Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective

Jacqueline Nolan-Haley
Fordham University School of Law, jnolan@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship
Part of the Dispute Resolution and Arbitration Commons, and the Legal Profession Commons

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/360

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective

Jacqueline M. Nolan-Haley†

ABSTRACT

Mediation is a big business today that is practiced by lawyers and non-lawyers, and is closely related to the business of law. Lawyers have a long-standing monopoly on the law business and do not look favorably on sharing their power with non-lawyers. This phenomenon is odd because it occurs at the same time that the legal profession is beginning to embrace a new ethic of problem-solving that honors the values of collaboration and power-sharing among professionals in multiple disciplines. Lawyers protect their professional monopoly through the unauthorized practice of law ("UPL") doctrine that limits the practice of law to licensed professionals who have satisfied educational and moral requirements and have been admitted to state bars. The organized bar's use of UPL regulations to suppress competition from non-lawyer mediators has caused tensions and turf battles that inhibit the high-quality development of mediation as a profession. As a result, the public, especially unrepresented parties, lose out. In this Article, I call for a moratorium on mediation turf battles, and sketch a proposal that will advance the culture of problem-solving in the legal profession.

I commence by describing the problem of blurred boundaries between the legal profession and the emerging mediation profession that leaves non-lawyer mediators across the country unsure of where they stand. I describe the legal profession's traditional weapon against non-lawyer competition, the UPL doctrine, and

† Associate Professor, Fordham University School of Law. I am grateful to friends and colleagues who discussed drafts of this Article, including Bruce Green, Jim Haley, Bobbi McAdoo, Catherine McCauliff, Catherine Cronin-Harris, Russell Pearce, Elizabeth Plappinger, Kathleen Scanlon and Maria Volpe. I thank Kathy Bartlett, Gretchen Henninger, Argi Krypotis, Jessica Sombat and Claudia Villanella for their excellent research assistance. I am grateful to Fordham University Law School for providing financial support for this project.
show that the consumer protection rationale for UPL regulation is a myth.

I then demonstrate the empirical reality of mediation practice, how it often slides into the practice of law, and discuss the variety of ways that non-lawyer mediators pretend they are not engaged in law practice in order to protect themselves from UPL exposure. I call for greater honesty about what is happening today in mediation practice and argue that the question is not about who owns or controls mediation, but, rather how we should regulate it and protect parties in ways that safeguard the core values of both the legal profession and the emerging mediation profession.

Finally, I sketch a proposal that would modify UPL regulations to allow non-lawyer mediators more freedom in mediation practice and that would encourage the legal profession to respond to the needs of the emerging mediation profession by contributing its unique expertise in ethics development.

---

<table>
<thead>
<tr>
<th>Introduction</th>
<th>237</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I</td>
<td>240</td>
</tr>
<tr>
<td>I. ADR as “Law Business”</td>
<td>241</td>
</tr>
<tr>
<td>A. Conflict Resolution</td>
<td>241</td>
</tr>
<tr>
<td>B. ADR: Historical Background</td>
<td>242</td>
</tr>
<tr>
<td>C. The Search for Professional Autonomy</td>
<td>243</td>
</tr>
<tr>
<td>II. The New Culture of Problem-Solving</td>
<td>246</td>
</tr>
<tr>
<td>A. Lawyers and Problem-Solving</td>
<td>246</td>
</tr>
<tr>
<td>B. What is Problem-Solving for Lawyers?</td>
<td>248</td>
</tr>
<tr>
<td>C. Lawyers’ Response to Problem-Solving: Integrating ADR into Law Practice</td>
<td>250</td>
</tr>
<tr>
<td>D. New Lawyering Roles</td>
<td>253</td>
</tr>
<tr>
<td>E. Paradox of the Problem-Solving Culture</td>
<td>254</td>
</tr>
<tr>
<td>Part II Boundary Conflicts</td>
<td>256</td>
</tr>
<tr>
<td>I. ADR and the Practice of Law</td>
<td>256</td>
</tr>
<tr>
<td>II. The Unauthorized Practice of Law Doctrine</td>
<td>259</td>
</tr>
<tr>
<td>A. Historical Background</td>
<td>261</td>
</tr>
<tr>
<td>B. Defining UPL</td>
<td>262</td>
</tr>
<tr>
<td>C. UPL Today</td>
<td>264</td>
</tr>
<tr>
<td>D. Literature Review</td>
<td>266</td>
</tr>
<tr>
<td>E. Myth of Consumer Protection</td>
<td>268</td>
</tr>
<tr>
<td>F. Proposals for Reform</td>
<td>269</td>
</tr>
<tr>
<td>III. Mediation and the Unauthorized Practice of Law</td>
<td>269</td>
</tr>
<tr>
<td>A. Cases and Ethics Opinions</td>
<td>269</td>
</tr>
<tr>
<td>B. Managing the UPL Problem in Mediation Practice</td>
<td>271</td>
</tr>
</tbody>
</table>
INTRODUCTION

The legal profession is beginning to embrace a new ethic of problem-solving that values collaboration, power-sharing,\(^1\) and non-adversarial methods of dispute resolution over traditional legal processes. Whether prompted by failing ideals, a need for healing, or millennial reflection, a professional soul-searching has taken hold such that the view of the lawyer as problem-solver is gaining credibility over the hired-gun or gladiator image that has dominated the American legal landscape for so long.\(^2\) The rhetoric of the alternative

---

1. In this Article, the concept of power-sharing by lawyers refers to attitudes and behaviors that respect the abilities of non-lawyers to make meaningful contributions towards activities related to the law. Current examples of power-sharing include client-centered counseling and interdisciplinary problem-solving projects.

dispute resolution ("ADR") movement and the practice of mediation in court-annexed programs, in particular, has been and continues to be a powerful force in this transformation.  

But the old adversarial ethic has not yet been fully displaced, and power-sharing with non-lawyers is neither a familiar nor comfortable experience for American lawyers. While ADR and mediation may offer a transformative path for lawyers who seek a more problem-solving approach to conflict, it also presents new challenges in working with non-lawyers who are actively involved in the business of dispute resolution as mediators and arbitrators. Critics within the legal profession bemoan the opportunism of non-lawyers "get[ting] on the bandwagon." At the same time, non-lawyers, many of whom have already arrived there, show no signs of retreat from the business of ADR.

The ADR movement, and mediation in particular, offers the legal profession a different view of access to the law and, in the process, an expansion of the law's ambit. Lawyers have a long-standing monopoly over the business of law, and have generally believed that this business belongs exclusively to lawyers. For over one hundred years, this belief has been protected by the unauthorized practice of

3. See generally Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes (3d ed. 1999). The term "ADR" has been defined as "alternative" or "appropriate" dispute resolution. It is commonly understood to refer to processes that supplement full-fledged court adjudication of disputes. Such processes include negotiation, mediation, arbitration, and assorted combinations of these.

4. In his Introduction to John R. Van Winkle, Mediation: A Path for the Lost Lawyer, (2001), Jerome Shesteck, former president of the American Bar Association, describes ADR as the "hot button" in the development of the law today with mediation as its most "promising province [because] its development transforms the goals and values of the traditional legal process in our justice system. And it has deep implications for the nature of a civil society." Jerome Shesteck, Introduction to John R. Van Winkle, Mediation: A Path for the Lost Lawyer, at vii (2001).

5. See John R. Van Winkle, Mediation: A Path for the Lost Lawyer 45 (2001) (describing the author's conversion from litigation practice to ADR as characterized by "evangelistic fervor").


law ("UPL") doctrine limiting the practice of law to licensed professionals who have satisfied educational and moral requirements and have been admitted to state bars. This doctrine gives almost absolute control of legal business to lawyers. Individuals engaging in activity that even resembles the practice of law are vulnerable, risking exposure to civil and criminal penalties.

Mediation, becoming as integral a part of the corporate setting as the court system, has flourished in both the private and public sectors. Along with the growth of the mediation business and its connection to the justice system has come the organized bar's interest in the enforcement of unauthorized practice regulations against non-lawyers. As a result, mediators and other problem-solving experts now join accountants, probate, tax and divorce counselors, multidisciplinary practitioners ("MDPs"), and others whose professional activities have been challenged as encroaching on the practice of law. Mediation practice today operates under the haunting shadows of UPL regulation.

As the organized bar struggles with issues of professionalism, a growing movement for professional autonomy is taking hold within the dispute resolution community. This movement threatens the exclusive power that the legal profession has enjoyed in the business of resolving conflict. Paradoxically, as the field of dispute resolution moves in the direction of professionalization, legal ethics scholars debate whether law should be considered a profession or a business.

It seems to be the business, and not the profession of law, that drives efforts to limit and curtail the problem-solving activities of non-legal


12. Compare Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229 (1995), with Jeffrey W. Stempel, Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession, 27 FLA. ST. U. L. REV. 25 (1999). In the view of some commentators however, there is little doubt that law is now a business. See Terry Carter, Law at the Crossroads, A.B.A. J. 28, 30 (Jan. 2002) ("Probably the most significant change accompanying the huge growth has been the evolution from law as a profession to law as a business. Profits per partner and revenues are the new measures of success.")
practitioners in the field of dispute resolution, most notably in mediation practice.

The regulation of mediation practice through an unauthorized-practice-of-law regime is resulting in unnecessary turf battles between lawyers and non-lawyers. The central claim of this Article is that the rigidity of the UPL doctrine is ill-suited to what needs to be regulated in the mediation field. A problem-solving perspective will require that we should first consider the underlying needs and interests of the disputing parties in achieving justice and fairness instead of immediately defaulting to the conceptual framework of UPL regulations. This requires a broader vision that should move us closer to the parties being served. Then together, the legal and non-legal community can work collaboratively to develop optimal regulatory solutions that will achieve the highest quality in mediation practice. Finally, I offer a specific proposal to modify UPL enforcement in mediation practice.

Part I of this Article describes the problem of blurred boundaries between the legal profession and the emerging mediation profession against the background of a developing problem-solving ethic for lawyers.13 This Part also discusses the historical background of the ADR movement, out of which current mediation practice arises. Part II describes how the legal profession uses the threat of UPL regulations to suppress competition from non-lawyers.14 Part III demonstrates the empirical reality of mediation practice and then describes how mediators attempt to protect themselves from UPL charges.15 Part IV proposes a framework for reform that modifies existing UPL regulations in mediation practice.16 The way forward requires a bold vision for the legal profession.

PART I THE PROBLEM OF BLURRED BOUNDARIES

Distinguishing between the work of lawyers and the work of mediators and dispute resolution professionals is a fuzzy enterprise. Both lawyers and non-lawyers negotiate, mediate, and arbitrate. While this has always been the case, today, practitioners of these ADR processes have begun to organize themselves as a distinct profession, thereby blurring the boundaries between the legal and emerging dispute resolution professions. What makes the situation

13. See infra text accompanying notes 17-87.
14. See infra text accompanying notes 88-196.
15. See infra text accompanying notes 197-237.
even more complex is that attorneys often belong to and lead dispute resolution organizations.

The blurring of boundaries is problematic because it creates tensions and unnecessary battles. This is an odd phenomenon because it is happening at the same time that many in the legal profession are embracing a new ethic of problem-solving that encourages collaboration with other disciplines and honors the values of compromise, accommodation, and reconciliation.

I. ADR as "Law Business"

A. Conflict Resolution

The ADR movement, one of the most significant developments in the field of conflict resolution, provides a framework to address law-related disputes. While values such as efficiency and satisfaction have driven the growth of mediation practice in particular, it is important to note that the primary underlying value of mediation is the principle of self-determination—the parties affected by a dispute decide the outcome of the dispute. Because this principle complements the values of other professions devoted to problem-solving through party self-determination, ADR practice now attracts professionals from diverse disciplines including education, psychology, law and social work.

ADR's relationship to traditional legal practices has set the stage for current boundary battles. Dispute resolution activities have generated a business that is very much connected to the justice system.

17. See, e.g., Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44 UCLA L. Rev. 1871, 1880-81 (1997) (“In its current state of early professionalization, ADR is a fluid field, attracting practitioners from a number of different disciplinary backgrounds . . . ‘Turf’ battles over who will conduct mediation sessions are played out in proposed regulatory, licensing, and ‘credentializing’ schemes, with each profession claiming its disciplinary knowledge is essential to the task”); Nichol M. Schoenfield, Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes, 11 Ohio St. J. on Disp. Resol. 469 (1996) (identifying the advantages and disadvantages of attorneys and mental health professionals as mediators in child custody disputes).

18. See infra text accompanying notes 42-68.


the natural habitat of legal professionals. Mandatory mediation programs, now a common feature in state and federal courts, have significantly contributed to the growth of an ADR industry. Thus, what began as a conversation in search of alternatives to adjudication has resulted in the development of a highly structured legal and extra-legal system for resolving disputes.

B. ADR: Historical Background

The historical background of ADR has been well documented. ADR practice is not a new phenomenon in the United States. Its modern history is rooted in labor relations and collective bargaining. It was not until the early 1970's that ADR assumed the attributes of a law reform movement at a time when many observers in the legal and academic communities began to have serious concerns about the negative effects of increased litigation. One well known effort in the search for alternatives occurred in 1976 when former Chief Justice Warren Burger convened the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Legal academics, members of the judiciary, and public interest lawyers joined together to find new ways of dealing with disputes. Some of the papers that emerged from the conference shape our basic theoretical understanding of ADR even today.

Scholars have described the historical development of the modern ADR movement in terms of stages progressing from innovation

---

21. Some observers have expressed concern with the growing interconnections between community mediation and the court system and the public perception that mediation is a "component of the justice system." Timothy Hedeen & Patrick G. Coy, Community Mediation and the Court System: The Ties That Bind, 17 Mediation Q. 351, 362 (2000).

22. Comprehensive federal and state legislation has promoted the institutionalization of ADR and has resulted in its highly respectable status in the judicial system and administrative agencies, as well as in the private sector. See, e.g., Goldberg et al., supra note 3.

23. See id.


27. Perhaps the most frequently cited and relied upon paper is Professor Frank Sander's Varieties of Dispute Processing, in The Pound Conference, supra note 26.
and experimentation to institutionalization.\textsuperscript{28} ADR began as a community-based initiative. Local citizens served as mediators in neighborhood justice centers offering community members both an alternative to the courts and accessible justice.\textsuperscript{29} The 1980's was an era of innovation, with courts and corporations both experimenting with various forms of ADR. By the end of the 1990's, ADR became well entrenched, and scholars noted that its focus had shifted from experimentation to institutionalization.\textsuperscript{30} As usage increased, ADR moved beyond its efficiency goals and helped parties achieve greater personal satisfaction through its outcomes and enhancement of relationships.\textsuperscript{31}

C. The Search for Professional Autonomy

The combined energy of multiple disciplines has been reflected in a movement for professional autonomy in ADR, particularly in mediation. This movement was energized with the establishment of several professional organizations, most notably the Society of Professionals in Dispute Resolution (“SPIDR”) in 1972.\textsuperscript{32} The growth of mediation activity in so many sectors has resulted in the notion of mediation as an emerging profession, with its indicia of formal expertise, regulatory power and a desire by members to be accepted as professionals.\textsuperscript{33

\begin{thebibliography}{99}
\bibitem{28}E.g., Carrie Menkel-Meadow, Pursuing Settlement in An Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,” 19 Fla. St. L. Rev. 1, 6-17 (1991); Goldberg et al., supra note 3, at 6-9.
\bibitem{30}See Goldberg et al., supra note 3, at 6-9.
\bibitem{32}SPIDR has merged with the Academy of Family Mediators (“AFM”) and CREnet and is now known as the Association for Conflict Resolution (“ACR”). ACR’s web site can be found at http://www.acresolution.org (last visited Oct. 14, 2001).
\bibitem{33}There is a vast literature on professions. See, e.g., Robert Dingwall, Accomplishing Profession, 24 Soc. Serv. Rev. 331, 331-49 (1976); Pearce, supra note 12, at 1238-40 and accompanying notes; see generally Professions and Professional Ideologies in America 3-69 (Gerald L. Geison ed., 1983). It should be noted, however, that some scholars do not agree that mediation should be considered a profession. See, e.g., Jeffrey W. Stempel, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. Disp. Resol. 247, 282 (2000) [hereinafter Stempel, Inevitability of
Overall, there is a great concern with competency, quality, and ethics in dispute resolution practice. Nowhere is this concern more evident than in the field of mediation where efforts to certify and license mediators are taking place in many states.\textsuperscript{34} standards have been drafted to insure good mediation practice,\textsuperscript{35} and a number of major organizations are involved in collaborative efforts to pass uniform legislation.\textsuperscript{36}

But, mediation is still an evolving profession and the movement for professional autonomy is at an early stage of development.\textsuperscript{37} It is a movement plagued with questions: Who should regulate? How

\textit{the Eclectic} (explaining the potential shortcomings of the professionalization of mediation).


36. It should be noted that similar concerns exist in the more established profession of arbitration where there has also been a significant concern with ethics, competency and quality. A revision of the ethics code is being drafted and due process protocols have been adopted by many provider organizations. See, e.g., Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of The Employment Relationship (1995) reprinted in GOLDBERG ET AL., supra note 3, at 254; The Due Process Protocol for Mediation and Arbitration of Consumer Disputes (April 17, 1998), American Arbitration Association, DISP. RES. J. 15 (August 1998).

37. Cooley, supra note 11, at 75-76.
should regulation be accomplished? What qualifications are required? There have been some limited collaborative efforts among different professions to achieve consensus on critical issues affecting mediation practice. But professional organizations are drawing boundaries about what is needed before they will support uniform efforts to regulate and are also clear in their concern that mediation be considered distinct from the practice of law.


40. An interesting example of collaborative efforts is the Uniform Mediation Act (UMA) Project. See Michael B. Getty et al., Symposium on Drafting a Uniform/Model Mediation Act, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998); Model Mediation Law Effort Begins, DISP. RESOL. MAG., Fall 1997, at 20. This is a project of the Uniform Law Commissioners that involves the ABA, SPIDR and several official observers. A final draft of the Act was presented to the NCCUSL for a final reading in July 2001. The Drafting Committee on the UMA was convened by the National Conference of Commissioners on Uniform State Laws and the ABA. For the last two years, hearings have been held over the text of the Act in an effort to create model legislation that can be adopted by the individual states. The UMA was approved by the American Bar Association in February 2002.

41. The Uniform Mediation Act Project offers another example here. Over the course of the drafting project, two major ADR organizations stated that they would not support the UMA unless it were limited in scope to issues that require uniformity, provide clear confidentiality protection and provide that mediation practice is distinct from the practice of law. The depth of reflection about the profession is significant with the following eleven fundamental principles offered to guide SPIDR and AFM’s support for the Uniform Mediation Act:

(1) it addresses only those areas (such as confidentiality) where uniformity it required; (2) preserves party empowerment and self-determination; (3) provides adequate, clear and specific confidentiality protections and, where necessary, limited and clearly defined exceptions that would maintain mediation as an effective confidential process in which people are free to discuss issues without fear of disclosure in legal or investigatory procedures; (4) reflects an understanding of diversity of mediation styles and the range of disputes mediated; (5) is easily understood by mediation participants; (6) preserves mediation as a process that is separate and distinct from the practice of law, arbitration, and judicial proceedings; (7) provides that mediators may come from a variety of professional and non-professional backgrounds; (8) provides procedural protections for the disputants, the mediator, and the process when exceptions to confidentiality are raised; (9) adequately addresses how mediators, parties and representatives are to comply, if at all, with
II. THE NEW CULTURE OF PROBLEM-SOLVING

A. Lawyers and Problem-Solving

Over the last twenty years, interest in the theory and practice of problem-solving as an approach to lawyering has paralleled developments in the ADR and mediation movements. The essential attribute of a problem-solving orientation is a focus on parties' underlying needs and interests rather than on their articulated positions. A rapidly growing literature admonishes lawyers to shed adversarial clothing, think outside the litigation box, embrace creativity, create value, and move into the twenty-first century as problem-solvers rather than as gladiators. At the same time, there has been a growing interest in the development of problem-solving courts that are

mandatory reporting requirements that may be required by law or professional ethical standards; (10) Preserves the impartiality of the mediator; and (11) Takes into consideration the special concerns raised when the threat of violence is present. Justin Kelly, National ADR Groups Lay Out Terms for Uniform Mediation Act, (July 20, 2000), http://www.adrworld.com.


more responsive to litigants' specific needs than traditional law courts.\textsuperscript{44}

Law schools have joined in the venture as well. Beginning in the early 1980's, critics of traditional legal education criticized law schools for their emphasis on training law students for combat, competition and rivalry rather than for reconciliation and accommodation.\textsuperscript{45} Over the last twenty years, the study of ADR has become part of the law school curriculum both in clinical and theory courses.\textsuperscript{46} In 1992, the MacCrate Report, an American Bar Association ("ABA") Task Force Report on Legal Education and Professional Development, identified problem-solving as one of the ten fundamental lawyering skills that were important for practicing lawyers to possess.\textsuperscript{47} Over the past ten years, several funding sources have devoted resources to developing a problem-solving pedagogy in law schools\textsuperscript{48} and significant programs have devoted considerable efforts to examining the role of the lawyer as problem-solver.\textsuperscript{49} Some scholars have


\textsuperscript{45} Derek Bok, \textit{A Flawed System of Law Practice and Law Teaching}, 33 J. LEGAL EDUC. 570 (1983).


\textsuperscript{48} Early funding efforts began with the National Institute for Dispute Resolution ("NIDR"). The Hewlett Foundation has funded a three-year Problem Solving Project for the Dispute Resolution Section of the American Bar Association, the Soros Foundation has funded a Problem-Solving Project for the CPR Institute for Dispute Resolution and the Fund for the Improvement of Post-Secondary Education has also supports pedagogical developments. Professor Leonard Riskin of the University of Missouri Law School played a major role in infusing ADR in the law school curriculum. See Leonard Riskin, \textit{Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: a Report on a Collaboration with Six Law Schools}, 50 FLA. L. REV. 589 (1998).

\textsuperscript{49} The CPR Institute for Dispute Resolution has engaged in a major program, the CPR Problem Solving and Legal Education Project available at http://www.cpradr.
called for less fidelity to the traditional Langdellian model of law school pedagogy and greater emphasis on developments in cognitive science.\textsuperscript{50} Other scholars argue for greater recognition of the benefits of interdisciplinary learning and dialogue.\textsuperscript{51}

B. \textit{What is Problem-Solving for Lawyers?}

At a basic level, it may seem silly to talk of a new movement that looks upon lawyers as problem-solvers. Lawyers have always been sought out as solvers of legal problems. What then is significant about a problem-solving approach to lawyering?

Within the context of the modern problem-solving movement, problem-solving can be understood broadly as an orientation that moves away from positional articulation of problems to interest-based articulation of problems. This approach opens up greater possibilities for developing broadened options and solutions that more directly respond to the parties' underlying needs. In moving away from a positional articulation of problems, "needs" analysis takes into account the powerful role that personal values and emotions play in guiding our ethical and moral choices.\textsuperscript{52} Problem-solving fits into a broader trend of transformative law practice, holistic lawyering and therapeutic jurisprudence that views law as a healing profession.\textsuperscript{53}

\hspace{1cm} \begin{footnotesize}
\end{footnotesize}
It is part of wider restorative justice and preventative law movements that value peacemaking and consensus building, and seek a more humanistic approach to the practice of law.\footnote{See Phillips, supra note 53, at 105.}

Problem-solving can also be understood as an ability to share decisionmaking power and engage with other actors, including non-lawyers, in the management and resolution of disputes. Thus, projects that involve collaboration, interdisciplinary initiatives, partnering and group decision-making are highly favored under a problem-solving regime.\footnote{See, e.g., Trubek & Farnham, supra note 10 (describing power-sharing project where lawyers and non-lawyers work jointly to meet client needs).}

At a minimum, problem-solving skills require an ability to identify and analyze underlying interests,\footnote{This assumes, of course, that the lawyer has acquired the baseline skill of being able to differentiate interests from the parties' articulated positions.} expand resources, generate options and help clients arrive at solutions that are truly responsive to their needs.\footnote{See, e.g., Steven Keeva, What Clients Want, 57 A.B.A. J., June 2001 at 48 [hereinafter Keeva, What Clients Want] wherein the author describes a problem-solving, needs-based approach to lawyering that one client claimed has transformed her life:}

A case in point: Macie Scherick. When she hired Herz two years ago, all she needed was for him to draft documents so she could sell her 50 percent share of a SoHo art gallery. At least, that's all she said she needed. Indeed, it's all she thought she needed. But Herz sensed there might be more to think about. He asked Scherick about the business and about her partner of 15 years, and he carefully listened to her answers. The result? Well, here's how Scherick puts it: 'He profoundly transformed my life.' Lawyers help people all the time, in ways large and small. But transforming their lives? Scherick insists it's true. 'Before I worked with him I had lots of fears, but that's all gone now,' she says. 'I was stuck, and he helped me travel the road I needed to go down.' \textit{Id.} at 49-50.

\footnote{For a sampling of different thinking on what constitutes an appropriate curriculum, compare the view of Professor Lani Guinier with that of Professor Carrie Menkel-Meadow in CPR Problem-Solving and Legal Educ. Project, \textit{Background Compilations on Problem-Solving and the Law School Curriculum} 18 (Kathleen M. Scanlon, Project Dir., 2000). According to Professor Lani Guinier:}

Problem-solving in the twenty-first century may require the input of diverse perspectives and skills, including the ability to listen as well as speak, to synthesize as well as categorize, and to think hard about nuance and context even when that slows down the decision-making process; insight, especially in team contexts, benefits from the integration of mainstream and marginal viewpoints . . .
C. Lawyers' Response to Problem-Solving: Integrating ADR into Law Practice

The rhetoric of a problem-solving perspective for lawyers is frequently equated with mediation or some form of ADR practice. Thus, lawyers' response to the developing culture of problem-solving has been in the direction of non-adversarial dispute resolution, and ADR is becoming an integral part of the practice of law. Rules of professional ethics, the courts and aspirational creeds require

Lani Guinier, Lessons and Challenges of Becoming Gentlemen, 24 N.Y.U. Rev. L. & Soc. Change 1, 13 (1998). Professor Menkel-Meadow articulates her view that students would begin with more traditional courses in their first year and proceed to specialization:

In my ideal curriculum there would be logical development, beginning with first year courses that teach traditional theoretical and doctrinal analysis but incorporates problem solving skills and interdisciplinary materials. The second year would be devoted to the acquisition of more substantive knowledge (in law and other disciplines) with simulated and integrated skills courses (on question framing, interviewing, counseling, decision-making, problem-solving, case valuation, negotiation, mediation, facilitation, transaction planning). The third year capstone would include intensive work on one area of specialization, advanced writing, and exposure to real clients and real legal problem solving in clinics . . .


59. See Kimberlee K. Kovach, Good Faith in Mediation-Requested, Recommended or Required? A New Ethic, 38 S. Tex. L. Rev. 575, 580-81 (“Mediation provides a different paradigm for dispute resolution—one which includes collaboration . . . Participants, and in particular attorney-advocates find that old behaviors are no longer helpful nor appropriate.”).

60. See Keeva, What Clients Want, supra note 57.


62. The growth in membership of the Dispute Resolution Section of the ABA and the ADR section of the American Association of Law Schools are good examples.
lawyers to advise clients of ADR options. Many law firms have developed ADR practice sections as well. Corporations report a growing use of ADR, over four thousand companies have signed a corporate pledge to seriously explore ADR processes in conflicts arising with other signatories.

The rapid growth of court-annexed programs, many of which are mandatory, has been perhaps the most significant catalyst for the incorporation of ADR into legal practice. Mediation is the most prevalent form of court-connected ADR today. When lawyers and


66. See http://www.cpradr.org/pledges.htm (last visited Oct. 13, 2001). The pledge was developed by the CPR Institute for Dispute Resolution and provides as follows:

We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation.

In recognition of the foregoing, we subscribe to the following statements of principle on behalf of company and its domestic subsidiaries:

In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.


68. See, e.g., National Center for State Courts website stating that “mediation is the primary ADR method used by the courts . . .” available at http://www.ncsc.dni.us/KMO/Topics/ADR/ADRsbnmry.htm.
clients are required by court rule or statute to participate in ADR programs, usage obviously increases and credibility is enhanced. Some bar associations have taken the lead in thinking about standards for the mediation profession as well as providers and have offered guidance to the profession at large.69

Lawyers are involved both as advocates and as neutrals in ADR processes. Serving as arbitrators, mediators, early neutral evaluators, and special masters in complex litigation, most lawyers offer a legalized view of dispute resolution. They tend to confine their discussion of conflicts and disputes in structural categories that are familiar to them. “Cases” are referred to mediation. “Litigants” participate in the mediation process. Their involvement has given rise to charges that they are making ADR more adversarial and legalistic,70 these processes have become more settlement-driven71 and they are attempting to co-opt the field.72 The most serious concerns about lawyers’ aggressive behavior arise in mediation practice. In the view of one commentator, lawyers have “intentionally creat[ed] an ever widening feeling of distance between the everyday citizen and the practice of mediation. In this way, lawyers have been able to

69. See The Committee on Alternative Dispute Resolution, Mediation Standards Checklist, Association of the Bar of the City of New York, available at http://www.mediate.com/articles/docs0001.cfm. It is interesting to note that one of the standards includes the parties right to have a “mediation advocate or legal representative” present. Standards, 3 (A)(ii). The standards include guidance on mediator qualifications, ethics, provider organization requirements and training.

70. For example, when lawyers act as advocates in mediation, some have reported that they have taken over the mediation process from litigants, acting as the dominant participants in the mediation process. See, e.g., Elizabeth Ellen Gordon, Attorneys’ Negotiation Strategies in Mediation: Business as Usual?, 17 MEDIATION Q. 383, 384 (2000) (reporting on a North Carolina civil mediation program in which attorneys acted as the main negotiators in mediated settlement conferences and generally disfavored litigants acting as the main participants); Jacqueline M. Nolan-Haley, Lawyers, Clients and Mediation, 73 NOTRE DAME L. REV. 1369 (1998) [hereinafter Nolan-Haley, Lawyers & Clients].

keep the new 'given tool' (mediation) from those who are not connected to the law 'fraternity.'”

D. New Lawyering Roles

The questions and issues raised by lawyers' involvement as neutrals in ADR have given rise to a vast ethics literature and call for new professional responsibility rules. The involvement of lawyers as neutrals in ADR processes raises ethical issues for which little guidance currently exists. There are questions that arise when rules of professional ethics for lawyers collide with those for neutrals. The role of the lawyer as neutral is not specifically addressed under the ABA Model Rules or the Code of Professional Responsibility. There are new proposals to govern the conduct of neutral lawyers. The ABA Ethics 2000 Commission has also proposed a new ethics rule that would expand the lawyer's role to include serving as a dispute resolution neutral. All of this activity has the effect of making an


74. See, e.g., KOVACH, supra note 19, at 298, 299; Maureen E. Laflin, Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 479, 481 (2000).


76. The role of lawyer as an advocate in processes such as mediation also raises questions that I have addressed elsewhere. See, e.g., Nolan-Haley, Lawyers & Clients, supra note 70.

77. The CPR Georgetown Commission has issued a Draft Model Rule to govern the conduct of lawyers who act as neutrals. The Preamble Model Rule explains the need for a new professional responsibility regime to govern the conduct of lawyers who act in non-representational capacities:

This Rule applies to the lawyer who acts as third party neutral to help represented or unrepresented parties resolve disputes or arrange transactions among each other. When lawyers act in neutral, non-representational capacities, they have different duties and obligations in the areas addressed by this Rule than lawyers acting in a representational capacity. The current Model Rules are silent on lawyer roles as third party neutrals, which are different from the representational functions addressed by the Model Rules of Professional Conduct and judicial functions governed by the Judicial Code of Conduct.

The full text of the Model Rule is available at http://www.cpradr.org/cpr-george.html.

78. The new Rule 2.4 provides: "A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter." Approved by the ABA House of Delegates in February 2002. See http://www.abanet.org/cpr/e2k-rule2.4.html. See generally Douglas H. Yarn, Lawyer Ethics in ADR and the
attorney's neutral work in ADR a "lawyering role" and gives the legal profession a greater sense of claiming ADR practice for its own. To the extent that lawyers incorporate ADR into their legal practice, it becomes legitimized as another "lawyering role," and with this exclusivity comes greater ownership claims on ADR practice by lawyers.

E. Paradox of the Problem-Solving Culture

Despite the new ethic created by the culture of problem-solving with its emphasis on collaborative processes, the old adversarial ethic has not been fully displaced. Boundary conflicts, control and monopolistic behavior are still apparent and as tensions mount between lawyers and non-lawyers over ownership of ADR, in particular, mediation practice.

The joinder of legal and non-legal professionals in the mediation community has created a conceptual collision course driven by proprietary questions: Should any one group dominate the field and if so, are others displaced? Should lawyers be involved in shaping mediation practice? Both legal and non-legal professionals are somewhat uncomfortable with these questions. Dispute resolution professionals fear that their emerging profession is under attack by the organized bar. Their fears are supported by rhetoric on "how to defend themselves against the mounting attack on the ADR profession" and "a call to arms against the threat of the 'lawyerization' and 'parochialization of alternative dispute resolution practices." Their fears may be justified. With the expansion of court mediation programs and with more lawyers trained in mediation skills, there is a greater demand by lawyers for mediation business. In fact, in some contexts, only lawyers are permitted to mediate.

79. See, e.g., Cooley, supra note 11, at 72 (introduction to the article describes it as "a call to arms against the threat of the 'lawyerization' and 'parochialization' of alternative dispute resolution practices).  
80. According to one empirical study, "lawyers are begging for work." Professor Thomas Metzloff, Remarks at AALS ADR Program, Washington, D.C. (January 2000).  
81. Many dispute resolution programs and court-connected ADR programs permit only lawyers to act as neutrals. Telephone interview with Donna Stienstra, Federal Judicial Council (April 2001). For example, the U.S. District Court for the District of Columbia adopted rules in April 2001 that would require mediators to have ten years of legal practice and be a member of the D.C. Circuit's bar in addition to mediation training and experience. Justin Kelly, D.C. Circuit Adopts Strict Mediation Confidentiality, Immunity Rules, ADR News (Apr. 4, 2001), at http://www.adrworld.com.
The legal profession has its own economic concerns. Dispute resolvers from outside the legal profession have been encouraged to adapt their skills to mediation and offer parties an alternative to litigation. Consider the following comment in a social work journal: "While the utilization of mediation is still limited, the need to contain costs, to be more time-efficient, and to reduce the backlog in courts, will advance the field of mediation. It is anticipated that mediation will eventually be considered the appropriate form of dispute resolution rather than as an alternative to litigation. Social workers have many opportunities to be at the forefront in this exciting and challenging field of practice."82

The greatest area of tension between lawyers and non-lawyers has been in mediation practice.83 For non-lawyers, the entry of lawyers has caused a great deal of discomfort. Lawyers trying to carve


83. While the bar has focused some of its energies on excluding non-lawyers from arbitration, the bulk of its attention has been directed toward mediation practice. Arbitration has been the traditional alternative to the court adjudication of disputes in the United States. From the revolutionary through the colonial era until the present time, arbitration has flourished as an informal adjudicatory process, providing flexibility, efficiency and neutral decision-makers with expertise in the subject matter. See e.g., Bruce H. Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L. REV. 443 (1984). Non-lawyers have a long history of serving as arbitrators in this country.

In recent years, the legal profession’s major concern with non-lawyer participation in arbitration is not with those who serve as neutrals but with those who represent parties in arbitration proceedings. Most recently, the concern has been with securities industry arbitration and with what one commentator has described as the "booming cottage industry for nonlawyer advocates who openly solicit investors to pursue claims against their stockbrokers to recover losses." As a result of the Supreme Court’s endorsement of mandatory arbitration clauses in broker-dealer customer agreements, securities arbitration has become the primary method of resolving disputes between brokers, dealers and customers. The inability of small investors to obtain legal counsel to pursue claims against brokers and dealers in arbitration has contributed in part to an area of non-lawyer practice, labeled “non-attorney representatives” (NAR) by the Securities Industry Conference.

The involvement of non-lawyers as party advocates has raised concern with the unauthorized practice of law doctrine. After numerous complaints, the Securities Industry Conference (SICA) conducted a two-year study of the issue. Although it concluded that NAR practice may constitute the unauthorized practice of law, it left the issue to individual states for regulation. Some states have specifically barred non-lawyers from representing individuals in securities-related matters. See John P. Cleary, Protecting the Public, Not Anyone’s Turf: The Unlicensed Practice of Law in Securities Arbitration, 26 PEPP. L. REV. 543 (1999).
out a niche in a pre-existing field threaten their lay counterparts who fear that the power of the bar and the growth of court-connected programs may exclude them. Tensions between legal and non-legal professionals who practice mediation have reached such a level of passion that use of the term “non-lawyer” in mediation has been labeled “pejorative.”

Despite the work of some lawyers committed to fostering a problem-solving ethic, lawyers’ entry into the developing profession of mediation has been compared to “the proverbial bull in the china shop.” Mediator and lawyer David Hoffman observes with candor: “Many of my colleagues in the bar believe that their law degrees alone qualify them to be dispute resolvers, and they have little regard for the thousands of mediators who come from a variety of professional and nonprofessional backgrounds.”

The paradox of the new problem-solving ethic challenges the legal community. Despite the prevailing rhetoric of collaboration, compromise and peacemaking, the problem of blurred boundaries between the legal profession and the emerging dispute resolution profession has raised serious conflicts, particularly in court-connected ADR programs. In the following section, I describe these conflicts with particular focus on mediation practice, and discuss how the organized bar has used the threat of UPL enforcement to minimize competition from non-lawyers.

PART II  BOUNDARY CONFLICTS

I. ADR AND THE PRACTICE OF LAW

As ADR and mediation, in particular, began to develop as a profession, scholars and practitioners explored whether mediation constituted the practice of law and if so, what results flowed from that conclusion. Part of their concern was directed at lawyers in their

84. Lemoine D. Pierce, It’s Time to Get Rid of the Term “Non-Lawyer”, Letter to the Editor, DISP. RESOL. MAG., Fall 1998, at 2. For other concerns with use of the term non-lawyer see Ericka B. Gray, What’s In a Name? A Lot When “Non” Is Involved, 15 NEGOTIATION J. 103 (1999).

85. See David A. Hoffman, Is There a Niche for Lawyers in the Field of Mediation? 15 NEGOTIATION J. 107 (1999) wherein the author claims: “Some lawyers have entered the field of mediation like the proverbial bull in the china shop, with little regard for the hard work that pioneers in the field have done to develop standards for training, ethics, and qualifications.”

86. Id.

87. The extent to which the prevailing rhetoric has taken firm hold in the world of real lawyering practice is questionable.

88. See, e.g., Andrew S. Morrison, Is Divorce Mediation the Practice of Law? A Matter of Perspective, 75 CAL. L. REV. 1093 (1987); Peter S. Adler, Lawyer & Non-
new roles as third party neutrals. Specifically, mediation practice by lawyers, sparked considerable debate about the relevant ethical rules governing lawyer behavior. Several questions arose: Do lawyer-mediators engage in representation during the mediation process? How does this implicate conflict of interest rules? Is mediation covered under the ancillary practice rules? Many of these concerns related to ongoing but separate debates about the merits of "facilitative" versus "evaluative" forms of mediation practice, whether lawyers serving as neutrals could give legal advice to parties

---


90. **Model Rules of Prof'l Conduct** R. 5.7(b) (1994) (defines law-related services as, "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.")

91. See *infra* text accompanying notes 186-93.
during a mediation proceeding and whether they could draft settlement agreements.\textsuperscript{92} Scholars argued that if mediation were the practice of law, new professional responsibility rules were needed for lawyers.\textsuperscript{93}

An equally serious part of the practice of law concern was with non-lawyers. Much of the concern in mediation has been with the activities of non-lawyer neutrals engaged in divorce mediation. In the early 1980's several bar association ethics committees issued opinions regarding the permissible boundaries of divorce mediation.\textsuperscript{94} Typical inquiries in most opinions concern whether mediation constitutes the practice of law, the extent to which non-lawyers may participate in the mediation process and the extent to which lawyers may participate in mediation with non-lawyers or alone. Concern with unauthorized practice pervades the opinions.\textsuperscript{95} Except for what seems to be leniency towards not-for-profit mediation services, non-lawyers were generally restricted in their mediation activities.\textsuperscript{96}

\textsuperscript{92} Ethics 2000, Draft Rule 2.4, (2002) at http://www.abanet.org/cpr/e2k-rule-2.4.html (remaining silent on whether lawyers as neutrals can give advice to parties in an ADR proceeding and whether they can draft settlement agreements).


In general, commentators offered different views on the extent to which non-lawyers could engage in law-related activities. Some scholars argued that it was unwise to prohibit an explanatory discussion of law by non-lawyer mediators, but that it would not be a good idea to sanction it completely. Others distinguished between "facilitative" and "evaluative" styles of mediation practice, arguing that laypersons should be permitted to engage in facilitative mediation, but only lawyers should be permitted to practice evaluative mediation. Others argued for uniform standards to govern UPL and mediation practice.

The escalating boundary battle between lawyers and non-lawyers in ADR has proceeded along an historically predictable course. The legal profession has sought refuge in the protections offered by the UPL doctrine while dispute resolution professionals respond that their practices do not amount to the practice of law. The following sections offer a brief background of UPL regulation in the United States. This area has been the subject of extensive commentary and my purpose here is to explain it in light of the issues and questions raised by the involvement of non-lawyers in the emerging mediation profession.

II. THE UNAUTHORIZED PRACTICE OF LAW DOCTRINE

The UPL doctrine limits the practice of law to licensed attorneys who have satisfied educational and moral requirements. Every state regulates the unauthorized practice of law by statute, case law or a uniform code. Curiously, there has been much less concern in the literature with non-lawyers who participated in arbitration, one of the oldest forms of ADR in this country, where non-lawyers traditionally serve as neutrals. Most interest here is found in the reports of the securities industries groups. The focus was not on the neutral providing services as it was in mediation but on non-lawyers representing parties during securities arbitration proceedings. See, e.g., Cleary, supra note 38, at 543-44.

combination of both. Unauthorized practice rules apply both to non-
lawyers and to attorneys who are not licensed to practice in a particu-
lar state. UPL enforcement methods vary and may rest with bar as-
sociations, supreme court committees or civil and criminal law en-
forcement through the attorney general or public prosecutor’s office. When cases are not resolved through negotiated settle-
ments, remedies may take the form of injunction, criminal prose-
cution, criminal contempt and quo warranto writs. Overall, there has been a decrease in enforcement activity over the last thirty years.

The ethical rules that regulate a lawyer’s professional behavior, the 1969 ABA Model Code of Professional Responsibility and the 1983 ABA Model Rules of Professional Conduct, offer consumer protection as the rationale for UPL rules. Consumers need to be pro-
vided with competent professional judgment and protected from

For a recent survey of state UPL regulations, see Yvonne A. Tamayo, Defining the Practice of Law in the 21st Century, ABA Conference on Professional Responsibility, Appendix B (2000).

102. See, e.g., Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998). The court upheld the refusal of a California corporation to pay a New York law firm for work they did in California while preparing for an arbitration that took place in San Francisco because they were not members of the California bar and thus were engaged in the unauthorized practice of law. See Cal. Civ. Proc. Code § 1282.4 (West 2002) (post-Birbrower amendment allowing out-of-state attorneys to represent parties in private arbitration proceedings without violating the unautho-
rized practice of law regulations).

103. Model Rule 5.5(b) prohibits lawyers from “assist[ing] a person who is not a member of the bar in the performance of activity that constitutes unauthorized prac-


105. See Wolfram, supra note 103, at 845.

106. See Denckla, supra note 9, at 2592. See also Wolfram, supra note 103, at 845-46.

107. See Denckla, supra note 9, at 2585; ABA Commission on Nonlawyer Pract-
tice, Nonlawyer Activity in Law-Related Situations: A Report with Recommen-
ineffective assistance of counsel.\textsuperscript{108} The assumption is that lawyers are forced to exhibit a level of education and ethical standards\textsuperscript{109} whereas non-lawyers are not regulated “as to integrity or legal competence by the same rules that govern the conduct of [lawyers].”\textsuperscript{110} Likewise, case law refers to the state’s interest “in preventing legally untrained shysters who pose as attorneys from milking the public for pecuniary gain.”\textsuperscript{111}

A. Historical Background

The history of efforts to regulate the unauthorized practice of law has been well documented.\textsuperscript{112} Restrictions against the unauthorized practice of law can be traced to the colonial era.\textsuperscript{113} Courts attempted to control who would appear before them as advocates for clients.\textsuperscript{114} In the non-litigation context, however, non-lawyers were permitted to engage in a wide variety of legal assistance activities including drafting wills,\textsuperscript{115} giving legal advice, and preparing legal documents.\textsuperscript{116}

The legal profession’s organized opposition to the unauthorized practice of law began in 1930, a time described by Weckstein as “a

\textsuperscript{108} EC 3-1 instructs that “[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.” \textsc{Model Code of Prof’l Responsibility} EC 3-1 (1983).

\textsuperscript{109} EC 3-2 defines the lawyer’s “competent professional judgment” as “the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.” Denckla, supra note 9, at 2593 (quoting \textsc{Model Code of Prof’l Responsibility} EC 3-2 (1981)).

\textsuperscript{110} \textsc{Model Code of Prof’l Responsibility} EC 3-3 (1983).

\textsuperscript{111} Hackin v. Arizona, 389 U.S. 151, 151-52 (1967).


\textsuperscript{113} \textsc{Commission on Nonlawyer Practice}, supra note 107, at xi. Christenson, supra note 112.

\textsuperscript{114} Several states did allow non-lawyers to appear as advocates. The era of non-lawyer practice ended at the time of the Civil War with the rise of bar associations and the beginnings of the growth of professionalism. Denckla, supra note 9, at 2583.

\textsuperscript{115} \textsc{Wolfgram}, supra note 103, at 825-26.

\textsuperscript{116} \textsc{Hurst}, supra note 112, at 319. Three of these activities are prohibited today as the unauthorized practice of law. Denckla, supra note 9, at 2583. \textit{See also Wolfgram, supra note 103, at 825.}
period of economic depression when lawyers, along with almost everyone else, were struggling to protect their livelihood from competition and economic catastrophe." 117 In this year, the ABA established a committee on unauthorized practice and began to encourage state bar associations to do the same. 118 Four years later, the ABA began publication of the Unauthorized Practice News and a few years later began negotiating statements of principle with potential competitors about the permissible limits of their activities. 119 Not until the Supreme Courts' decision in Goldfarb v. Virginia State Bar, 120 subjecting anticompetitive activity by bar associations to the federal antitrust laws, did UPL activity begin to subside.

B. Defining UPL

Efforts to define the "unauthorized practice of law," or conversely the "practice of law," are characterized, at best, by longstanding ambiguity. The ethical rules governing lawyers' behavior do not define unauthorized practice and instead leave it to the states for individual determination. 121 There is little uniformity in the definition of unauthorized practice or law practice. 122 This is not surprising as the manner in which the practice of law is defined varies among the states. 123 Despite the uncertainties of what constitutes the practice of law, vagueness challenges to UPL statutes have been routinely rejected. 124

118. The New York County Lawyers Association established an unauthorized practice committee as early as 1914 to respond to competition from title and trust companies. HURST, supra note 112, at 323.
119. WOLFRAM, supra note 103, at 825-26.
121. EC 3-5 states: "What constitutes unauthorized practice of law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1983).
122. A common critique is the lack of definition both of UPL and of the practice of law. See, e.g., Rhode, Policing the Professional Monopoly, supra note 104, at 81; Laurel S. Terry, A Primer on MDPS: Should the "No" Rule Become a New Rule?, 72 TEMP. L. REV. 889 (1999).
123. See Michelman, supra note 104, at 4, 5.
Three of the most common tests applied by courts in determining whether activity constitutes the practice of law are: (1) the Professional Judgment Test focusing on whether the relevant activity is one that requires specialized training and skills;\(^{125}\) (2) the "Traditional Area of Practice" Test which defines law practice as that which lawyers do;\(^{126}\) (3) the "Incidental" Legal Services Test, or the flip side of the traditional area of practice test which examines whether the challenged activity by non-lawyers is consistent with being "an adjunct to a routine in the business or commercial world that is not itself law practice."\(^{127}\)

A number of exceptions to the scope of UPL regulations have been recognized. Apart from self-representation, which is recognized as a constitutional right,\(^{128}\) states also recognize the following situations: cases in which a personal attorney-client relationship is absent;\(^{129}\) nonlawyer representation before state and federal

\(^{125}\) WOLFRAM, supra note 103, at 836.

\(^{126}\) EC 3-5 offers a functional understanding of what lawyers do: "The practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1983). See WOLFRAM, supra note 103, at 836, for a critique of this test.

\(^{127}\) WOLFRAM, supra note 103, at 836. See, e.g., Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 633 (Wash. 1985). Application of New York County Lawyers Ass'n ("Bercu"), 78 N.Y.S.2d 209 (N.Y. App. Div. 1948), aff'd 299 N.Y. 728, 87 N.E.2d 451 (N.Y. 1948). This exception is generally limited to nonlawyers who do not charge for their services. Rhode, Policing the Professional Monopoly, supra note 104, at 82-83. The incidental test has been criticized for its failure to consider the interests in protecting the public welfare. See Agran v. Shapiro, 273 P.2d 619, 625 (Cal. Ct. App. 1954). It should be noted that several other tests have also been used by the courts. See Dencikla, supra note 9, at 2588-89. Rhode, Policing the Professional Monopoly, supra note 104, at 81-85.


\(^{129}\) Michelman, supra note 104, at 7.
administrative agencies\textsuperscript{130} and small claims courts;\textsuperscript{131} representation by supervised law students in a law school clinic;\textsuperscript{132} publishers' First Amendment rights to create and sell do-it-yourself legal kits;\textsuperscript{133} and scriveners rights to assist in completing forms as long as no advice is given.\textsuperscript{134}

C. UPL Today

In general it may be said that UPL enforcement varies considerably across the country. It is pursued actively in some states\textsuperscript{135} such as Texas\textsuperscript{136} and Florida,\textsuperscript{137} and almost ignored in others.\textsuperscript{138} In the wake of the MDP debate, however, many states have increased their


\textsuperscript{131} See Ryan J. Talamante, We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law in Arizona, 34 ARIZ. L. REV. 873, 885 (1992).


\textsuperscript{133} This exception applies as long as there is no relationship between the buyer and seller on how to use the kit. See, e.g., In re Thompson, 574 S.W.2d 365, 369 (Mo. 1978); NJ State Bar Ass'n v. Divorce Ctr. of Atlantic County, 477 A.2d 415 (N.J. Super Ct. Ch. Div. 1984). See generally Patricia J. Lamkin, Annotation, Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law, 71 A.L.R. 3d 1000 (1976).

\textsuperscript{134} See, e.g., Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978).

\textsuperscript{135} See, e.g., Arons et. al. v. Office of Disciplinary Counsel of the Sup. Ct. of Del., 756 A.2d 867 (Del. 2000).


\textsuperscript{137} See, e.g., Florida Bar v. Eubanks, 752 So.2d 540 (Fla. 1999); Florida Bar v. Catarcio, 709 So.2d 96 (Fla. 1998).

\textsuperscript{138} There have been several proposals to allow lay persons to engage in limited law practice. See, e.g., Justice, supra note 132, at 193-210.
UPL activities and the ABA has expressed renewed interest in UPL enforcement.\textsuperscript{139}

Over the last twenty-five years,\textsuperscript{140} state court UPL litigation represents a mix of roughly seven general categories of cases: employment issues raised at administrative hearings,\textsuperscript{141} divorce,\textsuperscript{142} adoption,\textsuperscript{143} child support,\textsuperscript{144} insurance,\textsuperscript{145} real estate\textsuperscript{146} and mortgage cases.\textsuperscript{147} The largest area of case law relates to real estate and mortgage issues. Individual states brought charges against non-attorneys involved in a variety of activities that constituted the practice of law, including providing advice or ‘typing services’ for divorce,\textsuperscript{148} immigration\textsuperscript{149} or bankruptcy filings.\textsuperscript{150} The largest single area of state involvement was in attorney disciplinary proceedings.\textsuperscript{151} The

\textsuperscript{139} Concerned with lax enforcement of UPL regulations, the ABA House of Delegates, at its 1999 Annual Meeting, passed a resolution sponsored by the Ohio State Bar Association that would increase the enforcement of unauthorized practice regulations and require the ABA to collect data on unauthorized practice. Gillers & Simon, supra note 103, at 304-05. The resolution requires every jurisdiction to:

(1) establish and implement effective procedures for the discovery and investigation of any apparent violation of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of those laws, and (2) require the ABA to establish and support a mechanism for identifying and reporting to state, local, and territorial bar associations and designated authorities instances of persons or organization engaging in the unauthorized practice of law in more than one jurisdiction.

American Association of Law Schools, Professional Responsibility Newsletter (Spring 2000).

\textsuperscript{140} Analysis of cases prior to 1980 have been discussed at length elsewhere. See Rhode, Policing the Professional Monopoly, supra note 104; Christenson, supra note 112.


\textsuperscript{143} E.g., State v. Thierstein, 371 N.W.2d 746 (Neb. 1985).

\textsuperscript{144} E.g., Furtado v. Furtado, 402 N.E.2d 1024 (Mass. 1980).

\textsuperscript{145} E.g., In re Allstate Ins. Co., 772 S.W.2d 947 (Mo. 1987); Prof'l Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982).

\textsuperscript{146} E.g., Kunz v. Warren, 725 P.2d 794 (Colo. App. 1986).


\textsuperscript{148} E.g., The Fla. Bar v. Furman, 451 So.2d 808 (Fla. 1984).

\textsuperscript{149} E.g., Unauthorized Practice of Law Comm. v. Cortez, 692 S.W.2d 47 (Tex. 1985).

\textsuperscript{150} E.g., State ex rel. Disciplinary Comm'n of the Sup. Ct. of Ind. v. Crofts, 500 N.E. 2d 753 (Ind. 1986).

\textsuperscript{151} E.g., In the Matter of Discipline of Jorissen, 391 N.W. 2d 822 (Minn. 1986); State ex rel. Nebraska State Bar Ass'n v. Frank, 363 N.W. 2d 139 (Neb. 1985); In re Yamaguchi, 515 N.E.2d 1235 (Ill. 1987); In re Knutson, 405 N.W.2d 234 (Minn. 1987).
states were also heavily involved in criminal prosecution that incor-
porated UPL charges,\textsuperscript{152} or in cases where defendants requested the aid of lay representation.\textsuperscript{153}

The majority of UPL cases brought in federal court involve bank-
rupency issues.\textsuperscript{154} Non-lawyers are typically charged with assisting parties in drafting and filing petitions.\textsuperscript{155} This is not a surprising revelation, considering the significant increase in consumer bankruptcy filings by pro se debtors.\textsuperscript{156}

D. Literature Review

Over the last twenty-five years, UPL regulation has been the subject of extensive criticism and proposals for change.\textsuperscript{157} Some


\textsuperscript{156} Susan Block-Lieb, A Comparison of Pro Bono Representation Programs for Consumer Debtors, 2 AM. BANKR. INST. L. REV. 37, 37 (1994) ("While many are aware that consumer bankruptcy filings have more than doubled in the fifteen years since the enactment of the Bankruptcy Code, few are aware that a substantial and increasing number of these consumer bankruptcy petitions are filed pro se by debtors without the assistance of counsel.")

\textsuperscript{157} See, e.g., Hunter & Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 VILL. L. REV. 6 (1979-80) (proposal to license non-lawyers); Justice, supra note 132; Morrison, Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4 NOVA L. REV. 363 (1980) (proposal to reexamine what constitutes the practice of law through a mini-legislature of three different groups); Carol A. Needham, The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice, 36 S. TEX. L. REV. 1075 (1995) (arguing that states should amend their UPL provisions to exempt out-of-state lawyers from prosecution for UPL); Rhode, Policing the Professional Monopoly, supra note 104; Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform, 11 GEO. J. LEGAL ETHICS, 989 (1998) (arguing that paraprofessionals be permitted to provide legal services with adequate legal protection for the public); Alex J. Hurder, Nonlawyer Legal Assistance and Access to Justice, 67 FORDHAM L. REV. 2241 (1999) (arguing for expanded role for non-lawyers to increase access to the legal system); Weckstein, supra note 117 (non-lawyer representation permissible if waiver and malpractice standards in place); Margaret F. Brown, Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized
scholars have challenged the idea that the public was being protected and that these rules were about the integrity of the legal profession; they charged that these rules were about excluding competitors.\textsuperscript{158} Professor Deborah Rhode's seminal article in 1981 focused her UPL analysis on First Amendment and due process objections to the doctrine.\textsuperscript{159} Other scholars have attacked the doctrine as a violation of the right to petition.\textsuperscript{160} Perhaps the most common critique of unauthorized practice in recent years is that it denies poor people access to the legal system.\textsuperscript{161}
E. Myth of Consumer Protection

The legal profession traditionally described the UPL doctrine as a consumer welfare measure that was structured to protect the public against fraud and incompetent, unlicensed lawyering.\textsuperscript{162} Protection of the public is the dominant theme found in the relevant ethical rules governing lawyers' behavior.\textsuperscript{163} Legal commentators, however, have not been persuaded by the consumer protection justification. Instead, they have suggested that rather than enhancing consumer protection, UPL restrictions were prompted by an intent to exclude a number of ethnic groups from the legal profession\textsuperscript{164} or to prevent low-cost competition for legal services by lay persons.\textsuperscript{165}

Despite the consumer welfare rhetoric of unauthorized practice regulation, the limited empirical evidence suggests otherwise. One of the earliest empirical studies, a 1976 analysis of uncontested divorces, showed that pro se litigants performed about as well as lawyers in document preparation and court proceedings and better than lawyers in other areas such as timely filing of papers.\textsuperscript{166} Rhode's empirical study in her 1981 classic article on unauthorized practice suggested a low incidence of consumer injury from lay practitioners.\textsuperscript{167} After an exhaustive two-year study, the ABA Commission on Non-lawyer Practice acknowledged that "the literature reporting evidence of harm is quite sparse."\textsuperscript{168} More recently, Palomar's empirical study of lay practitioners in the real estate business suggests that, "the public does not bear a sufficient risk from the lay provision of real

\textsuperscript{162} See, e.g., Frederick C. Hicks & Elliott R. Katz, The Practice of Law by Laymen and Lay Agencies, 41 YALE L.J. 69, 71-72 (1931).

\textsuperscript{163} The ABA's position on harm to the public caused by the unauthorized practice of law is explicitly described in a 1941 Report: "The public, far more than lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight." STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW, REPORT, 66 A.B.A. REPORT 268 (1941) quoted in Roger Hunter & Robert Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 VILL. L. REV. 6 (1979-80).

\textsuperscript{164} JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102-29 (1976).

\textsuperscript{165} Morgan, supra note 158, at 707. See also Hurst, supra note 112, at 323.

\textsuperscript{166} Ralph C. Cavanagh & Deborah L. Rhode, Project—The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 YALE L.J. 104, 123-29 (1976). A more recent study of four settings (appeals of unemployment compensation claims, state tax appeals, appeals of denials of social security disability benefits and labor grievance arbitrations) in which lawyers and nonlawyers appear suggests that nonlawyers trained in specific areas of law can be as effective or more effective than lawyers. HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 5, 21-22 (1998) [hereinafter KRITZER, LEGAL ADVOCACY]

\textsuperscript{167} Rhode, Policing the Professional Monopoly, supra note 104, at 43.

\textsuperscript{168} ABA/UPL NONLAWYER PRACTICE, supra note 101, at xvii.
estate settlement services to warrant a blanket prohibition of those services under the auspices of preventing the unauthorized practice of law.”

F. Proposals for Reform

Over the last twenty years, the ABA has conducted three major studies involving non-lawyers and UPL. The most recent report in 1995 recommended loosening of the unauthorized practice doctrine and it gave preliminary approval to deregulation that would permit greater non-lawyer participation in some areas of law practice. Over the last two decades states have proposed a variety of reforms that would permit non-lawyers to engage in what would otherwise be considered the unauthorized practice of law.

III. MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW

A. Cases and Ethics Opinions

Much of the concern with lawyering by non-lawyers in ADR stems from mediation practice. Case law is sparse and thus to a large degree mediation practice by non-lawyers operates more

---


171. See Nonlawyer Practice, supra note 170, at 9 (recommending that states “assess whether and how to regulate” the activities of nonlawyers by applying certain criteria: (A) Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being? (B) Do potential consumers of law-related services have the knowledge needed to evaluate the qualifications of nonlawyers offering their services? (C) Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?); see also 1994 Survey and Related Materials on the Unauthorized Practice of Law, NONLAWYER PRACTICE, 1994 A.B.A. CENTER FOR PROF'L RESP.

172. E.g., Nonlawyer Practice, supra note 170 (“preliminary endorsement to a deregulated licensing approach permitting greater nonlawyer practice in specified areas.”).

173. See, e.g., Justice, supra note 132; Talamante, supra note 131 (discussing reform efforts in Arizona).

174. It should be noted that there has been some concern with UPL in arbitration practice and it has focused on non-lawyers who represent parties in arbitration proceedings. See, e.g., The Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So.2d 1178 (Fla. 1997) (nonlawyer, who
under the shadow or threat of UPL regulations rather than under an active enforcement regime.\textsuperscript{175} The early ethics opinions on UPL dealt primarily with non-lawyer involvement in divorce mediation.\textsuperscript{176} More recently, there has been a concern with the limits of advertising.\textsuperscript{177} No coherent doctrine has emerged that interprets or otherwise distinguishes ADR and mediation from the practice of law.

One of the few reported UPL cases involving mediation practice, \textit{Werle v. Rhode Island Bar Association},\textsuperscript{178} involved a psychologist's brochure advertising divorce mediation services that would assist couples in reaching an agreement on property division, support, and child custody. The Rhode Island Bar Association sent Werle, a psychologist and mediator, a cease-and-desist letter informing him that he was in violation of Rhode Island's UPL statute. Werle sued the Rhode Island Bar and the members of its UPL Committee pursuant to 42 U.S.C.\textsection 1983, claiming a violation of his First and Fourteenth Amendment rights. The court held that the defendants were entitled to immunity under Paragraph 1983 and the case was ultimately dismissed.\textsuperscript{179}

\textsuperscript{175} For example, in a survey of state and local bar associations published by the Dispute Resolution Section of the American Bar Association, only four state bar associations reported knowledge of cases in which UPL charges were brought against mediators: North Carolina, Rhode Island, Connecticut and Utah. See American Bar Association, Section of Dispute Resolution, State and Local Bar Association Dispute Resolution Survey 2001 Edition at http://www.abanet.org/statelocal/disputesurvey.html. Likewise, in a survey conducted by the state of Virginia in preparing its UPL guidelines, the vast majority of states that responded reported that they were unaware of court cases or ethics opinions in their state addressing mediation and UPL. \textit{Virginia Guidelines on Mediation & the Unauthorized Practice of Law} 35-38 (1999) [hereinafter \textit{Virginia Guidelines}]. In a survey conducted by Professor Nancy Rogers and Craig McEwen, only seven out of more than 30 counsel who responded reported complaints about mediators engaged in the unauthorized practice of law. \textit{Cole et al., supra} note 35, at Paragraph 10:05 n.38. A preliminary survey of state UPL regulations and mediation conducted by the author suggests similar findings. \textit{See infra} note 298.

\textsuperscript{176} \textit{See} Silberman, \textit{supra} note 94.

\textsuperscript{177} \textit{See}, e.g., NJ Ethics Op., No. 676, ADR; NJ Supreme Court Advisory Committee on Professional Ethics 136 N.J.L.J. 1298 (1994); NJ Atty. Advert. Op. 18 (1994) ("Clearly non-lawyers may provide ADR/CDR services as long as they do not hold themselves out as lawyers and do not engage in any activities, such as the rendering of legal advice, that might constitute the unauthorized practice of law.").

\textsuperscript{178} 755 F.2d 195, 199-200 (1st Cir. 1985).

\textsuperscript{179} The court's rationale gives some hint about its views on unauthorized practice. According to the court, the defendants were entitled to immunity under one of two views. First, they were entitled to absolute immunity afforded to prosecutors exercising their discretionary function. Alternatively, qualified immunity was available.
More recently, in Commonwealth of Virginia v. Steinberg, Va. Circuit Court Henrico Co.,180 a non-lawyer mediator in Virginia was found to be engaged in the unauthorized practice of law for writing a letter to clients setting forth legal options and offering a legal analysis related to the client's specific facts. The mediator also drafted a separation agreement for the parties.181

B. Managing the UPL Problem in Mediation Practice

Most efforts to control non-lawyers' involvement in ADR through UPL arise in mediation practice. Regulatory efforts to avoid the UPL problem in mediation include three basic approaches: statutes and court rules that distinguish between legal information and advice; carve-out exceptions to UPL regulation for mediation; and resolutions holding that mediation is not the practice of law.

1. Distinguishing Between Legal Information and Advice

Many ethical codes prohibit mediators from giving legal advice,182 but allow them to give information they are qualified by training or experience to provide.183 When parties require legal advice, mediators are told to refer them to independent legal counsel.184 A more interesting variation of the information/advice dichotomy is a

because a reasonable person could conclude that Dr. Werle's divorce mediation services would constitute the unauthorized practice of law. Id. at 199.


181. Id.


183. In addition to the prohibitions found in ethical codes, some state regulatory bodies also prohibit the rendering of legal advice where parties are not represented by counsel. See, e.g., Florida Mediator Qualifications Advisory Panel, Opinions 95-002B (1995). See generally Robert B. Moberly, Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment, 21 FLA. ST. U. L. REV. 701, 714 (1994).

184. See Nolan-Haley, Court Mediation, supra note 182.
Florida rule that prohibits mediators from offering professional opinions but permits them to “point out possible outcomes of the case and discuss the merits of a claim or defense . . . .”

The advice/information distinction is repeated in state regulations and professional standards. The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, the first comprehensive standards to explicitly address mediation and UPL, distinguish between permissible and impermissible forms of mediator activities. A mediator is considered to have offered legal advice when “he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issues.” Mediators may, however, provide legal resources and procedural information and ask reality testing questions that raise legal issues. The guidelines offer examples of permissible and impermissible reality testing questions.

185. Florida Rules for Court-Appointed Mediators, Rule 10.370(c). In re Amendments to the Fla. Rules for Certified and Court-Appointed Mediators, 762 So. 2d. 441 (Fla. 2000). The Florida Rule 10.370 is significant because it was revised after a considerable debate on whether evaluative mediation should be permitted. The Rule provides:

(A) Providing information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide. (B) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the parties of the right to seek independent legal counsel. (C) Personal or professional opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

186. VIRGINIA GUIDELINES, supra note 175, at 13.

187. VIRGINIA GUIDELINES, supra note 175.

188. VIRGINIA GUIDELINES, supra note 175, at 17, 18. The guidelines acknowledge that:

“In this area, perhaps more than any other, the boundary between permissible questions and those that cross the line into legal advice is very narrow. The phrasing of the questions and the context are crucial. Open-ended questions that do not suggest an answer are almost always safe. On the other hand, leading questions that apply law to fact are problematic and may constitute legal advice since they are more likely to predict specific legal resolutions or direct or recommend a course of action.” Id. at 18, 19.

See also Geetha Ravindra, Balancing Mediation with Rules on Unauthorized Practice, ALTERNATIVES, Feb. 2000, at 22. But see Bruce E. Meyerson, Mediation Should Not Be Considered the Practice of Law, ALTERNATIVES, June 2000, at 107.
North Carolina has also adopted guidelines that permit mediators to offer legal information but not advice or opinions about legal rights. As a safeguard against any perception that mediators might be providing legal advice, parties are encouraged to consult with legal counsel before creating any legally binding document.

The advice/information distinction can be problematic as a long-term solution to the problem of managing UPL in mediation practice. Some commentators have observed that there is no real difference between information and advice. Moreover, distinguishing between the two forms of communication may be more difficult for a layperson than for an attorney and may well depend upon context.

2. Carve-Out Exceptions to UPL

A second approach for avoiding UPL issues is to carve out an exception to UPL for mediators. This avoids the difficult problem of trying to distinguish between legal information and advice. The

---

189. NORTH CAROLINA GUIDELINES FOR THE ETHICAL PRACTICE OF MEDIATION AND TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW [hereinafter NORTH CAROLINA GUIDELINES]. The guidelines were adopted by the North Carolina Bar Association Board of Governors in June 1999 and provide as follows:

(1) The mediator should inform the parties to a mediation that the mediator does not provide legal advice. (2) The mediator should encourage parties to consult independent counsel before creating any document the parties intend to be legally binding. (3) If the parties to a mediation wish to sign any memorandum of understanding or other summaries of their discussion, the mediator should offer no opinion regarding the legal effect of any such document. (4) If the parties choose to sign a memorandum of understanding or other summaries of the discussion, the mediator should not sign or initial any such document. If the mediator chooses or is required to sign or initial any memoranda of understanding or other summaries of the discussion, the mediator shall advise the parties in writing that the signature does not constitute an opinion regarding the content or legal effect of any such document.

190. Id.

191. See, e.g., COLE ET AL., supra note 35, at § 10:02.

192. The commentary to District of Columbia, Rule 49 provides in relevant part:

This Rule is not intended to cover the provision of mediation or alternative dispute resolution (“ADR”) services. This intent is expressed in the first sentence of the “practice of law” which requires the presence of two essential factors: the provision of legal advice or services and a client relationship of trust or reliance. ADR services are not given in circumstances where there is a client relationship of trust or reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel.


It is interesting to note that the ABA Commission on Multidisciplinary Practice included in Appendix A of its report a model definition of the practice of law based on this rule. Report to the House of Delegates, 1999 A.B.A. COMM’N ON MULTIDIsciplinary Prac. app. A1.
3. Official Resolutions and Positions

Both the legal profession and the dispute resolution profession are studying ways to resolve the UPL problem in mediation. The ABA Section on Dispute Resolution, through the work of its Unauthorized Practice subcommittee, has devoted considerable energy to this project. One result has been the issuance of a draft resolution stating that mediation is not the practice of law. The draft is significant.

---

193. The Resolution on Mediation and the Unauthorized Practice of Law, adopted by the ABA Section of Dispute Resolution on February 2, 2002, provides as follows:

Resolution on Mediation and the Unauthorized Practice of Law

The ABA Section of Dispute Resolution has noted the wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law. The Section believes that both the public interest and the practice of mediation would benefit from greater clarity with respect to this issue in the statutes and regulations governing the unauthorized practice of law ("UPL"). The Section believes that such statutes and regulations should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators. The enforcement of such statutes and regulations should be informed by the following principles:

Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

Mediators' discussion of legal issues. In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

Drafting settlement agreements. When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

Mediators' responsibilities. Mediators have a responsibility to inform the parties in a mediation about the nature of the mediator's role in the process and the limits of that role. Mediators should inform the parties: (a) that the
because it comes from a section of the American Bar Association that has both lawyer and non-lawyer members. As such, it should signify a substantial contribution to the development of mediation as a distinct profession.\textsuperscript{194}

In addition to the legal profession, the Association for Conflict Resolution (ACR) has assigned a task force to the UPL problem.\textsuperscript{195} Earlier public statements by its predecessor organization, SPIDR, emphasized that if dispute resolution professionals were to support efforts at uniform regulation, then it must be made clear that mediation is distinct from the practice of law.\textsuperscript{196} Boundary conflicts between the legal profession and the emerging mediation profession make mediation practice a risky enterprise for non-lawyers. Over-shadowed by the haunting threat of UPL enforcement, non-lawyers attempt to protect themselves by continually asserting that mediation is not the practice of law. However, their efforts to distinguish mediation from the practice of law have been fraught with difficulty. In the following sections, I describe why this is so.

**PART III  MEDIATION PRACTICE AND UPL RULES: RECOGNIZING EMPIRICAL REALITIES**

Thirty years ago, the late law professor Lon Fuller offered a vision of mediation that would ground it as a humanistic, relational practice for over two decades. The central quality of mediation, according to Fuller, was its "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attention toward each other."\textsuperscript{197} For many

\textquote{mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement; (b) that a settlement agreement may affect the parties' legal rights; and (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement."}.


194. The ABA Section of Dispute Resolution has also issued a resolution stating that all qualified individuals should be permitted to participate in court ADR programs whether or not they are lawyers. American Bar Association, Section on Dispute Resolution, adopted April 28, 1999, available at <http://www.abanet.org/dispute/resolution>.


196. See supra note 41.

practitioners, Fuller's relational and humanistic understanding is still alive and well. As mediation practice has expanded from the labor field and community dispute centers to courts and corporations, however, there has been greater experimentation that has generated more pluralism in practice. The emergence of diverse practices has been accompanied by a recognition that mediation is essentially a contextual process. Empirical studies describe mediator behaviors in terms of bargaining and therapeutic modes, directive and passive, or hashing, bashing and trashing. There has been much debate about what constitutes the legitimate practice of mediation, and specifically, whether certain mediator activities constitute the practice of law.

Perhaps the most significant event to capture the relationship between UPL and mediation practice is the “evaluative/facilitative” debate, a discussion of mediator behaviors inspired by Professor Leonard Riskin’s seminal article, Understanding Mediator’s Orientations, Strategies, and Techniques: A Grid for the Perplexed. Without setting out normative preferences, Professor Riskin attempted to capture the pluralism of mediation practice by identifying four types of mediator behaviors ranging from extreme evaluation to facilitation. While some commentators, arguing for a greater flexibility in the mediator’s role and calling for an end to the debate,


199. See, e.g., Nancy A. Welsh, All in the Family: Darwin and the Evolution of Mediation, A.B.A. Disp. Resol. Mag., Winter 2001, at 20 (noting that mediation is evolving into many different forms, depending upon the environment). This is no less true in the international setting where scholars have observed that a greater interest in peacemaking activities has “stretched the meaning of mediation.” CHESTER CROCKER ET AL., HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD 9 (1999).

200. Susan S. Silbey & Sally E. Merry, Mediator Settlement Strategies, 8 LAW & POL’Y 7, 19-25 (1986). Certainly, the therapeutic settlement strategies would have overtones of Fuller’s relational and humanistic understanding of mediation.


202. See supra notes 88-98 and accompanying text.


204. Within these categories, Professor Riskin also describes narrow and broad interpretation of issues. Id. at 25-34.


have been critical of the evaluative/facilitative distinction,207 discussion of these behaviors continues to dominate the mediation community.208

Mediation purists would have mediation practice stay true to Fuller's relational understanding and be limited to simply facilitating negotiations between the parties.209 Purists have a truth-in-labeling concern both with lawyer and non-lawyer behaviors. Imbedded in their arguments is an interest in fidelity to an original understanding of mediation as a facilitative process. The other strand of the evaluative/facilitative debate supports a more catholic view of mediation practice and argues for acceptance of multiple models, depending upon context. This would include the mediator's right to evaluate or to be eclectic.210

I. THEORY MEETS PRACTICE

Evaluative approaches to mediation practice have the potential to slip and slide into what may be considered the practice of law in many jurisdictions. This spillover effect may explain why, in many discussions about the merits of various mediation behaviors, there is a curious avoidance of what most practitioners know—that evaluation is out there for better or worse.211 In fact, it is rampant, particularly when an impasse occurs in the negotiations.212

208. These are not the only forms of behavior. See Joseph P. Folger & Robert A. Baruch Bush, Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice, 13 MEDIATION Q. 263 (1996).
210. See, e.g., Stempel, Inevitability of the Eclectic, supra note 33.
212. As Professor John Lande notes, “Although mediator evaluation is sometimes just what is needed to help parties seriously confront and resolve the issues in their dispute, it also risks perpetuating adversarial dynamics and entrenchment of positions.” Lande, Sophisticated Mediation Theory, supra note 211, at 326.
Evaluation practice in mediation is often a complex enterprise.\textsuperscript{213} It may be broadly categorized as \textit{explicit} or \textit{implicit} and within these major categorizations, it can be either \textit{intentional} or \textit{unintentional}.\textsuperscript{214} \textit{Explicit} evaluative behaviors are best described as a continuum that includes a range of activities from giving specific advice, rendering an opinion on a likely court outcome,\textsuperscript{215} offering a "mediator's proposal,"\textsuperscript{216} to simply giving information.\textsuperscript{217}

\textit{Implicit} evaluation is a more subtle undertaking that involves both non-verbal as well as verbal communication. Examples here include mediator option generating, facial expressions and silence. The very selection of specific options geared to understanding the parties' interests or needs places the mediator in the position of selecting some options from many and thus can be considered an \textit{implicit} form of evaluation. Facial gestures reveal volumes about a mediator's thinking. Thus, a mediator's nod or frown in response to a question can be implicitly evaluative.\textsuperscript{218} Finally, silence may be one of the subtlest forms of implicit evaluation. Indeed, in some cultures, silence may be interpreted as approval of a course of action or an agreement.\textsuperscript{219}

Rarely will mediation proceed without some form of evaluation.\textsuperscript{220} Mediators help parties develop solutions that respond to

\begin{itemize}
\item \textsuperscript{213} Wade points out that the timing and form of advice is complex. It is not a simple question of giving or not giving advice. John Wade, \textit{Forever Bargaining in the Shadow of the Law—Who Sells Solid Shadows? (Who advises what, how and when?)}, 12 \textsc{Australian J. Fam. Law} 256, 257 (1998) ("Just as 'advice' is slippery in meaning, the word 'legal' is even more of a weasel-word. It has many broad and narrow possible meanings.").
\item \textsuperscript{214} I thank my colleague Dr. Maria Volpe for recognizing this distinction.
\item \textsuperscript{215} \textit{See In re Amendments to the Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441, 444-45 (Fla. 2000) ("In this mediation style, the mediator, often at the request of the parties, makes and offers an independent judgment on the merits of issues under consideration and explains the likely outcome of litigation.").
\item \textsuperscript{216} For a discussion of this technique \textit{see Dwight Golann, Mediating Legal Disputes: Effective Strategies For Lawyers And Mediators} 168-69 (1996).
\item \textsuperscript{217} \textit{See James H. Stark, The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator, 38 S. Tex. L. Rev. 769, 774 (1997) (citing mediator and trainer Margaret Shaw for developing the concept of evaluation as a continuum of activities).}
\item \textsuperscript{218} It could also be explicitly evaluative.
\item \textsuperscript{219} \textit{Michele Hermann et al., The Metrocourt Project Final Report 143 (1993) (describing how, in some minority cultures, a mediator's silence regarding a proposed agreement may be interpreted as approval).}
\item \textsuperscript{220} Because mediation is a private process, the extent to which legal evaluation takes place is unclear. One clue, however, is an examination of the case law where reports are found of legal evaluation. Many of the cases come from the court-connected programs where legal rights predominate and not from the labor mediation
\end{itemize}
their needs and interests. In order to do this, mediators ask questions in a "reality-testing process" or they may explore the range of settlement options to ensure there is informed consent. Standard mediator techniques such as creating doubt, framing, reframing and selective facilitation may also be intentional or unintentional ways of providing evaluation.

In reality, much of what passes for standard mediator techniques can be a form of explicit or implicit evaluation. This is true whether it takes the form of encouraging exchanges of information, helping parties to understand each other's views, stimulating the parties to develop creative solutions or helping parties to invent solutions that meet their basic needs and interests. In short, it does not take too much to transform the act of inventing solutions into the practice of law.

Mediation is a contextual process and this makes evaluation more prevalent in certain subject areas such as court-connected and some family law programs. Professor Randolph Lowry claims that all mediators evaluate and the question really should be how evaluation is conducted. Australian law professor and mediator John Wade claims that in the context of family mediation practice, "it is not possible to be an 'adviceless mediator, conciliator or facilitator.' All mediators give some advice." Wade also claims that "anecdotally, it is clear that many, and perhaps the majority of, 'successful' mediators give some subtle forms of 'legal' information, opinion and advice in some cases."

The reality of evaluative mediation, particularly of law-related issues, is that its spillover effect into the practice of law implicates UPL regulations. In my view, we should deal with these evaluative

---

221. See The Benjamin N. Cardozo School of Law Online Journal of Conflict Resolution, ADA Mediation Guidelines, § IV(A-C) (2000). These Guidelines for mediation providers are the product of a national Work Group convened to develop practice guidelines unique to conflicts arising under the Americans with Disabilities Act.


224. An example here would be custody and divorce mediation.


226. See Wade, supra note 213, at 287.

227. Id.
practices head-on rather than with the "tip-toe around it" approach that seems to predominate in the existing mediation culture. 228

II. HOW MEDIATORS AVOID UPL CHARGES

Given the pervasiveness of evaluation, in all its forms, and its close proximity to the practice of law in many jurisdictions, it is not surprising that mediation practitioners have adopted multiple approaches for avoiding UPL problems. The first is a structural response, advocating a form of mediation practice that eschews any form of evaluation. A good example of this is the transformative approach to mediation advocated by Professors Bush and Folger which deliberately adopts a practice style that excludes information or advice. 229 By definition, this approach has a built-in protection against the threat of UPL charges.

The second approach is quasi-legalistic and may be labeled "informed consent." An "informed consent" response says that however you label the mediator's activities, the parties acknowledge that these activities are not the practice of law. 230 This approach may require parties to sign agreements to mediate in which they acknowledge their understanding of the mediator's role as one of a facilitator and not as an attorney representing them in any capacity. Or, parties may sign statements saying that they understand that they should consult with an attorney.

A third approach is the "distinction" mode where mediators label their borderline practice of law activities as legitimate mediator techniques to facilitate settlement. These techniques could include reality testing, some forms of framing and some forms of questioning. The distinction approach would also include attempts to differentiate between legal information and advice. 231

228. See infra text accompanying notes 230-31.
229. See remarks of mediator Sally Ganong Pope, of the Academy of Family Mediators: "Unauthorized practice is not an issue if the mediator practices from the transformative framework. The transformative mediator does not evaluate the case or advise the parties. Assisting parties to become clearer and more focused and to make decisions while taking into account the other's perspective is not the practice of law." A.B.A. Section on Dispute Resolution, High Level ADR Talk . . . Who Is Qualified?, JUST RESOLUTIONS 6, (1999).
230. This approach bears a striking similarity to many of the top five accounting firms in the MDP debate who, in response to charges that they were violating the unauthorized practice of law regulations, simply replied that they were not practicing law. See Terry, supra note 122, at 881-82 (1999); Mary C. Daly, Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 GEO. J. LEGAL ETHICS 217, 262-63 (2000).
231. See supra text accompanying notes 182-90.
III. PROBLEMS WITH REGULATING MEDIATION PRACTICE THROUGH UPL REGULATIONS

Controlling mediation practice through traditional UPL regulations is problematic from both a practice and a policy perspective. It leads to two sets of practice rules, one for lawyers and one for non-lawyers, that will continue to cause divisiveness in the mediation profession. From a public policy perspective, it is potentially harmful for the majority of Americans who cannot afford legal counsel in mediation. These individuals will be deprived of information that could assist them in making educated and informed decisions in the mediation process. Thus, UPL regulations represent a major impediment to the implementation of informed consent practices in mediation. Finally, controlling mediation practice through lawyers' professional monopoly is counter-productive to the growing interest in a problem-solving ethic for the legal profession.

A. Example 1

Two examples illustrate the potentially inequitable effects of UPL regulations on disputing parties in mediation. First, consider the classic understanding of the mediator as an "agent of reality." Professor Stulberg defines "agent of reality" behavior as being "able to identify for each party what is do-able in light of the interests and resources of the other parties to the discussion. If a party's proposal is inflated, the mediator must let him know that it is simply unobtainable." In a Small Claims Court mediation session, one party's proposal for settlement includes a claim for damages for emotional distress, which are not recoverable. The mediator, who also happens to be a lawyer, could inform the parties that damages for emotional distress are not recoverable in Small Claims Court. Depending upon whether this information was considered legal information or advice, under a strict UPL regime, the non-lawyer mediator could be silenced on this point. Yet, for the parties, ignorance of this information could affect the long-term durability of the agreement reached in mediation.

233. Under some standards, giving such information might be considered the unauthorized practice of mediation. See, e.g., Carrie Menkel-Meadow, Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution, 28 FORDHAM URB. L.J. 979, 980 (2001).
B. Example 2

A second example to illustrate the inequitable effects of UPL regulation relates to the mediator role that Professor Stulberg labels "guardian of durable solutions." Stulberg notes that "[T]he mediator should not impose on the parties his own judgment or preference as to how a problem should be resolved. But the mediator must consider the consequences of what people are agreeing to and try to ensure that the terms of agreement they develop will last." Again, in the Small Claims Court setting, the lawyer-mediator could tell parties who are about to settle for $4,000.00 that the jurisdictional limit of the court is $3,000.00 and therefore that the $4,000.00 settlement might be unenforceable if there were a lack of compliance. It is doubtful that the non-lawyer mediator could offer the same legal insights without violating UPL regulations.

The two sets of rules, one for lawyer-mediators, one for non-lawyers, have potentially harmful consequences for the principle of informed consent. This is particularly disturbing for unrepresented parties, as low cost mediation centers are promoted to solve the problem of overcrowded dockets and give pro se parties a way to solve their legal needs. Non-lawyer mediators who are silenced by UPL regulations may be ineffectual because they are unable to offer the parties sufficient information for educated decision-making. Without sufficient information, parties cannot give informed consent in mediation and it is difficult to understand how low cost mediation centers would truly be able to solve their legal needs.

Finally, regulating mediation through UPL is counterproductive to the developing ethic of problem-solving for lawyers. Embracing a new ethic that values collaboration and accommodation on the one hand, while suppressing competition from non-lawyers in mediation practice on the other, leads to a schizophrenic type of existence that will prove untenable in the long run for both the legal profession and the emerging mediation profession. We need a new way forward together. In the following section, I sketch a framework for reform.

234. Stulberg, Taking Charge, supra note 232.
235. Id.
PART IV  THE WAY FORWARD

I. A TRUE PROBLEM-SOLVING PERSPECTIVE FOR LAWYERS

Our professional compasses need to be adjusted towards a power-sharing and problem-solving orientation. Competition between lawyers and non-lawyers for clients and fees has blurred our professional vision. As a result, debates about the boundaries of law practice and mediation have occurred largely at a distance from the parties being served and from the goals of justice and fairness. Driven by economics, power struggles and politics, discussions and arguments about the philosophical nature of mediation have turned into turf battles and are, consequently, stumbling and groping for direction.

A problem-solving perspective requires input from the multiple fields that comprise the emerging mediation profession and collaboration with the range of perspectives that is represented. We then can focus combined energies on the needs of parties being served in mediation, both the unrepresented as well as the represented. Boundary conflict questions between lawyers and non-lawyers can be reframed to ask basic problem-solving questions: What are the public's needs and interests? What options respond to these interests? Which options are most durable and readily understood? Power sharing requires a collaborative search for answers to these questions by both the legal and dispute resolution professions. In the long run, this approach offers more promise for justice.

II. AFFIRMING COMMON FOUNDATIONAL PRINCIPLES

Justice, fairness and resolution, presumably the goals of most parties who are served in mediation, are supported by three foundational principles—process quality, neutral competency and informed

---

238. As Martha W. Barnett, President of the American Bar Association, recently noted: [T]oday, as the legal profession has evolved with modern economics, so has the typical lawyer, from statesman to businessman. Society has changed as well. We are more consumer oriented and so is the law. The proliferation of lawyers, not to mention the ever-increasing number of non-lawyers who want to offer legal services, has created intense competition for clients and fees. Martha W. Barnett, Keynote Address, 52 S.C. L. Rev. 453, 455 (2001).

239. See supra notes 32, 51-55 and accompanying text.

240. In this regard, lawyers might reconsider the ideal that law practice should serve the public interest. See Steven H. Goldberg, Bringing the Practice to the Classroom: An Approach to the Professionalism Problem, 50 J. LEG. ED. 414, 416-17 (2000) (quoting Roger C. Cramton, On Giving Meaning to "Professionalism," in TEACHING AND LEARNING PROFESSIONALISM 19 (1997)).
consent. The quality principle relates to process integrity and requires that parties perceive the dispute resolution process as fair whether or not an agreement is reached.\textsuperscript{241} The principle of neutral competency is self-evident and flows from the quality principle—those who serve as mediators and neutrals must be knowledgeable in all aspects of managing the process and must meet the reasonable expectations of the parties regarding substantive competency. Finally, the principle of informed consent in mediation requires both process and outcome consent. Parties give their consent not only to participating in the mediation process but also to the outcome that is achieved.\textsuperscript{242} Outcome consent based on justice and fairness principles requires educated decision-making. Without the ability to engage in informed decision-making, mediation is a crapshoot and parties may achieve results that are neither fair nor just.\textsuperscript{243}

The goals of process quality and neutral competency,\textsuperscript{244} while presenting on-going implementation challenges, are much more easily achieved than adherence to the principle of informed consent. Despite agreement in principle among legal and dispute resolution professionals about the importance of informed consent in mediation, as a matter of practice it is frequently an illusory principle. This is due in large measure to the threat of UPL enforcement.\textsuperscript{245} Non-lawyer mediators who inform parties' decision-making, whether by offering them legal information, helping them develop options based on an understanding of the relevant law, or engaging in other law-related activities, are vulnerable. In some jurisdictions, some or all of these behaviors may be considered the practice of law. How many non-lawyer mediators are willing to risk exposure to UPL enforcement in the name of fidelity to the principle of informed consent?\textsuperscript{246}


\textsuperscript{242} See Nolan-Haley, Informed Consent, supra note 237.


\textsuperscript{244} Process quality and neutral competency are achieved through systems design training programs, state ADR offices, etc.

\textsuperscript{245} Other reasons for informed consent deficiencies in mediation practice are similar to those that exist in medical practice—people do not understand the concept or medical personnel do not take the time to make it part of the process.

\textsuperscript{246} See supra text accompanying notes 104-06 (discussing penalties for UPL violations).
The legal profession should realize that power-sharing with mediators and other dispute resolution professionals is inevitable. Barbara Philips makes the point quite clear: "It is not whether to begin to share power and to experience the vast increase in real power that brings, but how we will approach it that is the most obvious step in moving away from power-based and rights-based approaches and toward interest-based approaches and beyond." The reality of mediation practice is that both lawyers and non-lawyers mediate. The question is not about who owns or controls mediation but rather how we should regulate it and protect parties in ways that safeguard the core values of both the legal profession and the emerging mediation professions as well as the public. It is time, then, to shift from a positional doctrinaire perspective with UPL rules in mediation and move towards power-sharing and problem-solving. This should bring us in a new direction, closer to the parties whom the rules are designed to protect. Then we can develop policies and practices that truly respond to their needs.

III. FRAMEWORK FOR REFORM

Given the debate on what constitutes the legitimate practice of mediation and the ambiguity on what constitutes the legitimate practice of law, controlling the emerging profession of mediation with the norms of the legal profession creates turf battles and hardly seems an ideal way forward. The problem with turf battles in mediation practice is that the public, particularly unrepresented parties, often loses out. Energies that are better spent on more productive endeavors are wasted.

A more ideal way forward is to move in a problem-solving direction, focus on the underlying needs and interests of the parties served in mediation, and then work to devise solutions that respond to those needs and interests. First, we should consider how the UPL doctrine could be reformed to allow quality mediation practices without losing the protections for consumers that this doctrine was designed to provide. Specifically, mediation practice needs to be defined and regulated in ways that: (1) satisfy the legitimate consumer protection

---

247. PHILLIPS, supra note 53, at 265.
248. See supra text accompanying notes 204-10.
250. See infra text accompanying notes 301-12. It is also an inefficient mechanism to regulate ADR practice.
concerns of UPL regulation; (2) encourage creativity and problem-solving in resolving conflict; and (3) to the extent that legal rights are involved, keep the quality of justice at a high level. This task should begin with a rethinking of UPL regulations as they are currently applied to mediation practice.

Once the legal profession is loosened from its fixation with UPL enforcement activity, the second task is to identify the unique skills and values that lawyers bring to the developing mediation profession. The legal profession can then consider how it can use these skills and values to improve mediation practice, and contribute to formulating good public policy in mediation, particularly as it affects the justice system.

IV. Rethinking UPL Regulations in Mediation: The “Primary Purpose” Approach

As discussed earlier, there are numerous activities within the mediation process that may be interpreted to be the practice of law even though mediators do not consider practicing law as central to their work. Mediators attach to these activities a variety of dispute resolution technique labels such as reality-testing, framing, reframing or testing for understanding of consequences. While the purpose of these semantic endeavors is rarely an effort to deliberately disguise practice of law behaviors, the situation does have a somewhat disingenuous flavor. As one scholar has aptly noted, mediators are coy about what they do in this area. Their coyness arises, however, from the necessity of avoiding UPL exposure.

The time has come for more honesty about our actions in mediation practice. Rather than engage in the considerable semantic gymnastics that are required to separate particular mediator behaviors from the practice of law, we should plainly identify mediator behaviors. This means understanding that in conducting a mediation session, some non-lawyer mediators may cross-over into what has traditionally been the exclusive practice domain of lawyers. Instead of immediately jumping to the default position of UPL enforcement, however, we should pause and consider the essential purpose of the

---

251. See supra text accompanying notes 211-22. Mediators often assist pro se parties in mediation sessions. In an earlier article, I identified four types of legal assistance that unrepresented parties typically request: administrative, informational, analytical, and strategic. See Nolan-Haley, Court Mediation, supra note 182.

252. Marjorie Corman Aaron & David Hoffer, Decision Analysis as a Method of Evaluating the Trial Alternative, in GOLANN, supra note 216, at 269-70.
mediator's activities. If the mediator’s primary goal is to assist parties in their negotiations so that they can arrive at their own settlement, then any legal analysis and judgment offered by the mediator should not be considered a necessary part of the mediation process and UPL rules should not be applied. In this case, self-determination remains a core value in the mediation process. Alternatively, if the mediator's goals include advising parties as to what their settlement should be or guiding them towards a particular result, then legal analysis and judgment may be considered part of the primary purpose of the mediation. In the latter case, UPL restrictions would apply. Thus, if competent, non-lawyer mediators wander close to the boundaries of law practice that should be the beginning, not the end, of the UPL inquiry. As long as legal analysis and judgment are not part of the primary purpose of the mediator’s activity, then a preferable approach would be to modify UPL rules and exempt the mediator’s conduct from UPL regulation. It may well be that in some cases, non-lawyer mediators will offer better legal assistance than the average person admitted to a state bar. In commenting on a tax accountant’s legal advice on a tax matter, Professor Wolfram noted, “it is often simply untrue that a non-lawyer’s legal advice is less sound than a lawyer’s.”

This proposal assumes that the parties give informed consent to the mediator's approach. Thus, it is consistent with most of the regulation to date which is built on disclosure. Finally, this proposal assumes that the non-lawyer mediator is competent to offer legal assistance, whereas under traditional UPL structures, only lawyers would be competent.

253. Wolfram, supra note 103, at 839 n.91. See also Ronald Bernstein & Derek Wood, Handbook of Arbitration Practice 155-56 (1993) (discussing the benefits of representation by lay advocates in arbitration); Denckla, supra note 9, at 2594 (indicating that some non-lawyer specialists may offer superior performance in some tasks than do lawyers); Herbert M. Kritzer, The Justice Broker: Lawyers and Ordinary Litigation 170-76 (1990) (concluding that, in civil litigation, “[p]araprofessionals . . . might be as effective and less expensive than legal professionals in handling routine cases of personal and property injury or routine contract disputes”); Herbert M. Kritzer, Legal Advocacy, supra note 166 (study of lawyer and nonlawyer advocates in three different settings).


The primary purpose approach is similar in some respects to the “incidental legal services” test used by courts in traditional UPL enforcement. That test focuses on whether the behavior alleged to constitute a UPL violation “is simply an adjunct to a routine in the business or commercial world that is not itself law practice.”

A common example found in court cases is that of a real estate agent who completes forms in a closing transaction. Courts have held that form work is “incidental” to the practice of real estate brokering and as long as no separate fee is charged for the form work, there is no UPL violation. The “incidental” test has also been applied by courts to the activities of accountants who are permitted to go further into areas of traditional law practice and actually give advice on legal questions.

The suggestion that non-lawyer mediators’ peripheral “practice of law” activities be exempt from UPL regulation is hardly a radical proposal. Numerous scholars have called for the deregulation of the practice of law in several contexts and some have urged the abolition of UPL restrictions altogether. Moreover, in other countries non-lawyers are permitted to perform many functions that are

256. See supra text accompanying notes 125-27 (discussion of tests used by courts). The primary purpose test, however, does not ignore the interest in protecting the public welfare, one of the criticisms of the incidental services test. See Agran v. Shapiro, 273 P.2d at 625. Mediators who offer parties legal assistance must be competent to do so.

257. WOLFRAM, supra note 103, at 836.


259. The kinds of questions that accountants answer are quite basic. However, some scholars have observed that considerable leeway is provided through the incidental test. “The incidental analysis is quite liberal because it does not prohibit accountants from resolving legal questions for their clients as part of their ordinary services.” Schwab, supra note 258, at 1448. For an application of an “incidental” test to lawyer-mediators see Va. Sup. Ct. Prof. Resp. Rule 2.11(D)(2001) which provides:

A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator’s impartiality or the self-determination of parties.

260. It is interesting to note that persons not admitted to practice law may serve as judges in the informal courts in some states. In New York, for example, the requirements for town and village justices are to take a thirty five hour educational program, followed by a twelve hour advanced course and an annual update. See Enhancing Public Trust and Confidence in the Legal System, N.Y. St. B.A. Spec. Comm. on Public Trust and Confidence in the Legal System, Rep. to the H.D., 52, 53 (October 2000). For a criticism of this situation and recommendation for change, see id at 52, 53.


262. Id.
typically limited to lawyers in the United States. Reports of resulting harm to consumers are rare.

The primary purpose approach allows the legal profession to work collaboratively with dispute resolution professionals which is preferable to the current practice of sniping at them with UPL bullets. It reflects what Herbert Kritzer describes as the phenomenon of post-professionalism or the loss of exclusive control by members of a particular profession. The marginalization of lawyers through cyberspace developments is an example of what Kritzer describes. No longer does the legal profession have exclusive control of dispensing "law" to the public. Legal information is freely available on the Internet and on-line ADR services aggressively compete for "law" business. Some scholars have even suggested that law school faculty promote public information projects by collaborating with specialists from other professional disciplines to provide online public education materials.

A. New Directions for Specialization

In arguing for a reform of UPL rules in mediation, I do not advocate abandonment of the UPL doctrine, nor am I advocating a blanket endorsement of non-lawyers offering legal services at random. Non-lawyer-mediators should be allowed to give legal assistance only when they are competent to do so either because of their specific

263. See, e.g., Kritzer, Legal Advocacy, supra note 166, at 2-3, 202 (discussing activities in England); Dziekowsk & Peroni, supra note 7, at 113.
264. Dziekowsk & Peroni, supra note 7, at n.155.
265. Kritzer defines post-professionalism in reference to the defining characteristics of professions as "exclusive occupational groups and the application of abstract knowledge ... [p]ostprofessionalism refers to the loss of exclusivity combined with routinizing the application of knowledge through a combination of increased specialization and reliance on information technology. The result is that services previously provided only by members of professions can now be delivered by specialized non-professionals." Kritzer, Legal Advocacy, supra note 166, at 217 (1998). To a lesser extent, this notion can also be understood as a part of what Carroll Seron calls the concept of postindustrialism where "legal entrepreneurs push the boundaries of the norms of professionalism and incorporate a diversity of postindustrial designs." Carroll Seron, The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys 19-30 (1996).
266. See generally Larry Lessig, Code: And Other Laws of Cyberspace (1999).
background or as a result of specialized training. Informed consent and mediator competency are key factors in implementing the revised UPL framework. Mediators who offer legal assistance must be competent to do so. They must explain their approach to the parties and then obtain their informed consent. This suggests new directions for mediator training and specialization in substantive law areas. It also allows sound distinctions to be made to enforce differences in practice specialties in mediation and allows law-trained mediators to make more informed referrals to attorneys. Examples of mediation training projects that provide substantive law components include employment dispute programs, Americans with Disabilities Act dispute programs, landlord and tenant programs in housing courts, custody and visitation programs in family courts and special education mediation. Given the contextual nature of mediation, the possibilities for specialized training are endless. The purpose of specialized legal training is not to transform non-lawyer

269. Specialization in community problem-solving has been suggested by Attorney General Janet Reno as a way of providing access to justice for the poor. See Janet Reno, Lawyers as Problem-Solvers: Keynote Address to the AALS, 49 J. LEGAL EDUC. 5, 12 (1999).

270. See, e.g., Richard C. Reuben, Alliance Works to Bring Mediator Training to New Level, Disp. RESOL. MAG., Fall 2000, at 28 (describing a project called National Alliance for Education in Dispute Resolution that adds a substantive law component to traditional 40 hour process skills mediation training). See also The Alliance for Education in Dispute Resolution website, at http://www.ilr.cornell.edu/alliance. A recent New York University School of Law brochure for the School’s Center for Labor and Employment Law, Program on Employment Law and Mediator Skills Training for ADR Neutrals, June 18-22, 2001 shows that the following legal subjects are taught: sexual harassment law and theory, disability discrimination law and theory, employee benefits law and theory, age discrimination law and theory. The training program is offered to both lawyers and non-lawyers with strong employment or ADR experience. (Brochure on file with the author).


272. See Model Standards of Practice for Family and Divorce Mediation, Standard II A (1) (August 2000) (“A family mediator shall be qualified by education and training to undertake the mediation. A. To perform the family mediator’s role, a mediator should: 1. have knowledge of family law . . .”), Model Standards of Practice for Family and Divorce Mediation, 35 FAMILY LAW Q. 27, 30 (2001). See also mediation programs discussed in Harges, supra note 34.

mediators into ad hoc lawyers. Rather, it is to give mediators greater familiarity with the substantive aspects of a dispute and thus enhance their competence *qua* mediators.\textsuperscript{274}

B. Regulatory Structures

Under a modified UPL regime in mediation, regulatory structures would assume increased importance. Already, there are many efforts underway to regulate the mediation profession, but much of this is a work-in-progress awaiting further empirical study.

In crafting regulations to protect mediation consumers, numerous questions arise.\textsuperscript{275} Should regulation take the form of individual, profession-based rules or universal norms applicable to both lawyers and non-lawyer neutrals?\textsuperscript{276} Should separate norms be created for mandatory mediation programs? Who should be in control of rulemaking operations? What should be the content of training?\textsuperscript{277} Who should conduct training? In agreements where legal rights may be implicated, should court approval be required, even if mediation takes place outside of the court setting?\textsuperscript{278} What should be the standard of mediator liability?\textsuperscript{279} If the activities of non-lawyer mediators slip into the practice of law and harm consumers, should they be liable in the same manner as attorneys?\textsuperscript{280}


\textsuperscript{274} Joseph B. Stulberg, \textit{Training Intervenors for ADR Processes}, 81 KY. L.J. 977, 990 (1993) ("mediator cannot handicap the discussions through ignorance of the substantive milieu in which the controversy occurs.")

\textsuperscript{275} For an enlightening proposal to protect parties in court-connected mediation, see Nancy A. Welsh, \textit{The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?}, 6 HARV. NEGOT. L. REV. 1 (2001) (proposing a three day cooling off period after parties have entered into a mediation agreement).


\textsuperscript{277} Certainly, where there is a likelihood that legal issues may be involved, there should be a higher level of competency required of mediators.

\textsuperscript{278} This might occur, for example in community dispute resolution centers.

\textsuperscript{279} Currently, many ADR neutrals enjoy qualified civil immunity. \textit{See, e.g.}, COLE \textit{et al.}, \textit{supra} note 35, at Ch. 11. \textit{See also} Amanda K. Esquibel, \textit{The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity}, 31 RUTGERS L.J. 131, 156 (1999).

\textsuperscript{280} Brown, \textit{supra} note 34, at 784 (suggesting a private cause of action of complaints against ADR neutrals based on improper conduct).
There is much work being done to address these questions. The answers are not easily obtainable, but with the enactment of ethical codes for neutrals in several states we can begin to learn what works.

C. Benefits of UPL Reform in Mediation

The proposed framework for modifying UPL rules in mediation is a corrective mechanism. It enhances the goals of fairness and justice and supports the principles of competency, quality and informed consent in mediation. First, easing UPL restrictions in mediation allows all mediators, not just those who are attorneys, to give parties legal assistance that may contribute to informed decision-making. While this may not substantially affect parties who are represented by counsel, it does substantially affect the majority of Americans who cannot afford legal counsel. The ability to engage in educated decision-making may have significant effects on the participants' perceived fairness of the mediation process and satisfaction with the outcome.

281. A helpful guide in determining an appropriate regulatory structure is found in the ABA, Nonlawyer Activity in Law-Related Situations: A Report with Recommendations, cited in Bertelli, supra note 157, at 40: “Criteria . . . should include the risk of harm these activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public.”

282. The Minnesota Supreme Court has enacted a Code of Ethics which applies to both lawyer and non-lawyer neutrals practicing in court-annexed ADR. Minn. Gen. R. Prac. 114 app. See also Fla. R. Certified & Ct. Appointed Mediators 10. For an interesting discussion on the necessity for increased training see Eric R. Galton and Kimberlee K. Kovach, Essays, Texas ADR: A Future So Bright We Gotta Wear Shades, 31 St. Mary's L.J. 949 (2000) wherein the authors, experienced mediators and trainers, argue:

Based upon our own and our colleagues experiences spanning nearly two decades, we believe that the statutorily required forty-hour training originally designed to provide a quick supply of neutrals primarily for volunteer work in a community setting, is grossly inadequate to prepare mediators and other neutrals for the private practice of dispute resolution let alone for specialized matters such as family law or public policy disputes.

Id. at 976-77.

283. In a study of special education mediation, Goldberg and Kuriloff found that parties equated process fairness with having an attorney present in mediation and reported greater process fairness with the agreement where they were represented by attorneys. Peter J. Kuriloff & Steven S. Goldberg, Is Mediation A Fair Way to Resolve Special Education Disputes? First Empirical Findings, 2 Harv. Negot. L. Rev. 35, 55 (1997). See also Goldberg, supra note 223, at 129 (remarking that in special education mediation, parents who have an attorney “feel more fairly treated than parents who represent themselves or have a parent advocate”).

284. Recent empirical studies suggest that parties were more likely to perceive mediation as fair when mediators offered evaluations in a case. Roselle L. Wissler, To
As I have discussed earlier, one of the problems with UPL restrictions is that they may prevent unrepresented parties from receiving the assistance they need to engage in informed decision-making in mediation. I am not suggesting here that allowing non-lawyer mediators to give legal assistance in mediation is the answer to the plight of pro se parties. The pro se problem is a systemic one that calls for radical changes by many groups, including the legal profession. However, in situations where mediators in a particular program could be trained in the relevant substantive law and thus possess legal knowledge that may be helpful to parties’ decision-making, they should be allowed to share that knowledge with the parties. Giving pro se parties legal assistance enables them to make their own decisions and the end result honors a core value of mediation—self-determination.

My proposal to modify UPL rules in mediation is not simply a “default” provision for the poor and unrepresented. While it benefits them, there are also other benefits. First, a modified UPL regime in mediation allows the parties’ negotiations to flow and develop with continuity. In any given mediation this may prevent impasse and

---


286. Some members of the legal profession have responded to the problem by advocating the concept of unbundled legal services in both the litigation and mediation contexts. See Symposium, Unbundled Legal Services and Unrepresented Family Court Litigants, 40 FAM. CT. REV. 13 (January 2002). Law school clinical programs have also been active in attempting to respond to the problems of pro se parties. See Michael Millemann et al., Limited Service Representation and Access to Justice: An Experiment, 11 AMER. J. FAM. L. 1 (1997) (describing a University of Maryland law clinic providing limited legal advice to clients); Margaret Martin Barry, Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?, 67 FORDHAM L. REV. 1879 (1999) (discussing some programs for pro se parties and public education programs on divorce procedures at Catholic University); Antoinette Sedillo Lopez, Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 CLINICAL L. REV. 307, 315-16 (2001) (describing efforts to create educational materials in a community lawyering program at the University of New Mexico).

287. Of course, the parties must be aware of the limitations of non-lawyers legal assistance.

288. We have hardly begun to exhaust possibilities for providing legal services in this country. Perhaps this is because we have been so busy guarding our turf or because we have not focused on the challenge with any determined effort to alleviate the problem. Relaxing UPL regulations in mediation is one step in the direction of creating a climate of cooperation between professions that can lead to greater help for alleviating the legal problems of the poor.
move the parties closer to settlement, which presumably is the goal that most parties seek in mediation.

Second, permitting qualified non-lawyer mediators to offer legal assistance may prevent what John Wade has referred to as the “wilderness factor” in mediation practice, that is, the emotional exhaustion that results when parties are sent out from one professional in search of another. As Wade describes the phenomenon—“[a] mediator may experience a momentary glow of ethical righteousness when referring a client away to obtain independent specialized advice. However, the demoralized client may go away in silent despair.”

In such a case, what has been achieved?

Third, permitting mediators to offer legal assistance makes the process more honest. It eliminates the “Alice-in-Wonderland” element, where mediators lump all sorts of law-related activities under the “agent of reality” umbrella and pretend that it has nothing to do with the practice of law.

Finally, the primary purpose test promotes quality mediation practice while preserving lawyers’ expertise for consumers. Allowing competent mediators to practice outside the haunting shadow of UPL regulations gives mediation consumers greater choices in the selection of neutrals. Lawyer-mediators still retain an important role in legal disputes. Where problems are bound up with significant legal claims, consumers are able to choose lawyer specialists as their neutrals.

D. Objections

Modifying UPL regulations in mediation must be carried out with caution. When mediators give legal assistance to parties, it threatens neutrality, a core value in the mediation process. Certainly, what Professor Leonard Riskin has observed in connection with lawyer-mediators engaged in this behavior is equally true of

---

289. Wade, supra note 213.

290. Wade describes this as “the financial reality for many impoverished clients that no competent alternative sources of advice are available.” Wade, supra note 213, at 287. He notes that this situation may take place at the same time “with a client’s emotional exhaustion which follows from being ‘sent away’ from one skilled helper in search of another.” Id at 288.

291. See supra text accompanying notes 229-31 (discussing how mediators avoid UPL charges).

non-lawyer mediators—it can be problematic.\textsuperscript{293} The selection of certain legal information that will assist parties in their decision-making, can indicate favoritism toward one of the parties. Likewise, decisions not to share specific legal information with the parties may indicate a bias that impairs the mediator's neutrality. It is not clear, however, that neutrality is a universal principle in mediation.\textsuperscript{294} Scholars have observed that cultures differ in approaches to this principle.\textsuperscript{295} Moreover, recent empirical studies suggest that participants experience greater perceptions of fairness when mediators engage in evaluative behaviors.\textsuperscript{296} Thus, while we still need to explore ways to manage the tensions between neutrality and fairness, the mediator's primary concern should be to uphold the integrity of the process.

A final objection relates to the need to protect consumers. It may be argued that allowing non-lawyers to engage in law-related activities as part of the mediation process will be harmful to some disputing parties who may rely on the mediator as a type of legal counselor. Support for this claim is weak. First, competent and qualified mediators do not pretend to be lawyers, nor do they prey upon an unknowing public.\textsuperscript{297} Rather, they try to help parties resolve problems within a broad framework of values that may include law. Second, the limited empirical research in this area shows little harm to mediation consumers from UPL violations by non-lawyers.\textsuperscript{298}

\textsuperscript{293} Professor Riskin, writing largely in the context of divorce mediation, describes such neutral lawyering as "unusual, problematical, and perhaps even dangerous if not conducted carefully." Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 Ariz. L. Rev. 329, 351 (1984).

\textsuperscript{294} While neutrality is a primary value in mediation, it may not be an absolute one. Some scholars, notably Sara Cobb and Janet Rifkin, have noted that there are various degrees of neutrality. See Nolan-Haley, Informed Consent, supra note 237, at 837 (discussing neutrality concerns with giving legal information to unrepresented parties).

\textsuperscript{295} Lande, Sophisticated Mediation Theory, supra note 211, at 332.

\textsuperscript{296} See Wissler, supra note 284.

\textsuperscript{297} In examining the relationship of UPL regulations to mediation practice, it is useful to recall that the origins of the UPL doctrine grew out of an effort to protect consumers from non-lawyers who pretended to be lawyers. These non-lawyers were considered imposters or shysters preying upon an unwitting public. See supra text accompanying notes 112-20.

\textsuperscript{298} The author has conducted a preliminary survey of state UPL/ADR regulation over the last two years. Out of thirty states responding, twenty-three states reported that they received no complaints regarding any harm resulting to parties from non-lawyers charged with the unauthorized practice of law in mediation (Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, New Hampshire, New Jersey, Ohio, Oklahoma,
There is evidence, however, that a lack of legal information in mediation can be harmful to parties.\textsuperscript{299}

V. RESPONDING TO THE NEEDS OF AN EMERGING PROFESSION

Released from the rigid ties that bind and blind in professional turf wars with non-lawyers, lawyers are free to respond to the needs of the emerging mediation profession. Two questions arise in this regard: 1) what do lawyers, both as advocates and mediators imbued with a problem-solving orientation, have to offer, and 2) what can they gain from power-sharing and collaboration with non-lawyers?

In examining the elements of traditional lawyers' values and skills that continue to be important in a modified UPL atmosphere, it is clear that lawyers can bring a perspective and wisdom based on an understanding of the law that non-lawyers will never have. Beyond this obvious point, the unique value that lawyers bring to the mediation table is their long experience in developing professional ethics systems. Professional responsibility has been referred to as the "crown jewel" of the U.S. legal system.\textsuperscript{300} Ethics development in ADR and mediation, on the other hand, is nascent. Thus, an important area where lawyers with a problem-solving perspective can make a difference is in helping to develop a professional ethics regime for mediation.

As mediation develops into a distinct profession, there are several efforts being made at the state and national level to certify mediators and develop codes of ethics.\textsuperscript{301} Relaxation of UPL regulations in mediation frees the legal and dispute resolution professions to work collaboratively and address ethics issues that really matter. These include problems such as honoring confidentiality,\textsuperscript{302} dealing with deception\textsuperscript{303} and preventing mediator coercion.\textsuperscript{304} It also frees


\textsuperscript{300} See Mary C. Daly, The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences In Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers, 32 VAND. J. TRANSNAT'L L. 1117, 1145 (1999).

\textsuperscript{301} See supra text accompanying notes 37-41.

\textsuperscript{302} See e.g., Ellen E. Deason, The Quest for Uniformity In Mediation Confidentiality: Foolish Consistency or Crucial Predictability, 85 MARQ. L. REV. 79, 81-84 (2001) (discussing the value of confidentiality in mediation).

\textsuperscript{303} John W. Cooley, Defining the Ethical Limits of Acceptable Deception in Mediation, BRIEF: J. DUPAGE COUNTY B. ASS'N, Aug. 1998, at 29, ("Consensual deception is
Lawyers, Non-Lawyers and Mediation

Lawyers to use their expertise in crafting new ethical rules for representing parties in mediation. Mediation advocacy is an underdeveloped field.305

There are commonalities between the professions that should be explored. The core values of the legal profession (loyalty, confidentiality, independence of judgment, competence, and improvement of the profession) correlate generally with many of those in the emerging mediation profession.306 Mediators are expected to follow a code of ethics, and in some states they are certified and must follow state ethical rules as well. Confidentiality must be honored in mediation in some form,307 and mediators are required to avoid conflicts of interest.308


304. See Alan v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998). This case represents a striking example of professional misconduct. The plaintiff's allegations of mediator coercion were that the mediator had "forced" her and her husband to settle and that he had misled them. Even though the plaintiff's attorney was present during the mediation, she claimed that she was coerced and intimidated into signing the settlement agreement. Perhaps the most troubling aspect of this case is the reported response of one of the authors of an Amicus Curiae Brief filed in the case by the Association of Attorney Mediators that, "[w]hat some people might consider a little bullying is really just part of how mediation works." Id. at 947-48.

305. See e.g., Kimberlee K. Kovach, New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem-Solving, 28 Fordham Urban L. J. 935 (2001); Nolan-Haley, Lawyers & Clients, supra note 70 (arguing against adversarial behaviors in mediation); Jean Sternlight, Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting, 14 Ohio St. J. on Disp. Resol. 269 (1999) (discussing separate responsibilities of lawyer and client depending upon client needs and barriers to settlement).

306. With lawyers now acting as third party neutrals, working with non-lawyers in multidisciplinary practice, we may need to add to the list of core values. Certainly one value that we might consider adding is protection of the public interest.

307. Joint Code for Mediators, Standard V provides, "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." Codes of Ethics and Standards of Conduct for Mediators, Rogers & McEwen, supra note 97. Similar provisions for confidentiality are found in the Model Standards of Practice for Family and Divorce Mediation (August 2001). Standard VII provides, "A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants." Model Standards of Practice for Family and Divorce Mediation, 35 Fam. L.Q. 27, 33 (2001).

308. Joint Code for Mediators, Standard III provides:

Conflicts of Interest:
A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect
What do lawyers have to gain from power-sharing and collaboration with the emerging mediation profession? A major benefit of working within the larger framework of the conflict resolution field is that there may be more for clients to achieve in mediation than just a settlement. When mediation is viewed narrowly as a settlement-driven process, growth opportunities may be lost. Experiences that may offer significant benefits to clients, such as better communication and improved relationships, are undervalued. Mediation's potential for forgiveness remains untapped. While there has been some scholarly work on the transformative powers of mediation, restorative justice and the value of apologies, the whole area of reconciliation in law practice is understudied.

Finally, collaboration with other disciplines in the field of conflict resolution offers rich benefits that come from professional dialogue. The success of social justice, lawyer-social worker, and other collaborative projects suggests that much good can come against conflicts of interest also governs conduct that occurs during and after the mediation.

309. New York mediator David Geronemus makes the point quite well in the context of commercial mediation, "The question is not whether settlement is important in commercial cases—of course it is. The question is whether it is enough." David Geronemus, *The Changing Face of Commercial Mediation*, in *Into the 21st Century: Thought Pieces on Lawyering, Problem-Solving and ADR* 38, CPR Institute for Dispute Resolution (2001).


312. See, e.g., William Isaacs, *Dialogue and the Art of Thinking Together* 47 (1999) ("Dialogue engage[s] our hearts. This does not mean wallowing in sentimentality. It refers, instead, to cultivating a mature range of perception and sensibility that is largely discounted or simply missing from most professional contexts.")

313. See Trubek & Farnham, *supra* note 10 (describing the usefulness of law and legal institutions and how to use them).


to clients when lawyers collaborate with other professionals. Collaboration offers opportunities for learning new perspectives on the cross-transfer of knowledge. While in the past, lawyers have applied learning from legal dispute processing in ADR to political conflict, we have not yet considered what we can learn from conflict resolution efforts in the broader political processes. Lessons learned from the world of political conflict may be relevant to individual disputes faced by clients in a number of contexts, including class actions and intractable conflict situations.

**CONCLUSION**

Lawyers' professional monopoly has flourished under the traditional adversarial ethic, has exerted a powerful influence over the field of conflict resolution, and the emerging mediation profession. This Article has examined a new framework of problem-solving for lawyers that is slowly displacing the old framework. I have argued that in the spirit of that new framework, we should not get stuck in the rigidity of the UPL doctrinal position that regulates non-lawyer mediation practice. Instead, we should reform our professional monopoly from a problem-solving perspective that will bring us closer to the needs and interests of the parties being served in mediation.

The legal profession's recent soul-searching has led it to seek new constructs of lawyering that have expanded both the activities that lawyers consider to be "lawyers work" and the roster of values that lawyers consider to be important. It would be at best ironic and at worst disingenuous for lawyers to seek out new visions of transformative legal practice and at the same time limit the potential of non-lawyers to engage in transformative work. If the new ethic of problem-solving is to take hold in the legal profession, systemic change is necessary. The time has come to recognize the powers of collaboration and compromise. In doing so, we will help the profession to heal itself.

---

316. See Seamus Dunn, Case Study: The Northern Ireland Experience: Possibilities for Cross Fertilization Learning, 19 ALTERNATIVES TO HIGH COST LITIG. 153 (2001) (examining the possibility of cross-fertilization learning from the world of political conflict to social, business and legal conflicts.)

317. For reflections on all that needs healing in the legal profession, see KRONMAN, supra note 2 and VAN WINKLE, supra note 4.