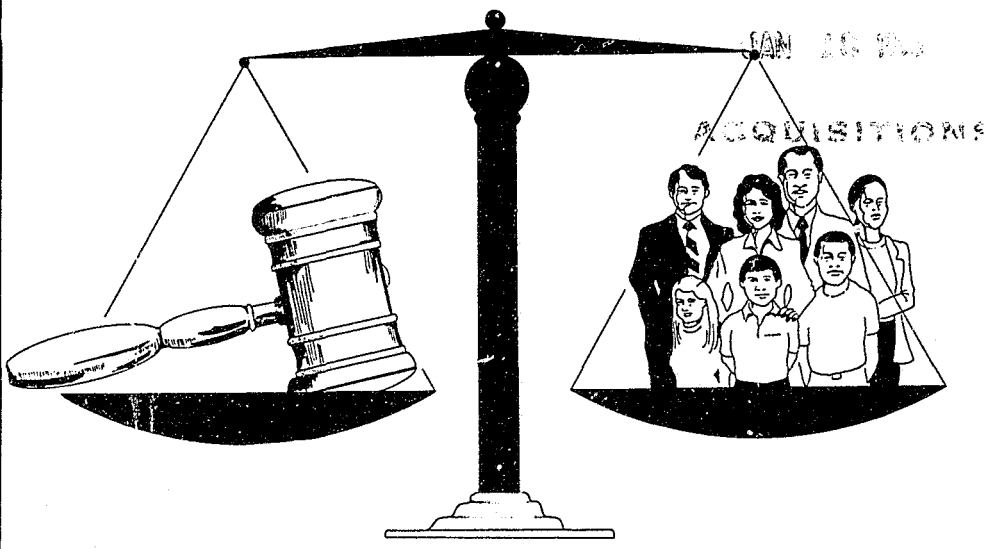
[illegible]



School of Social Work
The University of Michigan

NOVA University
Shepard Broad Law Center

Mediation Involving Juveniles: Ethical Dilemmas and Policy Questions

By
Robert A. Baruch Bush[1]

This publication was made possible by a gift from the Annie E. Casey Foundation.

Additional copies may be obtained by contacting:
Center for the Study of Youth Policy
School of Social Work
The University of Michigan
1015 East Huron Street
Ann Arbor, Michigan 48104-1689
(313) 747-2556

Printed: January, 1991

JUDICIAL COUNCIL MEMBERS

Justice Rosemary Barkett
SUPREME COURT OF FLORIDA
Supreme Court Building
Tallahassee, FL 32399
(904) 488-0357

Judge Gary Crippen
MN COURT OF APPEALS
1300 Amhoist Tower
St. Paul, MN 55102
(612) 297-1015

Judge Nancy Francis
WASHTENAW CO. JUVENILE COURT
2270 Platt Rd.
Ann Arbor, MI 48104
(313) 971-2240

Judge Seymour Gelber
11 JUDICIAL CIRCUIT
3100 N.W. 27th Ave.
Miami, FL 33142
(305) 638-6185

Judge Paul Lawrence
GOFFSTOWN DISTRICT COURT
150 Myrtle
Manchester, NH 03104
(603) 497-2402

Judge Sharon McCully
SECOND DISTRICT COURT
3522 South 700 West
Salt Lake City, UT 84119
(801) 265-5900

Judge Robert Murphy
MD COURT OF APPEALS
401 Bosley Avenue
Towson, MD 21204
(301) 974-3923

Judge Frank Orlando
Center for the Study of Youth Policy
3100 S.W. 9th St.
Nova Law Center
Ft. Lauderdale, FL 33315
(301) 462-8939

Judge Enrique Pena
327th DISTRICT COURT
City Co. Bldg., Room 214
500 E. San Antone
El Paso, TX 79901
(915) 546-2032

Judge Stephen Schiller
CIRCUIT CT. OF COOK CO.
Richard J. Daley Center
Room 1610
Chicago, IL 60602
(312) 443-4834

Justice Charles Smith
WASHINGTON SUPREME COURT
Temple of Justice
Mail Stop AV-11
Olympia, WA 98504-0511
(206) 357-2053

Judge Susan Snow
CIRCUIT CT. OF COOK CO.
1802 Daley Center
Chicago, IL 60602
(312) 443-3350

Table of Contents

FOREWORD

Recent years have seen an increasing trend towards the use of mediation and arbitration as an alternative to the adjudicatory process in parent-child and school-student disputes and as an alternative to dispositions for restitution purposes. The use of mediation in family disputes has been expanding nationwide over the last 20 years. The Florida Legislature has declared the use of mediation and arbitration as the public policy of the state (Sec. 44.101 (4) Fla.Stats.), and the State Supreme Court has adopted rules of procedure governing the process in all civil, family and juvenile cases (F.R.C.P. Ch 1.700-mediation & arbitration). Courts, schools and executive administrative agencies across the country are adopting mediation and/or arbitration as an alternative dispute process. Much has been written about the process, but very little real research or evaluation has been done.

This paper examines issues related to ethical dilemmas which mediators face and the need for ethical standards. The paper also addresses the need for effective training and professional development. The paper is published by the Children, Youth, and Families Judicial Council, whose members are listed herein. The Council is part of the Key Decision Maker Project sponsored by the Annie E. Casey Foundation. The purpose of the Council is to bring to the public policy arena critical issues pertaining to children and families which have a direct impact on our courts.

The members of the Council were chosen because of their concern for issues pertaining to children and families, and for the esteemed reputation they enjoy in their chosen areas of judicial responsibility. All members of the Council may not totally share the opinions or conclusions of the author, Professor Robert Bush, but all members endorse the concept of publishing scholarly papers that we hope will generate public policy discussions and enlightenment.

Professor Robert Bush is a noted law teacher and researcher in the field of mediation. Professor Bush regularly contributes to the development of training standards for mediators and has lectured extensively in the field.

This paper discusses the types of dilemmas and conflicts that mediators are faced with when dealing with parent-child issues. The paper encompasses the results of research undertaken by Professor Bush for the Judicial Council. It gives policymakers direction

in finding ways to favorably resolve the dilemmas. The Council is fortunate to have the opportunity to publish this timely and thought provoking paper.

Judge Frank A. Orlando (Ret.)
Director
Center for the Study of Youth Policy
Nova University
Shepard Broad Law Center

Mediation Involving Juveniles: Ethical Dilemmas and Policy Questions

By
Robert A. Baruch Bush[1]

Introduction: Abstract of the Study

Since the early 1980s, mediation has been developing as a means of resolving conflicts involving juvenile disputants. Parent-child mediation is one of the most rapidly growing areas of practice in many jurisdictions. However, serious concerns about mediation have also increased, especially on the ground that its practice is insufficiently professionalized and disciplined. One central concern is that there are no clear and demanding standards of practice for mediators and therefore there is little initial training or ongoing guidance regarding ethical practitioner conduct.

This paper is based on research, sponsored by the Judicial Council of the Center for the Study of Youth Policy and by Hofstra University School of Law, involving interviews of roughly 25 mediators working in parent-child mediation programs. The mediators were asked to identify mediation situations they had experienced which, in their view, raised difficult ethical dilemmas on which they felt the need for guidance by professional standards and program policy. This report summarizes and illustrates the findings of the research as to major types of dilemmas confronting youth-centered mediators and analyzes how these dilemmas resemble and differ from those presented by mediation in other contexts. It then offers suggestions regarding policies that can help train and guide mediators in how to recognize and respond to dilemmas in practice.

I. Background: The Development of Mediation Involving Juveniles

Over the past two decades, dissatisfaction with the formal judicial process — its high costs, adversarial character, and frequent inability to provide satisfying remedies — has led to the development and expansion of a range of nonjudicial alternatives for resolving disputes.[2] These "alternative dispute resolution" (ADR) mechanisms include arbitration, mediation, and negotiation as well as mini-trial, summary jury trial, and early neutral evaluation.[3] These are "alternatives" in the sense that they resolve disputes by means other than court adjudication. All have, in varying degrees, some common elements distinguishing them from adjudication — most notably, privacy, relaxation of procedural formality, nonapplication of substantive legal rules, and emphasis on compromise to find a solution.[4] ADR processes have increasingly been utilized in many different areas, including business and commercial, environmental and public policy, consumer, divorce and custody, and many other disputes and conflicts.[5]

This paper focuses on one ADR process, mediation, as it is used in disputes in which one of the parties is a juvenile. Mediation is commonly described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.[6] Since the early 1980s, there has been a marked growth in the use of mediation to resolve disputes involving children or youth, especially in three areas: intra-family, or parent-child conflict;[7] conflict between students in elementary or secondary schools;[8] and interpersonal conflicts leading to minor criminal complaints against "juvenile offenders."[9] The idea of using mediation in these areas was in part an outgrowth of two earlier developments in the utilization of mediation.[10] First, mediation was used, beginning in the early 1970s, as "an alternative to criminal prosecution" to resolve minor interpersonal disputes between neighbors, acquaintances, co-workers and so on, which could otherwise lead to complaints to local law-enforcement agencies.[11] By 1980, mediation was well-established and widely used in this field; and as those familiar with the field explored potential new applications, minor disputes involving juveniles — within families, schools, and the larger community — seemed particularly good candidates for the mediation process. Second, mediation was used

beginning in the late 1970s as an alternative to civil litigation to resolve contested divorces, especially child custody, visitation and support issues.[12] By the mid-1980s, child custody mediation was also widespread, and the resulting focus on the value of mediation in furthering children's welfare probably contributed to interest in applying mediation to cases involving juvenile disputants.

The extension of mediation to disputes involving juveniles makes good sense in terms of the general theory of mediation and its benefits.[13] Since it is nonadversarial and consensual, mediation can, according to theory, resolve disputes without destroying an important relationship between the disputants. Since it is not bound by formal legal definitions and rules, it can fashion creative and integrative solutions of higher quality than a by-the-rules court decision. And since it allows the parties themselves to find a solution to their problem, mediation educates disputants in self-reliance and responsibility. All three of these objectives — preserving relationships, finding creative solutions, and educating parties in responsibility — are clearly of great importance in parent-child and student-student conflicts.[14] And in "juvenile offender" cases, at least the latter two are very important. Using mediation in these areas makes good sense: it offers a number of very important benefits that are likely to be sacrificed by formal court adjudication in these kinds of disputes.

As a result of such considerations, mediation has grown rapidly during the 1980s in cases involving juvenile disputants.

II. Focus of the Study: The Need for Ethical Standards

The growing use of mediation has given rise to some important, as yet unaddressed, concerns, stemming from the fact that one of mediation's great strengths — its informality — is also a potential weakness.[15] The absence of procedural or substantive rules, in a process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners. In other words, in mediation, the quality of the process depends heavily on the quality of the practitioner. Therefore, mediation requires special attention to qualifications, training and standards of practice for practitioners. There is concern today that such attention has not kept pace with growth in the use of mediation.[16]

This concern is especially significant for mediation involving juveniles. The expansion of this field has meant an influx of new mediators to handle these cases, some with prior mediation experi-

ence in other areas and some with none. Although new mediators undergo training before handling cases, nevertheless, in this area as in most other areas of mediation, neither training nor qualification requirements are standardized according to any generally accepted definition of what constitutes adequate preparation for practice. Equally problematic is the absence of any clear and demanding standards of practice for mediators, both as to quality of performance and, especially, as to ethical conduct.[17] The concern for ethical practice is particularly important where the parties include youth. Ethical mediator conduct is vital not only to protect vulnerable parties, but also to teach important lessons about self-determination, responsibility and respect. Ideally, standards of practice in mediation involving juveniles should be incorporated in training from the earliest point on and should be a clear guide for the practicing mediator on an ongoing basis. Realizing the benefits while avoiding the dangers of mediation involving juveniles requires that mediators be trained in and guided by standards that identify the hazards and point in the right direction.

The literature on mediation involving juveniles has devoted little attention to the question of standards of practice, or to any critical concerns about the mediation process. It has focused almost entirely on describing mediation's potential benefits, its operation, the mechanics of establishing mediation programs, and the results of program evaluations.[18] However, utilizing the process effectively requires a critical perspective as well. This study's focus on concern for ethical practice is intended to add such a perspective, not as an objection to the use of mediation, but as a way of making mediation more effective and beneficial.

This paper starts from the assumption that the establishment of standards of practice, and their incorporation into training and supervision of mediators, is one of the critical policy issues in the juvenile mediation area. In order to establish sound standards, a solid basis of knowledge and theory is necessary. At present, little is known about the ethical dilemmas faced uniquely by mediators handling juvenile cases. Yet without a clear grasp of the relevant questions — the dilemmas mediators face — it is hard to identify good answers in the form of standards of practice. Moreover, information about the dilemmas of juvenile mediation, once it is gathered, needs to be analyzed in light of sound theory founded on the values uniquely served by the mediation process as it functions in youth-oriented contexts. Thus, until research clarifies the special

dilemmas of juvenile mediation and sound theory is applied, it will be difficult to establish adequate training and offer mediators ongoing direction for recognizing and handling the ethical dilemmas presented in their cases. The study summarized in this paper was designed to begin gathering information relevant to these fundamental questions by interviewing mediators regarding ethical dilemmas they encounter in daily practice in juvenile mediation.

III. Context: Parent-Child Mediation Programs

The mediators interviewed for this study worked in the most common type of program providing mediation in cases involving juveniles: parent-child mediation programs.[19]

Parent-child mediation programs generally handle cases referred from Family Court, public schools, or social service agencies.[20] Such programs go by different names in different jurisdictions: PINS (persons in need of supervision) mediation, or CHINS (children), MINS (minors), SINS (students), etc. Some are public programs, others private non-profit. Most are publicly funded. The cases handled involve parent-child conflicts which have led to court, school, or agency involvement, such as behavioral problems, truancy, neglect, or fighting. Families are sometimes referred to mediation as a voluntary matter, and sometimes ordered to mediation, depending on the referring agency involved and the nature of the case. Families referred to parent-child mediation are frequently receiving other social services as well. The mediators in parent-child mediation programs include both trained volunteers and paid program staff. In this study, the mediators interviewed worked in one of several programs, and included both volunteers and professional staff.

Two other types of programs providing mediation in cases involving juveniles are *schools mediation programs* for student conflicts and *"juvenile offender" mediation programs.* Schools mediation programs generally operate within individual elementary or secondary schools, and handle student conflicts, especially minor fights and disruptions, which are referred to mediation by teachers or administrators as an alternative to disciplinary action.[21] In juvenile offender mediation, cases are referred to mediation from local law enforcement agencies, including police, prosecutors and criminal courts, and the cases generally involve interpersonal disputes which could lead or have already led to criminal charges against a juvenile.[22]

This study focused on parent-child mediation, because it is probably the most significant and widely operating area of mediation involving juveniles. There are differences between parent-child

mediation and the other two areas mentioned, as well as variations in particular parent-child mediation programs. Nevertheless, the mediators interviewed in this study work in programs that are typical, in most respects, of other parent-child mediation programs; and the findings described below suggest that issues raised by the parent-child mediators interviewed in this study present basic questions relevant to mediation involving juveniles generally.[23]

IV. Findings of the Study: Dilemmas Encountered in Juvenile Mediation

A. *Methodology, Definitions, and Qualifications*

Interviews with mediators revealed several important types of dilemmas that cause them concern. They are described in this part of the paper, with specific illustrations wherever possible. The aim is to indicate as clearly and concretely as possible what the mediators' concerns and questions were, so this information can help clarify what kind of training and guidance mediators need in juvenile mediation.

The method for gathering information was straightforward and simple. Mediators were asked to describe situations they had encountered in practice which, in their view, presented an ethical dilemma regarding the proper course of action for them to take as mediator. They were then asked to explain why they viewed the situation as presenting a dilemma, i.e., the nature of the dilemma presented. Mediators were asked to tell and explain stories from their own experiences in practice that involved encountering ethical dilemmas. The findings are presented here so as to preserve, as much as possible, the mediators' own sense of the stories they told. Each of the dilemmas presented usually represents the voices of several mediators: many mediators encountered the same questions in slightly different factual settings.

In order to allow mediators the greatest latitude in responding, and thus elicit as much information as possible, the study intentionally avoided any narrow or formal definition of the central concept, "ethical dilemma." Instead, in framing the question, the interview defined "ethical dilemma" only as:

> a situation in which you felt some serious concern about whether it was *proper* for you as a mediator to take a certain course of action, i.e., where you were unsure what was the *right and proper* thing for you as mediator to do.

To clarify the point for mediators, the interviewer distinguished

between a "skills dilemma," where the mediator is unsure of *how* to effectuate a chosen course of action, and an "ethical dilemma," where the mediator knows how to effectuate a course of action but is unsure of *whether it is proper* to do so at all. The reason for employing this broad definition of "ethical dilemma" relates directly to the purpose behind the study — the development of training and standards of practice for mediators. If training and standards are to be meaningful and helpful, they must provide guidance in situations where mediators themselves feel the need for guidance. The purpose of this study was to identify such situations, so any narrow or formal definition of "ethical dilemma" would have been counterproductive. The same is true for the eventual development of standards of practice: defining "good practice" formally and narrowly will fail to provide mediators guidance where they themselves feel the need for it.[24] Therefore, wherever the term "ethical dilemma" is used in this report, it has the broad meaning indicated here.

When mediators were asked to explain the nature of the dilemmas they identified, their explanations generally followed a similar form. They pointed out the possible responses to the situation, and explained how each response would preserve some important value but undermine another. In other words, they emphasized the fact that there was an inevitable value conflict in any response to the situation and defined the dilemma in terms of the particular values in conflict. This pattern explains the form in which the findings are reported below, which directly corresponds to the way mediators responded in the interviews: the situation is described, alternative responses are imagined, value consequences of each response are pointed out, and the dilemma becomes apparent and is summarized in a specific question regarding how to proceed.

The findings reported here are not offered as the final word on the dilemmas of juvenile mediation, but rather as the beginning point for a more explicit discussion. Therefore, apart from organizing the questions raised by mediators into inductively-derived categories, the findings simply present the questions as the mediators themselves raised them, using concrete examples from the interviews to illustrate each type of dilemma. The dilemma categories were arrived at inductively by looking for similarities and differences in the situations described. While the categories have some face validity, there are points of overlap or blurring. Again, this is offered as a point of departure for further study, not a final model. The aim is to indicate the range and character of dilemmas

encountered by practicing mediators, and therefore the dimensions of their need for training and guidance in this area. Where analysis is offered, it is intended to be suggestive rather than conclusive. Therefore, the primary character of what follows is descriptive and evocative rather than analytical, because description must precede analysis.

B. ***Major Types of Dilemmas Reported in Parent-Child Mediation***

1. *Confidentiality and reporting.* Mediators in parent-child cases learn sensitive information from both parents and children. Some information may pertain to threats to the child's safety or well being, and laws may require reporting in such cases. But that is not the only kind of sensitive information revealed, and, in any event, the laws don't resolve all of the problems. *Mediators are left with questions regarding conflicts between their obligation to maintain confidences and their obligation to disclose or report certain kinds of information.*

(a) *Allegations concerning violence or other threats to the child's safety are sometimes made in mediation sessions.* Despite laws requiring reporting of allegations of abuse, mediators still face dilemmas in this situation, on a few different levels.

Example: In a private caucus, the child expresses fear of violence by her father (none has yet occurred, and the father is out of the home now, after the parents' divorce); but she doesn't *want* the mediator to tell anyone, and says that she felt betrayed when a counselor reported fears she had confided in the past. If the mediator doesn't report, she risks the child's safety (and may be in violation of the law); but if she does report, she betrays the child's confidence and risks damaging her already fragile capacity to trust. Should she report or not?

An additional dimension of the problem is that the mother, when asked about the child's fears, says they are exaggerated because the father is simply a threatener, but never acts on his threats. For the mediator, when is the situation serious enough to warrant reporting? If she reports potential abuse, it may halt the mediation and sacrifice its potential benefit for what may be a frivolous allegation. If she doesn't report, and the allegation proves founded, she risks the child's safety. Since she doesn't have a great deal of information on the family (this is mediation, not counselling — *see* Section 2), should she always err on the safe side and report? In other words, the law may require reporting of abuse, but the mediator is left to judge what does and doesn't constitute a "real and

substantial" allegation. In the grey area, what should she do?

(b) Even where nothing is said in the session that requires the mediator to report, sometimes *mediators receive requests from outside agencies to disclose information learned in mediation.*

Example: School officials call to ask the mediator to obtain certain information the school needs, e.g., who has legal custody, in order to provide better services to the child. Private or agency counsellors may call asking for the same kind of information. To respond to such requests would breach the confidentiality of mediation, but providing it could help the child get better services. Should the mediator always refuse?

2. *Separating mediation from counselling.* Whether they have a counselling background or not, *mediators are concerned about the line between mediating and counselling and the limits of their role as mediators rather than counsellors.* They feel a real tension in hewing to what they see as the mediation side of the line. In this area, there are two major dilemmas they experience.

(a) *The "tip of the iceberg/Pandora's box" problem* arises from the fact that *families in mediation often have profound problems calling for immediate help,* which mediators perceive but feel that they cannot effectively treat.

Example: The parties raise issues relating to destructive family emotional patterns rather than specific behaviors, or the mediator can see such patterns in the sessions although the parties themselves do not. How far should the mediator go in raising and dealing with such issues? "Mediation is not counselling," say the mediators, and "the role of the mediator is not to delve, probe or dredge up" these dimensions: "we can only deal with the tip of the iceberg." On the other hand, they clearly feel a tension. If the mediator avoids these issues and simply refers the parties to counselling, the risk is great that they simply won't go, so there will be no help on these issues at all unless in mediation. But, if the mediator addresses them, the time and depth limits of mediation could result in doing more harm than good, opening up "Pandora's box" without being able to follow through. What should the mediator do?

(b) A second set of problems in sticking to mediation rather than counselling involves several *questions that arise regarding resource and information giving.* The parties in parent-child mediation often lack basic information without which the mediation process itself is much more difficult. But there are real problems if the mediator acts as the source of such information. There are several dimensions to the problem here.

(i) *The parties (one or both) lack information* on a subject crucial to understanding and resolving the specific problem that brought them to mediation, such as the nature of adolescence, basic parenting and communications skills, or the availability of community resources. The mediator knows the information, but is not sure he should be the one to provide it: "I am not a parenting instructor;" "To a point we are resource people, but it's not really our role;" and "My job is *not* to stick my two cents in." The mediator feels that once he begins to act as "information expert" for the parties, it is difficult to get out of that role, and he becomes the "expert" problem-solver rather than a facilitator helping the parties find their *own* solutions. There is a tension which is difficult to resolve. If the mediator provides information, he risks confusing his role, deflecting time and energy from mediation to what is more like counselling, and becoming more directive than it is proper for him to be. But if he doesn't provide the information, the parties will lack tools they need to participate effectively in, and carry out the results of, the mediation. What should he do?

(ii) Even if the mediator decides to provide information, *the kind of information relevant to these cases is often "loaded" or "one-sided" information.* That is, it will automatically be perceived as favoring one side or the other, so the mediator will look non-neutral in providing it.

Example: If the mediator informs the parent that certain behavior is "normal for an adolescent," or that the child's well-being depends upon structure in the environment, or that body language can convey hostility and provoke reactions, all these may be seen as advocacy for the child. Other information may work the other way. So, if the mediator gives the information, she risks alienating one party or the other; but if she withholds it, the parties lack crucial tools to solve their problems.

(iii) Sometimes, even if it is not one-sided, *information can be inherently directive or controlling.* That is, the information itself, once given, shades or structures the parties' view of the problem, and predetermines the outcome. This is especially true for "expert information," which is very difficult for lay people to discount or ignore.

Example: If the mediator conveys the "experts' view" on child development or family structure, the parties may feel constrained to follow it. But the mediation process is supposed to "empower" them to construct their own solutions. The same is true for information

about "legal rights": once given, the information tends to direct the outcome regardless of other concerns. What does the mediator do? If she provides the information, the parties may be unduly swayed by it. If she does not, the parties will lack important information for deciding what to do.

(iv) The problem is worse, and combines all of the above, if *the parties specifically ask the mediator for the information.*

Example: In one case, a mother and daughter disagreed about whether the daughter should have an abortion. The mother asserted she could take her daughter to court and force her to, and asked the mediator, "Isn't that right?" Both parties looked to the mediator for an answer. In such a situation, both the one-sided information and directiveness problems are magnified. Any answer will seem to take sides and will tend to confirm the importance of the law (or the expert opinion) as the criterion for resolving the disagreement. But deflecting the question (e.g., by asking about the concerns behind it) unfairly ignores the parties' interest in the information and may generate resentment (and leave them to less reliable information sources).

3. *Directiveness.* According to most accepted theory, the mediation process is supposed to provide parties the opportunity to develop their own solutions to a problem.[25] The mediator helps with and facilitates the parties' problem solving efforts, but she is not supposed to be directive or controlling in any way. That is a key aspect of her impartiality, which permits the process to educate and "empower" the parties rather than simply providing an externally-imposed solution to the problem. Despite this ethic of empowerment, many parent-child mediators experience great tension between the dictates of this principle and their desire to intervene more directively and substantively in certain cases. *The question is when, if ever, the mediator can and should abandon the nonjudgmental posture and be more directive.*

(a) This question sometimes arises because *the parties want the mediator to provide solutions to the problems presented in the case.*

Example: The parties come in expecting the mediator to provide a solution to their problem; they don't want to have to work out a solution themselves. Or, the parties are floundering and can't see a solution; but the mediator sees one that is quite obvious to her. If, in either case, the mediator simply lays out the solution, the parties are satisfied, their problem is actually ameliorated, and time is saved on

all sides. However, the opportunity for teaching the parties how to solve problems for themselves — which many consider especially important in intra-family mediation — is lost. If the mediator holds back and allows (and helps) the parties to struggle themselves to find a solution, the educational experience is preserved, but the process may be more lengthy and frustrating and may not produce the best possible solution. Most mediators struggle to balance these concerns in deciding whether, and when, to be directive in providing solutions.

(b) A different aspect of the problem is presented when *the parties have found and agreed on a solution, but the mediator believes it is a poor response to the problem.*

Example: The original problem is that the child, aged 13, is staying out until 3 or 4 a.m. almost every night, thus finding it difficult to get up for school, etc. The parties, after discussion, agree that the child can stay out until 2 a.m., but no later. Even after the mediator raises questions with the parties about whether this will really solve the problem, they are agreed upon this. The mediator believes, based on personal and/or professional judgment, that this is a poor solution. Should he attempt to persuade the parties away from their agreement and towards a "better" one? Most parent-child mediators say they would not do so, no matter what the parties' agreement, unless it involved some form of illegal neglect — for example, an agreement to let the child stay out of school to work.

(c) A third, and perhaps the most difficult, version of the directiveness dilemma is closely connected to the issue of impartiality and power imbalances, discussed in Section 4, below. It arises when *the mediator finds the positions or demands of a "stronger" party extremely unfair to a "weaker" party, to the point where any agreement made on these terms would be oppressive or exploitative.* Usually in these cases, the mediator sees the parent as the stronger party, the child as the weaker. Often, the child, though "weaker," is still resisting the parents' demands, so the problem is not to avoid an unfair agreement, but rather to avoid an impasse due to the parents' "extreme" positions. Sometimes, however, the child seems ready to "cave in" and agree to an oppressive solution. Either way, the concern for the mediator is what to do about the "unfair" demands. More specifically, the concern is that, apart from simply raising questions about the workability, acceptability, etc., of the stronger party's positions, the mediator feels impelled to do more: to challenge these positions in non-neutral terms that verge on advocacy

for the other side, to push for "fairer" terms of agreement, and even to veto "unfair" agreements. But such measures clearly abandon the nondirective posture and take the solution out of the parties' hands.

Example: The cases reported here involve parents who, as characterized by the mediator, refuse to take normal adult responsibilities in the home, want to exploit the child to take care of chores well beyond their fair share, want to set up harsh and unreasonable (if not abusive) disciplinary measures, insist on the child's adhering to extremely rigid and confining standards of behavior in and outside of the home, etc. The result is intractable conflict, if not oppression, and the mediator sees the parents' "extreme and unfair" position as the source of the problem. Often there is a cultural element to the problem, with the parents' position rooted in a traditional cultural or ethnic background that the child is moving away from and implicitly challenging. In one case, for example, where the family was from a non-Western cultural background, the parents wanted the 14-year-old daughter to perform numerous cleaning and child-care duties, to have no social contact with boys, to wear no make-up or "immodest" clothing, and to agree to an eventual arranged marriage approved by the parents. The mediator saw these positions, taken together, as extreme and oppressive, and found it difficult not to argue as much on the child's behalf.

The problem experienced by mediators in these situations is that, despite the ethic of nondirectiveness, the mediator is strongly inclined to see the parents' position as extreme, rigid, unfair and *wrong*. The mediator, therefore, finds it difficult to refrain from pushing and challenging the parent in ways that border on (or merge into) advocacy for the child, in order to direct the case to a fairer and more reasonable solution.[26] Mediators explain that this problem is especially difficult in parent-child mediation, both because people (including mediators) tend to have particularly strong personal views about the parent-child relationship, and because the perceived power imbalance in that relationship makes special solicitude for the child a powerful and natural reaction.

The resulting problem is felt very sharply by the mediator. If she gives expression to her views (directly or not), she risks alienating the parents, losing any appearance of impartiality, and depriving the parties themselves of the opportunity to find a self-determined solution (whether or not it appears good to the mediator). If she suppresses her views, however, she allows and becomes party to what she sees as the oppression or exploitation of the child

by the parent. (Even if she tries to do this, of course, she may be so outraged by the parents' position that her impartiality is irreparably lost. *See* Section 4, below.) To paraphrase one mediator, most people have the strongest possible feelings about the parent-child relationship, so trying to remain nondirective and impartial as a mediator in these cases sometimes seems impossible — and indeed wrong!

4. *Impartiality.* As just discussed, the mediator's reactions to parties' positions can raise concerns not only about how to refrain from directiveness, but how — or whether — to remain impartial altogether. *There are several aspects of parent-child mediation that make the issue of impartiality a matter of extra concern for parent-child mediators.*

(a) First, *mediators may experience powerful reactions to one party's positions,* as discussed above, and this may lead not only to directiveness on the mediator's part but also to real antipathy or bias toward that party.

Example: The case involves a family with a history of child abuse by the father, already reported and under investigation. The father is still in the home, and parents and child are in mediation regarding other problems in the home. The mediator, aware of the past history of abuse, finds it difficult not to regard the father with suspicion and contempt in the mediation session, even though abuse is not an issue here. In such a case, or in one like that of the 14-year-old girl described above where the parents' positions seem outrageous to the mediator, should the mediator simply withdraw from the case? How does the mediator know when to do so, i.e., when his reaction has become too strong to continue? Should he automatically withdraw if he has any questions whatsoever about his reaction? Or, to the contrary, should the mediator, in some circumstances, abandon his impartiality and move to some sort of advocacy?

(b) Other problems of impartiality arise not because of specific features of the case, but because of *the structure of both parent-child mediation and the parent-child relationship itself.*

(i) The structure of mediation in this context automatically puts the mediator's impartiality in question, because the parties are child and adult(s), and the mediator is always an adult. Thus, *the appearance of alliance between mediator and parent(s), as adults, must always be overcome* to engage the child and gain her trust. However, if the mediator works to engage the child, he may alienate the parent(s). Thus the difficulty of conveying impartiality is partic-

ularly great from the beginning of the process, the mediator must take active steps to do so, and whatever the mediator does to engender trust with one party is highly likely to make the other party suspicious.

(ii) The likelihood that *the child has less capacity and power than the parents* leads mediators to feel obliged, at a minimum, to be especially careful to check on the child's understanding and consent at all stages. In some cases, like those above in Section 3, this imbalance of power and the resultant concerns for unfairness and oppression lead mediators to go much further and take measures that may seem like (or may actually be) advocacy for the child. However, showing special solicitude for the child is likely, in greater or lesser degree, to lead the parents to believe the mediator is biased against them. Indeed, special concern for the child may *in fact* bias the mediator against the parents.

(iii) The typical structure of family life itself, in which *most parents presume that a certain degree of parental authority is appropriate,* may make parents very sensitive to questions that are seen as challenging parental authority. Even where the mediator has no major concerns for unfairness or balance, she may still have to raise some such questions in order to explore the problem and potential solutions. No matter how carefully such questions are put, they may provoke an impression on the parents' part of mediator bias.

The sensitivities typically involved on *both* sides of the parent-child relationship put a special and constant burden on the mediator, since some of his necessary actions will almost inevitably create suspicions of partiality toward one side or the other. This is especially likely to occur where the mediator feels it necessary to respond to a perceived unfair imbalance of power.

5. *Consent.* Since every parent-child mediation involves a child, *it is imperative, but also often difficult, to be certain the child fully understands what is going on and whatever agreements are made.* Without understanding and consent the process is meaningless or oppressive, but sometimes it is difficult to determine if the child understands and consents.

Example: The child, throughout the mediation, "yeses you to death." That is, the child goes along with everything the parents or mediator say, always agreeing to whatever is proposed. The mediator may wonder whether the child is intimidated or incompetent, or perhaps manipulating the process to get it over with. Or is the con-

sent real? If the mediator suspects that the child does not really understand and consent, but can find no specific evidence of a problem, what should she do? And in giving the child special attention to confirm understanding and consent, will she risk alienating the parents?

6. *Detrimental reliance.* Parent-child mediators are often bothered by the fact that a family's problems are so manifold and profound that *conducting a mediation session at all, in certain circumstances, seems to be an exercise not only in futility, but in deception.*

Example: The family coming to mediation involves an unemployed single parent with several children and a truant child who may be involved with drugs and alcohol, living in substandard and deplorable conditions. The mediation involves the child's behavior at home and in failing to go to school. Some mediators are concerned that conducting a mediation in circumstances like these gives the parties the impression that something significant has been accomplished when they are finished, whereas in truth, their real problems remain essentially unchanged. They worry that providing mediation creates an illusion of relief that discourages families from seeking desperately needed help for more serious problems, e.g., drug treatment or counselling. Thus the parties rely, to their great detriment, on the mediation having helped them and refrain from getting the treatment they really need. They may wind up worse off than if no mediation had been conducted at all. Should a mediator refuse to handle a case for this reason? Few mediators say they would withhold services on this basis, except perhaps in cases of violence or abuse. But many experience this tension on a regular basis.

V. Analysis: The Special Dimensions of Juvenile Mediation Dilemmas

The primary point of this report is description and not analysis. However, some observations can be made regarding patterns in the above findings, and these observations can help provide the basis for some preliminary conclusions (*see* Part VI, below).

Despite differences in the specific shape of the dilemmas presented, the same general categories — confidentiality, counselling, directiveness, etc. — may be common to many kinds of mediation.[27] However, the findings of this study suggest that the specific dilemmas presented in juvenile mediation differ, in kind and intensity, from those presented both by mediation in other contexts and by juvenile service professions of other kinds, like counselling

or judicial intervention. The special character of juvenile mediation dilemmas can be seen in each of the general categories of dilemmas described in Part IV, above.

A. The *confidentiality dilemma* is probably common to all forms of mediation.[28] However, it is particularly tough in juvenile mediation because two factors are present that pull mediators very strongly in opposite directions. Because one party is a child or youth especially vulnerable to risk of harm from adults, it is more compelling to breach confidentiality at times and involve appropriate authorities to protect the child. On the other hand, because kids are highly sensitive about trust and betrayal, and because mediators encourage parties to trust and level with them, disclosing a child's confidence could be experienced as a serious betrayal, and this could be especially damaging to the child's fragile and perhaps already compromised ability to trust. Mediation with juveniles involves great tension between the desire to protect and the desire to maintain and nurture trust — two crucial values in dealing with children — and this tension is often very hard to resolve. Thus, while all mediators may face confidentiality dilemmas, the intense kind of confidentiality dilemma faced in juvenile mediation is probably unique in mediation. It may be closer to that faced by child welfare workers and counselors than to that faced by other mediators.

B. The *mediation/counselling dilemma* is also particularly strong in juvenile mediation, in two respects. First, the gravity and urgency of problems that regularly surface in parent-child mediation — addiction, joblessness, illiteracy, emotional disturbance, juvenile pregnancy, etc. — make the need for on-the-spot counselling very strongly felt, even if mediators know that it is difficult and highly risky to do it.[29] Second, while parties in many kinds of mediation often lack important information which the mediator might be inclined or asked to provide, the situation in parent-child mediation is particularly intense. Families that come to mediation, according to reports, are often profoundly ignorant of many crucial resources, and the costs of this ignorance are high in terms of family disruption and dysfunction. The temptation for the mediator to become an information expert is very strong. Most parent-child mediators say they resist this temptation, as well as the urge to counsel. But they still feel the dilemma very strongly.

C. The *directiveness dilemma* is also common to all mediation contexts, and has been studied more than the other kinds of di-

lemmas reported here.[30] Nevertheless, it may be especially troubling in juvenile mediation.

Parent-child mediators worry that the potential for really damaging solutions is particularly great in these cases because of imbalances of power and the child's vulnerability. Furthermore, many mediators hold strong personal views of "right and wrong" in parent-child relations which they find especially difficult to disregard. Therefore, despite the "educational" value of nondirectiveness — which parent-child mediators also strongly support — this combination of factors seems to make it more difficult for mediators in this context to decide whether or not to engage in directive behavior. The mediator's dilemma in this context is probably closer to that faced by other family service professionals than to that faced by other mediators. It is interesting to note that there seems to be a difference in this regard between volunteer or part-time mediators, and professional "staff" mediators who mediate more often. The former are much more troubled by the conflict involved in this dilemma; the latter are more willing to be nondirective no matter what.

It is noteworthy that the parent-child mediators seemed to assume that mediator directiveness (and the related tendency to move from impartiality to advocacy) would work to favor the child. This is what led them to see problems in the nondirective posture. The presentation of the findings in Part IV reflected this assumption without comment. However, it is important here to point out its weaknesses.

Directiveness may not necessarily favor or help the child in all cases. Mediators may find the child's positions outrageous and unfair to the parents, or they may strongly share the parents' views on responsibility, authority, etc.; or they may have a strong negative reaction to the child (rather than the parent), personally. In such circumstances, the mediator's departure from nondirectiveness and impartiality would clearly *disfavor* the child. In the privacy of the mediation process, this could be a real problem for children.

It is thus possible that even though mediators worry that nondirectiveness may leave children vulnerable, directiveness by mediators might, on the whole, make them even worse off.[31] This possibility should certainly be weighed against the unproven assumption that mediator directiveness would generally favor children. And in the light of this analysis, the tendency noted above of volunteer mediators to consider directiveness more acceptable

than regular staff mediators suggests the need for careful training and supervision regarding this dilemma, a point discussed in Part VI, below.

D. The *impartiality dilemma* is more complicated and intense in parent-child mediation than in other forms of mediation.[32] The structure of the parties' relationship itself routinely presents impartiality problems, as discussed earlier, in a way that simply doesn't occur in other kinds of cases.

E. The *"detrimental reliance" dilemma* is also a concern of mediators in many contexts. Community mediators, for example, often worry about the potentially harmful consequences of failed mediations. However, the dilemma is particularly troubling in the juvenile mediation context, if only because the disputes here involve juvenile parties who are more likely both to rely naively on the mediation process and to suffer harm if the process goes awry.

Beyond this immediate concern, however, the dilemma here is related to a larger — and quite striking — concern raised by a few mediators. One parent-child mediator pointed out that we know very little at present about the long-term effects of mediation on the families who experience it, and he raised several serious questions related to this point. For example, does introducing a bargaining model into the hierarchical structure of family relations help or hurt families in distress? Does introducing a model of "behavior by agreement" into the informal structure of family interaction formalize relationships, and is this beneficial or harmful to family welfare? Does mediation itself rest on cultural values antithetical to the cultural background of some families, and if it does, is using mediation tantamount to the imposition of foreign values on those families?

The general suggestion of mediators raising these larger concerns was, if we lack the answers to these kinds of questions, we must regard mediation as a kind of experimental procedure. And we must be even more concerned with the ethics of using this procedure — both with using it at all, and with how it is practiced when it is used.

F. *In sum,* the juvenile mediation dilemmas reported above are similar in general character to those faced by mediators in other contexts. However, they have unique dimensions as well and tend to be more intense and difficult than dilemmas presented in other contexts. This uniqueness and intensity arises from the nature of the family structure and from the fact that juveniles are involved. First, the involvement of juveniles as parties means *both* greater

vulnerability *and* greater potential for growth and development; therefore, the tension between protective values and educational values is at its most intense. Second, while family is a structure in which children generally learn within frameworks of authority, mediation is a collaborative and nonauthoritative process; therefore, the tension between self-determination and authority is very intense when mediation is used in the juvenile context.

More particular factors also complicate the picture, as discussed above: the great need of children for both protection and the ability to trust; the great need of families for not only long-term problem solving skills but short-term solutions to problems; the greater sensitivity of mediators to their personal values when children are involved; the greater sensitivity of both sides to these conflicts — parents and children — to impressions of partiality, and hence the greater risk of alienation. The very sensitivity of context that makes mediation a potentially valuable instrument for helping in these cases also makes it especially difficult to use that instrument in a responsible and appropriate manner. This study shows that mediators are struggling to do so; but they need guidance and direction.

VI. Conclusion: Policy Implications

The primary purpose of this study was to identify the range of ethical dilemmas, broadly defined, on which juvenile mediators need guidance from training and standards of practice. The findings and analysis presented above indicate clearly that mediators in this context face numerous and intense dilemmas, and that they themselves feel the need for guidance very keenly. How to respond to this need is the key policy question raised by this study. While a complete answer is beyond the scope of this study, the final part of this report offers some preliminary observations as the basis for further study and discussion.

A. *Encouragement and caution.* The findings of this study give cause for both encouragement and caution regarding the use of mediation in disputes involving juveniles. As noted above, mediation in this context seems to offer many potential benefits over more formalized processes — preserving relationships, providing better solutions to conflicts, educating youth and families in dispute resolution skills, and thus fostering self-reliance and responsibility. However, in order to realize these benefits, while avoiding the risks of abuse inherent in such an informal process, it is crucial that me-

diators be sensitive to what the risks are and committed to avoiding them. The most encouraging part of the findings of this study is that they provide strong evidence of just such sensitivity.

Recent criticism of mediation, taken as a whole, could give the impression that mediators are a cadre of insensitive, inept and/or oppressive practitioners, consciously or unconsciously manipulating disputants into solutions — often unfair or slapdash — of the mediator's own design.[33] If this were true, there would be very good reason to fear and avoid mediation, especially in the juvenile context. However, our findings give no support to this view of mediation practitioners. On the contrary, they suggest that mediators are highly concerned about and committed to responsible and ethical practice.

All of the dilemmas described in this report, including the often subtle explanations of their conflicting dimensions, were identified by practicing mediators themselves. These mediators are obviously concerned about, and sensitive to, the pitfalls of mediation. The contents of this report are thus strong evidence that mediators are in fact concerned about good practice, sensitive to what the dilemmas are, and anxious to resolve them responsibly. Of course, they may need guidance to do so. But they themselves are describing the problems and asking for that guidance. This is far from a picture of an irresponsible and abusive profession. Indeed, it suggests the very opposite, and that is cause for encouragement.

Moreover, the findings reported here show that mediators' concerns are not only for narrowly defined ethical dilemmas such as conflict of interest, intimacy with clients, etc. Mediators' concerns also include broader "value dilemmas" involving hard conflicts between different values and objectives at stake in mediation. Many of the dilemmas they describe go to the central question of what their job or role is and what they should consider the primary purpose of the mediation process when different objectives clash. In short, their concern for good practice is not only very real, but quite broadly defined. They don't just want to avoid gross abuses; they want to practice good mediation.[34] They recognize their need for guidance in order to do this. Here, too, the picture described by these findings is encouraging.

At the same time, the findings are cause for concern and caution. For mediators' interest in good practice, however encouraging, will not be enough by itself to guarantee the responsible handling of the numerous and difficult dilemmas described above. The

mediators know this. They need guidance: training, standards, supervision, etc. And that guidance must come from policymakers — at the program level, the state level, the national level. The real cause for concern is not what mediators are doing, but what policymakers are doing — or rather, not doing.

From the findings reported and analyzed above, it should be very clear that juvenile mediators are confronted with many quite difficult dilemmas in their cases. No one could claim that the appropriate solutions to these dilemmas are easy or self-evident. No one could deny that, if improperly handled, they can lead to serious harms. Yet little attention is given to addressing them at the program or policy level. Indeed, little attention has been given even to *identifying* them, as was the primary purpose of this study.

This is the caution: if identifying and solving problems of the subtlety, complexity and seriousness of those described above is left to the ingenuity and conscience of the individual mediator, without programmatic guidance, there is serious cause for concern. The problem is not with the mediators, or the mediation process; it is with those responsible for the guidance of both. The problem is the confusion, if not silence, that answers concerned mediators when they ask how to deal with the dilemmas they face. The caution is that if mediation involving juveniles is to continue and develop positively, direction must replace this confusion. The need for guidance must be addressed. The observations offered below are meant to provoke discussion on what form that guidance should take.

B. *Structural measures.* Some of the dilemmas described above can be, and some are currently being, addressed by structural measures. For example, the problem of mediators being tempted to act as counsellors and resource experts can be addressed by linking the mediation process to other services, as is frequently done now in parent-child mediation programs.[35] In those programs, the process is in effect divided or bifurcated, and staged, so that families receive informational counselling *before* mediation, by intake and education workers, and, if necessary, therapeutic counselling *after* mediation, by counselling professionals. The mediator is thus freed of the obligation, and the temptation, to do these other jobs, and can concentrate on the mediation role and task without conflict. This kind of bifurcation and staging of the process seems to be a very effective and desirable way to deal with some of the problems identified. Of course, it means establishing the entire network of services necessary, and this raises both administrative and fiscal issues. All structural solutions, however, are likely to raise such issues.

C. *Training and standards.* Other dilemmas identified above have no easy structural solution. The directiveness dilemma is perhaps the most important in this group. The temptation mediators face to be directive cannot be avoided or eliminated by arranging the process in a certain way. Nevertheless, as discussed at length above, it is a serious problem. If mediators give in to this temptation and act in a highly directive way, then they become de-facto arbitrators or judges, directing the parties to a certain outcome of their own choosing and design. As one person noted, this could turn mediation into a rough reincarnation of the old Juvenile Courts, where judges (advised by social workers) imposed solutions on families and children without the niceties of legal procedure or representation.[36] Moreover, directiveness undermines some of the very benefits that make mediation valuable in the first place — especially the potential for educating parties in dispute resolution skills and responsibility. Finally, directiveness may often — perhaps usually — work to the detriment rather than the benefit of vulnerable juveniles.

There is no easy way to avoid these dangers, or those associated with other dilemmas described above, such as the confidentiality and impartiality dilemmas. The best prospect, however, would probably be careful and systematic training of mediators, coupled with some system of supervision or monitoring. The training should be designed to sensitize mediators to the existence and importance of the kinds of dilemmas identified above, not only in general concept but in very concrete terms. Training should confront mediators with specific dilemma situations, like the illustrations given in this report. It should help mediators to understand *why* each situation presents a dilemma, and get them to struggle to find and justify a solution themselves. This kind of training in the ethical dimensions of mediation practice is very rare at present, if it exists at all.[37] Yet it is probably the best strategy for helping mediators to achieve the standard of practice they themselves want to meet. Of course, developing and implementing such training would add to the cost of mediation training. However, the investment is surely justified to improve the chances that mediation as a whole produces the benefits it promises rather than the dangers it risks.

Beyond presenting and analyzing the dilemmas, training must provide some answers. That is what mediators want and need, and what they deserve. Therefore, it should also delineate for mediators

what are considered appropriate and inappropriate responses to the dilemmas, i.e., give them a set of standards and guidelines to follow, not only for training but for ongoing practice. This means that such guidelines must themselves be formulated, which is another essential step that must be taken. The mediators interviewed here were concerned about ethical dilemmas broadly defined, and therefore the kind of standards needed are standards that address the many value conflicts inherently posed by mediation in these cases. Their point should be not just to prevent gross abuse, but to provide *guidance* to mediators about what mediation *is*.

Those guidelines should be clear and consistent and should reflect the reasons supporting the use of mediation in these cases in the first place: to provide families with the opportunity to try to find solutions to their own problems, without imposition of others' values, and at the same time to learn problem-solving skills that they can use on an ongoing basis. Of the various suggestions made here, the development of standards probably involves the least expense in fiscal terms, but the greatest effort. Yet it is an important foundation for every other step.[38]

D. *Research.* Finally, it is important to recall the comment of several mediators that mediation is in some ways like an experimental process. The current literature on mediation involving juveniles is a largely uncritical literature. It raises few if any of the kinds of questions that practicing juvenile mediators obviously find problematic. It presents little research, or even plans for research, to examine how different mediators answer those questions, and to assess the impact of mediation not only on individual disputants, but on the structure and welfare of the family. Another crucial suggestion is that we continue and expand research to study the operation of mediation and to evaluate its impact on families, both in the short and long run.[39]

E. *Conclusion.* Mediation involving juveniles continues to present great promise. However, much remains to be done at both the practical and the policy level to ensure that it has a beneficial impact not only in theory but in fact. This study shows that practicing mediators are already aware of the kinds of problems they face and the kinds of guidance they need. But they can only do so much. It is time for policymakers to pay more attention to the dilemmas mediators face, and to provide the help and guidance they need.

Endnotes

[1] Assoc. Professor of Law, B.A., Harvard Univ., 1969; J.D., Stanford Law School, 1974. The author thanks the Center for the Study of Youth Policy Judicial Council, and its Director, Frank Orlando, as well as the Hofstra Law School, for their support of this study. Research assistance was provided by Michael Bogin, Lisa Elovich, and George Pucci. Special thanks and acknowledgment go to the mediators who were interviewed for the study (and their agencies, *see infra* note 19), whose cooperation was so enthusiastic, and whose questions and comments form the most important part of this report.

[2] *See* Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L.REV. 1, 1-10 (1987); Sander, *Alternative Methods of Dispute Resolution: an Overview*, 37 U. FLA. L.REV. 1, 1-3 (1985).

[3] *See* AMERICAN BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION: A PRIMER (1987); RISKIN & WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 2-6 (1987).

[4] *See* Brunet, *supra* note 2, at 11-14.

[5] *See* GOLDBERG, GREEN & SANDER, DISPUTE RESOLUTION 311-436 (1985); Sander, *supra* note 2, at 3-11.

[6] *See* AMERICAN BAR ASS'N, *supra* note 3, at 1-2; FOLBERG & TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7-8 (1984); Stulberg, *The Theory and Practice of Mediation: a Reply to Professor Susskind*, 6 VT. L.REV. 85, 88 (1981).

[7] *See, e.g.*, E. VORENBERG, A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES (Amer. Bar Ass'n 1982); Phear, *Parent-Child Mediation: Four States, Four Models*, MEDIATION Q., Mar. 1985, at 35.

[8] *See, e.g.*, AMERICAN BAR ASS'N, EDUCATION AND MEDIATION: EXPLORING THE ALTERNATIVES (1988).

[9] *See, e.g.*, E. VORENBERG, *supra* note 7; Umbreit, *Mediation of Victim-Offender Conflict*, 1988 J. DISPUTE RESOLUTION 86.

[10] *See* Maxwell, *Mediation in the Schools*, 7 MEDIATION Q. 149, 149-50 (1989); Phear, *supra* note 7, at 36-37. Other factors also contributed to the development of mediation involving juveniles. In the schools, earlier steps in developing curricula and teaching materials for "peace and conflict resolution" courses naturally led to interest in mediation. *See* Maxwell, *supra*. In the parent-child area, one influential model was the Scottish Children's Hearings Sys-

tem. *See* Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 HARV. J.L. & PUB. POL. 153 (1982). Beyond the areas mentioned in the text, mediation has also been used in other areas involving children, including, for example, child welfare or protection cases. *See, e.g.*, Pearson, Thoennes, Mayer & Golton, *Mediation of Child Welfare Cases*, 20 FAM. L.Q. 303 (1986).

[11] *See* GOLDBERG, GREEN & SANDER, *supra* note 5, at 347-49; McGILLIS & MULLEN, NEIGHBORHOOD JUSTICE: AN ANALYSIS OF POTENTIAL MODELS (1977); NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (R. Tomasic & M. Feeley eds. 1982); Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALBANY L.REV. 359 (1975).

[12] *See* AMERICAN BAR ASS'N, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 1-362 (1982); Milne & Folberg, *The Theory and Practice of Divorce Mediation*, in FOLBERG & MILNE, DIVORCE MEDIATION 3 (1988).

[13] On this theory, as summarized in the text, *see, e.g.*, FOLBERG & TAYLOR , *supra* note 6, at 245-46; Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L.REV. 253, 266-73 (1989); Fuller, *Mediation — Its Forms and Functions*, 44 S.CAL. L.REV. 305, 315-27 (1971); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26, ARIZ. L.REV. 329, 347-59 (1984); Stulberg, *supra* note 6, at 113-16.

[14] *See, e.g.*, Phear, *supra* note 7, at 35-36; Maxwell, *supra* note 10, at 150-53.

[15] *See* FOLBERG & TAYLOR, *supra* note 6, at 244; Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L.REV. 1359, 1367-75, 1385-91; Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78, 1085-90 (1984); Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

[16] *See* Bush, *supra* note 13, at 253-59.

[17] *See id.* The only significant exception to the absence of standards is in the divorce mediation area, where there has been some development, although little consensus. *See id.* at 256 & n. 10.

[18] *See, e.g.*, AMERICAN BAR ASS'N, *supra* note 8; AMERICAN BAR ASS'N, *supra* note 12, at 483-605. Recently, however, at least in the parent-child area, there has been some more thoughtful and reflective literature, and some research beyond simple project evaluation reports. *See, e.g.*, Lam, Rifkin & Townley, *Reframing Conflict: Implications for Fairness in Parent-Adolescent Mediation*, 7

MEDIATION Q. 15 (1989); Zetzel, *In and Out of the Family Crucible: Reflections on Parent-Child Mediation*, MEDIATION Q., Mar. 1985, at 47.

[19] Most of the parent-child mediators interviewed for the study worked in one of three New York-area programs: the Children's Aid Society PINS Mediation Project (Brooklyn, N.Y.); the Community Mediation Services program (Jamaica, Queens, N.Y.); and the Conflict Resolution & Mediation Services (Suffolk Cty., N.Y.).

[20] *See* Phear, *supra* note 7.

[21] *See* AMERICAN BAR ASS'N., *supra* note 8, at 255-308.

[22] *See* Umbreit, *supra* note 9.

[23] A final point regarding the context of the study is that divorce/custody mediation, though it obviously affects juveniles, was also not a focus of this study. The reason is that, while custody mediation affects children, it usually does not involve them as parties per se. Therefore, while it presents some of the same issues as mediation that directly involves juveniles, there are many areas where the two do not overlap.

[24] *See* Bush, *supra* note 13, at 276-86.

[25] *See supra* notes 13-14 and accompanying text; Zetzel, *supra* note 18.

[26] For a description in the literature of a similar concern, *see* Zetzel, *supra* note 18, at 50-51, 59-61.

[27] *See* FOLBERG & TAYLOR, *supra* note 6, at 244-80; ROGERS & SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 61-105, 137-149 (1988); STULBERG, TAKING CHARGE/MANAGING CONFLICT 137-66 (1987); Bush, *Ethical Dilemmas in Mediation* (forthcoming).

[28] *See, e.g.*, AMERICAN BAR ASS'N, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE (1985); FOLBERG & TAYLOR, *supra* note 6, at 263-80.

[29] The text here does not exaggerate the gravity of the problems that families bring to parent-child mediation. *See* Zetzel, *supra* note 18, at 63-64.

[30] *See, e.g.*, Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, MEDIATION Q., June 1984, at 61; Folger & Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, MEDIATION Q., Dec. 1985, at 5.

[31] This seems to have been one of the concerns behind a recent study of how mediators "reframe" issues in parent-child mediation. *See* Lam, Rifkin & Townley, *supra* note 18. A similar concern underlies other research into the effects of mediators' values on divorce and custody mediation. *See* Levy, *Custody Investigation in Divorce Cases: The New York Law Revision Commission's Proposal in Perspective*, 19 COLUM. J.L. & SOC'L PROBS. 485 (1985).

[32] *See* Zetzel, *supra* note 18, at 59-61.

[33] *See, e.g.*, Abel, *The Contradictions of Informal Justice*, in I THE POLITICS OF INFORMAL JUSTICE 267 (R. Abel ed. 1982); Delgado, *supra* note 15; Dingwall, *Empowerment or Enforcement: Some Questions About Power and Control in Divorce Mediation*, in DIVORCE MEDIATION AND LEGAL PROCESSES (R. Dingwall & E. Eekalaar eds. 1987); Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAMILY L.Q. 525 (1984); Silbey & Merry, *Mediator Settlement Strategies*, 8 L. & POLICY 1 (1986); Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE, *supra* note 11, at 215.

[34] *See* Bush, *supra* note 13, at 282-86.

[35] *See* Shaw, *Parent-Child Mediation: A Challenge and a Promise*, MEDIATION Q., Mar. 1985, at 23, 24-25. The Brooklyn PINS mediation program is a good example of this approach.

[36] The comment was from Professor Barry Feld, an expert in the history of the juvenile courts. *See*, for the same concern, Levy, *supra* note 33.

[37] For a move in this direction, *see* Bush & Lang, *Ethics at Work: Case Applications*, in AMERICAN BAR ASS'N, FAMILY DISPUTE RESOLUTION: OPTIONS FOR ALL AGES 129 (1990).

[38] For one effort to begin articulating such standards, *see* Bush, *supra* note 13.

[39] For example, one direction for research suggested by this study would be to examine more closely the apparent difference between part-time volunteer and full-time staff mediators regarding responses to the directiveness dilemma. The results of such research might suggest new directions for training and recruitment of mediators.

About the Author

Professor Bush has made excellent contributions to mediation research, winning the 1990 CPR (Center for Public Resources) Legal Program Award for excellence and innovation in alternative dispute resolution. He won first prize for a professional article, "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation," published in the *Journal of Contemporary Legal Issues* (vol. 3, p.1). Professor Bush's other publications include "Defining Quality in Dispute Resolution," (1989, 66 *Denver Law Review,* 335) and "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation," (1989 41 *Florida Law Review,* 253).

The University of Michigan
School of Social Work
1015 East Huron Street
Ann Arbor, Michigan 48104-1689

NOVA UNIVERSITY
Shepard Broad Law Center
3100 S.W. 9th Avenue
Ft. Lauderdale, Florida 33315