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# Ethics: No One Ever Said It Would Be Easy: Bush's Contribution to Mediation Practice

*Albie M. Davis\**

The beauty of Robert Baruch Bush's research on ethics is that his conclusions grow out of the real life experiences of mediators.<sup>1</sup> Yes, his interpretation is influenced by his own biases, and yes, the Florida mediation scene, where he made his observations, is not a microcosm of the rest of the nation or the world; nevertheless, in spite of these limitations, he did a remarkable job of capturing the dilemmas that most mediators face.

Whenever I come across research such as Bush's, which sheds light on mediation practice, I feel an obligation to share it with others. As a mediation trainer, my rule of thumb is this: "If I cannot condense the information into a one page handout with a graphic, I do not really understand it." My preference for easy-to-understand handouts and diagrams stems from my sense that mediation calls upon practitioners to behave intuitively. Mediation training serves as an "intuition tune-up;" that is, a way for mediators to educate their intuition in order to be better able to make the thousands of snap decisions required. Graphics and short concepts are easier to recall quickly under these conditions. In addition to sharing research information, I feel compelled to poke it and probe it to see if the information comports with my own experience and the experience of others.

Let me give three examples. When I first read an analysis, by a University of Buffalo team,<sup>2</sup> of how parties behave during private caucuses, it seemed reasonable to me, but I wondered how other mediators would respond. I put the information into my word compactor and produced a handout that I tested on experienced mediators. Prior to giving them my training broadside, I posed the question, "Do parties in private sessions behave differently than parties in public sessions? And if so, how?" Collectively, experienced mediators consistently re-created the list given by the authors. One could argue, if mediators already know this information, why bother to teach it? Here is the reason. Although after consideration, both those questions and the answers to them seem obvious, I had never posed the questions before — either to myself or to others. Some

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

2. Gary L. Welton et al., *The Role of Caucusing in Community Mediation*, Paper presented at the Meetings of the American Psychological Association, Washington, D.C., 1986. (Copy of transcript on file with Author).

experienced mediators may have been intuitively operating on the underlying principles, but many were not. Once the question and research findings became conscious, all mediators had a new tool for making strategic decisions.

Another intriguing piece of research is an investigation of neutrality that led to the conclusion that this "sacred cow" of mediation is, in fact, a folk concept with scant reality.<sup>3</sup> After observing videotapes of dozens of actual community mediations, the researchers found that the party who first gains a foothold in describing the conflict (usually the person asked to speak first) is in the driver's seat.<sup>4</sup> From that point on, the other party is on the defensive. What is needed is a method that gives each party equal access to building a "conjunct" picture of the dispute — a storytelling approach.<sup>5</sup> Their findings and suggestions struck a chord with me. I tested the storytelling approach in subsequent mediation trainings and found that people appreciate its directness and simplicity.

Gulliver's classic analysis of the stages of negotiation and the corresponding emotional states of the participants clearly explained the "mood swings" of parties that are so disconcerting to both new and experienced mediators.<sup>6</sup> In 1984, I created a graphic entitled "Keeping Up Party and Mediator Morale and Momentum," illustrating the ups and downs of the parties' temperaments as they progress through the mediation process. This graphic was particularly helpful to new mediators who quite understandably associate party calmness with progress and party aggravation with incipient failure. Last fall, I was asked to present a workshop for middle school students on dealing with anger and other strong emotions during mediation. I reworked my graphic into a portrayal of a roller coaster filled with parties and mediators. The students understood it immediately and told me that the analogy helped explain what had previously been inexplicable. One month later, I used the student graphic with a group of adult trainees and it proved to be more effective than my previous one.

It was in this spirit of usefulness to the grassroots mediator that I scoured Bush's research for clues to improve mediation practice. To Bush's credit, he provides his own handy summary, offering nine major categories of dilemmas along with significant subcategories. While he acknowledges that his own findings are not necessarily "original nor the final word on the dilemmas of mediation practice," he feels that he "gives voice to collective rather than individual experience," and he "tries to present a panoramic picture of the whole range of dilemmas."<sup>7</sup>

It was his phrase "panoramic picture" that triggered my previously mentioned inclination to graphically represent his contributions. I wanted to construct a

3. See Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, *MEDIATION Q.*, Winter 1991, at 151, 151-63.

4. *Id.* at 154 n.2.

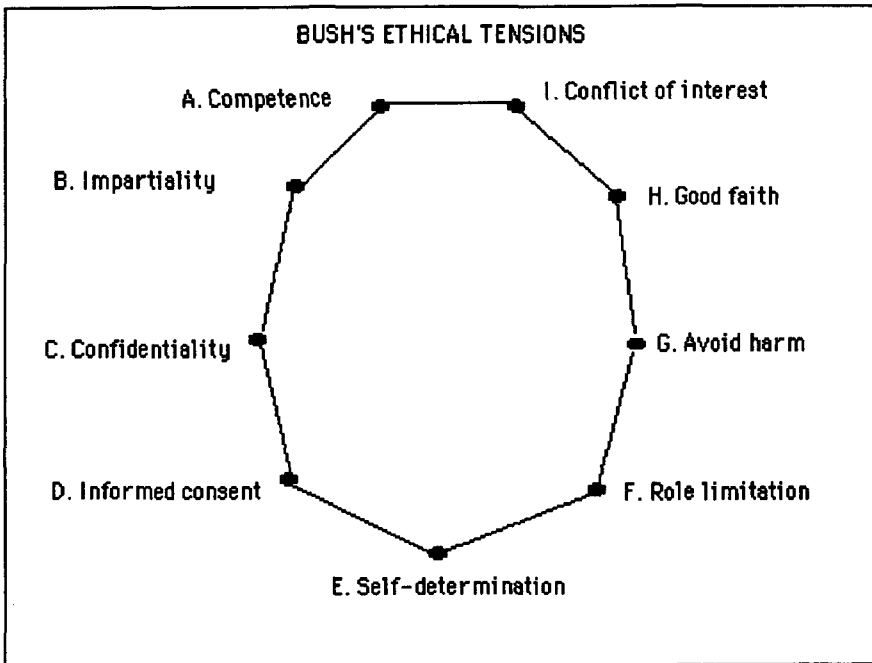
5. *Id.* at 160-62.

6. P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 121-77 (1979).

7. See Bush, *supra* note 1, at 8.

useful panoramic picture of the dilemmas. I was struck by Bush's notion that ethical issues are tied into values. Ethical dilemmas do not ordinarily emerge in a vacuum. Maintaining confidentiality is not usually a problem until there is some sense that one has a duty to reveal information. Again, as obvious as this may seem to me now, I had never viewed ethics in such a simple light. I always placed great emphasis on values, but I had not presented them as containing the seeds of a clash in values. As a member of the Ethics Committee that developed the SPIDR [Society of Professionals in Dispute Resolution] Code, I could not recall any serious or sustained discussions along these lines.

I needed to construct a diagram that captured the tension that Bush reported mediators were experiencing. In addition, I needed to take ownership of some of Bush's categories, both to satisfy my own understanding of their content, and, frankly, to shorten them for ease of reference.



For example, I changed the name of Bush's dilemma (or value) "F. Separating Mediation from Counseling and Legal Advice," to "Role Limitation." First of all, it is shorter, but more importantly, it captures the many ways that mediators may be tempted to impose their "special expertise" upon the parties. I am not just referring to legal or therapeutic advice, but also to such subjects as medical, parenting, electrical, or fiscal advice of which a mediator usually has some limited knowledge. I changed item "H. Preventing Party Abuse of the Mediation Process," to "Good Faith," which is shorter and yet retains the spirit of

Bush's observations. I placed self-determination in the central position since most mediators believe it is the most important of the ethical factors.

The diagram above approximates my attempt to convey the dynamic relationship among the values Bush identified through his research. The nine values are interconnected. Imagine, for the moment, 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.

The first time I tried out this diagram was during a workshop that a colleague<sup>8</sup> and I presented for the Massachusetts Association of Mediation Programs (MAMP). At the MAMP, we submitted a proposal to do a workshop entitled "The Mediator's Confessional Booth." We were not expecting many to attend the workshop, so we did no planning. The week before the conference, we were told that forty people had registered. At that point, we decided to do some planning.

The day of the conference, eighty mediators were present. After priming the pump with our own "confessions" — *e.g.*, the time Ericka lost her neutrality and laughed when a party said his case was worth a million dollars; the time I threw around my weight as mediator during a sexual harassment case, and, worse yet, enjoyed the experience — we drew out "confessions" from the audience. As a way of adding some substance to the workshop, we handed out Bush's summary of ethical dilemmas as represented by my chart. After each person "confessed," we asked him or her to identify the values or issues involved as they recognized them on the chart. Interestingly, everyone was able to pinpoint two, three, or more of Bush's dilemmas as coming into play in their own case. Furthermore, no one raised an issue that did not fit well into one of Bush's categories.

The experience proved amazingly therapeutic. What had seemed to each mediator like an "unpardonable sin" proved upon closer examination to be a genuine dilemma. Mediators wanted to do the right thing, but lacked the tools of analysis to invent an appropriate response. With Bush's nine points as reference, and a little help from their colleagues in the audience, the mediators were able to think through a variety of new alternatives. Hard work, but well worth the effort.

Since the MAMP workshop, I have used Bush's materials and my chart in several other settings. The results have been consistently positive. Mediators recognize their own struggles in Bush's analysis and appreciate the conceptual framework he has provided them. If I were so inclined, I am sure that I could find shortcomings in his research, his findings, and his recommendations. I am not inclined to do so at this time. It just so happens that I share his major bias toward self-determination as the cornerstone value of mediation. Rather than play the role of devil's advocate and criticize his approach, I would like to hear from those who genuinely disagree with this emphasis. Furthermore, I am not intimating that Bush, or anyone else, should solve all of our ethical dilemmas for

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8. That colleague, Ericka Gray, is a former Director of the Middlesex MultiDoor Courthouse; now senior mediator, manager, and trainer for Endispute.

us. My bias is toward the "thinking mediator," who is guided by a few strong, simple values and is capable of responding freshly and creatively to the issues and opportunities that present themselves in each conflict.

As Bush alerts his readers, his report "is not meant as the final word on the subject, but rather as the beginning point for an expanded and more comprehensive discussion of the subject."<sup>9</sup> Ideally, this symposium will help launch that wider dialogue.

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9. See Bush, *supra* note 1, at 8.

