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A Reply to the Commentators on the Ethical Dilemmas Study,

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A REPLY TO THE COMMENTATORS ON THE ETHICAL DILEMMAS STUDY

Robert A. Baruch Bush

The invitation to republish here the report on my study of mediators' ethical dilemmas was a very gratifying one. My hope was that this report would generate further thought and discussion on this important subject, and this symposium will certainly help to realize that aim. For this I am grateful to the editors of the *Journal* and their advisor, Professor Leonard Riskin. Moreover, the best part of this invitation was that it contemplated the publication of comments on the report from a number of well-known and thoughtful figures in the mediation field. This kind of public dialogue is something all scholars hope for, and I am pleased that it has occurred with this report. Waiting to read what the commentators had to say has involved some sense of anticipation, partly in wondering what they might find problematic in the study, but also — and moreso — in looking forward to what their comments would add to my own understanding of the issues. The wait has been well rewarded. With only a few qualifications, my view is that these comments genuinely advance the discussion of the issues addressed in the report.

Joseph Stulberg points out that many of the dilemmas stem from conflicts between mediators' possible roles, and that absent a clear conception of the mediator's role, it is hard to resolve these dilemmas or even agree on what constitutes a real dilemma.¹ These are solid points; but I disagree with his conclusion that, as a result, the study does not further the debate over the most fruitful conception of the mediator's role. Rather, it adds to that debate in two ways: by demonstrating what Stulberg himself points out — the pressing need for greater clarity and consensus about the mediator's role, in order to resolve or even define dilemmas; and by suggesting that the widespread concern about certain dilemmas, especially that concerning self-determination v. directiveness,² indicates where the tensions in the mediator's role are greatest and where our efforts at clarification and consensus should therefore be concentrated.

Stulberg and Linda Stamato both express concern about the report's conclusion that policymakers should take greater responsibility for providing mediators guidance in this area.³ I find myself largely in agreement with their main points — that training offers a better means of providing guidance than rigid

1. Joseph Stulberg, *Bush on Mediator Dilemmas*, 1994 J. DISP. RESOL. 57, 59-61.

2. See Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 22, 42.

3. Stulberg, *supra* note 1, at 63-65; Stamato, *Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. DISP. RESOL. 81, 83-84, 86.

standards, and that guidance should come from those within the field itself rather than outside public authorities. I don't think the report's conclusions contradict these points, but some clarification is obviously called for. First, the reference to "policymakers at the program, the state, and the national level" in my call for more guidance,⁴ need not mean outside public authorities uninvolved in the mediation process, but rather those *in the field itself* who occupy official or informal leadership roles at all three levels. I think everyone would agree that guidance can and should be expected from this source. Moreover, that leadership within the field can act to *educate* outside public authorities about what mediation (and mediators) can and cannot effectively do, and should and should not be expected to do.

Second, the report itself emphasizes training as the most important type of guidance needed.⁵ The further reference to standards, and the proposed standards appended to the report, grew out of a sense I have gained, after several presentations of this material to mediators, that once you raise the questions or dilemmas, practitioners have a burning desire to hear suggested answers. In short, training itself has to involve not only identifying questions, but suggesting possible answers; and doing that requires some reference point. Standards can provide such a reference point for both training and conduct — especially when framed only as guidelines and not rigid rules — if they are based on a coherent conception of the mediator's role, and accompanied by illustrative examples. In short, articulating standards can be used as a way of helping individual practitioners work out their own responses to dilemmas, rather than a means of prescribing (and proscribing) particular answers. However, I can see that the report might be read as going further than this and recommending a more rigid approach to the use of standards, and Stulberg and Stamato may be right in arguing that this would be ineffective or even counterproductive.

Albie Davis's comment actually provides an excellent example of the way in which I hoped the dilemmas (and standards) could be used for teaching and training. Her use of the material, in diagrammatic form, to stimulate mediators to disclose their own dilemmas and "confessions,"⁶ confirms the commonality of the kinds of dilemmas identified and shows how useful the typology can be in provoking thought and discussion. Davis's approach might also suggest how sample standards could themselves be used to stimulate discussion rather than impose rigid norms. One can imagine a session — and I have conducted several since the report was first published — in which mediators consider how a given case would be handled under the proposed standards, and then debate and discuss the appropriateness of the particular solution *and the standards themselves*. Used in this way, this or any other set of standards can be an excellent training tool.

4. Bush, *supra* note 2, at 44.

5. *Id.*, at 46-47.

6. Davis, *Ethics — No One Ever Said It Would Be Easy: Bush's Contribution to Mediation Practice*, 1994 J. DISP. RESOL. 75, 78.

Richard Salem's piece is in some respects the most supportive of the four comments, regarding the ultimate conclusions of the report, especially the need for training and guidance.⁷ This support is much appreciated, especially coming from a colleague with wide experience, whose work in the field I have long respected. However, at the risk of seeming unappreciative for the support, I must admit to being surprised by an implication I found in Salem's remarks that may be misleading and even unfair — not to the study I conducted, but to the Florida mediation community that was the subject of the study. Specifically, it seems to me that Salem's comments imply that, at least in certain respects, policymakers in Florida have been dilatory in not providing adequate guidance and training after 1988 (when Florida's comprehensive statute took effect) and have lagged behind other jurisdictions in this regard. I do not believe that this is the case.

A few factual clarifications may help here. Salem apparently assumes that the interviews for my study were done in 1992, four years after the 1988 workshop that inaugurated Florida's statute. Actually, though my report was originally published by NIDR in the fall of 1992, the interviews summarized in the report were done in December 1988 - January 1989, not quite a year from the date the Florida statute went into effect. In other words, my research reflects the state of affairs in Florida as of 1988, not 1992.

Florida has in fact done a good deal to provide guidance and training since 1988.⁸ Beginning in the summer of 1988, even before my research, new training programs were set up for all mediators seeking court certification. By late 1989, a special committee had established standards for mediator training programs, including guidelines for training content and coverage. Around 1992, standards of practice were adopted for court-certified mediators (on which, as the Appendix notes, my report's proposed standards were partly based). With these and other steps, Florida's efforts have probably gone a good deal further than those in many other states.

However, Salem suggests that the cases described in my report reflect "inadequate . . . guidance and . . . training," and "benign neglect."⁹ In his first example, the possible domestic violence case,¹⁰ he asks, "Why are cases being referred to a family mediator who has not been trained to recognize the signs of . . . violence or deal with them?" The question and following discussion seem to imply that Florida simply failed to provide necessary, standard skills training on domestic violence to its mediators. Therefore, the problem is not an ethical dilemma, but benign neglect of skills training. I disagree. The fact is that the case described by this mediator must have occurred in or before 1988, when I conducted the interviews. Did the absence of domestic violence training for family mediators, in 1988 or earlier, represent "benign neglect" of skills training

7. Salem, *Ethical Dilemmas or Benign Neglect?*, 1994 J. DISP. RESOL. 71, 71.

8. The developments mentioned in this paragraph were cited in a conversation with Sharon Press, Director of the Florida State Dispute Resolution Center, May 18, 1994.

9. Salem, *supra* note 7, at 74, 72.

10. *Id.*, at 72.

in Florida — given the general state of the field at that time? The answer is clearly negative.

Salem's own citation, to the Maine report on domestic violence in mediation, shows that *as of 1992* in Maine, training in recognizing and handling domestic violence cases was *only a recommendation*, not an actual reality.¹¹ Indeed, a broader study published in 1993, which reviewed programs for mediating domestic relations cases in several jurisdictions, concluded that

. . . mediators do not have the . . . training to cope with [domestic violence] cases, are unable to identify abuse when it is present, and . . . better training . . . is needed so that they are capable of recognizing and coping with the issues of domestic violence when it is signaled in mediation sessions.¹²

The authors did not find such training in operation in any jurisdiction they studied, as of the time they reached this conclusion.

Thus, even though everyone *now* agrees that such training is important, Florida's failing to provide it, *in 1988 or before*, was wholly typical of jurisdictions nationwide, including those with court-referred divorce and custody mediation. (I note that such training is now provided in Florida for certified family mediators, and has been for some time.¹³) In sum, this example does not support an implication that Florida's policymakers have been dilatory in developing and providing needed skills training for mediators in domestic relations cases. Perhaps other readers will not see such an implication in Salem's comment, and in any event it may be unintended. However, in case some may read the comment this way, I felt a clarification was in order.

Salem's larger point seems to be that better *skills* training — on topics like power-balancing, empathic listening, questioning, etc. — would enable mediators to deal with many of the cases reported in the study as ethical dilemmas.¹⁴ Again, his view is that the problems represent not ethical dilemmas, but insufficient skills training. I agree that some ethical questions can be obviated by adequate skills training: If a family mediator is trained in screening for domestic violence, she has no dilemma regarding whether and how to handle cases *without* such training. (Although until the skills training becomes available, there is indeed an ethical dilemma, as recognized by the mediator who reported it.)

However, it is important not to blur the distinction made in the report between a skills question and an ethical question, or to suppose that good skills training will do away with ethical dilemmas and eliminate the need for training in how to recognize and approach them. In many situations, skills are not the issue

11. *Id.*

12. Fischer, Vidmar and Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U.L.REV. 2117, 2172-73 (1993).

13. Conversation with Sharon Press, *supra*.

14. See Salem, *supra* note 7, at 74.

to begin with. Salem's third example, the depressed party case, is edited somewhat in his comment.¹⁵ However, reading the full version of the case¹⁶ should make it evident that power-balancing skills cannot obviate the tension in this type of case between the values of self-determination on the one hand and fairness or justice on the other. For cases like this, and like the vast majority of those reported in the study, skills training alone is not enough. Training must not only provide skills; it must also help mediators learn how to deal with situations that raise the question of whether to use one's plentiful skills for a certain purpose, or whether the purpose itself is improper in light of the goals and values of the mediation process.

One can certainly argue that policymakers in Florida have not gone far enough in providing this kind of training, and my report indeed says so. But this criticism applies to the entire field — as Salem himself notes at the end of his comment.¹⁷ Florida should not come in for special criticism simply because its mediation community was hospitable enough to cooperate in this study and, as Davis puts it, "confess" its puzzlements publicly. On the contrary, they deserve appreciation for this cooperation — which has provided the basis for the exchange presented here — and so do all the commentators for the insights they have offered.

15. *Id.*, at 73.

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

17. Salem, *supra* note 7, at 74.

