

Review of *Mediation Ethics: Cases & Commentaries*

The Honourable Murray Kellam AO, former Justice of the Court of Appeal, Supreme Court of Victoria and Chair of NADRAC from 2004 to 2011 reviews this text edited by Professor Ellen Waldman.

Although a number of other authors have given consideration to the ethics of mediation in a general context, or as part of a wider consideration of mediation issues, this is the first text I have read which deals with the issue of ethics exclusively.

It is an interesting and useful book for those engaged in the day to day challenges of mediation. The editor, Ellen Waldman, is a Professor of Law at the Thomas Jefferson School of Law in San Diego. She is the founder and director of the Mediation Clinic at that law school and has acted as a mediator in a wide variety of disputes.

Although the text is written in the context of mediation experience in the United States, many of the ethical challenges will be familiar to Australian mediation practitioners and academics.

The book commences with a discussion on the underlying values of mediation and the relevance of codes of conduct. The editor notes that in the US there are numerous specialist codes of conduct with much inconsistency. There is not the same problem in Australia, with the Australian National Mediator Standards being accepted as the appropriate practice standards for mediators operating under the National Mediator Accreditation System.

That said however, the conclusions reached by the editor that codes of conduct do not necessarily resolve ethical dilemmas, is one with which, in the Australian context, we would agree.

The first chapter of the book examines the various models of mediation and the role of mediator philosophy, but thereafter each chapter deals with a separate area wherein different ethical problems are considered. This is done by the presentation of hypothetical circumstances designed to illustrate some of the more difficult ethical dilemmas which arise in the practice of mediation. Prominent American mediators and academics provide commentary as to the manner in which they would approach the difficulties revealed by the hypothetical circumstances set out.

Chapter two of the book deals with the issues of autonomy and diminished capacity of disputants. It deals with issues which may arise when there are doubts as to whether a participant has capacity to engage in the mediation or even capacity to make a binding agreement. The commentary contains a useful consideration of the steps a mediator should take in giving consideration to the issues of autonomy of participants. It provides guidance as to how to structure a mediation if it is decided to continue such mediation notwithstanding the fact that issues of autonomy have arisen.

Chapter three deals with the often difficult ethical issues which may arise when working with disputants who are suffering intense emotional turmoil and the consequences such turmoil,

whether it be anger, anxiety, grief, shame or guilt, can have upon the outcomes of the mediation.

Chapters four, five and six deal with the separate issues of power imbalance, substantive fairness and the unrepresented party. I found these chapters to be particularly relevant in the Australian context. The two case studies in chapter four are in the context of divorce, custody, domestic violence and aggressive personalities in a “power play”. The analysis provided by the commentary contains practical recommendations to enable a mediator to continue to preside over a quality process notwithstanding such difficulties. Likewise, chapter five deals with the issues of informed consent, substantive justice and disputant autonomy in a practical and helpful way by the analysis of two personal injury scenarios wherein offers which do not reflect the legal reality of the cases have been made to vulnerable plaintiffs. The commentators approach the circumstances from different perspectives but nevertheless the discussion draws out the relevant issues to be considered by the mediator.

Chapters seven and eight consider the issues which can arise in mediation when the subject matter is close to the boundaries of legality and perhaps of more relevance when there are “lies in the room”.

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One of the commentators to the chapter seven scenarios is Julie Macfarlane from the University of Windsor, Canada, and who is well known here in Australia. In terms of the mediation of a matter which might be associated with illegality, she would draw the line at working with parties contemplating future illegal conduct but she would feel comfortable helping them “work out the knots” created by earlier illegal or semi-illegal activities. I am sure not all mediators would agree with that approach but the discussion does serve to highlight the tension between abstract principle and maintaining a non-judgemental stance which tension is clearly discussed in the chapter in question.

Chapter eight contains a scenario whereby the parties and their legal advisors engage in a number of deceptions thus raising the question of an appropriate ethical response by the mediator.

The chapters dealing with confidentiality raise many of the issues which are at present the subject of consideration in Australia and in particular in the Family Law context as a result of the NADRAC report to the Attorney-General of 28 February 2011; [Maintaining and enhancing the integrity of the ADR processes: From Principles to Practice through people.](#)

These chapters discuss the importance of confidentiality in maintaining the integrity of the process of mediation, but examine circumstances which create ethical quandaries of their own and the place that a rigid view of confidentiality has in the context of ethical community and social values.

Two of the issues raised by the case studies relate to that of lawyer misconduct which may become apparent by reason of the mediation and to the reporting duties of the mediators where allegations of child abuse may arise in the course of mediation. The discussion of these issues in the book takes place in an American context but is still useful from an Australian viewpoint. In particular the issues which have been considered by NADRAC in the above report are dealt with to some degree by the book. For instance, NADRAC has recommended that in mandatory ADR processes in the Federal Justice system there should be (amongst others) exceptions to the general rule of confidentiality which include circumstances of a serious and imminent threat to life, health or safety and the reporting of professional misconduct to the relevant disciplinary body.

In its concluding chapters, the text deals with conflict of interest for mediators, the different but increasingly more relevant issues which arise in a multi-cultural mediation and some of the ethical considerations which may arise for ADR provider organisations. Once again it examines the issues in a balanced and thoughtful way.

The text is replete with numerous references to other works and detailed notes upon each chapter. Overall, and despite the US orientation, I found the book to be a useful and thoughtful analysis of many of the contemporary ethical issues which face mediators, and although it will not necessarily provide an immediate solution for any particular ethical problem it does give options and some direction to those encountering many such problems.

I believe that it is a worthwhile book and until a book dealing exclusively and specifically with Australian ethical mediation problems, and such reported decisions as there are, is written and published it is a good place to start for those of us with an interest in both the theoretical and practical aspects that the ethical conduct of mediation can raise.

About the book

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About The Hon Murray Kellam AO

The Hon Murray Kellam AO is a former justice of the Court of Appeal Supreme Court of Victoria having resigned in June 2009. He was President of the Australian Institute of Judicial Administration from 2001 to 2003 and the Chair of NADRAC from 2004 to 2011. He is at present an adjunct Professor at the Faculty of Business and Economics, Monash University and is the Chief Commissioner of the Integrity Commission of Tasmania. He has engaged in ADR training for judges and lawyers throughout the Asia-Pacific region and is an enthusiastic supporter of ADR as a conflict resolution process. He has in addition engaged in ethics programs for judges and magistrates in Australia and has a keen interest in the practical application of ethics in ADR and in the field of corporate social responsibility.