

52. Ramona Buck proposes:

[R]outinization, of course, can be good—if it is routine that we explain about things like confidentiality and impartiality to all parties before we begin mediating, that is a good thing. If it is routine that we explain any prior relationships to the parties prior to a mediation, that routine could be good. If it is routine that we ask the parties to sign an agreement to mediate and go over it with them prior to mediating, again, that routine could be putting in place a best practice that we have carefully considered, found sound, and want to make sure we always do.

Memorandum from Ramona Buck to Charles Pou (May 14, 2003) (on file with author).

own mind and principles will be far abler to find apt solutions and avoid capitulation to economic pressure or other problematic norms than one who is unaware of or seeking to look up "the right answer." Far better to take the sensible, if broad, codes we now have (or something very similar) and seek to employ them as tools and standards that can enhance a mediator's intuition, judgment, and proficiency.

Participants in the ethics discussions at the Symposium identified two categories of activity meriting follow-up. Their informal "agenda for an optimally ethical ADR world" involved: (1) establishing systems that allow neutrals to know their obligations and that support discussion of difficult cases "before the deal is done"; and (2) improving how we train mediators to think about and handle ethical issues.<sup>53</sup>

### *B. Making Real Time Ethics Awareness Routine*

The worthwhile avenues discussed at the Symposium were numerous, and included the following.<sup>54</sup>

1. Greater Focus on the Relation Between Ethics and Good Practice in Training Programs and at Professional Conferences

All ethics discussants agreed that a key, if obvious, first step is helping neutrals, especially newer ones, to *recognize* ethical problems.<sup>55</sup> One initiative that the group agreed to pursue forthwith is to try to assure that focused, regular ethics discussions play more prominent parts in ACR, ABA, and other conferences.<sup>56</sup>

2. Hotline or Other Feedback for Mediators

Hotline ideas ranged from an e-mail address to which a mediator facing an ethical dilemma could write for reactions or referrals (or, as one described it, an "Ann Landers column") to more elaborate opportunities for structured feedback.<sup>57</sup> Practical issues involved timeliness concerns and possible lack of opportunity for true dialogue.<sup>58</sup>

One possibility raised was that the hotline could essentially serve as an entry point for identifying a peer counselor, "duty officer," or other local or regional feedback source because "human interaction in talking

53. See *supra* note 4 and accompanying text.

54. See *supra* note 4 and accompanying text.

55. See *supra* note 4 and accompanying text.

56. See *supra* note 4 and accompanying text.

57. See *supra* note 4 and accompanying text.

58. See *supra* note 4 and accompanying text.

through the problem in its context” would be ideal.<sup>59</sup> At the least, it could assist by helping neutrals with conundrums to eliminate obviously bad choices.

### 3. Ethics Web Sites and Other Information Sources

Ethicists from other fields noted that ethics web sites are common in many professions.<sup>60</sup> One mentioned an NSF funded web site for scientists and engineers containing codes, case studies, commentaries, examples of “moral heroes,” transcriptions of ethics forums, and an online hotline where serious issues are referred to professionals with substantial experience in discussing and resolving ethical dilemmas.<sup>61</sup>

Another ethics web site worth closer exploration is the one provided by the Center for the Study of Ethics in the Professions.<sup>62</sup> It includes a variety of codes, an index to the codes, an introduction covering the debate about the function and value of codes of ethics, a context for using a code by considering a sample case, resources on writing codes, links to other sites, and a bibliography.<sup>63</sup>

The group discussed some practical problems, such as identifying a site to keep relevant materials.<sup>64</sup> No ready answers surfaced, though one participant suggested that a site may not necessarily be sophisticated or costly, especially if it sought mainly to compile or to help inquiring minds link to relevant sources already available.<sup>65</sup>

### 4. Case Studies

Several discussants mentioned that other professional groups have ethics programs that rely considerably on case studies of ethical conundrums, with or without commentary.<sup>66</sup> Some participants saw a need for doing more—e.g., to develop a book or other compendium presenting a series of common situations and circulate it to trainers and

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59. See *supra* note 4 and accompanying text.

60. See *supra* note 4 and accompanying text. For a recent addition to available resources for dispute resolution professionals, see PHYLLIS BERNARD & BRYANT GARTH, *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* (2002).

61. See *supra* note 4 and accompanying text; *Online Ethics*, at <http://onlineethics.org> (last visited Aug. 1, 2003).

62. See *Center for the Study of Ethics in the Professions*, at <http://csep.iit.edu> (last visited Aug. 1, 2003).

63. See *The Association for Practical and Professional Ethics (APPE)*, at <http://ezinfo.ucs.indiana.edu/~appe/home.html> (last visited Aug. 1, 2003).

64. See *supra* note 4 and accompanying text.

65. See *supra* note 4 and accompanying text.

66. See *supra* note 4 and accompanying text.

mediators.<sup>67</sup> A number mentioned that they have developed some case studies for ethics teaching purposes and offered to share them and upload them to an ethics website.<sup>68</sup>

### 5. Local or Regional Support Systems

The above possibilities led to the suggestion that we begin to develop local or regional networks of people conversant with ethics standards and mediation practice for continued interaction; one participant suggested the development of counselors, expert advisors, or peer discussion groups to allow mediators to have the right kind of conversations about ethics problems.<sup>69</sup> Some well-designed, well-run court and community programs now present brown-bag in-service, peer supervision, or similar models that many thought worthy of closer attention and possible emulation.<sup>70</sup> A related idea was the establishment of small groups of eight to ten mediators committed to coming together periodically and holding themselves open generally, to discuss ethical aspects of their cases with other group members.<sup>71</sup>

Participants saw great benefit in additional discussions about how to structure and operate such "local systems" for allowing meaningful ethics conversations to occur; one suggested that we proceed by undertaking a "systems design" approach to its development.<sup>72</sup>

### C. Making Ethics Skills Routine

Participants strongly expressed the view that ethics should not be treated as an afterthought in "practical" skills training, or as something separate from good practice.<sup>73</sup> They believed that basic and advanced mediation training programs should place the systematic exploration of applicable codes much closer to the center of their curricula.<sup>74</sup> One participant suggested that these standards seek to express our goals and ideals; in so doing, they inform new and experienced mediators about

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67. See *supra* note 4 and accompanying text. Bush's report, see Bush, *supra* note 3, was identified as presenting a partial model, but one Symposium participant suggested it should be "richer and inclusive of different voices." See *supra* note 4 and accompanying text.

68. See *supra* note 4 and accompanying text.

69. See *supra* note 4 and accompanying text.

70. See *supra* note 4 and accompanying text.

71. See *supra* note 4 and accompanying text. Social workers, it was observed, build similar peer discussions into their routine activities as part of their career development. See *supra* note 4 and accompanying text.

72. See *supra* note 4 and accompanying text.

73. See *supra* note 4 and accompanying text.

74. See *supra* note 4 and accompanying text.



“who we are.”<sup>75</sup> Conversely, they also build internal inconsistencies into our outlooks and tensions into day-to-day practice. The better able a mediator is to perceive, analyze, and avert or deal with ethical dilemmas, the better the mediator will be. For these reasons, it was argued, ethical dilemmas should be dealt with as part and parcel of practice.<sup>76</sup>

Whether offered separately, as a core part of broader training,<sup>77</sup> or as professional “in-service” exchanges, a case-specific method should play a central role. As Bush has suggested, and as ethics instruction in most other disciplines indicates, specific cases offer more engaging exchanges than theoretical discussions of principles.<sup>78</sup> This said, the ADR field should give much closer thought to how best to present and draw wisdom from case studies and help trainers enhance their ability to employ them.

Mary Thompson, an experienced dispute resolution trainer in Texas, counsels that handling ethical dilemmas requires mediator competency in at least four very different areas: self-awareness, knowledge of professional standards, analysis and decision making, and in-the-moment performance.<sup>79</sup> The last of these competencies involves sharpening our skill at applying the results of the first three in a manner that is appropriate to the situation, the neutral’s style, and the neutral’s individual strengths and limitations.<sup>80</sup> Each competency has its own unique aspects, and Thompson describes the practice implications of each.<sup>81</sup>

Thompson notes first that ethical decision making involves more than knowing a code of ethics, but also understanding those personal factors (e.g., morals, biases, religious and cultural values) that affect a

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75. See *supra* note 4 and accompanying text.

76. See *supra* note 4 and accompanying text.

77. An associated issue is whether professional ethics is best raised as an integrated part of a “core curricula” or separately. One view at the Symposium was that “both is ideal,” but that if only one mode is available, “integrated is best.” See *supra* note 4 and accompanying text. An engineering ethics specialist noted a related challenge facing “integrated” approaches; that skills trainers and other “non-ethics” faculty often are less interested in ethics, see it as detracting from their teaching goals, or may feel uncomfortable teaching ethics. See *supra* note 4 and accompanying text. He suggested “structured faculty development” as a possible solution. See *supra* note 4 and accompanying text.

78. See Bush, *supra* note 3.

79. THOMPSON, *supra* note 16; see MARY ALTON, AT THE TABLE: A SYSTEM FOR MEDIATOR EVALUATION AND TRAINING (1995) (a trainer guide and accompanying videotape with professional actors, presenting trainees a chance to observe generic situations, stop the action, discuss issues raised, and assess options for responding). Alton’s training materials present one model that could be worth drawing on or emulating in the ethics skills context. See *id.*

80. *Id.*

81. *Id.*

mediator's ability to remain impartial and ethical.<sup>82</sup> She suggests that mediators who have developed awareness of their personal values will be better able to:

1. avoid accepting cases where the mediator may not be able to be neutral or impartial;
2. better manage their own reactions when events in the mediation challenge their personal values;
3. know when to withdraw if their personal values threaten their role as a mediator; and
4. be clear with the parties regarding the mediator's personal boundaries and limits regarding behaviors, topics, etc.<sup>83</sup>

Thompson points out that, in any given profession, individuals work within, and must understand, the applicable laws, organizational policies, certification requirements, and ethical rules or guidelines.<sup>84</sup> Mediators who understand these standards, she says, are better able to:

1. recognize an ethical dilemma as it arises in the session;
2. anticipate situations where different codes of ethics might offer conflicting guidance;
3. develop marketing, intake, and office procedures to avoid any appearance of unethical behavior;
4. establish mediation ground rules or procedures that address appropriate ethical, legal, or organizational parameters for the session; and
5. avoid formal complaints, charges, or grievances.<sup>85</sup>

Armed with knowledge of personal values and professional standards, a mediator must then be able to analyze an ethical dilemma and decide on a course of action, often during the fast pace of a session.

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Thompson maintains that mediators who are competent in analysis and decision making should be better able to:

1. know the questions to ask oneself when analyzing a dilemma;
2. choose between conflicting principles of practice;
3. understand when action is warranted in an ethical dilemma; and
4. defend their decision as an ethical choice.<sup>86</sup>

Finally, Thompson says, mediators must not only arrive at an ethical decision, but also select and implement a course of action in a way that minimizes damage to the parties, to the process, and to the role of the mediator.<sup>87</sup>

Thompson notes that enhancing each of these competencies is best done via differing modes of instruction.<sup>88</sup> For self-awareness, she suggests: personal bias exercises, like “Stand by Your Values,”<sup>89</sup> and standard negotiation exercises, like “Prisoner’s Dilemma.”<sup>90</sup> To instill knowledge of applicable standards, she would employ “Code Comparison” and “Ethics Jeopardy.”<sup>91</sup>

Analysis and decision-making skills could be raised via exercises like: (1) “Decision Tree,” where trainees arrive at an ethical solution after being presented with a decision making model; (2) “Where Do You Draw the Line?” in which a situation is raised (e.g., the parties ask the mediator for advice), trainees discuss five to seven possible responses arranged on a continuum, and all exchange views of which responses actually cross the line; and (3) “Defend Yourself,” a small group exercise with each group set up as a grievance committee considering a

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* “Stand by Your Values” is an exercise where the trainer posts flip charts in different areas of the room, with each area representing a choice relating to a question posed by the trainer; for example, “In a barking dog mediation, which of the following solutions would be hardest for you to live with as a mediator?” *Id.* Trainees then stand by the sign that represents their choice and are asked to talk with each other about what their choice says about their personal values. *Id.*

90. *Id.*

91. *Id.* “Code Comparison” is an exercise where trainees divide into small groups and then compare and contrast what various mediation codes say about a specified ethical dilemma; the small groups then gather into a large group and debrief each other. *Id.* “Ethics Jeopardy” adapts a quiz show format to test a trainee’s knowledge of codes of ethics. *Id.*

disputant's complaint and requiring the mediator to justify her actions.<sup>92</sup>

Performance skills, Thompson says, could be heightened via: (1) role plays in which ethical dilemmas arise and mediators receive feedback on how to deal with them effectively; (2) stop-action demonstrations where trainees watch a simulated role play, stop action at points where they recognize an ethical dilemma has come up, discuss the situation, observe as the mediator implements a strategy to respond, and then discuss the effectiveness of the mediator's response; and (3) "Quick Decisions," in which a "mediator" in a small group responds to an ethical dilemma, then the entire group offers feedback on how effective the response was, and ultimately all have a chance to play the mediator role.<sup>93</sup>

Thompson's advice can assist us in conceptualizing and developing sensible methods and useful materials to help neutrals dealing with cases where standards afford them only sketchy guidance or internally inconsistent priorities. She indicates that mediation trainers can, and should, be creative in developing additional engaging activities for meaningful learning.<sup>94</sup> While some of her suggested techniques are widely used today, others are innovative; especially when taken together, they raise the possibility of identifying replicable pedagogical approaches, or even parts of "models" for ethics education.

#### *D. Related Activities on Mediator Ethics*

##### 1. Improving Complaint Handling

A system supporting ethical behavior, and occasionally sanctioning misbehavior, likely will include continuing ethics education, feedback, and a complaint handling procedure. It will also look beyond the individual neutral.

Meaningful options to enhance expeditious handling of complaints or grievances deserve a closer look. The Association for Conflict Resolution ("ACR") has begun to examine how a new Ethics Committee can play a complaint-handling role.<sup>95</sup> Some current after-the-fact

92. *Id.*

93. *Id.*

94. *Id.*

95. ACR's Board of Directors recently approved a policy for an Ethics Committee, with the President appointing the Ethics Committee Chair who will in turn appoint the remaining Committee members. See Lynn Kinnucan, *ACR Board of Ethics Committee* (Nov. 26, 2002), *at* <http://www.acresolution.org/research.nsf/articles/B4D9C6132717D81785256C7D006CF5F4>. The primary responsibility of the Ethics Committee will be to review and address ethics complaints. *Id.* In addition, the Committee is authorized to offer mediation under

systems, while implemented in a very professional manner, tend to focus on relatively formal processes whose effectiveness and “user friendliness” have been widely questioned.<sup>96</sup> ACR, and other parts of the ADR field, will need to proceed thoughtfully, because grievance and enforcement processes can raise confidentiality, fairness, and efficiency challenges. A few questions:

1. Who would serve as ethics committee members, peer reviewers, mediators, or ombuds?
2. How would the various roles be structured and carried out, especially in light of resource and burden issues and possible regional and stylistic variations?
3. Should a committee, ombuds, or peer review groups have any authority to issue sanctions, or publicly available findings? Would there be any public record of process or results?
4. Are there antitrust, fairness, or appearance concerns that ought to be addressed?
5. Would an ombuds make reports periodically (or ever) to an oversight committee, or any other entity?
6. Are existing ethical standards or codes adequate for decisions on complaints?

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appropriate circumstances. *Id.* To ensure an efficient and diverse flow of members through this committee, the first Ethics Committee will develop criteria for selecting Committee members, as well as a training process that new members will be required to undergo prior to joining the Committee. *Id.*

96. The Texas Mediator Credentialing Association, now developing a credentialing regime for Texas, is reviewing a lengthy, detailed proposal that some have criticized as legalistic and excessively concerned with “what lawyers and judges are comfortable with.” See generally Suzanne M. Duvall & John P. Palmer, *ADR Counsel Authorizes Committee To Meet with Mediator Groups To Establish Credentialing Program Based on the Revised Proposal for a Voluntary Program for Mediators’ Designation Credential Mediator* (June 12, 1998), at <http://www.texasadr.org/tmca.cfm#toc>. Some jurisdictions currently employ relatively formal procedures for assuring that neutrals perform adequately. The Florida Supreme Court, for example, created advisory panels to field written requests from mediators on ethics questions and party grievances. See FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS r. 10.900. The typical sanction in Florida tended toward requiring further training or imposing restrictions on certain types of practice (e.g., no more family cases). A very few mediators have been suspended. In practice, however, programs have seldom found it necessary to employ such formal procedures.

Establishing graduated, flexible complaint procedures, and possibly a complaint “hotline” for complaining parties, are methods some programs employ to promote ethical behavior. An ombuds, or perhaps a diverse set of ombuds, could be created. The Maryland Mediator Quality Assurance Committee’s pending Concept Paper calls for:

[An ombuds function that] would be operated with independence, impartiality, and confidentiality and would manage initial efforts to check out and deal with issues raised by a complaint. The Ombuds function could be the first step in a variety of resolution possibilities, to include conciliation, mediation, or, eventually, a peer review panel, if that seemed appropriate or needed. Clients would retain all other remedies available.<sup>97</sup>

A few programs, such as the Massachusetts Office of Dispute Resolution, follow up with targeted mentoring or training when parties’ assessments indicate troublesome patterns of behavior by certain neutrals. Some Symposium participants expressed the view that complaint processes should be available both to customers of mediation services and to mediators wanting a say concerning negative assessments of their performance.<sup>98</sup>

## 2. Developing and Enforcing Professional Standards

We see a spectrum of possible “carrot-and-stick” conduct that can be undertaken to promote suitable behavior: setting standards, educating practitioners, supporting good practice, offering feedback, cajoling, chiding, humbling, humiliating, and, if all else fails, disciplining or expelling.<sup>99</sup> Various organizations at local, state, organizational, and national levels are currently focused on varying segments of this continuum—mostly on developing or reviewing codes of ethics or just offering practice guidance.

In this regard, decisions—as to *who should be developing (and enforcing) ethical standards, for whom, and how*—are likely to be more important than the nature of the standards. Developers of standards should also carefully consider the implications of decisions about who ought to be doing what along the above continuum. Also, the quality and inclusivity of the processes used to develop any set of standards will be

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97. MARYLAND MEDIATOR QUALITY ASSURANCE COMM’N, THE MARYLAND PROGRAM FOR MEDIATOR EXCELLENCE (October 2002) (draft overview of proposed quality assurance system, including ethics education and enforcement components) (on file with author).

98. See *supra* note 4 and accompanying text.

99. See e.g., TERRY ALLEN, *Truckload of Art, on LUBBOCK (ON EVERYTHING)* (Fate Records 1979).

important for their quality, understandability, and acceptance.

*E. Moving the Focus Beyond Individual Neutrals*

Most codes of ethics to date have tended to place the onus on the individual mediator. The quality of dispute resolution services that users ultimately receive will, however, depend on many variables having little or nothing to do with an individual mediator's ethics or abilities.

After all, a program administrator's intake, assignment, and other actions greatly affect the "justice" that disputing parties receive and their satisfaction with the quality of their ADR services.<sup>100</sup> These activities warrant closer and more systematic examination. Similarly, a convener who overlooks tough issues or intentionally excludes key interests can cause significant harm. Systems designers and trainers are asked on occasion to offer advice or services in settings where they know that the program is very poorly conceived or will be run in an unfair manner or just operated so ineptly that no sensible person is likely to utilize it.<sup>101</sup>

Do ADR professionals face ethical challenges in any of these situations? Certainly their actions affect the long-term credibility and viability of ADR methods. The field should expand on a nascent trend to think "beyond the mediator," and pay a bit more systematic attention to "macro" issues—whether cast as standards, practice guidance, or perhaps best of all, "things to think about."

If ADR professionals do face ethical challenges, then how should they think more critically and systematically about identifying and implementing ethically appropriate responses? A few tentative steps have been taken.<sup>102</sup> One useful example of an effort to focus more broadly on quality issues relating to ADR programs was the CPR-Georgetown Commission on Ethics Principles for ADR Provider Organizations.<sup>103</sup> The Commission found that "provider organizations"

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100. See Charles Pou, *Gandhi Meets Eliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, 5 DISP. RESOL. Mag. 9 (1998) (describing an investigation of an agricultural mediation program that led to the program's handing over hundreds of sets of mediation files).

101. Possible examples—some extreme, others less so—include: (1) a company wants stand-alone training of its senior managers, all middle-aged white males, so they can be turned loose immediately to mediate in a new program to redirect all equal employment opportunity and workplace complaints; (2) a request from a court or agency to train their judges so they can "mediate from the bench" or observe "their mediators" in session more knowledgeably in cases pending before them; (3) other cases in which design or training expertise is sought in ways that defy sound systems design practice or plain common sense.

102. CPR-GEORGETOWN COMM'N ON ETHICS, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2001) [hereinafter PRINCIPLES].

103. *Id.* See also Charles Pou, MEDIATOR QUALITY ASSURANCE: REPORT TO THE MARYLAND MEDIATOR QUALITY ASSURANCE COMMITTEE 38 (2003). Several core

have responsibilities to provide fair, impartial, and quality ADR services.<sup>104</sup> These organizations perform intake, referral, clearinghouse, roster creation, advice giving, neutrals training, mentoring and monitoring, user education, or related activities in providing parties with the services of ADR neutrals.<sup>105</sup>

We need to encourage greater interchange among and between program administrators,<sup>106</sup> ADR provider organizations, trainers, and systems designers on these issues. This will promote a growing sense that these are professions, or at least areas of worthy endeavor; that this work can be performed well or poorly or even unethically; and that converging to discuss how to do them adeptly is valuable. Discussions and support structures similar to those advocated for mediators may be useful to these folks as well.

## V. Conclusion: Embrace Limbo

If “engineering ethics is part of thinking like an engineer,”<sup>107</sup> then surely mediators and others in the ADR field need to internalize ethical precepts as a basic part of thinking like, and acting as, dispute resolvers. Thinking and talking in a more focused way about ethics helps us explore systematically the relation between ethics and quality mediation practice, and to focus on building ethical awareness into the way we “think like mediators.” These exchanges are an important step, and let us

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principles guided this effort. The first is that it is timely and important to establish standards of responsible practice in this rapidly growing field to provide guidance to ADR provider organizations and to inform consumers, policy makers, and the public generally. Second, the most effective architecture for maximizing the fairness, impartiality, and quality of dispute resolution services is the meaningful disclosure of key information. Third, consumers of dispute resolution services are entitled to sufficient information about ADR provider organizations and their neutrals to make well-informed decisions about their dispute resolution options. And finally, ADR provider organizations should foster and meet the expectations of consumers, policy makers, and the public generally for fair, impartial, and quality dispute resolution services and processes to ensure that best practices will be highlighted in the development of the field.

The CPR-Georgetown Commission recommended several possible approaches to addressing the numerous issues of quality, selection, administration, access, oversight, and design that converge when public and private entities provide ADR services. PRINCIPLES, *supra* note 102. It recognized that, as dispute resolution activity becomes increasingly institutionalized, the need will grow for those who administer ADR programs to ensure that their efforts are effective and their activities viewed as fair and appropriate. *Id.* The Commission recognized that provider organizations’ efforts should include some self-assessment. *Id.*

104. PRINCIPLES, *supra* note 102.

105. *Id.*

106. See KEY BRIDGE FOUNDATION, CLEARINGHOUSE FOR MEDIATION PROGRAM MANAGERS: A RESOURCE FOR MEDIATOR ROSTERS, at <http://www.crinfo.org/mediation-program-managers> (last visited Aug. 1, 2003).

107. See Davis, *supra* note 1.



become abler and more scrupulous.

As a field, we probably will still be struggling twenty years from now on how to define who we are and how we ought to behave. This can be healthy. In the short term, some may prefer to depart as little as possible from the status quo; others will prefer the “certainty” of developing and hewing to relatively prescriptive edicts and elaborate grievance processes. We should resist these pressures, and be prepared to explain why we fancy something that is more than *laissez-faire* and less than rigid regulation.

David Sally urges us to “Yearn for Paradise, Live in Limbo.”<sup>108</sup> I suggest we learn to love limbo. This involves acknowledging that any move that leaves the field better able to handle ethical problems requires each of us to commit to do better. It also involves accepting risks and embracing the complexity of ethical decision making. This will necessarily require us, as a field, to counter tendencies (internal and external) to set up procrustean beds that do not further our rich, resilient practice.

Let us accept that codes of behavior offer only limited help in specific situations, and that the best approach will cause us to be reflective rather than prescriptive. After all, their flexibility and practicality are precisely what give mediation and similar consensus-based methods much of their value and meaning. Of course, we cannot disclaim the importance of consistency, efficiency, and accountability. Still, we should accommodate these potentially competing goals in ways that value and preserve mediators’ diverse styles and flexibility, and that recognize mediation’s potential to accomplish far more than merely promoting efficient decision making. The ideal result would be a system that: (1) trusts individual dispute resolvers to make the correct choices without “giving them all the answers,” and (2) encourages communication before, during, and after the mediation in lieu of detailed strictures and overly procedural complaint processes.

We can approach these goals by focusing more intensely on: (1) developing our individual ethical and professional capacities; (2) creating effective educational and support systems; and (3) enhancing and improving ethics-related resources. If we do not, then down the line we may find our ethical dilemmas as dispute resolvers to be multiplied.

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108. David Sally, *Yearn for Paradise, Live in Limbo: Optimal Frustration for ADR*, 108 PENN ST. L. REV. 89 (2003). Sally advises neutrals to “limit introspection.” *Id.* at 111. He also states: “[T]he ADR movement [must] be in limbo between its accomplishments . . . and its aspirations . . . ADR must keep both referents active and should not forsake or deny either.” *Id.* at 108.

Appendix A: Types of Ethical Dilemmas Mediators Face<sup>109</sup>

- A. Keeping within the limits of competency
  - 1. When "diagnostic" competency is lacking
    - (a) to diagnose a history of violence
    - (b) to diagnose mental incapacity
  - 2. When substantive or skills competencies are lacking
- B. Preserving impartiality
  - 1. In view of relationships with parties or lawyers
    - (a) after disclosure and waiver of objections
    - (b) when relationships arise after mediation
    - (c) when class or group "relationships" exist
  - 2. In view of a personal reaction to a party in mediation
    - (a) antipathy to a party
    - (b) sympathy to a party
- C. Maintaining confidentiality
  - 1. Vis-à-vis outsiders
    - (a) reporting allegations of violence or crime
    - (b) communicating to a court or referring agency
    - (c) communicating to a party's lawyer
  - 2. Between the parties
    - (a) when disclosure would prevent "uninformed" settlement
    - (b) when disclosure would break "uninformed" impasse
- D. Ensuring informed consent
  - 1. In cases of possible coercion of one party
    - (a) by the other party
    - (b) by the party's own lawyer/advisor
    - (c) by the mediator's "persuasive" measures
  - 2. In cases of party incapacity
  - 3. In cases of party ignorance
    - (a) of factual information known to the mediator
    - (b) of legal/expert information known to the mediator
- E. Preserving self-determination/Maintaining nondirectiveness
  - 1. When tempted to give the parties a solution
    - (a) at the parties' request
    - (b) on the mediator's own initiative
  - 2. When tempted to oppose a solution formulated by the parties
    - (a) because the solution is illegal
    - (b) because unfair to a weaker party
    - (c) because the solution is unwise

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109. Bush, *supra* note 3.

- (d) because unfair to an outside party
- F. Separating mediation from counseling and legal advice
  1. When the parties need expert information
  2. When tempted to express a professional judgment
  3. When a party needs a therapist or advocate
- G. Avoiding party exposure to harm as a result of mediation
  1. When mediation may make a bad situation worse
  2. When mediation may reveal sensitive information
  3. When mediation may induce “detrimental reliance”
- H. Preventing party abuse of the mediation process
  1. When a party conceals information
  2. When a party lies
  3. When a party “fishes” for information
  4. When a party stalls to “buy time”
  5. When a party engages in intimidation
- I. Handling conflicts of interest
  1. Arising from relations with courts or referring agencies
  2. Arising from relations with lawyers/other professionals

## Appendix B: Possible Variations in Mediator Settings

- I. Nature of cases
  - A. Number of parties
  - B. Complexity
  - C. Length
  - D. Subject Matter
    1. Environmental/Policy
    2. Civil Enforcement
    3. Mass Tort, Insurance, Product Liability, or Similar Litigation
    4. Commercial/ Business Conflicts
    5. Small Claims Litigation
    6. Workplace/Employment
    7. Family
    8. Consumer
    9. Labor Management
    10. Community
    11. Other
- II. Voluntariness of Parties' Participation in Mediation
  - A. Voluntary
  - B. Mandated
  - C. Other
- III. Parties' Role in Selecting a Mediator
  - A. Full
  - B. None
  - C. Other
- IV. Relative Nature of Parties
  - A. Unsophisticated/ Vulnerable/ Pro Se/ Novice
  - B. Experienced/ Fully Represented by an Attorney
  - C. Individual v. Organization
  - D. Individual v. Individual
  - E. Other
- V. Process Assistance Requested by Mediator
  - A. Facilitative Mediation
  - B. Evaluative Mediation
  - C. Other
- VI. Status of ADR Provider Organization
  - A. Court
  - B. Public Regulatory Agency
  - C. Public Dispute Resolution Provider Agency

- D. Other Public Entity
  - 1. State ADR Agency
  - 2. University
  - 3. Administrative Support Agency
  - 4. Office of the Administrative Law Judge
  - 5. Shared Neutrals Program
- E. Private Not-for-Profit
  - 1. Neighborhood Mediation Program
  - 2. Self-Regulatory Entity
  - 3. HMO
- F. Private For-Profit
- VII. ADR Provider Organization's Role in Listing and Referring Neutrals
  - A. Pure Clearinghouse
  - B. Selective Listing (Objective)
  - C. Selective Listing (Subjective)
  - D. Party Identified Panels
  - E. Assignor of Neutral
  - F. Mixture
- VIII. ADR Provider Organization's Role in Quality Control
  - A. Certification of Listees
  - B. None
  - C. Qualifications and Selection Process
  - D. Conflicts Check
  - E. Performance Evaluation
  - F. Discipline
  - G. Training
- IX. ADR Provider Organization's Operational Transparency
  - A. Opaque
  - B. Open Decision Making
  - C. Rules of Procedure
    - 1. Defining Required Competencies
    - 2. Disclosing Standards and/or Methods for Selecting Neutrals