



BOOK REVIEW:

Ellen Waldman, Ed., *Mediation Ethics: Cases and Commentaries* (Jossey-Bass 2011)

Book review by Jan Frankel Schau (ADR Services, Inc. jfschau@schaummediation.com)

Mediators are highly skilled at seeing contradictory versions of the same story and valuing at least two perspectives in a given dispute. We are able to juggle varying competing moral values and work daily to achieve the balance between right and just, practical and plausible, peace and conflict, and black, white and gray.



Jan Frankel Schau, Esq. is a member of the International Academy of Mediators and a fulltime neutral with ADR Services, Inc. specializing in employment and business disputes. She lectures regularly on topics related to ethics in mediation.

In *Mediation Ethics*, editor Ellen Waldman is true to her calling. She tackles thirteen ethical constructs by introducing each topic conceptually, reviewing whatever laws or rules may guide the ensuing analysis, and then illustrating the problem through a hypothetical dilemma or two. Each chapter contains commentary by two highly respected practitioners in our field and concludes with Editor's Thoughts. Ever the scholar, Waldman, a professor of law and founder and director of the mediation clinic at Thomas Jefferson School of Law in San Diego, California, includes 37 pages of Notes detailing the various statutes referenced, as well as the Model Standards of Conduct for Mediators adopted by the ABA and others in an Appendix.

The 27 contributing authors are impressive and thoughtful in their analysis, but the combination of their unique perspectives makes the 448-page book somewhat unwieldy. Nonetheless, one cannot explore this book without appreciating the enormous effort that must have gone into such a thorough survey. In true professorial style, the editor in most instances fails to provide any "bright lines" to guide practitioners and the disputants who come before us. For example, in the chapter entitled Tensions Between Disputant Autonomy and Substantive Fairness: The Misinformed Dispute, Waldman notes that mediation often involves "fuzzy borders" where "ambiguity...feeds confusion" and "issues remain knotty" (pp.120, 121).

The roster of contributing authors reads like a Who's Who in the field, including Harold Abramson, Phyllis Bernard, John Bickerman, Bill Eddy, Carrie Menkel-Meadow, Forrest Mosten, Bruce Myerson, R. Wayne Thorpe and John Winslade, among others. It is both incredibly rewarding and somewhat confounding that well-respected leaders in our field do not speak with one voice, but reach varying conclusions on the ethical obligations invoked by the hypotheticals. Some of the analyses by contributors were so outstanding that I was left longing for more analysis, not less.

The cases Waldman uses are engaging, well written and easily identify the ethical quandaries that are presented in mediations like those handled by many IAM members. The book provides the opportunity to engage in ideas and issues with the best and the brightest in our field.

For example, Lela Love commented, “In mediation, substantive fairness is quite different [from litigation or arbitration]. The parties are the arbiters of the relevant facts. A fair outcome is one that parties believe is acceptable and fair – not an outcome, necessarily, that would mirror what a court would do” (p.137). Later she spoke of “the mandate for mediator humility” (p.144), a guiding reassurance I will carry with me on the limits of my capacity and role in mediation for years to come.

Jeremy Lack’s analysis in the chapter on Mediating on the Wrong Side of the Law begins with the rhetorical question, “Is this mediation kosher?” (p.187) and concludes, “This is a personal consideration for each mediator, and it highlights the importance for each mediator of knowing his or her own comfort levels with ambiguity and his or her own values and ethics” (pp.187-88). Julie Macfarlane, commenting on the same hypothetical arising out of a mediation over the sale of illegal drugs, suggests “that we should trust each mediator’s intuitive moral compass...” (p.193). This, she concludes, may cause some of us to choose to withdraw from mediating a dispute involving illegal acts or transactions, while others would make a moral judgment which would allow them to tolerate certain acts, such as illegal sale of marijuana, tax evasion or dissolution of a same sex marriage in a state where gay marriage is unlawful, but not mediation of a transaction involving child pornography, sale of cocaine or grand theft.

The experts also serve to remind the reader of the limitations of our role as mediators. In the chapter on Confidentiality, Bruce Pardy recognizes that “I cannot coerce, but I can attempt to persuade” (p.245). Commenting on the same hypothetical, involving expert evidence which established that certain land was highly toxic and unsuitable for building a proposed housing project, Charles Pou states, “If we could not find a mutually satisfactory approach, I’d check my gut and, I hope, follow the course that will allow me to look in the mirror the next morning...” (p.246). Pou concludes: “Even confidentiality – which is in many ways the most objective and clearly defined of a mediator’s ethical duties – may involve a good deal of subjectivity as a mediator weighs obligations and options, susses out for himself what is ethical, and then acts accordingly” (p.251).

I am left in full agreement with Waldman’s conclusion in regards to the duty of reporting misbehavior learned in mediation, “As in every other mediation dilemma, context matters” (p.259); “This is probably as it should be, but the tension can engender moral distress” (p.258). But the editor’s conclusions are, in my view, unsatisfyingly equivocal. As she concludes in the chapter on Information, Autonomy and the Unrepresented Party about disputant deliberation, it “often falls squarely in between that floor and ceiling – in the Goldilocks space of neither perfectly hot nor perfectly cold, but perhaps good enough to proceed” (p.176).

This leaves me with the burning notion that perhaps IAM, comprised of leaders in our field, ought to consider developing our own ethical code of conduct, or building on the Model Standards of Conduct for Mediators. Several of the contributing authors are members of our organization and may wish to take up the challenge and advance this important and valuable conversation.

The book is very worthwhile and highly useable in its ambitious examination of critical ethical

dilemmas that arise in mediation. But we're left with the tension of putting our own conundrums into context and checking our own guts to determine the best course in each instance. The editor concludes in the chapter on Mediating Multiculturally, "Just as mediation offers parties an opportunity to express their deepest normative commitments, so too must the process respect and give voice to mediator values" (p.336). In the end, we are all called on to draw our own conclusions, hew to our own moral codes and engage our utmost humility as we approach the on-going challenges presented in our work in this field.

Purchasing: <http://www.josseybass.com/>