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# Ethical Dilemmas or Benign Neglect?

*Richard A. Salem\**

Some twenty dispute resolution experts from across the nation converged on Tallahassee in February, 1988 to join colleagues from Florida in a two day workshop on "Mediation in the Judicial Environment." Florida's courts had just been empowered to mandate mediation in a wide variety of cases in what was then viewed as "the nation's most comprehensive ADR statute."<sup>1</sup> The wisdom of outside specialists such as court personnel, program directors, professional association representatives, law professors, trainers, researchers, and mediators was being sought to help launch the Florida mandatory mediation program.

The consultants brought to Florida a panoply of expertise in mediation policies, procedures, practices, and problems. The consultants compared notes with experienced Florida mediators and program managers and shared their expertise with those in charge of launching the new dispute resolution program. Issues addressed included the goals of mediation, selection and training of mediators, the role of the mediator, program design, case selection, mediator standards, and standards for judicial review and administration.

Some four years later, the keynote speaker from that conference, Robert A. Baruch Bush, returned to Florida under the co-sponsorship of the National Institute of Dispute Resolution to ask a cross-section of mediators to identify "difficult ethical dilemmas" that they were experiencing and on which "they felt a need for guidance by professional standards and program policy."<sup>2</sup>

The responses of the eighty mediators interviewed led Professor Bush to the politically correct conclusion that "it is time for policy makers to pay more attention to the dilemmas mediators face, and do more to provide the help and guidance they need."<sup>3</sup>

But, the real message of this study is that guidance for mediators facing ethical dilemmas is long past due. The Florida mediators, as might have been anticipated, are encountering a number of ethical problems that are familiar to mediators elsewhere and that are endemic to practicing in this field. But, as Professor Bush suggests, the interviews indicate that some of the problems confronting Florida mediators result from their being placed in the untenable

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1. Steven Lubet, *Some Early Observations on an Experiment with Mandatory Mediation*, 4 OHIO ST. J. ON DISP. RESOL. 235, 236 (1989).

2. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 1.

3. *Id.* at 48.

position of not being provided with: (1) sufficient policy and procedural guidelines; or (2) training to competently mediate cases being referred to them.<sup>4</sup>

The problems do not result from ethical dilemmas so much as from benign neglect. The following are some examples used in Professor Bush's study:

#### *A. Example 1*

A family mediator suspects intimidation in a custody case when the wife repeatedly yields to her husband's negotiating demands and the husband "voices a threat of violence." The wife dismisses the threat and insists she is satisfied with the way the mediation is progressing. "Lacking any special training in domestic violence," and lacking "training on what questions to ask or how to evaluate the answers," the mediator is uncertain how to proceed.<sup>5</sup>

It is no wonder the mediator is stumped. Why are cases being referred to a family mediator who has not been trained to recognize the signs of intimidation or violence or to deal with them? In a recent study of programs in Portland, Oregon and Minneapolis, Minnesota, performed by the Association of Family and Conciliation Courts, about three-quarters of all parties surveyed in custody and visitation mediations reported that they had been subjected to some form of abuse ranging from at least two incidents of verbal intimidation to serious violence.<sup>6</sup> Another study of California-based programs reported a sixty-five percent rate of abuse.<sup>7</sup> The prevalence of domestic violence has led the Maine Court Mediation Service to recommend that, in addition to the screening of all domestic relations cases for violence before being accepted for mediation,<sup>8</sup> mediators be specially trained to recognize and handle these cases.<sup>9</sup>

4. *Id.* at 1.

5. *Id.* at 11.

6. Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, FAM. & CONCILIATION CTS. REV., (forthcoming Oct. 1994).

7. Charlene E. Depner et al., *Building a Uniform Statistical Reporting System - A Snapshot of California Family Court Services*, FAM. & CONCILIATION CTS. REV., April 1992, at 185, 193-94.

8. MAINE CT. MEDIATION SERV., *Mediation in Cases of Domestic Abuse: The Final Report of the Domestic Abuse and Mediation Project*, Jan. 1992, at 26.

9. *Id.* at 36.

Mediators must receive extensive training in domestic abuse to enable them to handle safely, responsibly, and effectively domestic relations cases involving abuse. Training programs must cover assessment of danger, child abuse reporting procedures, and mediator liability for failure to disclose threats made to potential victims. Mediators must have access to supervision and support, a good referral network, and an office and mediation environment that are safe for both themselves and abused persons.

*Id.*

### B. Example 2

In a landlord-tenant case, in an effort to break impasse, is it appropriate for the mediator to suggest to the landlord "that it will take months to get an eviction, and cost thousands of dollars," even though the mediator "has no idea of local court conditions and whether or not this is true?" Can the mediator "lie about her knowledge," *i.e.*, pretend that she knows when she does not?<sup>10</sup>

It is unfortunate that a mediator might have more of an ethical dilemma over an imperfect settlement than over lying to the parties. A mediator who decides to deceive the landlord in this way is not only judging the case, but is ignoring a basic tenet of mediation, *i.e.*, that effective mediators must be able to gain and maintain the trust of the parties.<sup>11</sup> In addition to the moral, ethical, and conceptual considerations, there is the practical consideration that a mediator caught in this lie (and a landlord is a likely candidate to catch the lie) may be unable to find work as a mediator again.

### C. Example 3

A family mediator notes that a party "appears dangerously depressed and disoriented, drifts away from the discussion, cannot remember what is being discussed at times, and shows other signs of mental disturbance." Should the mediator discontinue the mediation even though the party wants to continue?<sup>12</sup>

If suspending mediation creates an ethical dilemma for the mediator, then it is probable that the mediator has not been trained to deal with severe power disparities,<sup>13</sup> and further, it is possible that the policies and procedures governing the court-referred case do not address the fairness issue.

10. Bush, *supra* note 2, at 19.

11. For discussions of the importance of building trust in mediation, see SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, THE REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS, DISPUTE RESOLUTION FORUM, NATIONAL INSTITUTE OF DISPUTE RESOLUTION, May 1989, at 9; NANCY H. ROGERS & RICHARD A. SALEM, A STUDENTS' GUIDE TO MEDIATION AND THE LAW 11 (1987); Alan Gold, *Conflict in Today's Economic Climate*, address to the Society of Professionals in Dispute Resolution, in PROCEEDINGS OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, at 12, 15 (1981). The Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution, 1986, states under General Responsibilities: "Neutrals have a duty to the parties, to the profession, and to themselves. They should be honest and unbiased, act in good faith . . . ."

12. Bush, *supra* note 2, at 20.

13. For a discussion of ways to identify and respond to power disparities, see Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, MEDIATION Q., Dec. 1984, at 17-26.

There are other indications in the study to suggest that some Florida mediators are coming to the table with inadequate policy and procedural guidance and lack training in how to respond when issues of confidentiality, mediator bias, or conflicts of interest arise.<sup>14</sup> In a number of interviews, it appears that the mediators perceived themselves to lack the ability to draw out from the parties critical information needed to make an informed decision on how to proceed.<sup>15</sup> This suggests that the mediators could benefit from additional training in the information gathering stage of the process. That training would encompass such things as learning empathic listening, asking nonthreatening questions, and dealing with anger and other emotions of the conflict. The importance of training mediators in the above areas is not always fully recognized by trainers and administrators.<sup>16</sup>

To complement the valuable data produced by Professor Bush's study, it would have been enlightening if he had obtained feedback from some of Florida's mediation policy makers and program administrators regarding his findings and conclusions. There is no reason to believe that the ethical and other problems uncovered by Professor Bush's study are limited to court-affiliated mediation programs in Florida. Florida policy makers and program administrators apparently cared enough about the quality of justice in their state to cooperate in this study. They can now benefit from the wealth of data it unearthed. Florida officials, obviously, are responsible for the quality of mediation in their state. They had no shortage of advice when they began their court-mandated mediation program, and now they have no shortage of information about what they should be doing to strengthen it. Perhaps Professor Bush can return to Florida again soon to see what has changed. It would truly be unethical for mediation policy makers and program administrators to let the situation reported by Professor Bush prevail.

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14. Bush, *supra* note 2, at 9-10.

15. *Id.* at 10-12.

16. See Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines*, 9 NEGOTIATION J., Oct. 1993, at 341; Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOTIATION J., Oct. 1993, at 321; Richard A. Salem, *The Interim Guidelines Need a Broader Perspective*, 9 NEGOTIATION J., Oct. 1993, at 309.