

Institutionalizing ADR: *Wagshal v. Foster* and Mediator Immunity

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Wagshal v. Foster,
28 F.3d 1249 (D.C. Cir. 1994).

Although alternative dispute resolution (ADR) procedures are quickly becoming accepted and influential parts of the trial process,¹ they must overcome several obstacles before they will be incorporated as central features of the judicial system. In *Wagshal v. Foster*,² the Court of Appeals for the District of Columbia Circuit took a step toward institutionalizing ADR by extending quasi-judicial immunity to case-evaluators in the mediation program of the D.C. Superior Court.³ Although *Wagshal* is an important first step toward solidifying the standing, respect, and influence of ADR procedures, improvements on two other fronts are needed: the creation of minimum standards for mediation training programs and the promulgation of explicit confidentiality guidelines.

Wagshal v. Foster arose at the conclusion of Wagshal's original suit against his property manager, Charles E. Sheetz.⁴ Pursuant to the District of Columbia Rules of Civil Procedure, trial judge Richard A. Levie submitted the Wagshal-Sheetz case to the case-evaluation section of the court's ADR program.⁵ Wagshal claimed that the first

1. See generally Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339-91 (1994) (exploring the pervasiveness and variety of federal court programs designed to encourage settlement).

2. 28 F.3d 1249 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

3. See *id.* at 1254.

4. See *id.* at 1250.

5. See *id.* The Rules provide that "the judge will . . . explore the possibilities for early resolution through settlement or alternative dispute resolution techniques" and require "all parties [to] attend . . . any alternative dispute resolution session ordered by the Court." D.C. R. Crv. P. 16(b), 16(j). The Superior Court's Multi-Door Dispute Resolution Division contains three sections: arbitration, mediation, and neutral case evaluation. See *Wagshal*, 28 F.3d at 1251. The *Wagshal* court noted that "the case evaluator focuses on helping the parties assess their cases." *Id.* at 1251 n.2. Prior to neutral case evaluation, the parties must sign a Statement of Understanding that explains that the proceedings are privileged, that the evaluator subsequently may not

neutral case evaluator⁶ had a conflict of interest, and Judge Levie appointed Foster as a substitute.⁷ Wagshal raised tentative objections to Foster, and after Wagshal at Foster's request failed either to pursue his objection or withdraw it, Foster recused himself.⁸ Foster then wrote a letter to the judge and parties summarizing the status of the case and recommending that Judge Levie submit the case to another evaluator.⁹ Foster wrote that the case could be settled if the parties acted reasonably and urged the court to order Wagshal "as a precondition to any further proceedings . . . to engage in a good-faith attempt at mediation."¹⁰ He also urged the court to consider carefully which party should bear Sheetz's costs.¹¹ Judge Levie excused Foster, and, with the assistance of the third case evaluator, the parties then reached a settlement.¹²

A few months after settling with Sheetz, Wagshal sued Foster and sixteen members of his law firm, claiming that Foster's conduct violated the Fifth Amendment right to due process and his Seventh Amendment right to a trial by jury.¹³ Wagshal argued that Foster's conduct as case evaluator forced him to settle the case against his will, resulting in a far lower recovery than if he had pursued the claim in court. Wagshal sought compensatory and punitive damages and an injunction to prevent Foster from "committing violations of litigants' rights in the future."¹⁴

The district court rejected Wagshal's claims on the ground that Foster enjoyed judicial immunity.¹⁵ The court reasoned that "court-appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the

testify voluntarily on behalf of either party, and that a party may not subpoena the evaluator or any documents submitted during the evaluation. *See id.* at 1251.

6. Case evaluators "are members of the District of Columbia bar, with at least five years of relevant litigation experience, who volunteer to serve without compensation, undergo required training, and are approved as such by the court." *Wagshal v. Foster*, 1993 WL 86499 at *1, *3 n.2 (D.D.C. 1993).

7. *See* Brief for Appellees at 2, *Wagshal*, 28 F.3d 1249 (No. 93-5063).

8. *See Wagshal*, 28 F.3d at 1251.

9. *See id.*

10. *Id.*

11. *See* Appellant's Initial Brief at Complaint Exhibit 3, *Wagshal*, 28 F.3d 1249 (No. 93-5063).

12. *See Wagshal*, 28 F.3d at 1251.

13. *See id.* Wagshal also brought tort claims for defamation, invasion of privacy, and intentional infliction of emotional distress. *See id.*

14. *Id.*; *see also* *Wagshal v. Foster*, 1993 WL 86499 at *2 (D.D.C. 1993).

15. *See Wagshal*, 28 F.3d at 1251.

court may properly invoke the same protection . . . [granted to] traditional agents of the judicial process."¹⁶

The D.C. Circuit affirmed.¹⁷ The court first rejected Wagshal's claim for injunctive relief, stating that Wagshal lacked standing to sue on behalf of others and that he had failed to allege a likelihood that he would suffer repeated injury in the future.¹⁸ The court then examined the central issue in the case: whether a case evaluator qualifies for quasi-judicial immunity under the three-part test articulated in *Butz v. Economou*.¹⁹ The three-part *Butz* test inquires:

(1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation [of the officials] by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct.²⁰

The court found that Foster clearly fit within the first prong of the *Butz* test. Noting that Foster's assigned tasks included identifying factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts, the court concluded that "[such] tasks appear precisely the same as those judges perform going about the business of adjudication and case management."²¹ The court likened the duties of the case evaluator to the tasks judges may perform pursuant to Federal Rule of Civil Procedure 16: "[There] is nothing in Foster's role that a Superior Court judge might not have performed under Superior Court Rule 16(c), which substantially tracks the federal model."²²

The second *Butz* consideration — the potential for harassment or intimidation of ADR officials by the litigants — also counseled in favor of granting immunity to neutral case evaluators.²³ The court reasoned that news delivered by a court official often disappoints the

16. *Wagshal*, 1993 WL 86499 at *2.

17. *See Wagshal*, 28 F.3d at 1254. The United States Supreme Court subsequently denied Wagshal's application for certiorari. *See Wagshal v. Foster*, 115 S. Ct. 1314 (1995).

18. *See Wagshal*, 28 F.3d at 1251.

19. 438 U.S. 478 (1978).

20. *Id.* at 512.

21. *Wagshal*, 28 F.3d at 1252.

22. *Id.* at 1253.

23. *See id.*

parties. Upset litigants unable to sue judges because of judicial immunity therefore might sue officials such as case evaluators as an alternative.²⁴

The court stated that the third prong of *Butz* was satisfied because litigants like Wagshal possessed alternatives to suing ADR officials for damages.²⁵ The court noted that Wagshal could have sought relief from Judge Levie in the first instance, or alternatively sought to recuse Judge Levie on the grounds that Foster's comments had prejudiced him.²⁶ Thus, the court held that the *Butz* test was satisfied and that quasi-judicial immunity extends to neutral case evaluators in the D.C. Superior Court.²⁷

Although securing immunity for ADR officials is important, it is merely a first step toward institutionalizing ADR. To succeed, ADR must earn the respect of the legal community. Two reforms can achieve this result: improving mediator training and establishing clear confidentiality guidelines.

Most ADR programs require an official to undergo initial instruction, and some require additional training as a prerequisite to practice in certain subject areas.²⁸ Critics have charged that these standards are deficient.²⁹ In particular, many programs, including that of the D.C. Superior Court, lack continuing education requirements such as co-mediation, mentor feedback, or group discussions of ADR experiences.³⁰

24. *See id.*

25. *See Wagshal*, 28 F.3d at 1253.

26. *See id.*

27. *See id.* at 1254. The court's decision also extended immunity to mediators. *See id.* In addition, Wagshal contended that even if Foster is eventually granted immunity in his capacity as an ADR official, Foster should still be liable for breaching his obligation of confidentiality. The court rejected this contention, reasoning that if immunity is to mean anything, it cannot be denied because the conduct was in error or was in excess of authority. *See id.*

28. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (West Supp. 1995) ("To facilitate disputes relating to the parent-child relationship, the mediator must have an additional twenty-four hours of training.").

29. *See, e.g.*, Irene S. Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality under the Texas ADR Statute*, 36 S. TEX. L. REV. 579, 626 (1995) ("[T]raining programs vary widely, and are neither standardized nor accredited."); Joshua D. Rosenberg & H. Jay Folberg, *Alternate Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1545 (1994) (proposing improved initial training for evaluators in the Northern District of California).

30. *See* Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977, 988 ("Generally, a mediator development program is best viewed as consisting of three components: (1) a screening process; (2) concentrated training and education programs; and (3) an in-service process."); Joseph B. Stulberg & B. Ruth Montgomery, *Design Requirements for Mediator Development Programs*, 15 HOFSTRA L. REV. 499,

With better training, Foster may have handled the Wagshal-Sheetz settlement more effectively, thereby avoiding the problems that gave rise to the Wagshal-Foster litigation. Foster was never trained specifically in neutral case evaluation, and this was a crucial failing.³¹ The high stakes of the lawsuit,³² the involuntary imposition of case evaluation, and Wagshal's dissatisfaction with his lawyer and the first case evaluator intensified the tensions of the parties, making them particularly sensitive to any indiscretion on the part of the ADR official. Foster's approach proved to be a poor choice for ameliorating those tensions and for fostering an environment that encouraged settlement. Foster reacted to Wagshal's initial objection by issuing an ultimatum — waive it or pursue it. As evidenced by the third neutral appointed to the case, a less combative posture could have facilitated settlement between these litigants. Proper training might have enabled Foster to resolve the case without incident.

Courts must also establish explicit and clear confidentiality guidelines to establish credibility with litigants and to further institutionalize ADR. The Statement of Understanding used by the D.C. Superior Court provides that "all proceedings . . . are privileged and shall not be disclosed . . ."³³ It later states, however, that the mediator or case evaluator may not "voluntarily testify on behalf of a party."³⁴ A lack of clarity concerning the term "testify" may also cause misunderstanding. Because Foster's comments to Judge Levie were based on knowledge gained from the ADR proceedings, Wagshal asserted that these comments constituted unsworn testimony.³⁵ The Statement never specifically addresses the central issue in this case — communication between the judge and the neutral. Such inconsistencies must be addressed and clarified to provide the parties with a clear understanding of the responsibility and scope of a neutral's authority.

Similar nebulous confidentiality standards govern other ADR programs. For example, the procedures for the Eastern District of

515-16 (1987) (describing three components of an apprenticeship program at a neighborhood justice center: observation of experienced mediators, co-mediation with an experienced mediator, and observation by a mentor); Rosenberg & Folberg, *supra* note 29, at 1545 (proposing the establishment of an ongoing program of meetings for all evaluators).

31. See Appellant's Initial Brief at 13, *Wagshal*, 28 F.3d 1249 (No. 93-5063).

32. Wagshal's original complaint "sought massive compensatory and punitive damages." Brief for Appellees at 2, *Wagshal*, 28 F.3d 1249 (No. 93-5063).

33. Appellant's Initial Brief at Complaint Exhibit 2, *Wagshal*, 28 F.3d 1249 (No. 93-5063).

34. *Id.*

35. See *id.* at 16-19.

New York require complete confidentiality in *mediation* proceedings but allow for some communication between a *case evaluator* and the presiding judge.³⁶ Obviously, this scheme would not have resolved the dispute in the instant case because the terms “mediator” and “evaluator” seem interchangeable in the District of Columbia ADR program. Texas has an ADR statute requiring that “all matters, including the conduct and *demeanor* of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.”³⁷ This statute appears to settle the *Wagshal* matter by requiring absolute confidentiality. Commentators have noted, however, that such an extreme rule is neither necessary nor feasible in most contexts.³⁸

A study of the ADR program in the Northern District of California suggests better confidentiality procedures for ADR proceedings.³⁹ The authors of the California study suggest that the use of preproceeding informational discussions between the ADR officials and the parties would help to ameliorate problems caused by confusing confidentiality standards. They further state that “[i]t would be helpful for the evaluator to discuss with each side his own specific view of [case evaluation], what he expects to happen, [and] his view of the case evaluator’s role in the process”⁴⁰ In *Wagshal*, if Foster had specifically explained his view of his role and if *Wagshal* had discussed his own expectations, the controversy might have been avoided, thereby enhancing the credibility of both Foster and the superior court’s ADR program.

In extending absolute quasi-judicial immunity to the ADR volunteers in the D.C. Superior Court’s Dispute Resolution Program, the court of appeals recognized the judicial nature of the ADR practitioner’s role and brought these individuals and the program under

36. See U.S. DIST. CT. E.D.N.Y. CIV. R. app. F, pt. IV, ENE Procedures § VII(A)(3). “Except for communication between the judge and the evaluator regarding noncompliance with program procedures, there will be no communication between the court and the evaluator regarding a case that has been designated for evaluation.” *Id.* at Mediation Procedures, § IV(B).

37. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (West Supp. 1995) (emphasis added).

38. See, e.g., Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 25 (“It is sometimes said that mediators should never breach client confidentiality and yet there will be cases where mediators will want to disclose information given in the mediation session.”).

39. See Rosenberg & Folberg, *supra* note 29, at 1549.

40. *Id.* (“[T]hese conversations helped ensure a successful session . . . and such communication may be essential to help participants develop accurate expectations for the process.”).

the umbrella of the legal process. Although immunity is an important and necessary step, full institutionalization can only be realized by strengthening the credibility and reputation of ADR practitioners. These objectives can best be achieved through extensive initial and continuing training, clear and explicit confidentiality guidelines, and effective procedures for the parties to discuss and share their expectations and understandings of the process. The end result will be an improved ADR process that is more beneficial to both users and administrators of the legal system.

