Fordham Urban Law Journal

Volume 28
Number 4 *Symposium - ADR and the Professional Responsibility of Lawyers*

Article 1

2001

ADR and the Professional Responsibility of Lawyers

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Cover Page Footnote
Associate Professor, Fordham University School of Law; Director of the Fordham Law School Mediation Clinic. This Symposium has been developed from presentations at the Association of American Law Schools' Annual Meeting, Joint Session of the Sections on Professional Responsibility and Alternative Dispute Resolution. The program was chaired by Professor Nolan-Haley on January 5, 2001, in San Francisco, California.

ADR AND THE PROFESSIONAL RESPONSIBILITY OF LAWYERS

A Symposium Sponsored by the Association of American Law Schools

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ADR AND THE PROFESSIONAL RESPONSIBILITY OF LAWYERS

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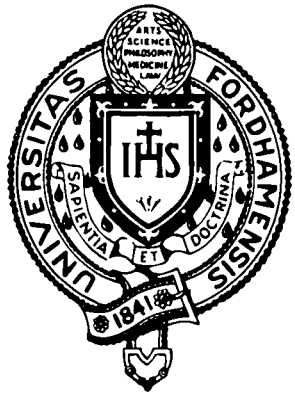
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INTRODUCTION: LAWYERS' ETHICS IN ADR

*Jacqueline M. Nolan-Haley**

INTRODUCTION

Alternatives to the court adjudication of disputes generally have been considered a welcome corrective to the American justice system.[1] Alternative dispute resolution ("ADR") is a term that includes a wide variety of processes for managing or resolving disputes that differ in kind and scope from judicial adjudication.[2] But ADR is more than simply an alternative or corrective to the existing court structure. In many situations, ADR offers lawyers a better way to practice law, presenting opportunities for problem solving, peacemaking, and responsiveness to clients' needs and interests that do not exist in traditional legal practice.[3]

In this Symposium, a distinguished group of ADR scholars explores the emerging professional responsibility issues implicated by ADR legal practice. These essays grew out of a joint program entitled "ADR and the Professional Responsibility of Lawyers," sponsored by the Sections on Professional Responsibility and Alternative Dispute Resolution of the Association of American Law Schools. The essays focus on some of the critical ethical issues related to lawyers' participation in ADR processes.

The ADR movement has undergone extraordinary growth since Chief Justice Warren Burger posed the question, "Isn't there a better way?" almost two decades ago.[4] Nowhere has this growth been

* Associate Professor, Fordham University School of Law; Director of the Fordham Law School Mediation Clinic. This Symposium has been developed from presentations at the Association of American Law Schools' Annual Meeting, Joint Session of the Sections on Professional Responsibility and Alternative Dispute Resolution. The program was chaired by Professor Nolan-Haley on January 5, 2001, in San Francisco, California.

1. Of course, there have been some critics. *E.g.*, Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073 (1984); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

2. The term ADR also is understood to mean "appropriate dispute resolution." *E.g.*, Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 167-68 (1999).

3. *See* Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999) (describing the diverse functions performed by lawyers).

4. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (suggesting that replacing litigation with arbitration would be a "better way" of resolving disputes).

more evident and relevant for lawyers than in the judicial system. Today, court-connected ADR programs, offering processes such as mediation, arbitration, and early neutral evaluation, have moved beyond the experimentation stage and become institutionalized. ADR processes are no longer offered to litigants simply as a *better* way—in many situations, they are the *only* way to obtain access to adjudication, as state and federal courts regularly require parties to participate in some form of ADR before they may proceed to trial.[5]

Lawyers' increased participation in ADR has generated a number of complex questions about their professional responsibilities. Some of the emerging ethical issues relate to client counseling, confidentiality, conflicts of interest, duties of good faith and candor, unauthorized practice of law, and the impartiality of third-party neutrals. In general, there are more questions than answers.

Lawyers have multiple roles in ADR legal practice. First, lawyers engage with clients, courts, and judges, as well as with each other. Lawyers counsel clients about the merits of ADR processes, advocate for and accompany them in these processes, and review and help implement the agreements that clients make in ADR. In some cases, lawyers later may argue in court against the enforceability of agreements created in ADR.[6] In court-connected ADR programs, lawyers may act as either third-party neutrals or as partisan advocates for clients. Finally, lawyers are often in a professional relationship with each other when participating in ADR processes.[7]

Whether lawyers act as third-party neutrals in arbitration or mediation, advise clients about their ADR options, represent them in ADR proceedings, or teach law students about these roles, they are challenged by the question: "What system of ethics governs?" The question becomes complex when lawyers acknowledge that ADR is a multi-disciplinary field with many non-lawyer partici-

5. *E.g.*, Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, 658 (2000).

6. *E.g.*, Patel v. Ashco Enter., Inc., 711 So. 2d 239 (Fla. Dist. Ct. App. 1998) (determining that mediation agreement was enforceable, despite plaintiff's argument that parties had entered into the agreement while case was pending before a court that lacked subject matter jurisdiction).

7. In this regard, some ADR scholars have argued for greater civility in specific ADR processes. *E.g.*, Constantine N. Katsoris, *Advocacy With Civility: A Prescription for Success*, THE NEUTRAL CORNER, Jan. 2001, at 1 (addressing arbitration). I have made a similar argument with respect to mediation. Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998).

pants.[8] Certainly, lawyers have the traditional ethics rules—the *ABA Model Rules of Professional Conduct* and the *ABA Model Code of Professional Responsibility*. But it is questionable whether these rules alone give sufficient guidance to understanding professional responsibilities in ADR legal practice. The ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct has struggled to address some of the emerging issues related to lawyer participation in ADR. Its proposals will be presented to the ABA for a first reading at the next annual meeting in July 2001.[9] In the meantime, legal educators face the challenge of preparing students to engage in ethical ADR practice without a clear compass.

The realities of practice challenge us to think critically about our professional role as lawyers and law teachers and to consider what it means to engage in "ethical" ADR lawyering. Is it, or should it be, any different from traditional lawyering practice? Many ADR scholars make the claim for difference and have suggested a variety of ethics reforms, including a higher standard of truthfulness in negotiating;[10] a requirement of good faith in negotiating and mediating;[11] a duty to advise clients of ADR options;[12] and even an aspirational guide for lawyers, the "Ten Commandments of Appropriate Dispute Resolution."[13] I also have argued for reform, urging a greater appreciation of, and adherence to, the principle of informed consent in mediation.[14] All these concerns push us to the ultimate question raised in this Symposium: If ADR is an alternative way of lawyering, do we need an alternative set of ethical rules?

The main theme running through the following essays is that change is needed, that current ethics rules and codes must be adjusted, and new rules must be drafted that respond to the subtleties

8. *See* AM. ARBITRATION ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), *available at* http://www.adr.org/~les/ethics/standard.html.

9. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, CHAIR'S INTRODUCTION AND EXECUTIVE SUMMARY (Nov. 2000), *available at* http://www.abanet.org/cpr/e2k-intro_and_summary_changes.html.

10. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1,* 19 N. ILL. U. L. REV. 255 (1999).

11. Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997).

12. Robert F. Cochran Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients,* 41 S. TEX. L. REV. 183 (1999).

13. Menkel-Meadow, *supra* note 2, at 167-68.

14. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking,* 74 NOTRE DAME L. REV. 775 (1999).

and complexities of the issues raised in ADR legal practice. In short, "new wine requires new wineskins."[15]

Professor Carrie Menkel-Meadow provides an overview of the major ethical issues facing lawyers in ADR practice and reviews the current ethics rules landscape in ADR.[16] Professor Robert Cochran offers a proposal to amend the current professional responsibility rules to include a mandate for advising clients of ADR options.[17] Professor Kimberlee Kovach argues in favor of a new ethic for non-adversarial representation.[18] And Professor Stephen Huber addresses a number of critical ethical issues implicated by arbitration practice.[19] We hope that the ideas and proposals advanced here can provide a framework for future deliberations about the professional responsibilities of lawyers in ADR.

15. Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-adversarial Approach to Problem-Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001).

16. Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001).

17. Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895 (2001).

18. Kovach, *supra* note 15.

19. Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915 (2001).

PROFESSIONAL RULES AND ADR: CONTROL OF ALTERNATIVE DISPUTE RESOLUTION UNDER THE ABA ETHICS 2000 COMMISSION PROPOSAL AND OTHER PROFESSIONAL RESPONSIBILITY STANDARDS

*Robert F. Cochran Jr.**

INTRODUCTION

In the early 1900s, Boston, Massachusetts witnessed a nasty lawsuit between two brothers.[1] The papers filed in the case accused the older brother—trustee of the family estate—of a breach of trust. In many respects, the suit was typical: the accusations were harsh, the defendant took them personally, and the litigation increased the animosity between the parties. There were, however, a few unusual aspects of the suit. One was the prominence of the participants. The trustee-brother was Samuel Warren, former law partner of Louis D. Brandeis and co-author with Brandeis of the *Harvard Law Review* privacy article, possibly the most famous and influential law review article ever published.[2] The plaintiff-brother was Ned Warren, early gay activist and one of the founders of the

* Louis D. Brandeis Professor of Law, Pepperdine University School of Law; J.D., University of Virginia. This is an expanded version of a speech given at the Annual Meeting, Joint Session of the Sections on Professional Responsibility and Alternative Dispute Resolution, in San Francisco, California, on January 5, 2001. Portions of this speech were adapted from Robert F. Cochran Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999). My thanks to Beth Nunnick for her research assistance.

1. For the facts of the *Warren* case described in the following paragraphs, see John T. Noonan Jr., *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227, 234-36 (1981) (citing Warren v. Warren, No. 14630, Mass., *filed* Dec. 13, 1909); THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994). The case involved a will drafted by Louis D. Brandeis while he was practicing law. John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 694-98 (1965) (discussing the charge, facts, and ethical problems in the case).

2. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Boston Museum of Art.[3] A second unusual aspect of the case was its tragic consequence. After being subjected to two days of harsh cross-examination, Sam Warren died; apparently, he committed suicide. A third unusual aspect of the case is the note Ned wrote to Sam and delivered on the day that the suit was filed. This note reveals something not only about the relationship between Ned and Sam, but also about the relationship between Ned and his lawyers. It reads, in part:

> The phrases [in the complaint] are such as in a legal document I have felt obliged to sign, but are very far from representing my feelings toward you. . . . Let us try to agree; it would be much pleasanter.
>
> Your affectionate brother, E.P. Warren.[4]

It is not surprising that the allegations of a breach of trust in the complaint had more influence on Sam than the brotherly note. The suit proceeded toward its tragic consequence.

The note suggests that Ned's lawyers had two characteristics that are common among lawyers: they were aggressive and paternalistic. These lawyers filed suit and made vicious allegations against Sam, in spite of the better instincts of their client. Ned likely agreed to the filing of the suit, but as he wrote in his note, the allegations "are very far from representing my feelings toward you."[5]

Today, some lawyers would recognize this case as a good candidate for mediation—parties who have had, and are likely to continue to have, a long-term family and business relationship; parties who are likely to want to preserve family privacy; parties who are likely to have other family members who will want to preserve family peace and privacy; and, if Ned's letter is to be believed, a plaintiff who as an "affectionate brother" believes it would be "much pleasanter" to "agree."[6] Today, the right lawyers might have presented Ned with the option of pursuing mediation and this case might have been resolved peacefully. I wish I could say that Ned's lawyers' methods were the methods of an earlier era, but, unfortunately, their type of practice is very much alive and well today. One of the most often heard complaints about lawyers is

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3. *See generally* DAVID SOX, BACHELORS OF ART: EDWARD PERRY WARREN AND THE LEWES HOUSE BROTHERHOOD (1991).

4. Noonan, *supra* note 1, at 234-36.

5. *Id.*

6. *Id.*

that they exacerbate conflict between people. Many lawyers today would follow in the footsteps of Ned's lawyers.

I have suggested elsewhere that lawyers should present the option of pursuing alternative means of dispute resolution ("ADR") to clients as a matter of good practice,[7] and that lawyers might be subject to malpractice liability if they fail to do so.[8] My argument here is that the rules of the legal profession should require lawyers to present such options to clients. Section I will consider the arguments for giving control of this decision to clients. Section II will offer analysis of current professional rules that address this issue. Section III will focus on the recent proposals of the American Bar Association's ("ABA") Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission" or "Commission"). Finally, in Section IV, I will propose two alternate rules that would give clients greater control over ADR choices: the client control model and the informed consent model.

7. ROBERT F. COCHRAN JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 189-202 (1999).

8. Robert F. Cochran Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 48 WASH. & LEE L. REV. 819 (1990). I argue that a right of client control of ADR should be adopted based on the medical informed consent analogy. Courts developed the right of medical patients to choose alternatives to surgery as a medical malpractice rule. Though there are strong parallels between the right of patients to choose alternatives to surgery and the proposed right of clients to choose ADR options, it is unlikely that an ADR rule will develop as a matter of malpractice law. It is likely that courts and juries would recognize the right of a client to choose ADR options (in light of the arguments made below), but it is unlikely that a client, in a particular case, would be able to establish that the lawyer's failure was a cause-in-fact of the client's loss. In the medical informed consent action, the patient must establish that had the doctor informed her of an alternative, she would have chosen the alternative, and that the alternative likely would have yielded a better result. This presents difficulties in some informed consent cases, but patients often are able to meet this burden. In a comparable action for the failure of the lawyer to present ADR options to a client, the client would have to show not only that (1) he would have chosen the alternative means of dispute resolution, but (2) that the other side would have agreed to it, and (3) that it would have yielded a more favorable result. For further discussion of the possibility of establishing cause-in-fact in a claim against an attorney for failure to present the ADR option, see *id.* at 871-76. The difficulties that the client would have in meeting such a burden make it unlikely that the right to choose ADR options will develop as a matter of legal malpractice.

I. JUSTIFICATIONS FOR CLIENT CONTROL OF ADR

A. Preserving Client Dignity, Especially of Poorer or Inexperienced Clients

Maintaining a significant level of control over one's life is an important aspect of human dignity. One of the primary roles of the lawyer is to increase the client's control of her own life when that control is threatened by individuals, the state, or other institutions. Nevertheless, one of the dangers of lawyering is that the lawyer merely will become another person who tells the client what to do. In this way, lawyers can be threats to, instead of protectors of, client dignity.

The market does a pretty good job of protecting the dignity of the wealthy, educated client who has experience dealing with lawyers. If a lawyer is too controlling, the wealthy, educated client has the means and knowledge to seek representation elsewhere. Such clients do not need the professional responsibility rules to protect their right to autonomy within the lawyer-client relationship. They are likely to know about alternative means of dispute resolution, and, if they are interested, can demand that lawyers pursue them. One of the biggest areas of growth of ADR in recent years has been among corporations that have demanded that their lawyers seek alternatives to litigation.[9] It is the poorer, less-informed clients who need the rules of professional conduct to protect their rights to self-determination. As the following subsection explains, the determination of whether to pursue ADR is likely to have a significant impact on the client's life.

B. The Importance to the Client of the Means of Dispute Resolution

The choice of the means of dispute resolution is likely to have a significant impact on the client's time and money, the client's relationship with the opposing party, the ultimate result of the representation, and the client's privacy and personal satisfaction.

Mediation and arbitration can save the client both time and money.[10] Parties generally can arrange to have a dispute mediated

9. *See, e.g.*, Ronald D. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 536 (1994) (discussing how corporations became increasingly interested in ADR in the 1980s, during a period of falling interest rates and rising legal costs, because lengthy litigation no longer served their financial interests).

10. *E.g.*, Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 435-37 (1982); KARL D. SCHULTZ, FLA. DISPUTE RESOLUTION CTR.,

or arbitrated at a much earlier date than they can have it litigated.[11] In addition, once mediation and arbitration begin, they may require a shorter amount of attorney and client time than litigation or attorney negotiation.[12] A savings in attorney time generally means a savings in attorney fees. In cases in which mediation is successful and attorney negotiation would not have been successful, the savings in time and money can be substantial.[13] Of course, if mediation or non-binding arbitration fail to resolve a dispute, ADR is likely to increase the costs to the client—the client must pay for the costs of litigation as well as the costs of ADR. Whether a particular case is likely to be resolved through ADR generally will turn on its facts. Thus, the lawyer should explain this risk, as well as the potential benefits, of ADR to the client.

Another potential benefit of ADR is that the parties are likely to have a better relationship after ADR than after a trial.[14] This may be especially important in cases in which the parties may have a future relationship, such as in family and commercial cases.[15] The

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FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT viii (1990), *cited by* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 703 (1994).

11. Though the parties can arrange for mediation at an early date, if the parties fail to resolve a dispute through mediation, and then have to get a trial date, the mediation may delay the resolution of the dispute. The parties can avoid this problem if they set a trial date and mediate the dispute pending the trial. Parties can be certain that a dispute will be resolved at an early date if a case is arbitrated. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 146-47 (1988). As with mediation, the parties can arrange to have a case arbitrated within a short period of time, and, unlike mediation, the parties can be sure that arbitration will result in a resolution of the dispute. The client does not have the right to reject the decision of the arbitrator, but the client can be confident that the arbitrator will reach a decision.

12. One study found that companies using mediation in business disputes most often achieved settlement an average of ten months earlier than those companies who used mediation least often. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 843 (1998).

13. Studies have indicated that mediation is more successful at resolving disputes than attorney negotiation. *E.g.*, Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, *in* ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 51, 57-58 (Howard Davidson et al. eds., 1982).

14. RISKIN & WESTBROOK, *supra* note 11, at 24. A study comparing child custody agreements reached through mediation with other child custody arrangements found that a substantially higher number of the parties who had mediated agreements were in compliance with the terms of those agreements. Pearson & Thoennes, *supra* note 13, at 59.

15. Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 (1986).

Warren case was both a family and a commercial dispute. Ned and Sam might have preferred a peaceful resolution of the dispute, both for the sake of family peace and for the sake of the smooth and efficient operation of the family business. Whereas litigation and attorney negotiation are likely to inhibit communication between the parties, mediators try to open lines of communication so that the parties can better understand one another.[16] The ultimate goal of many mediators is the reconciliation of the parties.[17] Indeed, parties are more likely to comply with and less likely to litigate over agreements that they reach through mediation.[18]

In many cases, mediation is likely to yield a better result for both parties than litigation or attorney negotiation. In mediation, the parties may develop a creative resolution of a dispute that benefits both parties and is different from any remedy a court could provide.[19] Attorneys, of course, may reach a creative resolution of a dispute in negotiation, but the parties are often more familiar with the subject matter of the dispute than are their attorneys and, thus, may be more likely to develop a creative resolution.[20]

An additional advantage that accrues to the parties of alternative methods of dispute resolution is privacy. Mediation sessions and arbitration hearings generally are not open to the public.[21] Privacy can be especially important to parties to a family dispute, as in the *Warren* case.[22]

A final important justification for requiring lawyers to present ADR options to clients is that clients generally are more satisfied with ADR than with litigation and attorney negotiation.[23] Al-

16. *Id.*

17. *See generally* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

18. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 248 (1989).

19. Lieberman & Henry, *supra* note 15, at 429.

20. In mediation, the parties are involved directly in the negotiation process and can minimize the effect the lawyer's self-interest might have on the results. *Id.* at 430.

21. *Supra* text accompanying notes 1-5.

22. RISKIN & WESTBROOK, *supra* note 11, at 148.

23. *E.g.*, Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 254-60 (1981) (discussing high satisfaction levels for mediation users and attributing those positive responses to parties' perceptions of "processual advantages"); Pearson, *supra* note 10, at 432 (reporting on a long-term follow-up study showing that sixty-nine percent of clients who reached agreements in the Denver Custody Mediation Project were satisfied, as compared with only fifty-three percent of adversarial control group members); Gary Phelan, *Dispute Resolution the Mediation Way*, CONN. L. TRIB., Aug. 18, 1997 (stating that a survey of general counsel, deputy counsel, and chief litigators from 528 of the largest 1000 corporations in the United States indicated that eighty-one percent felt medi-

though the value of this satisfaction may be difficult to measure, it seems that ADR increases client feelings of self-worth as clients take more control of their lives. ADR empowers clients.

I am not suggesting that in every case all these factors will point toward pursuing ADR; rather, I suggest that enough of these factors are likely to point toward pursuing ADR that the lawyer should inform the client of the ADR options and allow the client to decide whether to pursue them. There are risks and potential benefits to both litigation and ADR and the choice between them should be made by the client. The client is likely to bear most of the risks of the choice, and the client is likely to be the best judge of her own interests.

C. The Lawyer's Conflict of Interest

The decision whether to pursue ADR should be made by clients, rather than attorneys, not only because of the risks and potential benefits to clients, but because lawyers are likely to have a conflict of interest as to this issue. If ADR requires less attorney time than traditional means of dispute resolution, lawyers who are paid on an hourly basis will lose money. If the parties choose to mediate without the presence of attorneys, the loss is likely to be especially great.

Attorneys who do not have experience with mediation and arbitration will have an additional conflict of interest as to whether to pursue these processes.[24] If a client chooses to pursue mediation or arbitration and the lawyer does not have experience with them, the lawyer may have to refer the case to another attorney. One study found that the strongest predictor for whether a lawyer will refer clients to mediation is whether the lawyer has experience in mediation.[25] The availability of ADR to a client should not turn on whether the lawyer has had experience with it.

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ation provides a "more satisfactory process" than litigation and sixty-six percent felt mediation provides "more satisfactory settlements"); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 568 & nn.15-16 (1997) (reporting on studies finding that mediation users are generally more satisfied and view the process as more fair than do users of adjudication).

24. Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 49-50 (1982).

25. Richard J. Klimoski et al., Non-Binding Dispute Resolution for Business Disputes? Corporate Counsel Are of Two Minds (1998) (unpublished manuscript, on file with authors), *cited by* Rogers & McEwen, *supra* note 12, at 845.

II. CONTROL OF ADR UNDER EXISTING PROFESSIONAL RESPONSIBILITY STANDARDS

Professional groups have proposed, and jurisdictions have adopted, a wide variety of standards that are likely to have an impact on who makes the decision whether to pursue ADR. Jurisdictions have at least four potential means of involving clients in the question of whether to pursue ADR: client consultation, client notice, client control, and informed consent models. In this section, I consider those models that are currently in effect.

A. Consultation Models: Current ABA Model Rule 1.2 and Virginia's Rule 1.2

The *ABA Model Rules of Professional Conduct* ("*Model Rules*," "*MRs*," or "*Rules*") govern lawyers in the vast majority of states.[26] The *Model Rules* were adopted in 1983, before use of ADR was common, yet the *Rules* give some guidance that can be helpful in determining who should control ADR decisions. *Model Rule* 1.2(a) allocates lawyer and client decision-making responsibility. In part, it states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[27] The decision whether to pursue ADR seems to be a means decision, and because alternative *means* of dispute resolution may be used to seek the client's objectives, it is likely that the *Model Rules* require lawyers to consult with clients about them.

The comments to Virginia's newly adopted version of the *Model Rules* make this reasoning explicit. Effective in 2000, Virginia added the italicized portion of the following to the ABA's Official Comment to *MR* 1.2:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. *In that context, a lawyer shall advise the client about the advantages, disadvantages, and availa-*

26. AM. BAR ASS'N & BUREAU OF NAT'L AFFAIRS, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 1:3 (1984).

27. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

> *bility of dispute resolution processes that might be appropriate in pursuing these objectives.*[28]

Other portions of the ABA's Official Comment to *MR* 1.2 state that clients *should* control some means decisions:

> In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.[29]

It may be that under this Comment, the lawyer "should defer to the client" as to whether to pursue ADR. The decision whether to pursue ADR is not so technical that a client cannot understand it. Furthermore, whether the client engages in ADR is likely to have such a significant impact on the two factors mentioned by the Comment—expenses incurred and concern for third parties—that leaving this decision to the client is justified. As noted in the previous section, some methods of ADR are likely to save money and preserve the client's relationship with the opposing party.[30] The importance that the Comment gives to these considerations, coupled with the non-technical nature of the decision whether to pursue ADR, suggest that under the Comment the lawyer *should* consult with the client about whether to pursue ADR. But the Comment is couched in hortatory language ("should"), rather than mandatory language ("must"). A violation of hortatory language in the lawyer codes does not subject a lawyer to discipline.[31]

Some commentators have suggested that *MR* 1.4(b) imposes a duty on lawyers to present ADR options to clients.[32] It states: "A lawyer *shall* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[33] Much as I would like this section to require lawyers to present ADR options to clients, it does not identify the "informed decisions" that clients are entitled to make. *Model Rule* 1.4(b) merely dictates the level of counseling assistance a lawyer must give clients about issues that the client is entitled to resolve under *MR* 1.2(a). Since *MR* 1.2 only requires the lawyer to "con-

28. VA. CODE ANN. R. Pt. 6, § II, R. 1.2 cmt.[1] (Michie 2000) (emphasis added).

29. MODEL RULES OF PROF'L CONDUCT R. 1.2. cmt.[1].

30. *Supra* Section I.B.

31. MODEL RULES OF PROF'L CONDUCT, Scope [13].

32. *See generally* Edward A. Dauer & Cynthia McNeil, *New Rules on ADR: Professional Ethics, Shotguns and Fish*, 21 COLO. LAW. 1877 (1992).

33. MODEL RULES OF PROF'L CONDUCT R 1.4 (emphasis added).

sult" with the client concerning means decisions, it does not appear that the *Model Rules* require the lawyer to allow the client to choose whether to pursue ADR.

The term "consult" suggests that the client is entitled to something less than control of ADR, but something more than mere notice of the means that the lawyer has chosen.[34] When I am hired as a consultant, I do not have control over decisions, but I am listened to carefully and am likely to have substantial influence on decisions that are made. As to the ADR decision, the *Model Rules*' duty to consult probably requires that the lawyer, in the terms used by the Virginia *Rule*'s Comment, "advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives"[35] and obtain and consider the client's opinion about the matter. Ultimate control of means appears to be in the hands of the lawyer under the *Model Rules*, but only after a serious evaluation of those means with the client. Of course, in the case of wealthy, informed clients, the practical effect of consultation is likely to be client control. If the lawyer does not comply with client wishes, the client is likely to go elsewhere. Consultation, however, is unlikely to give much power to the poor or weak client.[36]

B. Client Notification Models: The Colorado Rule

Several jurisdictions encourage, but do not require, lawyers to inform clients of ADR options.[37] For example, *Rule* 2.1 of the *Colorado Rules of Professional Conduct* states:

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34. The Terminology section of the *Model Rules* states: "'Consult' or 'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." MODEL RULES OF PROF'L CONDUCT, Terminology [2]. The ABA Ethics 2000 Commission moved the Terminology section to a new rule, Proposed Rule 1.0, and deleted the definition of "Consult" or "Consultation." ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, FINAL RULES PART TWO, Proposed Rule 1.0 (Dec. 1, 2000), http://www.abanet.org/cpr/e2k-final_rules2.html.

35. VA. CODE ANN. R. Pt. 6, § II, R. 1.2 cmt.[1] (Michie 2000).

36. *Supra* Section I.A.

37. *E.g.*, COLO. REV. STAT. CT. R. chs. 18-20 app. R. 2.1 (2000); HAW. RULES OF PROF'L CONDUCT R. 2.1 (2000) ("[A] lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."); GA. R. & REGS. FOR THE ORG. AND GOV'T OF THE STATE BAR R. 3-107, EC 7-5 (1999) ("A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation."); OHIO STATE BAR ASS'N RPTR. xli (1997) (exhorting lawyers to advise clients of ADR options); THE TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM § II

> In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.[38]

Although the Colorado *Rule* obviously was designed to encourage lawyers to discuss ADR options with clients, it has several weaknesses. First, the Colorado *Rule* is hortatory ("a lawyer should . . . ."). It does not require lawyers to present ADR options to clients. Second, the *Rule* encourages lawyers only to "advise the client" of ADR. Presumably, a lawyer could meet the requirements of the *Rule* merely by describing ADR methods and then informing the client that he has decided to file suit. Unlike a consultation model, the lawyer need not seek client input. Finally, the Colorado *Rule* may actually weaken the possibility that *MR* 1.2 (which remains a part of the Colorado professional rules) would be interpreted by a court or disciplinary body to require that lawyers "consult" with clients about ADR, as suggested in the previous section.

C. Client Control: The Michigan Rule

A few jurisdictions have adopted rules that require lawyers to allow clients to control the decision whether to pursue ADR. A Michigan Bar opinion states:

> A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interest, or if the lawyer has any reason to think that the client would find the alternative desirable.
>
> . . . .
>
> While not all options which are theoretically available need be discussed, any doubts about whether a possible option is rea-

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A(11) (1989) ("I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes."); ARK. CODE ANN. § 16-7-101 (Michie 1999) (encouraging lawyers to advise clients of ADR options); N.J. SUP. CT. R. 1:40-1 (West 2000) (encouraging attorneys to become familiar with dispute resolution programs and inform clients of their availability).

A few court rules, statutes, and ethics opinions *require* lawyers to initiate discussions of ADR options with clients. *E.g.*, MASS. LOCAL R. (D. MASS.) R. 16.1(D)(3)(b) (1995) (requiring attorneys to certify that ADR options have been discussed with the client); MICH. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, FORMAL OP. RI-255 (1996) (requiring attorney to inform client if opposing counsel suggests ADR); PA. BAR ASS'N, COMM. ON LEGAL ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 90-125 (1991) (stating that *Rule* 1.4 and *Rule* 1.2 read together obligate a lawyer to inform a client when the opposing counsel suggests mediation).

38. COLO. REV. STAT. CT. R. chs. 18-20 app. R. 2.1 (2000).

> sonably likely to promote the clients [sic] interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.[39]

In addition, the rule articulated in the *Restatement (Third) of the Law Governing Lawyers* may require lawyers to allow clients to control ADR decisions. I will discuss the *Restatement* as well as a proposed professional rule that would give clients control of the ADR decision in a later Section.[40]

III. THE ABA ETHICS 2000 COMMISSION

In 1997, the American Bar Association appointed the Ethics 2000 Commission and gave it the express responsibility of updating the *Model Rules of Professional Conduct.*[41] The *Model Rules* had been adopted in 1983, when ADR was in its infancy.[42] Tremendous growth in the ADR field had occurred since the *Model Rules* were adopted, and it was my hope that the Ethics 2000 Commission would recognize the importance of ADR and the importance of client control over the decision whether to pursue it.[43] Unfortunately, the Commission's proposed rules may undercut the possibility of client influence over the ADR decision.

The Commission's initial "Proposed Rule," issued as a "Public Discussion Draft" on April 24, 2000, would have removed the language from *MR* 1.2 that requires lawyers to consult with clients about means decisions—a step that would have had implications far beyond the issue of control of ADR.[44] Not surprisingly, this proposal was short-lived. As I suggested in testimony before the

39. Formal Op. RI-262; *see also* OR. REV. STAT. § 36.185 (Supp. 1998) (requiring all parties in civil actions to file a confidential statement indicating their knowledge of ADR and their election whether to participate in an ADR proceeding).

40. *See infra* Section IV.B.

41. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, CHAIR'S INTRODUCTION AND EXECUTIVE SUMMARY (Dec. 1, 2000), http://www.abanet.org/cpr/e2k-intro_and_summary_changes.html.

42. MODEL RULES OF PROF'L CONDUCT (1999).

43. Robert F. Cochran Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999).

44. The Commission's proposal was to delete the following language with the strikethrough and add the italicized language to *Model Rule* 1.2(a): "[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and ~~shall consult with~~ *may take such action on behalf of* the client as ~~to the means by which they are to be pursued~~ *is impliedly authorized to carry out the representation.*" ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, PRO-

Commission, this proposal would have moved us in the wrong direction, toward lawyer paternalism and away from client autonomy.[45]

The Commission's "Final Proposed Rules," issued on December 1, 2000, provide for what may be a weakened client right to be consulted about means decisions. In a Comment, the Commission raises the possibility that a client might have a right to be informed about ADR. Three provisions of the Commission's proposed rules are relevant to ADR decision-making.

POSED RULE 1.2—PUBLIC DISCUSSION DRAFT (Apr. 24, 2000), http://www.abanet.org/cpr/rule12.html.

45. As I testified:

> [The Ethics 2000 Commission's] Proposed Rule 1.2 contains one of the most surprising proposed changes to the rules. Under Proposed Rule 1.2, clients continue to control the objectives of the representation, but they no longer have the right to be consulted about the means used to obtain those objectives. This moves in exactly the opposite direction from the general direction of the law toward client autonomy. The Commission appears to move us . . . from consultation to pure lawyer control.
>
> Comment 2 of the Reporter's Explanation of Changes states that the "Commission believes that the current formulation [of *MR* 1.2] is flawed because it . . . suggests too strongly that the lawyer never has to abide by a client decision with respect to means as distinct from objectives." The problem is that the Commission's proposed formulation continues to strongly suggest that "the lawyer never has to abide by a client decision with respect to means," *and* it withdraws the requirement that the lawyer consult with the client about means decisions. In my view, the Rule should expressly expand client control, not retract it. The Proposed Rule withdraws one of the few requirements that lawyers give clients any influence as to means decisions.
>
> Comment 2 of the Reporter's Explanation of Changes to *Rule* 1.2 also states that "the Commission recommends that the lawyer's responsibilities to consult with the client about the means to be used . . . be determined by reference to the lawyer's duty under *Rule* 1.4 to keep the client reasonably informed about the representation." It seems to me that a "duty to inform" under the Proposed Rule 1.4 is a much weaker duty than a duty to "consult" under the current *Model Rule* 1.2(a). For example, a duty to keep the client informed would be met by notice that the lawyer has filed suit against the opposing party. A duty to consult with the client would at least require that the lawyer contact the client before filing suit and get the client's reaction to the proposed suit. Of course, my earlier argument is that the client needs some muscle. My proposals would require the lawyer to not merely inform or consult with the client, but to allow the client to decide whether to sue and whether to pursue an alternative means of dispute resolution.

ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, COMMENTS ON PROPOSED RULES 1.2, 1.4, AND 2.1 AND A PROPOSAL THAT MODEL RULE 1.2 REQUIRE LAWYERS TO ALLOW CLIENTS TO CHOOSE WHETHER TO PURSUE ADR [hereinafter ABA ETHICS 2000 COMM'N, COMMENTS] (July 6, 2000) (statement of Robert F. Cochran Jr.), *available at* http://www.abanet.org/cpr/cochran10.html.

First, the Commission's Final Proposed Rule 1.2 adds the italicized language to the original Model Rule:

> **Rule 1.2: Scope of Representation *and Allocation of Authority Between Client and Lawyer*** A lawyer shall abide by a client's decisions concerning the objectives of representation [and], *as required by Rule 1.4*, shall consult with the client as to the means by which they are to be pursued. . . .[46]

Note that the Commission has re-instituted the client's right to be consulted about means decisions, but it is now "required by *Rule* 1.4," rather than *Rule* 1.2.

The relevant portion of the Commission's Proposed Rule 1.4 reads as follows:

> **Rule 1.4: Communication** A lawyer shall . . . *reasonably consult with the client about the means by which the client's objectives are to be accomplished*. . . .[47]

Moving the client's right to be consulted about means decisions from *MR* 1.2 to Proposed Rule 1.4 initially might appear to be merely a matter of moving boxes around, but on closer examination, the move may be significant. Under the proposed rules, the client's right to be consulted about means decisions appears under *Rule* 1.4, labeled "communication," rather than under *Rule* 1.2, which allocates authority between client and lawyer. Under the proposed rule, the right to be consulted looks much more like the right to be informed than the right to have influence.

In addition to the changes to *Rules* 1.2 and 1.4, a change to the Comments to *Rule* 2.1 in the Ethics 2000 Commission proposal includes a specific reference to the decision whether to pursue ADR. *Model Rule* 2.1 is entitled "Advisor" and requires the lawyer to "render candid advice."[48] The Commission would add the italicized portion below to the Comment:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, *the lawyer's* duty to the client under Rule 1.4 may require that the lawyer ~~act~~ *offer ad-*

46. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, *supra* note 34, R. 1.2(a).

47. *Id.* R. 1.4(a). The proposed rule adds the word "reasonably" to the language that originally appeared in *Model Rule* 1.2. I do not see this as a significant limitation on the client's right to be consulted. I am confident that any court or bar committee would have implied this limitation to the original language of *Model Rule* 1.2.

48. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1999).

> *vice* if the client's course of action is related to the representation. *Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.*[49]

I have three concerns with the Commission's proposed addition to this Comment. My first concern is with the weakness of the Comment's language. The Commission's proposal says merely that *MR* 1.4 *may* require the lawyer to inform the client of ADR. That language fails to give the lawyer any guidance. The ambiguity (and ambivalence) of the Comment certainly will give any attorney charged with a disciplinary violation a strong argument that he should not be disciplined. Nevertheless, the rule does raise the possibility that *MR* 1.4 will require lawyers to notify clients of ADR, and it may be that careful lawyers will give such notice in order to avoid the possibility of discipline.

Second, the Comment states only that lawyers may be required to *inform* clients about ADR. Both *MR* 1.2 and the Commission's Proposed Rule 1.4 require the lawyer to "consult" with the client about means decisions. As I argued previously, I think that the right to be consulted is more than the right merely to be notified.[50] A duty to consult would at least require the lawyer to hear and consider the opinion of the client on the ADR issue.

My final concern is with locating the provision in the Comment to *Rule* 2.1 (though, given the weakness of the rule, it may be just as well). Lawyers who are wrestling with the question whether to discuss ADR options with clients are more likely to go to *MR* 1.2 or 1.4, which have to do with allocation of authority and communication, than to *MR* 2.1. The Commission's proposed addition to the comment is, by its very terms, a statement about what "may be necessary under Rule 1.4." It would seem that the proper location of the Commission's Comment would be under *Rule* 1.4 (though, as I argue below, I believe that a much stronger rule should be added as part of *Rule* 1.2.).

IV. TWO ALTERNATE PROPOSALS: INFORMED CONSENT OR CLIENT CHOICE

It is important that clients get not only information, but empowerment. Information about ADR is likely to enable the client who

49. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, *supra* note 34, R. 2.1 cmt.[5].

50. *Supra* Section II.A.

is already powerful to choose ADR, but it may not help the poor or uneducated client. I propose two alternate rules, either one of which would allow clients to make the ultimate decision whether to pursue litigation or ADR. Both rules have strong precedents. Whatever rule is adopted, it should be included in *Rule* 1.2(a), the rule that allocates authority between lawyer and client. *Model Rule* 1.2(a) currently reads:

> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.[51]

A. Alternative One: Informed Consent

My first proposal is that the ABA add the following sentence at the end of *MR* 1.2(a): "A lawyer may litigate a matter if the client gives informed consent."

Several provisions of the *Model Rules* and the Proposed Rules give the client the right to informed consent as to other matters. Under Proposed Rule 1.2, the lawyer must obtain the client's informed consent to limit the scope of the representation; under *MR* 1.6, the lawyer must obtain informed consent to the disclosure of confidential information; and under *MR*s 1.7 to 1.12 the lawyer must obtain informed consent to several types of conflicts of interest. Surprisingly, nowhere in the *Model Rules* or the Proposed Rules is the lawyer required to get the client's informed consent to litigating a case. Litigation is at least as important as are these other matters that require the client's informed consent.

The Commission's Proposed Rule 1.0: Terminology includes the following provision:

> (e) "Informed consent" denotes the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[52]

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51. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

52. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, *supra* note 34, R. 1.0(e).

If the Rules were to require that the lawyer obtain the client's informed consent before litigating a matter, pursuant to this definition, the lawyer would have to obtain the client's "agreement to [litigate] after the lawyer has communicated [to the client] adequate information and explanation about the material risks of and reasonably available alternatives to the [litigation]." Those alternatives would include means of ADR that are reasonably available in the jurisdiction.

There is an analogy between the rule that I am proposing here and the informed consent right of medical patients. Medical patients have the right to be informed about and choose alternatives to a proposed medical procedure.[53] The recognition of the medical informed consent cause of action was a choice for patient autonomy and against doctor paternalism. Because the patient is the person who bears the greatest risks, the courts concluded that the patient should control the choice.

Legal clients have similar interests in being able to choose alternatives to litigation. In many respects, litigation is to the client what surgery is to the patient. Both litigation and surgery are likely to carry great risks and offer great potential benefits for the client or patient. It is not that ADR is always better than litigation, any more than conservative medical care is always better than surgery. It is a question of who should decide. An attorney disciplinary rule requiring the lawyer to present the client with the option of pursuing ADR would be based on a concern for client dignity, as the duty of doctors to obtain informed consent is based on a concern for patient dignity; to the extent reasonably possible, individuals should control decisions that affect them.

B. Alternative Two: Client Choice

As an alternative, the ABA might add the italicized portion of the following to Proposed Rule 1.2 (a):

53. Karp v. Cooley, 349 F. Supp. 827, 838 (S.D. Tex. 1972) (explaining that a lack of informed consent does not amount to liability unless it is the proximate cause of the patient's injuries); Dunham v. Wright, 302 F. Supp. 1108, 1111 (M.D. Pa. 1969) (holding that informed consent may not be required in emergency cases); Williams v. Menehan, 379 P.2d 292, 294 (Kan. 1963) (stating that a doctor need only make a "reasonable disclosure" to obtain informed consent); Natanson v. Kline, 350 P.2d 1093, 1106 (Kan. 1960) (determining that patient did not give informed consent to radiation treatment because physician failed to warn her of the hazards involved); Mitchell v. Robinson, 334 S.W.2d 11, 18-19 (Mo. 1960) (holding that doctors owe their patients who are in possession of their mental faculties the duty to inform them of the possible serious collateral dangers of shock therapy).

> A lawyer shall abide by a client's decision *whether to pursue a means of alternative dispute resolution and* whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether to testify.[54]

The existing *Rule* identifies several means decisions that are reserved for the client. In my view, the decision whether to pursue alternative means of dispute resolution is of equal importance to these decisions. My proposal would give the client the right to choose to pursue ADR and would preclude the lawyer from adopting a form of ADR against the client's wishes.[55]

As noted previously, a few jurisdictions, through bar opinions and court rules, have given clients the right to control the ADR decision.[56] In addition, under the *Restatement (Third) of the Law Governing Lawyers*, it may be that a lawyer is required to allow clients to make this decision. Section 33(1) states:

> As between client and lawyer . . . the following *and comparable decisions* are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.[57]

The *Restatement*'s Comment to 33(1) identifies the factors that determine whether a means decision is "comparable" to those decisions explicitly allocated to the client's control and therefore also within the client's control. Those factors are:

> [H]ow important the decision is for the client . . . whether reserving decision to the client would necessitate interrupting trials or constant consultations; whether reasonable persons would disagree about how the decision should be made; and whether the lawyer's interests may conflict with the client's.[58]

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54. ABA ETHICS 2000 COMM'N, COMMENTS, *supra* note 45.

55. The California Supreme Court held that a lawyer may not opt for arbitration against the client's wishes. Blanton v. Womancare, Inc., 696 P.2d 645 (Cal. 1985). In a concurring opinion, Justice Bird stated, "An attorney should explain to the client the strategic considerations that determine whether a jury trial or some other form of dispute resolution should be utilized." *Id.* at 656 (Bird, Chief J., concurring).

56. *Supra* note 39 and accompanying text.

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33(1) (1998) (emphasis added).

58. *Id.* cmt. e.

Each of these factors suggests that the decision to pursue ADR should belong to the client:

> (1) "*how important the decision is for the client*": As suggested earlier in this article, the decision whether to pursue ADR is a very important decision for the client. ADR can save time and attorney's fees, reduce hostility between the parties, and protect the client's privacy.[59]
>
> (2) "*whether reserving decision to the client would necessitate interrupting trials or constant consultations*": Reserving this decision to the client would not interrupt a trial or require constant consultations. The decision whether to pursue ADR generally is made a substantial time before trial.
>
> (3) "*whether reasonable persons would disagree about how the decision should be made*": There are advantages and disadvantages to the ADR options. Reasonable people can differ over whether to pursue these options. The lawyer cannot know how the client would choose and should present this issue to the client.
>
> (4) "*whether the lawyer's interests may conflict with the client's*": As suggested previously, the lawyer and client are likely to have conflicts of interest over this issue.[60] Pursuing ADR may conflict with lawyers' interest in high attorney's fees and some lawyers' interest in maintaining a "hardball" image. Lawyers who do not practice in the ADR area may have to give up a case if a client chooses ADR.

Overall, it appears that under the *Restatement*, the client should be entitled to decide whether to pursue ADR options.

As between an informed consent rule and a client control rule, my preference, though not a strong one, is for a client control rule. Under either rule, the lawyer must present ADR options to the client, describe their advantages and disadvantages, and allow the client to make the ultimate decision. But I believe that the informed consent rule and the client control rule have significant differences in emphasis. The label "informed consent" suggests that the lawyer might merely seek the client's consent to the lawyer's decision. The "client control" model properly focuses on the client's control.

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59. *Supra* Sections I.A, B.
60. *Supra* Section I.C.

CONCLUSION

The ABA should amend the *Model Rules* to require lawyers to present the option of pursuing ADR to the client. Whether to pursue ADR is important to the client, the ability to make the decision is likely to be within the competence of the client, and the lawyer is likely to have a conflict of interest as to this issue. One of the attorney's primary functions is to protect client autonomy from interference by the state and other individuals. Attorneys should enhance client autonomy; they should not be an additional source of interference with that autonomy.

What would the result of such a rule be? I do not think that it would put a great burden on lawyers. Standard forms for instructing clients about the various types of dispute resolution would evolve. Lawyers would give such forms to clients as a part of their standard package of client materials. Clients could look such materials over at their leisure. Some clients who are not informed of ADR options today would choose to pursue them. ADR would be more heavily used, there would be less litigation and less conflict within our society, and clients would have a greater sense of control over their lives.

THE ROLE OF ARBITRATOR: CONFLICTS OF INTEREST

*Stephen K. Huber**

INTRODUCTION

Arbitration is everywhere! Do you have a brokerage account? If so, you have agreed to arbitrate any disputes arising out of or relating to that brokerage relationship.[1] Have you purchased a computer from Gateway? If so, you have agreed to arbitration—in Chicago—pursuant to South Dakota law.[2] Until recently, Gateway contracts even mandated that arbitration proceedings be conducted pursuant to the rules of the International Chamber of Commerce ("ICC"), including the requirement that all correspondence be sent to ICC headquarters in Paris, France.[3]

Have you used a pest control service? You can probably guess what the small print on the form you signed almost certainly says about dispute resolution.[4] Arbitration provisions are also now standard in franchisor-franchisee contracts. For example, Subway Sandwich Shop franchise disputes have generated dozens of lawsuits, virtually all of which have been decided in favor of the franchisor.[5] Have you or your child entered a contest by collecting game pieces or participating in instant prize giveaways at fast food

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1. *E.g.*, E*Trade Customer Agreement (2001), http://www.etrade.com/cgi-bin/gx.cgi/AppLogic+OpenAccount; Ameritrade Terms and Conditions (2001), http://www.ameritrade.com/getting_started/apply_online.html.

2. Gateway Consumer Products Limited Warranty and Terms & Conditions Agreement (1999), http://www.gateway.com/help/support/8505295.shtml.

3. Brower v. Gateway 2000, 676 N.Y.S.2d 569, 574 (App. Div. 1998) (finding provision requiring arbitration under rules of ICC to be "substantially unconscionable"). The International Chamber of Commerce ("ICC") rules required consumers to pay an advance fee of $4,000—an amount greater than the price of virtually all Gateway products—of which, a $2,000 registration fee was nonrefundable even if the consumer prevailed at the arbitration. *Id.* at 571.

4. *E.g.*, Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265 (1995) (discussing termite prevention contract specifying that any controversy under the contract would be settled exclusively by arbitration).

5. *E.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (preempting a Montana notice requirement that contracts subject to arbitration so state in underlined capital letters on the first page of the contract). For a case study of the litigation related to Doctor's Associates, Inc. ("DAI") arbitration provision and DAI's arbitra-

chains? By now you will have guessed that any disputes relating to such contests likely will be subject to arbitration.

Arbitration provisions are an increasingly common feature in contracts between banks and their customers. Manufactured housing sales and financing contracts usually contain arbitration provisions as well.[6] Such terms also are increasingly common in real estate contracts—including those between and among brokers, sellers, buyers, and agencies.[7] Arbitration provisions rapidly are becoming a standard feature of employment contracts, too.[8] Mandatory arbitration provisions permeate relationships in the health industry—including those among patients, employers, physicians, HMOs,[9] PPOs,[10] and insurance companies.[11] Of direct interest to readers of this essay, arbitration terms are now common in agreements between lawyers and clients, as well as between lawyers and their firms.[12]

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tion and litigation strategy, see STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, ARBITRATION: CASES AND MATERIALS 199-224 (1998).

6. *E.g.*, Green Tree Fin. Corp. v. Randolph, 121 S. Ct. 513, 518 (2000) (discussing provision requiring that all contract disputes pertaining to housing finance agreements be resolved through binding arbitration).

7. *See, e.g.*, Buyer's First Realty v. Cleveland Area Bd. of Realtors, CV-339578, 2000 WL 1060527, at *1 (Ohio Ct. App. Aug. 3, 2000) (affirming arbitration award in action between real estate brokerage and its agents).

8. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (upholding a provision requiring mandatory arbitration of an Age Discrimination in Employment Act claim). The Justices also stated that they were "unpersuaded by the argument that arbitration [would] undermine . . . the ADEA." *Id.* at 28.

9. Health Maintenance Organizations ("HMOs") provide medical coverage to the insured at lower cost than traditional methods, often without patient deductibles. HMO plans typically require, however, that the insured choose a physician from a specific network of doctors and obtain referral before seeing specialists. PREMIER FIN. BENEFITS, LLC, *HMO v. PPO, at* http://www.premierhealthplans.com/hmovsppo.htm.

10. Preferred Provider Organizations differ from HMO plans in that the insured may choose any physician she wishes, however, the PPO often will pay a higher percentage of the costs if a doctor is chosen from the company's list. *Id.*

11. *E.g.*, Group Health Plan, Inc. v. BJC Health Systems, 30 S.W.3d 198, 205 (Mo. Ct. App. 2000) (holding that confidential information from prior arbitration was not discoverable in present, unrelated arbitration between health services corporation and health care provider). "Though we recognize that arbitrators enjoy wide latitude in granting discovery . . . [t]o permit arbitrators to conduct illimitable discovery . . . would have a chilling effect on the willingness of parties to arbitrate their disputes." *Id.*

12. *E.g.*, Sage v. Greenspan, No. 1413, 2000 WL 1855141 (Pa. Super. Ct. Dec. 20, 2000) (holding that in a malpractice action, statutory procedure prevailed over provisions of arbitration agreement). For a greater collection of cases involving arbitration in the legal and medical contexts, see STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, ARBITRATION: CASES AND MATERIALS 681-700 (1998).

The statement that arbitration is everywhere somewhat exaggerates realty. One place where arbitration notably is absent is the curriculum of the modern American law school. Because this essay is based on a presentation to a joint session of the Association of American Law Schools ("AALS") Sections on Professional Responsibility and Alternative Dispute Resolution,[13] my focus will be on some particularly interesting ethics issues that frequently arise in the arbitration context.

The main topic I address, by way of raising ethics issues that may arise in arbitration, is the role of the arbitrator. Arbitrators commonly are referred to as private judges, but there are major differences between arbitrators and judges—two of which are central to this discussion:

1. Arbitrators are commonly selected, either directly or indirectly, by the parties involved in the dispute; and
2. Individuals are commonly chosen as arbitrators precisely because they have considerable knowledge about the subject matter of the arbitration, or because they are the leading experts in the industry.

These factors require the background of arbitrators to be quite different from that of judges. Although judges all have been trained as lawyers—in addition to acquiring extensive professional experience—many arbitrators are not lawyers and have little if any legal training. Yet, if adjudicatory finality is the benchmark standard, arbitrators have greater judicial power than civil trial judges because the nature and extent of judicial review under the Federal Arbitration Act ("FAA")[14] and the Uniform Arbitration Act ("UAA")[15] is more restrictive than appellate review of trial court decisions.

A basic understanding of the differences between arbitration and litigation is important for anyone who works with civil clients. In addition, the differences between arbitrators and judges raise

13. The other essays based on presentations at this Symposium, *ADR and the Professional Responsibility of Lawyers*, are reported within this volume of the *Fordham Urban Law Journal.*

14. 9 U.S.C. §§ 1-16 (1994).

15. The UAA was approved by the House of Delegates to the American Bar Association in 1955 and has been "reprinted by the American Arbitration Association . . . for the assistance of legislators, lawyers, and others who wish to improve the arbitration legislation in their own states." Uniform Arbitration Act, http://www.adr.org/law/federal/uniform.html. For the most recent revisions to the Act, see UNIF. ARBITRATION ACT (revised 2000), *available at* http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf.

important professional ethics issues about the neutrality of arbitrators—neutrality being the hallmark of the adjudicative process.

I. THE PLACE OF ARBITRATION IN THE LAW SCHOOL CURRICULUM

Before turning to the appropriate role for arbitrators, attention must be given to arbitration in context of the law school enterprise. Both the professoriate and law students alike are largely ignorant of arbitration and the extraordinary expansion of its relevance in recent years.

Recently, I made a presentation to my colleagues at the University of Houston ("UH") Law Center about the many important arbitration developments during the 1990s. Borrowing from late night television host David Letterman, I structured those developments in the form of a "Top 10" list.[16] To gauge the background of my audience, I asked some twenty of my compatriots what they had learned about arbitration in law school. Their answers ranged from "nothing" all the way to "absolutely nothing." My own answer was that I, too, had learned nothing about arbitration. Only one of my faculty colleagues, Ron Turner, recalled more than a passing mention of arbitration while in law school—and he practiced and now teaches labor and employment law.[17]

Law professors, like others, tend to forget some of the lessons they learned in school—even when their instructor may have presented the material in a brilliant and amusing manner. To ensure against such lapses in memory, and also to avoid reporting ancient history, my sample of the UH Law Center faculty was heavily skewed toward more recent law school graduates.

This initial—and purposely unthreatening—question facilitated a general discussion of what law school faculties know about arbitration and the place of arbitration in the law school curriculum. The overall level of knowledge claimed by my faculty colleagues was minimal, although this may reflect undue modesty on their part. As might be expected, knowledge about arbitration tended to be greatest among faculty who taught in subject areas where the use of arbitration is most common: labor, employment, consumer, patent, and international commercial transactions. Notably, none of these areas are at the core of the law school curriculum.

16. For the complete version, see Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, 55 DISP. RESOL. J. 24 (2001).

17. Indeed, Turner's comments refreshed my recollection that arbitration had received brief attention in my own labor law course.

Law students receive little, if any, exposure to arbitration during their legal education; this is particularly true in first-year courses. The obvious place in the first-year curriculum to find arbitration is in the contracts course. A sampling of the leading casebooks turned up little arbitration material, so it would take an affirmative effort on the part of a contracts teacher to provide even a general introduction to the subject of arbitration. An overview of the very modest coverage provided in contracts casebooks is found in the Appendix to this essay.

Civil procedure casebooks commonly address alternative dispute resolution ("ADR") topics, but the focus is on procedures that serve as adjuncts to litigation rather than alternatives to trial courts.[18] A striking exception is the civil procedure casebook used at Columbia Law School.[19] Rather than focusing on ADR within the litigation process, this casebook devotes nearly the entire ADR chapter to private arbitration. The authors offer the following explanation: "Of all the alternatives . . . the one that comes closest to the normal adjudicative process is arbitration . . . . Because arbitration is so close to adjudication in many of its major characteristics, it serves as a mirror that reflects the strengths and weaknesses of court process."[20]

II. TEACHING ARBITRATOR CONFLICTS ISSUES IN PROFESSIONAL RESPONSIBILITY

Arbitration practices, as they pertain to professional responsibility issues, are as absent from professional responsibility courses as they are from the rest of the law school curriculum.[21] Professional ethics courses already have a considerable body of material to cover, often within a two-credit course, so suggestions for additional curricular material are offered with certain diffidence. Focus, however, on the role of the arbitrator and conflicts of interest

18. The most recent editions of civil procedure casebooks contain materials on mediation, in the context of the judicial process, but not about arbitration as an alternative to law suits. Court-Annexed Arbitration ("CAA") receives some mention, but CAA is part of the trial process rather than an alternative thereto.

19. MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE (5th ed. 1990).

20. *Id.* at 1111. There is also a four-page section on the enforcement of foreign arbitration awards in American courts. *Id.* at 1132-35.

21. The goal in the discussion that follows is to offer material for understanding the role of the arbitrator and conflicts of interest—it does not assume any knowledge about arbitration law or practice.

is useful in law school because it illuminates those parallel issues for lawyers generally, as well as for judges.

It is helpful when teaching professional ethics to have a widely accepted set of rules of conduct, which provide a basis for considering specific problems and issues. Fortunately, such a set of rules for arbitrators exists and is widely cited by the courts—the *Code of Ethics for Arbitrators in Commercial Disputes* ("*Code of Ethics*"), jointly promulgated by the American Arbitration Association ("AAA") and the American Bar Association ("ABA").[22] The AAA also has adopted a parallel set of rules for labor disputes—the *Code of Professional Responsibility for Arbitrators in Labor-Management Disputes*.[23]

III. THE "EVIDENT PARTIALITY" STANDARD FOR VACATING ARBITRATION AWARDS

Arbitration statutes provide for vacating arbitration awards due to unacceptable conflicts of interest on the part of arbitrators.[24] The relevant provisions in both the FAA and the UAA for vacating an award due to arbitrator bias cites "evident partiality or corruption."[25] Thus, short of actual corruption on the part of an arbitrator, the governing legal standard is "evident partiality." The meaning of this phrase is hardly self-evident, which allows for lively debate about what content should be placed in this vessel.

The United States Supreme Court has made only one foray into the evident partiality thicket, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[26] Not only is more recent guidance from the high Court lacking, but *Commonwealth* produced a plurality opinion by Justice Black and an often quoted concurring opinion by Justice White. The Court adopted an "impression of possible

22. AM. ARBITRATION ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATION IN COMMERCIAL DISPUTES (1977), *available at* http://www.adr.org [hereinafter CODE OF ETHICS]. The Code of Ethics was revised in 1999 by a Committee convened by the Arbitration Committee of the Section of Dispute Resolution of the American Bar Association and including representatives of the American Arbitration Association and CPR Institute for Dispute Resolution. The revised *Code of Ethics* is available at http://www.abanet.org/ftp/pub/dispute/arbdoc.txt (last visited March 27, 2001).

23. AM. ARBITRATION ASS'N ET AL., CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATION OF LABOR-MANAGEMENT DISPUTES (1985), http://www.adr.org/rules/ethics/labor_code.html (last visited March 27, 2001).

24. Although there are typically one to three arbitrators, in theory, the parties can specify any number of arbitrators. 9 U.S.C. § 5 (1994).

25. 9 U.S.C. § 10 (1994).

26. 393 U.S. 145, 147 (1968) (stating that it was the desire of Congress to "provide not merely for *any* arbitration but for an impartial one") (emphasis in original).

bias" test, which hardly clarifies matters.[27] For subsequent case law, one may turn to other federal, but most likely state, courts. Many cases arising under the FAA are heard by state courts because the FAA, unlike many federal statutes, does not provide an independent basis for federal jurisdiction.

In his *Commonwealth* concurrence, Justice White elaborated on the appropriate standards for vacating arbitration awards due to arbitrator bias:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean that the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.[28]

The differences between the appropriate background of judges and arbitrators, and their impact on the adjudicatory process, are highlighted nicely by Judge Richard Posner:

> The ethical obligations of arbitrators can be understood only by reference to the fundamental differences between adjudication by arbitrators and adjudication by judges and jurors. No one is forced to arbitrate a commercial dispute unless he has consented by contract to arbitrate. The voluntary nature of commercial arbitration is an important safeguard for the parties that is missing in the case of the courts. Courts are coercive, not voluntary, agencies . . . [resulting] in a judicial system in which impartiality is prized above expertise. . . . [P]eople who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of the subject matter. . . . There is a tradeoff between impartiality and expertise. The expert adjudicator is more likely than a judge or jury not only to be precommitted to a particular substantive position but to know or have heard of the parties (or if the parties are organizations, their key people). "Expertise in an industry is accompa-

27. *Id.* at 149-50.
28. *Id.* at 150 (citations omitted).

> nied by exposure, in ways large and small, to those who are engaged in it. . . ."[29]

Another factor that places pressure on the "evident partiality" standard is the fact that judicial review of arbitration awards is extremely limited—clearly more limited than review of trial court decisions. The result is a form of the phenomenon known as displacement. Losing parties are dissatisfied with the result of the arbitration, but the possibility of vacatur for errors of fact or law is extremely modest, so the only remaining option is to challenge the neutrality of an arbitrator. As a result, losing parties in arbitration closely examine the backgrounds of their arbitrators in search of undisclosed conflicts. Of course, judges are acutely aware of the motives underlying such hindsight, but the search sometimes turns up information that could have seriously undermined neutrality.

Such situations put into conflict the goals of finality, certainty, and expert decisions on the one hand, and neutrality on the other. In addition, arbitrators are directly or indirectly, selected by the parties—something inconceivable with state-supplied courts. Party choice is an independent value. Therefore, neutrality is arguably less important in arbitration, where the parties choose their judges, than in court proceedings, where the state provides the judge.

A further—but less important—reason not to vacate an arbitration award is that the entire process must be started anew, which is often not the case with courts. Courts have an institutional existence, while arbitration panels are ad hoc bodies. A court cannot remand a decision to the arbitrators for clarification, and they cannot ask the arbitrators to reconsider one of several issues—the common affirm in part and reverse/remand in part decision. This fact is known as the doctrine of *functus officio*.[30] Not too much should be made of this difference, but it does mean that reviewing courts have less flexibility in reviewing an arbitration award than in reviewing a court decision.

There is an obvious solution to concerns about bias situations. Potential arbitrators should disclose everything of any conceivable interest to the parties after a complete conflicts check that includes the parties, counsel, and witnesses. If this is done, a party must

29. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (quoting Andros Compania Maritima, S.A. v. Marc Rich & Co., 579 F.2d 691, 701 (2d Cir. 1978)).

30. "Of an officer or official body without authority or legal competence because the duties and functions of the original commission have been fully accomplished." BLACK'S LAW DICTIONARY 682 (7th ed. 1999).

make a timely objection before the arbitration takes place, or waive its objection. This approach is easy to articulate but difficult to implement in practice. The practical question faced by a court is whether to vacate an arbitration award due to bias. The wrongdoer is the nondisclosing arbitrator; the injured party is the prevailing party in arbitration. A similar problem arises when a trial court is reversed, but this rarely happens because of a trial judge's failure to recuse herself.

In light of a very general governing standard—evident partiality—severe consequences of vacatur, important disclosure values, and circumstances in which strategic behavior by the parties is to be expected, the reader might expect that the case law is inconsistent and reflects a variety of underlying values. That is in fact the state of the law.[31]

On the off chance that the consideration of issues related to evident partiality has not sated the reader's appetite for professional responsibility problems related to the role of the arbitrator, let me offer an introduction to three additional sets of issues: structural bias (particularly in contracts of adhesion), party arbitrators, and hybrid arbitration/mediation proceedings. Each of these issues provides additional sauce for the proverbial goose.

IV. STRUCTURAL BIAS (PARTICULARLY IN ADHESION CONTRACTS)

Arbitrator bias determinations are difficult enough in the ordinary course of things because of the expertise and industry background that arbitrators possess. In the courtroom context, parties have no input in the selection of persons who judge their dispute, and they certainly are not permitted to specify the qualifications of judges by contract. We already have seen that arbitrator expertise is an important feature of the arbitration process, but neutrality also is expected. Suppose, however, that the qualification of the arbitrator appears to favor one of the parties—how far can the contract be used to specify the background of an arbitrator? To a certain extent, expertise—certainly, compared to a jury trial—favors commercial entities over individuals.

Injured tort claimants provide a good example, notably in medical malpractice or informed consent cases, because the situation is

31. For examples of well-reasoned opinions that reflect different philosophies and reach opposite results, compare *Merit*, 714 F.2d at 673 (arbitration award confirmed), with Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629 (Tex. 1997) (arbitration award vacated).

familiar to law students and requires no background knowledge about arbitration. Suppose that the contract calls for arbitration by a mutually agreeable person, but that the arbitrator must be a medical care professional (a defined term)? Should courts enforce a term that requires the arbitrator to be a physician? May the contract specify that the physician must be a specialist in the same field as the doctor against whom the patient has a claim?

An answer to some of these questions can be found by examination of specific contract arrangements. For example, some contracts between RE/MAX, the national real estate firm, and its sales agents provided that disputes would be settled by three RE/MAX brokers selected by management.[32] An Oklahoma court refused to uphold this arbitration arrangement, analogizing it to having foxes assigned to guard the rabbits.[33]

A similar arbitration provision is used by BDO Seidman, the national accounting firm, in contracts between the firm and its partners.[34] Disputes are to be settled through arbitration, with the panel of arbitrators composed of five BDO partners, three of whom must be BDO directors.[35] There are four decisions that have considered this approach, and three have ordered that the dispute be settled in arbitration.[36] The only court that refused to order arbitration found BDO to be judging its contract, thus determining the outcome of its own dispute.[37]

This BDO situation is of particular interest because, unlike real estate brokers or purchasers of Gateway computers, it cannot be argued that partners in accounting firms lack choices or the ability to understand contracts. Similar provisions now are found in contracts between law firms and their lawyers in Houston, and I am confident that the same is true in cities throughout the country.

Also of interest are contract provisions that come close to allowing one party to the contract to be the arbitrator of product quality. Perhaps the leading case involved the purchase by the New York City Transit Authority ("NYCTA") of expensive equip-

32. Ditto v. RE/MAX Preferred Properties, Inc., 861 P.2d 1000, 1001 (Okla. Ct. App. 1993)

33. *Id.* at 1003.

34. BDO Seidman v. Miller, 949 S.W.2d 858, 861 (Tex. App. 1997).

35. *Id.*

36. HUBER & TRACHTE-HUBER, *supra* note 5, at 390-93 (comparing *BDO Seidman*, 949 S.W.2d at 861, with three unpublished opinions).

37. *Id.*

ment from Westinghouse.[38] The contract provided that the chief electrical officer of the NYCTA would be the sole arbiter of issues arising under the contract, and that his decision was final and binding.[39] A unanimous New York Court of Appeals upheld this approach.[40] This decision could be read as limited to government contracts—whether it should be so read, at least in the context of sophisticated commercial parties, is itself an interesting question.

One common contractual approach used for the selection of arbitrators in the event of a dispute is for each party to pick one person, and then those two individuals select a third arbitrator who becomes the chair of the panel. All three arbitrators are neutrals, but one can wonder about the nature and extent of neutrality where an arbitrator was selected by one of the parties. Neutrality, however, may have a structural and a factual component. Suppose in a labor dispute that management picks the vice-president for human relations at another firm, and the union selects an official from a different union. Alternatively, in a construction dispute, the prime contractor might select another prime while the subcontractor selects a fellow sub. There may be a strong disposition by each of the arbitrators toward the appointing party, but still a willingness to be persuaded by the facts. The expertise that the arbitrators would bring to the proceeding relates to labor-management disputes in general, but not necessarily to that dispute in particular. It is reasonable to call such persons "neutrals," but neutrality means something different from what that term commonly is taken to mean in the judicial context.

V. PARTY ARBITRATORS: "NON-NEUTRAL" NEUTRALS

As if the approach of parties appointing "neutral" arbitrators is not sufficiently dissonant to those accustomed to thinking about neutrality in terms of judges and juries, let us now turn our attention to a model unique to American arbitration: the "party-appointed" arbitrator. In the party-appointed arbitrator model, each party appoints one arbitrator and those arbitrators jointly select the third arbitrator. "Party arbitrators," however, are not neutral; instead they are permitted to be—indeed, they are expected to

38. Westinghouse Elec. Corp. v. N.Y. City Transit Auth., 623 N.E.2d 531 (N.Y. 1993).

39. *Id.* at 532.

40. *Id.* at 536.

be—biased toward the appointing party.[41] Under the AAA/ABA *Code of Ethics*, a party arbitrator may be "predisposed" toward the appointing party.[42] The nature and extent of permissible bias allowed under the rubric "predisposed" is a good discussion topic.

In effect, the use of party arbitrators produces an arbitration proceeding with a single neutral arbitrator—with party advocates in the room with the judge, instead of outside as in the judicial process. Why bother, particularly in view of the added cost and complexity associated with adding two non-neutral arbitrators whose influence and votes will almost certainly cancel out each other? Such a question does not reflect a piercing objection in a market economy. If rational maximizers regard the party-arbitrator approach as a good way to spend their funds, it is not the place of government to second-guess them—unless, of course, that approach is inimical to important social values. This topic is likely to generate heated debate among those interested in the law and perhaps shed some light on the nature of appropriate dispute resolution.

The AAA/ABA *Code of Ethics* requires that party arbitrators disclose relevant interests and relationships, but the disclosures "need not include as detailed information as is expected from persons appointed as neutral arbitrators."[43] Conflict of interest restrictions are inapplicable to the appointment process, and the existence of even a severe conflict of interest does not provide the basis for a motion to recuse a party arbitrator. In short, conflicts are not a bar to serving as an arbitrator, so long as they are disclosed.

A party arbitrator may communicate with the appointing party, but not even the nature, let alone the precise contents, of these ex parte communications need be revealed to the other party or the other arbitrators. Prior notice for such communications must be given to the other party and arbitrators, but the AAA/ABA *Code of Ethics* expressly authorizes blanket notice for future communications.[44] In this context, the initial notice requirement seems to be at best a needless formality and at worst a potential trap for the unwary.

41. Outside the United States, the use of arbitrators appointed by the parties is common enough, but such arbitrators are always neutrals.

42. AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Cannon 7(A)(1), (E)(1) (1998).

43. *Id.* at (B)(1).

44. *Id.* at (C)(2).

A different approach was adopted in the interesting case of *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, where the New Jersey Supreme Court, by a 4-3 vote, ruled that party arbitrators are subject to the same "evident partiality" standards as other arbitrators.[45] The court ruled that the same standards must govern the conduct of all arbitrators, including party arbitrators.[46] Accordingly, the court required that every arbitrator, neutral or party-designated, must make full disclosure of all possible conflicts of interest to the parties prior to commencement of arbitration proceedings.[47]

The New York Court of Appeals rejected this disclosure standard for party arbitrators.[48] In an opinion by Judge Stanley Fuld, the court stated that an attack on an arbitration award based on "evident partiality" "must be based on something overt, some misconduct on the part of the arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship to the party who selected him."[49]

The dissenting opinion in *Barcon* took a moral position different from the majority. It stated that:

> Party-designated arbitrators are not expected to approach the dispute with the impartiality of a neutral arbitrator. Indeed, the partisanship of the party-designated arbitrator is perceived as an advantage of the tripartite system, ensuring that each party's position will be adequately presented and pressed before the panel. . . . The Court's error . . . results both from a misguided sense of commercial morality and a mistaken notion of sound public policy. Its morality consists of the proposition that there is something inherently evil in allowing party-designated arbitrators to participate in the resolution of disputes when they may be partial to the party that selected them. The truth is that there is nothing wrong with it at all.[50]

There must be some limits on the behavior of party arbitrators, but these limits are not easily stated. Most fundamentally, arbitrators should be willing to listen to the facts of a particular dispute with an open, even if predisposed, mind. However, because commercial arbitration awards are not normally accompanied by a statement of reasons, the behavior of party and other arbitrators is

45. 430 A.2d 214, 224 (N.J. 1981).
46. *Id.*
47. *Id.*
48. Astoria Med. Group v. Health Ins. Plan, 182 N.E.2d 85, 89 (N.Y. 1962).
49. *Id.*
50. 430 A.2d at 227 (Clifford, J., dissenting).

difficult to monitor. Even reasoned arbitration awards are cursory by the standards of appellate courts. Perhaps the more appropriate comparison is with trial courts, which often do not produce written opinions.

Party arbitrators typically are compensated by the appointing party, and no disclosure about payments is made to the other party. One party arbitrator who represented claimants in disputes with insurance companies charged a contingent fee—ten percent of the amount awarded.[51] When questioned, the arbitrator readily admitted what he was doing, and said he had been using this approach for some time. The Rhode Island Supreme Court was deeply offended by the arbitrator's fee approach, but nevertheless confirmed the underlying award because the insurance company failed to demonstrate that the wrongful conduct of the party arbitrator was prejudicial.[52]

VI. ARBITRATION AND MEDIATION HYBRID PROCEEDINGS

Arbitration and mediation may be used as successive processes. The key issue to be considered here is whether a single individual, consistent with rules of professional ethics, may or should serve in both capacities in the same dispute between the same parties. It is readily apparent that two different people can perform the two roles in succession. To avoid problems related to adhesion contracts or disparity of knowledge/wealth/power between parties, it should be assumed that both parties are sophisticated commercial entities that are represented by competent counsel. Quite different issues arise depending on whether arbitration or mediation takes place first.[53]

Serial arbitration and mediation proceedings before the same arbitrator tend to happen in steps—the neutral is asked to serve in a dual capacity only after the first process is under way, if not completed. Where the contract with the arbitrator provides for sequential processes, the neutral will be in breach of contract if she refuses to continue to the end. If a neutral refuses on principle to serve in multiple capacities in the context of a single dispute, that fact might be communicated to the parties, preferably in writing, by the neutral before agreeing to serve.

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51. Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991).

52. *Id.*

53. The discussion here is limited to two simple models, but parties sometimes design fancier approaches that combine decisional and facilitative dispute resolution processes.

A. Arbitration Followed by Mediation ("Arb-Med")

In Arb-Med, the third-party neutral hears the dispute in the same manner as with conventional arbitration. She renders an award that is placed in a sealed envelope, but is not disclosed to the parties, whereupon the neutral then conducts a conventional mediation. If a settlement is reached, that ends the matter. Subsequent disclosure of the superceded arbitration award is likely to produce unhappiness from at least one party to the dispute, but the parties do have the contractual power to specify disclosure. If no settlement is reached, the initial arbitration award is used to decide the dispute.

Can an attorney ethically serve as a mediator when she knows what the result will be if the mediation fails? If the answer is no, the consequence may be that similarly situated parties turn to nonlawyer neutrals instead. What would you advise a colleague about whether to serve in both roles? Before too quickly responding "under no circumstances," consider that the situation arises only because the commercial parties have asked the individual to serve in both roles. Suppose that the parties argue to the neutral that she signed on to help them find a quick solution, and now she is backing out of that commitment. In addition, the parties can point out that they have just spent a considerable amount of money—perhaps several hundred thousand dollars—in educating the neutral about this dispute, so that employing a second neutral would entail substantial expense and delay. Finally, issues of securing repeat business and professional reputation must be considered—do not let students too easily be "holier than thou" while ignoring basic economic reality.

B. Mediation Followed by Arbitration ("Med-Arb")

In Med-Arb, the third-party neutral mediates the dispute without the parties reaching an agreement. The neutral then becomes an arbitrator, with each party presenting its case in the same manner as an ordinary arbitration proceeding.[54] In practice, the hearing is likely to be somewhat truncated, and the decision rendered more rapidly because the neutral learned a great deal about the

54. For an illustration, see Al-Harbi v. Citibank, 85 F.3d 680 (D.C. Cir. 1996). When this mediation—between commercial parties with millions of dollars at stake—did not result in a settlement, the neutral (Kenneth R. Feinberg, of Agent Orange fame) recommended several persons to serve as arbitrator. However, consideration of cost and the desire for a faster decision caused the parties to prefer to continue with Feinberg as arbitrator.

dispute during the mediation phase. Here, the central ethical issue is that the neutral surely received important confidential, ex parte communications during the mediation. How does the neutral put this information out of her mind during the arbitration process? How does she ensure that her questioning of the parties does not reflect confidential information that was obtained during the mediation phase? As with Arb-Med, consent of the parties is not an issue; failure to serve in both roles results in money and delay costs to the parties; and the neutral may sacrifice future work.

CONCLUSION

Arbitration is everywhere in the American economic scene—except in the law schools. When a conservative institution like the law welcomes the explosive growth of arbitration in all segments of economic activity, and does so through the vehicle of conventional contract doctrine, it seems that the legal education establishment should take note.

Arbitration presents important professional responsibility issues for arbitrators and for those who represent clients in arbitration proceedings. This essay is limited to an examination of one class of such arbitration ethics issues: conflict of interest problems faced by persons who fill, or are being considered to serve in, the role of arbitrator. These and other arbitration issues should be part of the education of future lawyers.

APPENDIX

ARBITRATION IN CONTRACTS CASEBOOKS

Contracts casebooks give only modest attention to arbitration, at least if the indexes accurately reflect their contents. Although some contracts teachers may supplement these arbitration materials, it seems plausible to conclude that American law students generally emerge from the first year of law school with only the skimpiest knowledge about arbitration law and practice. The casebooks are considered in alphabetical order, by author, with page references in parenthesis.

1. *Randy E. Barnett, Contracts: Cases and Doctrine (2d ed. 1999).*

The index lists three entries for arbitration. The book states that "many commercial contracts contain clauses that give one or both parties the right to have the dispute, including the proper measure of damages, settled by arbitration or what is now referred to as alternative dispute resolution (ADR)" (170). A section is devoted to "Punitive Damages and Arbitration Clauses" (188-209). *Garrity v. Stuart*, 353 N.E.2d 973 (N.Y. 1976) is the main case, with no indication that it presents a minority rule, or that it is of only modest impact today due to federal preemption of state law related to arbitration. A contrary case is excerpted at length—though it was decided by a U.S. district court judge in 1984. The last item is an extensive excerpt from a wonderful article about arbitration in the diamond industry.

2. *E. Allan Farnsworth & William E. Young, Cases and Materials on Contracts (5th ed. 1995).*

The opening chapter contains a brief discussion of arbitration (41-43). Reference also is made to the United Nations Commission on International Trade Law ("UNCITRAL") *Arbitration Rules*, but not the FAA, UAA, or state arbitration statutes. Questions are raised about the remedial powers of arbitrators by asking the student to assume that there was an arbitration clause in the contracts at issue in two earlier cases. A similar question is raised later in the context of a liquidated damages clause (562).

3. *Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law (6th ed. 1996).*

The index does not contain an arbitration entry. The topic of arbitration appears to go unmentioned, a particularly striking omission in view of Professor Fuller's extensive writings about arbitration. Indeed, Fuller's original 1947 edition of this casebook presented a typical arbitration award, followed by a comment on "The Role of Lawyers in Commercial Arbitration" (711-13). In addition, the *General Conditions of the Contract for the Construction of Buildings*, published by the American Institute of Architects ("AIA") on the role of the architect and arbitration of disputes, was quoted at length (807-809).

4. *Robert W. Hamilton, Alan Scott Rau, & Russel J. Weintraub, Contracts: Cases and Materials (2d ed. 1992).*

This book does not consider arbitration at all. This is quite surprising given its second and third authors' experience. Alan Rau is a noted arbitration scholar and the author of a leading ADR casebook, and Russell Weintraub also has written about arbitration.

5. *Friedrich Kessler, Grant Gilmore, & Anthony T. Kronman, Contracts: Cases and Materials (3d ed. 1986).*

Arbitration is not an entry in the index. The chapter on remedies includes a section that addresses "The Power of the Parties to Control Risk and Remedies." The major topics are liquidated damages clauses and limitations on remedies, with the last including arbitration (1210-23). The primary case is *Garrity v. Stuart*, 353 N.E.2d 973 (N.Y. 1976), holding that arbitrators may not award punitive damages. Students are not informed, however, that the New York view is the clear minority position.

The notes focus on *Aimcee Wholesale Corp. v. Tomar Products, Corp.*, 237 N.E.2d 223 (N.Y. 1968) (1221), which rules that antitrust allegations present public policy issues that preclude arbitration. This is not the law today. Securities claims are said not to be arbitrable, citing *Wilko v. Swan*, 346 U.S. 427 (1953), which was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (after publication of this casebook). Brief mention is made of the FAA, but nothing would alert the reader to the existence of the UAA, or that every American jurisdiction has adopted a comprehensive arbitration statute.

6. *Charles L. Knapp, Nathan M. Crystal, & Harry G. Prince, Problems in Contract Law: Cases and Materials (4th ed. 1999).*

The 1993 edition of this casebook was limited to a three-page section titled "Commercial Arbitration" (1131-34); this material is repeated in the latest edition (1203-06). The materiality, vel non, of arbitration provisions in the context of the battle of the forms, UCC § 2-207, receives brief mention (317). There are several other references to arbitration that are not listed in the index. (This is the one current contracts casebook that I have read closely from end to end, because I teach from it.)

Most strikingly, the very first case in the book is one that focuses on arbitration at length (18-38, including comments and a problem). Why the authors selected this admittedly "complicated case with many different legal issues" by an Alabama trial judge is quite beyond me (28). This material is too difficult, and requires too much background, to use at the start of an upper-division arbitration course, let alone for the first week of the first year of law school. In addition, the arbitration decisions of the Alabama state and federal courts are inconsistent, messy, and just plain weird.

7. *Stewart Macaulay et al., Contracts: Law in Action (1995).*

Arbitration is addressed in the context of a section titled: "Grievance Processes Under Collective Bargaining" (350-58); and commercial arbitration is discussed briefly (421-23). The subject is revisited as an option in addressing the Westinghouse uranium contracts (1144-45).

8. *John E. Murray, Contracts: Cases and Materials (5th ed. 2000).*

Arbitration is not mentioned in the quite detailed—for teaching materials—index.

9. *Arthur Rosett, Contract Law and its Application (5th ed. 1994).*

The chapter on remedies closes with a section on arbitration (502-19). An arbitration decision is included in the chapter on personal services contracts (959).

10. *Robert S. Summers & Robert A. Hillman, Contract and Related Obligations: Theory, Doctrine, and Practice (4th ed. 2001).*

This casebook includes only two items related to arbitration: one is badly out of date, and not even the best piece of work by the author, and the other offers dreadful advice about arbitration. There is a reasonably lengthy (for a casebook) excerpt from an article about arbitration by Soia Mentschikoff published in 1954 (352-55). Surely something more recent could be found, although Dean Mentschikoff's *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961) still merits the attention of readers with a serious interest in arbitration.

The second foray into arbitration offers an "illustrative arbitration clause" (371-72). It begins, "All questions subject to arbitration under this contract shall be submitted to arbitration at the choice of either party to the dispute." (The ensuing paragraphs deal with the selection of arbitrators, and a few other matters related to the arbitration proceeding.) Because nothing is said about what disputes are subject to arbitration, the illustrative arbitration clause is without effect. Use of this approach in a contract would subject a lawyer to malpractice liability.

NEW WINE REQUIRES NEW WINESKINS: TRANSFORMING LAWYER ETHICS FOR EFFECTIVE REPRESENTATION IN A NON-ADVERSARIAL APPROACH TO PROBLEM SOLVING: MEDIATION

*Kimberlee K. Kovach**

And no one puts new wine into old wineskins; or else the new wine will burst the wineskins and be spilled, and the wineskins will be ruined. But new wine must be put into new wineskins, and both are preserved.[1]

INTRODUCTION

The new wine of mediation must have new wineskins, lest it not ferment and sour, left incapable of achieving its full potential. Yet we have assumed that we can merely pour the new wine into the old wineskins of litigation, advocacy, and adversariness, and that it will come of age and endure. Such is not the case. When a new wine is introduced, whether a new vintage or varietal, by its very nature a new wineskin is required. So, too, with the field of alternative dispute resolution ("ADR"), in particular mediation.[2] The wineskins are those parameters that shape lawyers' conduct, commonly ethical guidelines or rules.[3]

This essay specifically examines the role of the lawyer representative in the mediation process. The focus is not on lawyers who

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1. *Luke* 5:37-38 (New King James).

2. Note that some see alternative dispute resolution ("ADR") as merely old wine in new wineskins. *Infra* note 53 and accompanying text.

3. I could not resist expanding on the wine analogy, as the talk giving rise to this essay was presented at the Association of American Law Schools annual meeting in San Francisco—only miles from Napa-Sonoma. I also wish to recognize that I am not the first person to use this analogy in reference to ADR processes. *E.g.*, Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998).

serve as neutrals,[4] but rather those lawyers who find themselves representing clients at the mediation table instead of in courtrooms or at depositions. Although some attention has been paid to this subject in the past,[5] it often has been in making mediation sound more "adversary like," by use of terms such as "mediation advocate" and "winning at mediation."[6] This essay stresses the importance of lawyers understanding and conforming to the appropriate representative role in mediation, a process radically different from the litigation paradigm.[7]

Part I of this essay provides an overview of the issues addressed in the piece. Part II explores the inherent differences between mediation and litigation, otherwise referred to here as the adversary system. In so doing, I also outline the various complications that have resulted from the consumption of mediation by litigation. Part III illustrates the background of current ethical standards for lawyers, which originated and are housed in the adversary system. Some of the problems that such an adversarial approach may cause, even for those operating within such a paradigm, are highlighted. This section also examines the inapplicability of adversarial approaches in lesser, or non-adversarial procedures. Part IV questions the wisdom of employing only one code of ethics for all

4. For a discussion of lawyers serving as neutrals, see Carrie Menkel-Meadow, *The Silence of the Restatement of the Law Governing Lawyers: Lawyers as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631 (1997) [hereinafter Menkel-Meadow, *Silences of the Restatement*], and 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 (2000). *See also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001) (idenfitying four critical concerns in the practice of ADR); Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915 (2001) (discussing conflicts of interest among arbitrators as well as the failure of law schools to adequately address the subject).

5. Jean R. 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) (calling for a flexible role and division of responsibility between the lawyer and the client based, at least in part, on ascertaining the needs of the client and the barriers to settlement). *See also* JOHN COOLEY, MEDIATION ADVOCACY (1996); ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994); Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963 (1998).

6. The American Bar Association, through the Section on Dispute Resolution, recently has instituted a mediation advocacy competition, which conducted its first National Finals at the Section Annual Meeting in April 2000. To describe more accurately the role of the lawyer, the Section entitled the competition "Representation in Mediation." SECTION OF DISPUTE RESOLUTION, A.B.A., http://www.abanet.org/dispute/MediationComp.html.

7. *Infra* Part II.

lawyers, particularly as law practice has diversified. The lack of relevance of one code to varying practices is underscored and an examination of the justification for new and separate ethics is provided. I then demonstrate the rationale for the development and enactment of new and distinct rules of conduct for lawyers who choose to represent clients in a non-adversarial forum such as mediation. Part V explores the elements of potential new rules, providing detail as to the specific types of guidelines that may be established. Finally, Part VI raises additional questions and concerns that such an approach will present and calls for additional research and discussion of these difficult but necessary considerations.

I. OVERVIEW

ADR[8] has developed over the last twenty-five years to a point where it is integrated within the legal system of jurisdictions throughout the United States[9] and abroad.[10] This development was, at least in part, a response to observed problems within the

8. The term "ADR" is used to encompass a panoply of processes or fora for the resolution of conflicts and disputes. As will be emphasized, this paper deals with only one process specifically, that of mediation. With the advent of court-annexed ADR, however, some confusion and blending of these processes has occurred, leading to a debate about which process might be best suited for particular disputes, legal or otherwise. For a discussion of the lawyer's role in assisting the client in selecting an appropriate process, see Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting An ADR Procedure*, 10 NEGOTIATION J. 49 (1994); *see also* Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895 (2001).

9. In Texas, for example, state courts may order parties to participate. Decker v. Lindsay, 824 S.W.2d 247, 250-51 (Tex. Ct. App. 1992) (outlining the courts' ability to compel litigants to participate in ADR). Courts have implemented such participation in various ways. In many courts, the judge orders ADR on a case-by-case basis. Alternatively, Travis County, Texas, follows a standing order that mandates that litigants participate in ADR in order to receive a setting for a jury trial. In Florida, the state court system has had an institutionalized mediation program for a number of years. James Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 307 (1994). In the federal system, a number of methods for ongoing referral exist. *E.g.*, Elizabeth S. Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Lawyers & Judges* (1996), *available at* http://www.fjc.gov/ALTDISRES/adrsource/adrone.pdf; Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

10. The ADR movement also spread to other countries. For a discussion of ADR in Europe, see http://www.cpradr.org/european.htm. In Argentina, Gladys Alvarez has established the "Programa de Actualización en Negociación y Resolución de Conflictos," http://www.fder.uba.ar/derecho/posgrado/area16.htm.

legal system, such as cost and delay, along with a general dissatisfaction with the administration of justice.[11] With promises of saving time and money, ADR (most often the mediation process) was introduced to, and soon implemented by, the courts.[12] Simultaneously, and from a related impetus,[13] mediation as a process for resolving conflict also flourished at the non-litigation stage of disputing. This process often is termed "community mediation."[14] Community mediation centers have grown, and a national organization for those involved in this work, the National Association for Community Mediation, was created.[15] More recently, we have seen the proliferation of mediation use in a variety of contexts, ranging from the workplace[16] to nursing homes[17] to managed-care conflicts.[18] With the various applications of mediation, variation in the way the process is approached and conducted also has surfaced.

11. The Pound Conference, held in 1976 and seen as the beginning of the "modern mediation movement," was based upon Roscoe Pound's 1906 article, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). *See also* STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-9 (3d ed. 1999) (discussing the sources and goals of the ADR movement).

12. *E.g.*, Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

13. Both the court-annexed movement and community use of mediation often are traced to the Pound Conference in 1976, where alternatives were discussed to respond to the difficulties in the administration of justice. Edith B. Primm, *The Neighborhood Justice Movement*, 81 KY. L.J. 1067, 1067 (1992-1993).

14. Community mediation centers were often the first ADR programs in a jurisdiction. *Id.*; *see also* Timothy Hedeen & Patrick G. Coy, *Community Mediation and the Court System: Ties that Bind*, 17 MEDIATION Q. 351 (2000) (assessing the relationship between community mediation and the justice system), *available at* http://mediate.com/articles/cohed2.cfm.

15. National Association for Community Mediation, http://www.nafcm.org.

16. *E.g.*, L. Camille Hébert, *Establishing and Evaluation a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 OHIO ST. J. ON DISP. RESOL. 415 (1999); Carrie Bond, *Resolving Sexual Harassment Disputes in the Workplace: The Central Role of Mediation in an Employment Contract*, 52 DISP. RESOL. J. 15 (Spring 1997).

17. *E.g.*, Shoshana K. Kehoe, *Giving the Disabled and Terminally Ill a Voice: Mandating Mediation for all Physician-Assisted Suicide, Withdrawal of Life Support, or Life-Sustaining Treatment Requests*, 20 HAMLINE J. PUB. L. & POL'Y 373 (1999); Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821 (1994); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 406-15 (1997).

18. James W. Reeves, *ADR Relieves Pain of Health Care Disputes*, 49 DISP. RESOL. J. HEALTH CARE L. 421 (1999); EDWARD DAUER ET AL., HEALTH CARE DISPUTE RESOLUTION MANUAL: TECHNIQUES FOR AVOIDING LITIGATION (2000).

And although the term ADR often is used to describe all of these processes, it is only upon the mediation process that I focus, because it is the process that differs so significantly from our more "traditional" adversarial system.[19] It is the integration of mediation with the litigation process that is the focus of this piece.

Mediation and litigation, or the civil justice system, embrace very different paradigms for dispute resolution and problem solving. Despite the transparency of the previous statement, judges, legislatures, and lawyers have begun to merge the two,[20] often with mixed results.[21] In some jurisdictions that utilize court-annexed mediation, mediation remains a distinct process;[22] whereas in others, mediation is viewed as merely part of pretrial litigation.[23] There are a

19. For an overview of the significant distinctions, see *infra* Part II.

20. This is what often is termed "court-annexed mediation," in which the court has a very active role in the referral and oversight of the mediation. There is some debate, however, about whether it is an accurate description of the mediation employed in private practice—or whether "court-annexed" should describe only these programs that are actually "housed" in the courthouse. Another term is "court connected." Symposium, *The Structure of Court-Connected Mediation Programs*, 14 OHIO ST. J. ON DISP. RESOL. 711 (1999); *see also* Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View form the Courts,* 2000 J. DISP. RESOL. 11 (2000). In several court programs described and studied by Professor John McCrory, the mediators were housed in a number of different places including—but probably not limited to—in-house staff mediators, court contracts with nonprofit service providers, private mediators paid by the court, private mediators paid by the parties, volunteer mediators supervised by the court, and mixed programs. John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigants Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 813-14 (1999).

21. In some jurisdictions, it appears that mediation maintained a separate identity, although in others, mediation succumbed to the legal process, being changed in terms of basic goals and objectives. Years ago, the analogy of mixing oil and water was used to describe the co-existence of ADR and litigation. Kimberlee K. Kovach, *Litigation & ADR: Is It Really Oil & Water?: Art of Advocacy in ADR*, S. TEX. C. OF L. & THE A. A. WHITE DISP. RESOL. INST. (1991). I contended that, as in cooking, oil and water possess different properties and can be combined in many recipes to produce viable and tasty results. Thought and consideration must be given to the combinations, however, lest they become unpalatable.

22. In Nebraska, for instance, the mediators in the federal court program are very careful to be facilitative in their approach and not engage in what might be termed case evaluation or "pre-trial settlement." And in Maine, for years divorce and family mediations were conducted without the presence of lawyers. *Cf.*, Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (arguing for the presence of attorneys during divorce mediations).

23. In many jurisdictions in Texas, lawyers are overheard discussing going to mediation as merely normal pretrial activity. On the one hand, it is good that the process has become so integrated in law practice, but when mediation is viewed *only* in this context, a number of attributes, including self-determination and the creative problem solving potential of the process, are often lost. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institu-*

number of reasons for this latter result, one being the strength of the adversary system itself.

Some of the difficulties in merging mediation and litigation are also due, in part, to lack of planning and a failure to consider early on the inherent differences between mediation and litigation.[24] This piece does not assume that one system or approach is better suited for dispute resolution than another, nor will it offer a direct attack upon the adversary system.[25] Although some are skeptical about which system is more appropriate for a dispute resolution or problem solving role,[26] I contend that both—and, indeed, many—different processes for dispute resolution and problem solving will continue to expand in use. What is most vital to the effective use of dispute resolution is that each method is approached, and the participation therein is commensurate, with the goals and objectives of that particular forum.[27]

This essay will not examine the role of the mediator, though many questions—including ethical ones—remain about the role of mediators in general,[28] and, specifically, the role of a lawyer serving as that neutral.[29] In fact, there still is debate over whether the work of a neutral, be it as arbitrator, mediator, or neutral case

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tionalization, HARV. NEGOT. L. REV. (forthcoming 2001) (examining the inherent conflict between achieving self-determination in which mediation focuses on settlement). Welsh addresses *Allen v. Leal*, 27 F. Supp 2d 945 (S.D. Tex. 1998) (discussing whether a settlement reached during mediation constitutes an enforceable contract).

24. I view this modern mediation movement as having passed through three distinct, somewhat overlapping stages. Beginning in the mid-1970s, was a time of experimentation. The 1980s saw a time of implementation, but without any real thought given to the dilemmas and issues that we now face. The mid-1990s began a time of regulation, in which a number of regulatory issues were—and still are—confronted by courts, legislatures, and membership organizations. The role of lawyers in mediation is but one of the issues for consideration.

25. Although strong support for the mediation process necessitates the move away from a win-lose perspective, I do not suggest that one system necessarily replace the other. *But see* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multicultural World,* 38 WM. & MARY L. REV. 5 (1996) (arguing that the adversary system is inadequate for the goals of dispute resolution).

26. *E.g.*, Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996) (critiquing Carrie Menkel-Meadow's view that alternative dispute resolution is superior to the adversary system).

27. In the adversary system, it is necessary that disputants retain zealous representation and compete for slices of a fixed pie; whereas, in more facilitative processes, it is not necessary to think or operate under the same conditions.

28. *E.g.*, Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 (1994); John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455 (1997); KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE, at Ch. 15 (2d ed. 2000).

29. *E.g.*, Laflin, *supra* note 4; *see also* Menkel-Meadow, *Silences of the Restatement*, *supra* note 4.

evaluator consists of the practice of law and, as such, should or can be governed by the ethical considerations for lawyers.[30] Those discussions are continuing to take place,[31] and I leave those for another time.[32] The focus here is on the role of lawyers in representing clients, but doing so in a distinct forum—that of the mediation room as opposed to the courtroom.

In this discourse, I attempt to refrain from reiterating the considerable debate about the various types, styles, and kinds of mediation that are utilized, as that has been done, if not overdone.[33] Instead, I will concentrate on examining the difficulties resulting from the insertion of mediation within litigation. Yet it must be

30. *E.g.*, Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Menkel-Meadow, *Silences of the Restatement supra* note 4; *see also* Douglas Yarn & Wayne Thorpe, *Ethics 2000: Proposed New ABA Ethics Rules for Lawyers-Neutrals and Attorneys in ADR*, DISP. RESOL. MAG. (forthcoming 2001).

31. *E.g.*, Symposium, *Is Mediation the Practice of Law?*, NIDR FORUM, June 1997; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 74 (1996); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 57 (1996); *see also* Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 ALTERNATIVES TO THE HIGH COST OF LITIG. 94 (1997).

32. For example, the ABA Section on Alternative Dispute Resolution is working to resolve some of these issues. Ideally, a resolution from the ABA stating that mediation is not the practice of law could pre-empt state bars from charging mediators with unauthorized practice.

33. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) [hereinafter *Mapping Mediation*] (arguing that mediation should not be among the processes where the neutral has an evaluative orientation or role); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (depicting on a grid the mediation universe); James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Kimberlee K. Kovach, *What Is Real Mediation and Who Should Decide?*, 3 DISP. RESOL. MAG. 5 (1996) [hereinafter *Real Mediation*]; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997) (arguing against ethical rules that prohibit mediator evaluation); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) (endorsing flexible mediation that permits judicious use of evaluative techniques); Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 62 (1996) (describing appropriate uses for mediator evaluation and recommending specific mediator strategies); Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371 (2000).

pointed out that some of the confusion[34] and resultant debate about mediation—as to its goals and objectives as well as theoretical underpinnings—have been generated by efforts to integrate, or at least associate, mediation with the adversary system.[35]

For clarity in this essay, the type and kind of mediation to which I refer is a process that, by facilitating communication and understanding, assists the parties in achieving a solution that they can accept.[36] In other words, the process is one that is focused on discovering the underlying interests of the parties and on solving a problem rather than one concentrated on obtaining a settlement based upon what the law may be or what it declares the parties' respective rights to be. Although I believe this to be a generally accepted definition of mediation,[37] some disagree and employ other possible definitions.[38]

My premise is that mediation has the potential to be a viable alternative to the adversarial paradigm.[39] As long as it continues to reside within the adversarial system of litigation, however, it will never have the opportunity to mature into the independent and unique process that it is designed and promised to be.[40] The goals of mediation are quite different than the goals of the litigation system. Mediation involves a radically distinct and contrasting paradigm—one that embraces a mindset, vision, skill set, and attitude very different from those of the prevailing adversarial norm.[41] Reflecting on what was first expounded on by Professor Leonard Riskin nearly twenty years ago,[42] mediation involves a different philosophical map, if you will. To participate completely in the

34. *E.g.*, Jeffery W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 (2000) (viewing mediation primarily, if not exclusively, as a supplement to the legal system); *cf.* John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321 (2000).

35. *E.g.*, Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovaiton Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

36. Interestingly, this is also the definition of mediation. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (Vernon 2000); *see also* COLO. REV. STAT. ANN § 13-22-302 (West 1999).

37. *E.g.*, KOVACH, *supra* note 28, at 23-25 (outlining a variety of definitions of the mediation process).

38. *Real Mediation*, *supra* note 33.

39. This would include, but may stop short of, the complete adherence to the transformative model.

40. The goals and objectives of mediation are quite different from those of the justice system. *Infra* Part II.

41. *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1 (1999-2000), *at* http://www.cardozo.yu.edu/cojcr.

42. Leonard L. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L. J. 29 (1982).

process, all participants must adopt this philosophical map. More specifically, to have an effective process, the conduct, performance, and skill set demonstrated by those who represent clients within a system must be consistent with the purposes set forth by the system. Consequently, the rules, and the conduct to be governed by those rules, must be changed if lawyers are to be suitable, capable, and competent representatives in the mediation process. Lawyers from a variety of practice areas have called for specialty codes of ethics.[43] The rationale for distinct ethics codes for specialized practice areas is that different goals in representation necessitate different roles for the lawyer; hence, the codes that set parameters for practice should likewise differ.[44] This same premise justifies the need for different ethical rules for lawyer-representatives in mediation.

II. DIFFICULTIES IN THE INTERSECTION OF MEDIATION AND LITIGATION

To say that some difficulties resulted from the integration of mediation with litigation is quite an understatement. The intersection of mediation and litigation can be viewed as having produced a train wreck—or at least a significant derailment. Mediation was forced off of the track.[45]

Much has been written of late on this phenomenon. Some commentators have observed that the focus of the mediator's role may change in the context of court-annexed work, where the mediation becomes more "evaluative,"[46] or the process more akin to a judicial settlement conference.[47] Others contend that mediators

43. *E.g.*, Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998) (discussing the creation of a federal law of bankruptcy ethics); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics* 76 MICH. L. REV. 423 (1978) (discussing the role of the corporate advisor); Jeffery N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 RECORD 715 (1990).

44. *E.g.*, Fred C. Zacharias, *Reconceptualizing Ethical Roles,* 65 GEO. WASH. L. REV. 169 (1997).

45. Again, it is my view that important goals and objectives of mediation, such as party empowerment, self-determination, and creative problem solving have been forfeited. *See* Welsh, *supra* note 23 (discussing the difficulties of the intersection of mediation and litigation).

46. Riskin, *supra* note 33; John Brickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST LITIG. 70 (1996).

47. *E.g.*, Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, ARIZ. ATT'Y, Nov. 1996, at 20; Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN.

should avoid such changes in their practice[48] and remain true to the mediation process.[49] Still others have observed that a hybrid of procedures has resulted. They use the term "liti-mediation" to describe a culture in which it is taken for granted that mediation is the typical way of ending litigation.[50] In that culture, mediators are encouraged to refine skills to fit within the adversarial paradigm.[51] Alternatively, mediation also is viewed as wholly outside of the legal context.[52]

Then there are those who contend that ADR is merely *old* wine in new skins.[53] To the extent that the only contribution made by mediation is assistance in the traditional litigation settlement procedure—with the focus only on risk assessment and predictions of trial outcome—perhaps it *is* old wine. If that is the case, then the use of the mediation label connotes nothing new or innovative, but is only a re-packaging of an old process. If that is all that we envision from the mediation process, then very little potential is actualized and therefore lost. Alternatively, if we allow mediation to achieve its full promise, to provide parties the opportunity to find creative and satisfactory solutions to problems without the contentiousness of a right-wrong paradigm, then a new model for the resolution of conflict will emerge. For it to ripen and flourish, we must allow a relatively unripe process to mature into a fine instrument of dispute resolution without being overgrown by those models which are more mature and experienced.

In a number of jurisdictions, mediation has become more akin to a pretrial procedure, another hoop to jump through before reaching the trial stage of litigation. The use of mediation in litigation has been the source for the new term "liti-mediation," described by Professor John Lande in a seminal piece looking at the intersection

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L. REV. 1339 (1994); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

48. Kovach & Love, *Mapping Mediation*, *supra* note 33; Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335 (2000).

49. Kovach & Love, *Mapping Mediation*, *supra* note 33.

50. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. ST. U. L. REV. 839, 846 (1997).

51. *See generally* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES (1996) (examining specific techniques and skills used by mediators in resolving lawsuits).

52. *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

53. *E.g.*, Jeffery W. Stempel, *Theralaw and the Law-Business Paradigm Debate*, 5 PSYCHOL. PUB. POL'Y & L. 849, 882 n.124 (1999) (stating that "segments of the theralaw and ADR movements are old wines in new skins . . .").

of mediation and litigation.[54] This development demonstrates how mediation can be, and to some degree has been, consumed by litigation—the very thing advocates of mediation sought to avoid.[55] This phenomenon also is illustrated by the use of the term "litigation lite,"[56] which aptly connotes the use of ADR in pending litigation. Part of the reason mediation has been consumed by litigation is that many lawyers conceive of it only in the context of litigation.[57] The possibility of individuals in conflict going to mediation, without first filing a lawsuit, is beyond the consideration of many.

Litigation is viewed also as the default paradigm for conflict resolution should settlement not be achieved through the mediation process.[58] In this version of mediation, the process is used solely to assist in the settlement of lawsuits, thereby squandering mediation's true potential. During this "mediation process," the discussions, actions, and outcomes closely resemble those that occur during adversarial pretrial litigation. As noted by Judge Wayne Brazil, this conduct may include activities such as:

> Advancing arguments known or suspected to be specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (e.g., projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties' access to information, or needlessly protracting the proceedings—simply to gain time, or to wear down the other parties or to increase their cost burdens.[59]

The invasion of these kinds of behaviors into the mediation process also is demonstrated by continuing education courses with titles like "How to Win in ADR" and "Successful Advocacy

54. Lande, *supra* note 50, at 846. "Liti-mediation" is an adaptation of the term "litigotiation" first set forth by Marc Galanter in 1984. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL. EDUC. 268, 268 (1984) (placing focus on study of the negotiation process within the context of litigation).

55. *E.g.*, Menkel-Meadow, *supra* note 35, at 6.

56. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution,* 47 EMORY L. J. 1289 (1998).

57. Stempel, *supra* note 34.

58. *Id.*

59. Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29 (2000).

Strategies for Mediations."[60] In these instances, perhaps all mediation has become a "lite" version of the litigation system. In other words, it is not a *real* alternative. Should the trend continue, I fear that real alternatives no longer will exist. Instead, only two choices will remain: litigation regular and litigation lite.[61]

In part, we, the ADR profession, are responsible for this phenomenon. We urged courts and legislatures to require that litigants participate in mediation, with the promise of saving time and money for the litigants as well as the court system. Of course, the use of mediation or ADR can be very effective in saving time and money. Court dockets can be reduced to a manageable size, as cases are settled earlier than they would without intervention.[62] And perhaps mediation does offer a better view of justice than the parties otherwise would have, because the parties themselves are permitted and encouraged to participate in the process.[63]

Unfortunately, the fact that mediation is so different from the traditional paradigm for dispute resolution was never stressed, and likely in many instances, never even mentioned. In fact, other commentators now note that both mediation supporters and court personnel failed to recognize the irony and potential for conflict when combining "a process that rejects the relevance of the law into the very institution which conditions access upon an effective invocation of the law."[64] Perhaps it was because the promise of saving time and expense was sufficient enough to garner interest.[65] In other instances, it was perceived that discussions of mediation and the idea of party participation and empowerment would be

60. *Id.*

61. Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2001 J. DISP. RESOL. 295 (2001) (emphasizing that mediation is but one process in a rich array of different dispute resolution processes and that, if not kept separate and distinct, this rich array of processes will no longer exist).

62. *E.g.*, Toni Heinzl, *Mediator Coaxes Couples to Agree; Lawyers Say Divorce Mediation is Fair to Both Sides and Moves Cases Through the Courts More Quickly*, FORT WORTH STAR TELEGRAM, Dec. 30, 2000, at 1 (quoting district court judge as stating, "Mediation gets people out of the system faster").

63. The degree of participation of the actual parties to the litigation differs. Some lawyers take a dominant participant approach while others participate very little. JOHN S. MURRAY ET AL., MEDIATION AND OTHER NON-BINDING ADR PROCESSES 150-51 (1996). Nevertheless, early research demonstrates that parties are satisfied with the mediation process because they have the opportunity to participate in resolving the dispute.

64. Welsh, *supra* note 45, at n.85.

65. For an overview of a number of court connected mediation programs, see COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998).

considered too "touchy-feely" for litigators, those charging into the battle of the courtroom.[66] Most lawyers were not readily willing, and perhaps not able, to adjust to this very different model of dispute resolution. So to "sell" mediation, the packaging was changed. Lawyers were encouraged to be tough mediation "advocates" and "win" at mediation. The problem is that the process was changed or modified along with the packaging—souring a possibly exquisite vintage.

Another aspect of mediation critical to the realization of its potential is that parties have an opportunity to fashion their own, creative solutions to their problems. To the chagrin of some in the justice system, these solutions are quite unlike and even unrelated to what a court might do in the same situation. Some quarrel with this, particularly in court-related matters, contending that the parties should at least be advised as to what they might achieve in a court proceeding, and therefore be in a position to make better informed decisions about the final outcome or resolution.[67] Others contend that the legal system is the default paradigm to be used, and therefore during the mediation process consideration should be given to the most likely litigation results,[68] and that the mediator has an active role in such deliberations.[69]

If mediation is indeed a unique process, then it requires new thinking in order to achieve new solutions. Establishing an innovative process includes establishing new parameters for conduct during that process; yet we have given lawyers little guidance in that regard. Although much time was spent on training and teaching

66. This is based upon nearly ten years of the author's own experience in Texas, from 1980 to late 1989. When mediation first was discussed with judges and litigators in Houston in the early 1980s, it was perceived as too "touchy-feely" for *real* lawyers. For that very reason, the first ADR process utilized in the Harris County Civil Courts was the Moderated Settlement Conference, a neutral case evaluation system. Kimberlee K. Kovach, *Moderated Settlement Conferences, St. Mary's Alternative Dispute Resolution, Procedures, Pitfalls and Promises* (1988); *see also* HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION ch. 7 (Amy L. Greenspan ed., 2d ed. 1990) (discussing in detail moderated settlement conferences). It was not until 1989, when some litigators realized that they could participate as mediators and achieve full time employment in such roles, that mediation came to be accepted. Even today in Texas—a state that uses mediation and ADR quite extensively—if mediation is focused on the concept of party empowerment and not on settlement, many litigators see little value in the process.

67. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996).

68. Stempel, *supra* note 34, at 249.

69. Bickerman, *supra* note 46.

mediators,[70] little attention was given to what the role of the lawyer-representative should be in the new process. Apparently, it was assumed that lawyers would accompany clients into a wholly different process—with a fraction of understanding about mediation and after years of being entrenched in the adversary system—and conduct themselves in a different manner. In most cases, that did not occur. Instead of viewing the participants across the mediation table as "joint venturers" in a problem solving process,[71] lawyers considered them adversaries. Hence, the contentiousness of the adversary system permeated the mediation process.

III. BACKGROUND OF THE ETHICAL CONSIDERATIONS AND RULES FOR LAWYERS

The ethical rules that currently govern lawyers were written with the adversary system in mind.[72] The underpinnings of the adversary system, with a focus on competition and winning at all costs, provide the context for the lawyer's work. Merits of the adversary system, as weighed against a different approach to dispute resolution or problem solving, have been ably explored,[73] yet I mention this system because it underlies the very nature of lawyer conduct. The adversarial system has a long history, and although the encouragement of adversarial behavior and competition works ideally to achieve justice through the determination of truth,[74] difficulties arise as well. In many instances, this adversary ethic has gone too far.[75] Reports have included even threats of murder and fistfights among lawyers,[76] a result of the argumentation, threats, and deception inherent in the adversarial approach.[77] This extreme adversary ethic is likely responsible, at least partially, for the low regard

70. *E.g.*, Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977 (1992-93).

71. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 163 (1999).

72. Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 325 (1999).

73. Menkel-Meadow, *supra* note 25.

74. Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 907-09 (2000).

75. *E.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L REV. 1267, 1287-89 (1975).

76. *E.g.*, Cumuso v. Nat'l R.R. Passenger Corp., No. 97-7891, 2000 U.S. Dist. LEXIS 5427, at *3-4 (E.D. Pa. Apr. 25, 2000); Donald P. Baker, *Richmond's Civic Embarrassments; Officials' Troubles and a Fight Over Lee's Portrait Keep City Stewing in it Past*, WASH. POST, June 10, 1999, at B3.

77. Menkel-Meadow, *supra* note 74, at 907.

that the general public holds for lawyers as well as the dissatisfaction the profession feels with itself.[78]

Many contend that the behavior of most lawyers today is a direct result of the contentiousness and adversarial culture inherent in the adversary system, both historically and currently.[79] Others note that this culture is not just part of the litigation system, but is a reflection of society generally.[80] Adversary conduct, which may involve ruthlessness, deceit, and verbal warfare,[81] is quite problematic enough in its home environment,[82] let alone in the context of a non-adversarial procedure. The demands of law practices today seem to compel even more extreme behavior, all of which is employed in the name of zealous representation.[83] Even the profession itself realizes that constant conduct in a contentious and litigious manner takes it toll. Lawyers report increased pressure in a ferociously competitive marketplace and complain about having to work in an adversarial environment "in which aggression, selfishness, hostility, suspiciousness, and cynicism are widespread."[84] Moreover, they complain about a lack of civility among lawyers and a lack of collegiality and loyalty with partners.[85] Yet this conduct is reinforced in many instances. Witness the use of metaphors to describe lawyers' work in a way that promotes combativeness and dominance.[86] Recently, the glamorization of the adversary lawyer role in the arenas of television and cinema emphasizes such

78. *E.g.*, Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 553 (1998).

79. Judith L. Maute, *Sporting Theory of Justice: Taming Adversarial Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 18-19 (1987).

80. *See generally* DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998).

81. Daicoff, *supra* note 78, at n.73.

82. *E.g.*, Maute, *supra* note 79, at 9-10; Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 700-01; MARK PERLMUTTER, WHY LAWYERS AND THE REST OF US LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR (1998); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 192 (1994) (noting that many attorneys believe that "zealously" representing clients means pushing all rules of ethics and decency to the limit).

83. Maute, *supra* note 79, at 9-10.

84. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 889 (1999) (quoting AMIRAM ELWORK, STRESS MANAGEMENT FOR LAWYERS 15, 20 (2d ed. 1997)).

85. *Id.*

86. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 225-26 (1995).

adversariness.[87] This adversarial attitude begins in law school, itself a competitive endeavor.[88] The student learns that competitive methodology is at the core of the legal system, and that translates to all forms of dispute resolution.[89] Perhaps, as others have pointed out, those individuals who possess a very competitive personality or lack more collaborative tendencies are drawn to law school.[90] And although some continue to call for change and reform of the conduct of lawyers, beginning with legal education as well as legal ethics,[91] and attempts have been made to effectuate changes, others wonder whether such reform is actually possible.[92]

The concept of zealous advocacy, although founded within the criminal system, has become part of lawyering.[93] This zealotry, however, has been exaggerated to the extent that some contend it gives rise to an unworkable view of the lawyer's task.[94] The belligerent and aggressive conduct of some lawyers continued to escalate, which resulted in a call for "professionalism" standards. Today, nearly every bar association has a committee or program focused on the civility of lawyers with calls for advancing professionalism and retreating from the "Rambo" approach.[95] Although professional courtesies often are extended, usually this is done only superficially. Many courtesies are ignored in practice, particularly under the stresses of time and the need for billable hours.

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87. Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 49, 49-51 (2000).

88. *E.g.*, Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH L. REV. 319, 319, 343 (1999).

89. Daicoff, *supra* note 78, at 548.

90. *Id.*

91. *E.g.*, Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1997).

92. *E.g.*, Jeffrey W. Stempel, *New Paradigm, Normal Science or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-93 (1993); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 945-53 (1993).

93. James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 739 (1992). *See also* Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103, 106-110 (1998) (placing the origins of zealous advocacy in both the American and British bars into historical context).

94. *E.g.*, James R. Elkins, *Lawyer Ethics: A Pedagogical Mosaic*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 158 n.98 (2000); Kerper & Stuart, *supra* note 93.

95. *E.g.*, William M. Sage, *Physicians as Advocates*, 35 HOUS. L. REV. 1529, 1566 (1999); *see also* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983) (stating that revisions to the lawyer's code of ethics were "designed to substantially reduce the adversarial nature of attorney behavior").

What is particularly problematic in the adversary system is that some of the rules permit conduct that may be viewed as deceitful and contentious. Yet this is approved of in the name of zealous representation, even though it is not always effective, even within the adversary paradigm. Many of the very rules that establish parameters or guidelines for lawyers' behavior were written by lawyers who advocated individual liberties and rights, regardless of morality issues.[96] This mindset was then incorporated into the mainstream and the *ABA Model Code of Professional Responsibility*.[97]

No doubt the adversary system remained the foundation of lawyers' work in the view of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission" or "Commission") in its new code[98] despite urgings to the contrary.[99] Although modifications were made to accommodate the lawyers as neutrals,[100] only one change aimed at the representative lawyer was enacted, that being a suggestion—but not a mandate—to inform clients about ADR.[101]

In the negotiation process, for example, *Rule* 4.1 provides a very nebulous truthfulness standard.[102] And although more than twenty years ago there appeared, at least in early drafts, a provision calling for more honesty in negotiation,[103] it was deleted and the current provision inserted.[104] The wording of the Comments often is used to support various methods of puffery and trickery in the context of negotiation. Although I do not support these "conventions in negotiation" as it allows representatives and those who negotiate

96. Daicoff, *supra* note 78, at 563-64.

97. *Id.* at 564; Krane, *supra* note 72, at 325.

98. Yarn & Thorpe, *supra* note 30. For the entire report of the work on the proposed code, *Ethics 2000*, see http://www.abanet.org/cpr/ethics2k.html.

99. *E.g.*, Robert F. Cochran Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999).

100. Yarn & Thorpe, *supra* note 30.

101. Cochran, *supra* note 99; *see also* Richard W. Painer et al., *Speakers Propose Model Rules Amendments to Ethics 2000 Commission*, 9 THE PROFESSIONAL LAWYER, at 10 (1998). Even this measure was not as some had suggested. I, as chair of the ABA Section of Dispute Resolution, urged that lawyers inform clients about ADR, as well as provide an explanation of the ethical boundaries for lawyer conduct in mediation, particularly that the conduct should differ from that in the adversarial arena.

102. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1999).

103. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J., at 926 (1980).

104. Geoffrey C. Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 190-91 (1981).

to deceive other parties, it remains at this point the norm, and is still accepted in legal contexts.[105] This clearly should not be the standard in mediation, a process that is dependent upon the direct and truthful exchange of communication.

But this conduct now carries over into the mediation context. If mediation is viewed as nothing more than facilitated negotiation, then what is acceptable conduct in the context of direct negotiation becomes, by extension, acceptable in the facilitated negotiation. This conclusion is contrary to those qualities, attitudes, and conduct basic to the mediation paradigm. Such approaches erode the fertile ground upon which to base non-adversarial resolutions. If it were up to me, and likely others,[106] I would change the "conventions" in the first place. Understanding that much direct negotiation still takes place in the context of the adversary system, however, perhaps it should remain as is, but at least be qualified in the contexts of mediation and other problem-solving, non-adversarial processes, such as consensus building and collaboration.[107]

Mediation is a process requiring, even demanding, a distinct mindset—unlike that necessary when entering the battlefield of litigation. But when the mediation process was combined with the highly adversarial litigation approach, mediation was all but consumed. When we examine the goals and objectives of each system, we see that they are very different. Although the adversary system attempts to determine truth, preserve rights, determine right and wrong, and punish a wrongdoer, the mediation process, on the other hand, focuses on the determination of interests, creative problem solving, party empowerment, and process satisfaction.[108]

Yet this innovative and unique varietal of wine was placed into the old wineskins of competitiveness and adversariness. In so doing, the potential for mediation to ripen and mature into its own varietal, quite different from that of the adversary model, was lost. As a result, many approaches to mediation are viewed as only liti-

105. *E.g.*, Charles B. Craver, *Negotiation Ethics: How to Deceive without Being Dishonest; How to be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987).

106. *See* James Alfini, *E2K Leaves Mediation in an Ethics Black Hole*, 7 DISP. RESOL. MAG. (forthcoming 2001).

107. For a discussion of collaborative lawyering, see *infra* notes 254-260 and accompanying text.

108. Symposium, *Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas?*, 1 CARDOZO ONLINE J. CONFLICT RESOL. (1999), *at* http://cardozo.yu.edu/cojcr/new_site/issues/vol1/vol1htm.

gation lite;[109] and the lawyers who represent clients in that system merely as wolves in sheep's clothing.[110]

I contend that we need new wineskins if the wine is to mature to its greatest potential, because wineskins are the parameters that shape the lawyers' conduct. It is possible to modify the lawyer's skill set, so that wolves are taught to act as sheep. Although others contend that both wolf- and sheep-like conduct are called for in many instances,[111] I urge that in most mediation circumstances, a more collaborative and cooperative, sheep-like approach is appropriate. If more specific ethics can be designated for those in collaborative situations, then the old wine in the old wineskins will remain intact. So, too, with the parameters of law practice, which now include those more traditional as well as innovative approaches to problem-solving and conflict resolution. Then, as the parable states, both systems may be preserved.

IV. JUSTIFICATION FOR NEW RULES

Presuming these differences between the two systems, specifically the fact that lawyer conduct and skills should be different in mediation, the question then arises: are new or different rules needed to effectuate such distinct conduct? A number of practicing lawyers contend that lawyers can and should merely learn different strategies and tactics to use in the mediation process.[112] That, however, is problematic. Many practicing lawyers may not be inclined to learn new and innovative approaches to lawyering, unless, of course, there is sufficient motivation in terms of necessity or enhanced practice revenues. Many categories of change are resisted by the bar, sometimes quite strongly.[113]

New rules are necessary. Rules guide lawyers' behavior. In fact, the enactment and enforcement of rules are the most likely mecha-

109. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution,* 47 EMORY L.J. 1289, 1292 (1998).

110. For further discussion of this phenomenon, see Robinson, *supra* note 5.

111. Symposium, *supra* note 108.

112. This statement is based upon the responses of several audiences before whom I have made this pitch about a requirement of certain standards of conduct (such as good faith) for participation in the mediation process.

113. Note the vigor with which new approaches to lawyering have been opposed, particularly with regard to the amendments of the *Model Rules of Professional Conduct.* For further information on this topic, see John Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century,* 69 FORDHAM L. REV. 83 (2000).

nism to change lawyer conduct. Because of their emphasis on rights and objectivity, lawyers are more willing to change behavior to conform to codified rules than to respond to a more intangible, subjective call for conduct.[114] Moreover, lawyers are familiar and comfortable with rules. For example, continuing legal education ("CLE") programs were offered in the past, but it was not until the states required a specific number of CLE hours per year to maintain licensure that attendance escalated.[115]

That is why, at least to some extent, this change to non-adversarial practices in the mediation process must be effectuated by changes in the codes of professional responsibility. Although it is too late for real changes in the recent Ethics 2000 project,[116] it is not too late to begin looking at the possibilities of establishing a separate, or at least supplemental, code for lawyers who represent clients in non-adversarial fora for dispute resolution. This might be effectuated by amending the existing codes or, alternatively, and perhaps more appropriately, by enacting a separate code, operational when practicing in a different forum, such as mediation. This recommendation is not something new, as specialized ethical considerations and codes have been urged in a variety of different practice areas.[117] Moreover, the "test" for whether different rules should be applied because of the difference in practices[118] clearly is met in terms of the mediation process.

Most of us are familiar with having some directive to guide our behavior. From one perspective, morality often is viewed as rule-based.[119] Looking to religion as a basis, most denominations receive guidance from rules and tradition. The education system is similarly full of standards, and therefore, so, too, are lawyers and

114. Daicoff, *supra* note 78, at 573-74.

115. Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE) The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145 (1995); Lisa A. Grigg, *The Mandatory Continuing Legal Education Debate: Is it Improving Lawyer Competency or is it Just Busy Work?*, 12 B.Y.U. J. PUB. L. 417 (1998).

116. For a complete overview of the work of "Ethics 2000," as well as the final product which is to be taken before the ABA's House of Delegates, see http://www.abanet.org/cpr/ethics2k.html. *See also infra* notes 134-146 and accompanying text.

117. *E.g.*, Rapoport, *supra* note 43, at 45; *see also*, Stanley Sporkin, Commentary, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 150-52 (1993) (urging specialized ethics for corporate and securities practice).

118. Rapoport, *supra* note 43, at 65-69 (setting forth a test of sorts to determine whether different codes of ethics are appropriate or necessary).

119. Nancy B. Rapoport, *Living "Top-Down" in a "Bottom-up" World: Musings on the Relationship Between Jewish Ethics and Legal Ethics*, 78 NEB. L. REV. 18 (1999).

law students. New law students become almost "programmed," if you will, to want to know the rules, the black letter. If there are no rules pertaining to mediation, and no requirements that students learn different skill sets or attitudes for it, then it is likely that the majority will not do so. In many instances, legal education is interested in preservation of the status quo, what has already been learned and reinforced. This creates a resistance to innovation. As a result, the legal culture has a real interest in preserving the adversary system;[120] therefore, external motivation is necessary.

Ethical guidelines sometimes motivate, but most often limit, lawyers' conduct. I do acknowledge, however, that not all change will or can be accomplished by ethics alone. These rules must be complemented by additional efforts. Some of us, for example, are attempting to effectuate change through educational endeavors.

Students in law school can be educated, but a number of other factors influence just how effective that education will be. First, students are directed by rules; they want to know what the rules are, and how to comply with them. By the second year of law school, students are familiar with having rules to guide their conduct and provide answers to most problems. If there are no rules that dictate conduct in a specific context, they sometimes conclude that context is not an important matter. Second, although this practice may not yield greater success, the persuasive method of teaching in the law schools is that of competitiveness and adversariness.[121] Therefore, there exists in law schools little institutional culture to reinforce new, non-adversarial approaches to practice and, in fact, what is reinforced is just the opposite. Third, law student personality types are such that most students lean toward the competitive approach.[122] Finally, even in those instances in which there has been sufficient education so that the students understand and acknowledge that different standards and skill sets should be utilized in non-adversarial situations, adhering to those standards and applying those skills may not be rewarded in the real world of everyday practice.

A number of factors account for this. For example, promotions and monetary rewards are dependent to a large degree upon billa-

120. Dzienkowski & Peroni, *supra* note 113, at 89.

121. Susan Sturm, *From Gladiators to Problem Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 122 (1997) (critiquing the "gladiator model" and advocating a shift to more of a problem-solving paradigm).

122. Daicoff, *supra* note 78, at 586.

ble hours. If cases are resolved and settled, there is, necessarily, less legal work to do on that file. Many ADR proponents, when confronted with this obstacle to wholehearted ADR implementation, have emphasized that satisfied clients would return should they have additional legal problems. Furthermore, satisfied clients actively will refer others to those lawyers with whom they are pleased. Nonetheless, neither the decrease of revenues nor the increase in client referral has been adequately and empirically researched; therefore, some of these concerns remain.

The practice of law is still largely competitive, from obtaining and maintaining clients,[123] to the adversary process itself. Students learn this fact early in law school.[124] When a lawyer "wins" a trial, there is great celebration around the firm. Such celebrating is not necessarily the case when the lawyer merely has settled the matter, though in many instances the settlement may in fact be an outcome superior to the trial for both the client and the firm. The United States Department of Justice has established a process by which new United States Attorneys are evaluated on their ability to problem solve, as well as try cases.[125] It is this type of approach that values less traditional problem solving approaches to lawyering that is sorely needed and necessary in the world of practice.[126]

The contentiousness and adversariness of law practice also has been somewhat responsible for the increasing need for professionalism mandates. But even here there is some disagreement about the need for and manner of effecting change.[127] Thus, how to effecutate change becomes a real issue.[128] This debate boils down to whether one should work within the system or create a new set of rules.

The proposal of new or different ethics requirements in a particular specialized practice area is not a novel concept.[129] Matrimo-

123. Schiltz, *supra* note 84, at 888-89; *see also* Janet Reno, Lawyers as Problem Solvers: Keynote Address to the AALS, *in* 49 J. LEGAL EDUC. 5 (1999) (encouraging law students to be problem solvers).

124. Because ADR courses attempt to teach a more cooperative and collaborative approach to dispute resolution, I think that as the instructor I should "walk the talk," and encourage students to collaborate on assignments, such as journals based upon the exercises conducted in class. Interestingly, in a class of approximately sixty students, only two agreed to write their paper together.

125. Janet Reno, Symposium, *Creative Problem Solving Conference, Session I: Envisioning the New Lawyer*, 37 CAL. W. L. REV. 1, 8-9 (2000).

126. *Id.*

127. Daicoff, *supra* note 78, at 566.

128. *Id.* at 594.

129. *E.g.*, Zacharias, *supra* note 44; Sporkin, *supra* note 117.

nial lawyers, for example, adhere to additional ethics based in part on the extra consideration that must be given to non-client third parties.[130] Different rules in terms of ethics also have been urged in the areas of bankruptcy law,[131] maritime law, tax law, military law, family law, and environmental law.[132] Implicit in these discussions is an acknowledgement that a single unitary code for all areas of practice is unsuccessful.[133] I propose that if these practice areas, many of which operate in an adversarial paradigm, need independent rules, so, too, must representational work in mediation.

A test of sorts[134] has been set forth by Dean Nancy Rapoport for determining if, in fact, new or distinct ethical considerations or rules are warranted in a specific area of legal practice.[135] The preliminary question is whether there is a poor "fit" of practice with the generalist model of ethics.[136] In the mediation context, where the substantive law is similar to other practice areas, both civil and criminal, the manner in which the procedure or process works is so dissimilar from that of adversary representation that I would contend that there is no "fit." When evaluating mediation, one recognizes that the skill sets, focus, thought processes, and analysis differ so significantly that there may be little to resemble the activity in an adversarial trial.[137]

The baseline question having been answered in the affirmative—there is a poor fit with the conventional model—Rapoport would then have us move to what she terms the "second order"[138] questions. Four additional observations help generate a justification for a specialized code of ethics. These observations are: (1) the existence of repeat players with novice practitioners; (2) jurisdictional layers; (3) ease of code enactment; and (4) the benefits of a single code balanced against the disadvantages of abandoning state regulation.[139]

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130. Rapoport, *supra* note 43, at 61-63

131. *Id.* at 49.

132. *Id.* at 56-57; *see also* Zacharias, *supra* note 44, at 190-98 (discussing specialized codes of conduct for various legal specialties, but stressing the need for code drafters to prescribe methods for facilitating communication between lawyers and clients).

133. *Id.* at 56; *see also* Krane, *supra* note 72, at 330.

134. Daicoff, *supra* note 78, at 65-69.

135. I reiterate that my focus is on the lawyer who represents clients in the practice area of mediation, rather than on the neutral mediator.

136. Rapoport, *supra* note 43, at 65.

137. *Supra* Part II (outlining and emphasizing the differences between the adversary system and the mediation process).

138. Rapoport, *supra* note 43, at 70.

139. *Id.* at 70-77.

The first of these considerations encompasses the necessity of a code describing acceptable behavior for those within a given practice community.[140] In her example, bankruptcy, as new and inexperienced lawyers enter the practice arena, Rapoport contends that a code is needed in order to prescribe ethical or acceptable conduct. This test is met as well in the context of the mediation process. Many lawyers do not have the experience of representing clients in mediation. Not all law students—not even a majority—take ADR courses. Even for those exposed to ADR in law school, once in practice, new lawyers may be so consumed with learning all of the nuances of practice that distinctions between adversarial and non-adversarial processes become blurred. One way to maintain the contrast is to enact a code of conduct for mediation.

In consideration of the second issue, which touches upon multi-jurisdictional practice issues, Rapoport acknowledges the states' interest in enforcing lawyer ethics. As the licensing entity, each state is responsible for oversight of attorneys.[141] With the ongoing increase in multi-state practice, however, it may be more sensible to enact a national code.[142] In bankruptcy matters, so long as a lawyer is admitted to practice in one state, he is able to practice in any bankruptcy court through the use of a motion pro hac vice.[143] This model could be applied to mediation, where an even more compelling case can be made as no one must be licensed—as yet—in order to represent parties in mediation.[144] Mediation takes place across state lines, particularly in large, multiparty cases in which lawyers come from numerous jurisdictions. Often due to convenience, these cases are mediated in jurisdictions different from that in which the case is pending. One central, universal code of conduct that would govern all of the lawyers representing clients would be

140. *Id.* at 70.

141. *Id.* at 72-73, 76.

142. *E.g.*, Dzienkowski & Peroni, *supra* note 113, at 92 (describing the role state bar associations play in attorney regulation); Krane, *supra* note 72, at 330 (stating that the "entire structure of attorney regulation in the United States is Balkanized").

143. Rapoport, *supra* note 43, at 79 n.164.

144. This consideration has obvious and considerable implications for mediation. Non-lawyers may be able to represent parties at mediation—for example, financial planners and accountants in business matters, or therapists in family cases. GALTON, *supra* note 5, at 8; *see also* KOVACH, MEDIATION PRINCIPLES AND PRACTICE, *supra* note 31, at 101 n.23 (discussing various roles for the mediation representative). *But see* Birbrower, Mantalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998) (holding that representation of a client in the preparation for arbitration and ultimate settlement of a case pending in California, where the lawyers were not licensed, was the unauthorized practice of law).

not only efficient but more evenhanded for all participants.[145] And, of course, with the rise in pre-suit mediation, there are no courts to which jurisdiction could be attached. This factor certainly demonstrates the need for different rules in terms of mediation practice, rules that would apply regardless of the location of the actual mediation session.

Continuing with the test as put forth by Rapoport, I consider the last two issues together, as both appear to provide for a balancing of sorts. One concerns the ease with which such a new code could be enacted and implemented. The other is whether benefits resulting from such efforts would outweigh the difficulties in enacting and enforcing new provisions for lawyer conduct.[146] I have suggested elsewhere that both the establishment and enforcement of different guidelines for participation in mediation would not be a simple task.[147] A variety of hurdles and obstacles will need to be surmounted, but in the long run, the benefits of enacting and enforcing, for awhile,[148] new provisions for lawyers' conduct in mediation will outweigh the struggles encountered. Balancing may be difficult, but if something is not implemented, I fear that difficulties in mediation will continue. Mediation as a distinct process will be eroded until ultimately all that remains of the process is nothing more than pretrial settlement discussions.

V. THE ETHICS OF NON-ADVERSARIAL REPRESENTATION

Having established the necessity of new and distinct ethical rules for lawyers who represent clients in mediation, and perhaps other problem solving arenas,[149] the next consideration is the rules themselves. What should those rules be? How should ethics inform the

145. Although it is likely that the court in which the case is pending might be able to set forth guidelines for mediation, as some do, this involvement would be only on a case-by-case basis. What I urge here is something broader that would not only guide behavior in each case, but also begin to revise ethical conduct of lawyers generally.

146. Rapoport, *supra* note 43, at 74.

147. Kimberlee K. Kovach, *Good Faith in Mediation: Requested, Recommended or Required: A New Ethic*, 38 S. TEX. L. REV. 575 (1997).

148. After a period of time, enforcement may not be necessary as such conduct becomes relearned, reinforced, and integrated generally into lawyering.

149. It may be valuable also to look at the long-term effect of such new rules in mediation, in which extending these guidelines would be applicable in other non-adversarial processes. One example might be a problem solving negotiation effort. *E.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984). *See also* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000) (offering a proactive approach to negotiation that also serves to reduce tensions associated with dispute resolution).

lawyer's conduct at mediation? I do not contend that we necessarily can transform people or their basic tendencies.[150] In fact, I question whether that same individual who is an outstanding zealous adversary is capable of altering conduct for a non-adversarial representational role.[151] But behavior can be changed by the enactment and enforcement of specific, directive rules.[152] Although ethical rules generally are designed to be multipurpose in nature,[153] I urge specificity and detail in creating standards of conduct for lawyer representatives in non-adversarial processes. Codes of legal ethics generally have been designed to achieve two objectives. One, punishment of departures from the "floor" of acceptable, minimally ethical conduct; and the other, guidance toward improvements above that floor.[154] Certainly new ethical considerations for lawyers who represent clients in mediation must encompass both of these goals; but, I also suggest a third, educational, objective. In part, it is the lack of education and training in non-adversarial and problem solving lawyering that is responsible for inadequate representation at mediation. To achieve these three goals, ethical standards or a code must be specific in direction, while simultaneously allowing for some discretion and choices in style and approach.

One option is the creation of an entire separate Code of Ethical Considerations for those who represent clients in mediation. A less radical option is to add a new rule, which would override the current rules governing lawyers who represent clients in mediation. For example, *Rule* 3.8 for prosecuting attorneys provides such an approach.[155] One for attorneys as mediation representatives similarly could be drafted. Of course, another alternative would be merely to include appropriate commentary to the existing rules—for example, *Rule* 2.1 with regard to discussions with the client, *Rule* 4.1 regarding truthfulness in communication with, or *Rule* 3.1 regarding candor.[156]

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150. There needs to be some consideration as to basic personality type as it relates to lawyering and negotiation. Both are relevant here, but would of course require much more study and deliberation than has been done at this time. Daicoff, *supra* note 78.

151. *Infra* Part IV.

152. Daicoff, *supra* note 78, at 573-74.

153. Rapoport, *supra* note 43 at 52.

154. *Id.* at 53-54, 70.

155. MODEL RULES OF PROF'L CONDUCT R. 3.8 (1999).

156. *Id.* R. 3.1.

The following discussion represents mere suggestions, a starting point if you will, for a dialogue about the ethical parameters of non-adversarial legal representation. Just as debate contributed to the creation of the first ethical provisions for lawyers, so we should begin discussions anew. It may take some time before an actual code or set of guidelines is put in place, these matters are now ripe for discussion. Although concern has been expressed about "over-regulation" in ADR, the dispute resolution field currently is focusing on the development of rules and standards for practice. Mediator organizations as well as legislatures and courts have begun to enact regulations, and it seems appropriate that the role of the lawyer-representative also be considered. The legal system, more generally, also continues to evolve with matters such as multijurisdictional practice,[157] multidisciplinary practice,[158] and transactional practice. Non-adversarial representation also should be included in rethinking the lawyer role. And as legal educators, it is imperative that we not only keep up with changes, but also take a leadership role in these developments.

A. The Good Faith Standard

In some instances, a standard of good faith participation in mediation has been advocated.[159] A detailed discussion, including both the advantages and downsides to such an approach may be found elsewhere,[160] but a brief discussion is warranted here. Although a good faith standard is proposed here as an ethical issue for lawyers, courts already consider participants' conduct at mediation in the context of good faith mandates.[161] In either approach, what may

157. Harriet E. Miers, *American Bar Association Study of Multistate Practice is on Fast Track*, ARIZ. ATT'Y, Feb. 2001, at 29.

158. Dzienkowski & Peroni, *supra* note 113; Carol A. Needham, *Permitting Lawyers to Participate in Multi-Discipline Practice: Business as Usual*, 84 MINN. L. REV. 1315 (2000).

159. Kovach, *supra* note 147.

160. *Id.*; *see also* Brazil, *supra* note 20, at 32-34 (stating that "good faith" requirements "may well have the ironic effect of intensifying the temptations to 'litigize' mediation").

161. Tex. Dep't of Transp. v. Pirtle, 977 S.W.2d. 657 (Tex. App. Ct. 1998) (affirming a trial court's award of sanctions for lack of good faith participation in mediation). *But see* Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d. 370 (Tex. App. Ct. 1999) (holding that because defendant filed an objection to the court's order for mediation, it was relieved of good faith obligation). *See also* Foxgate Homeowner's Ass'n v. Bramalea Cal., Inc., 92 Cal. Rptr. 2d 916 (Cal. Ct. App. 2000) (holding that sanctions may be appropriate for a lawyer who failed to fully and adequately participate in mediation), *review granted*, 999 P.2d 666 (2000).

be helpful to the endeavor is at least to begin a consideration of what such a standard or obligation might look like.

Good faith in mediation does not mean that an agreement must be achieved.[162] In order to demonstrate good faith, the parties need not settle the controversy. Mandatory good faith also does not dictate that agreements will be more likely. In fact, I am quite sure that there are many instances in which neither party to the mediation demonstrated good faith in the process and yet the parties still were able to reach an accord. As has been pointed out, settlement is not, and should not be, the absolute or only objective of mediation.[163] The process can be fruitful and beneficial even if no agreement is reached.[164]

Good faith would not obligate the parties to possess a sincere desire to resolve the matter, nor should it necessitate complete disclosure to the other participants or even the mediator. But information exchange is a vital part of mediation, so it is likely that an element of good faith would call for some sharing of information.[165] The scope of information to be disclosed, however, would remain within the discretion of the participants. Honesty in terms of this information also should be a basic consideration in defining elements of a good faith mandate. Just "being nice" also is not an element of good faith. One can be kind and cooperative, and yet do nothing to advance the ball in terms of resolution. Sometimes, of course, being "nice" is used as a tactic to throw the other unsuspecting party off guard, as in "good cop-bad cop" tactics.[166] Moving or changing an offer or demand also is not an essential element of good faith.[167] In fact, consideration of good faith should not be based upon the content of the proposals.

The term good faith can be, and likely is, used to mean a number of different things, and this potential lack of clarity is viewed as

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162. Kovach, *supra* note 147, at 584.

163. Welsh, *supra* note 23.

164. For example, other aspects of a relationship, such as communication, may be enhanced, which may result in the decrease in future conflict. Moreover, one recognized approach to mediation de-emphasizes reaching an agreement while placing focus on other critical aspects of the process, such as recognition and empowerment. BUSH & FOLGER, *supra* note 52. Partial agreements are also possible, as is reaching an accord sometime after the mediation. KOVACH, MEDIATION PRINCIPLES AND PRACTICE, *supra* note 28, at Ch. 13.

165. Kovach, *supra* note 147, at 611.

166. For a discussion of a number of negotiation tactics, see CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 167-204 (2d ed. 1993).

167. Halaby, McCrea, & Cross v. Hoffman, 831 P.2d 902, 908 (Colo. 1992) (en banc).

problematic in terms of establishing this standard. Prior criticism of good faith is, in part, based on the lack of objective standards, along with a corollary consideration, that a demonstration of good or bad faith is dependent on one's state of mind.[168] A specific definition, at least initially, will be necessary in order to provide detailed and useful guidance, leading to objective standards for mediation conduct. Such specificity can be beneficial in a number of ways. For example, mediation participants must know what is expected of them. Details in rules may aid the mediator, if and when a determination is to be made, and may assist the court should enforcement be necessary. In looking at definitions of good faith in other contexts, the requirements have been applied primarily to actions that occur during the exchange segment of the negotiation. Yet the mediation process really begins earlier. Preparation and presence at the mediation are necessary and important stages of the process. Courts currently do order attendance at mediation and advance exchange of information.[169] These are important considerations when creating a rule that is directly specific to mediation and is enforceable.

In addition to preparation and presence, the following list provides suggested aspects of conduct that could constitute the elements of a good faith standard: arriving at the mediation prepared with knowledge of the matter, in terms of both factual background and possible solutions; having all necessary decision-makers present at the mediation, not via telephone; taking into account the interests of the other parties; demonstrating a willingness to listen and attempting to understand the position and interests of the other parties; being prepared not only to discuss the issues and interests of your client, but also to listen to the issues and interests of all other participants; engaging in open and frank discussions about the case or matter in a way that might illuminate one's position for the other to know and understand better; not lying when asked a specific and direct question; not intentionally misleading the other side; having a willingness to discuss your position in detail; and explaining the rationale underlying why a specific proposal is all that will be offered, or why one is refused.

168. Kovach, *supra* note 147, at 599.

169. *E.g.*, Foxgate Homeowners' Ass'n v. Bramalea, California, Inc., 78 Cal. App. 4th, 653 (Cal. App. Ct. 2000) (sanctioning lawyer for failing to act in good faith). In Texas, standard court orders to mediation often contain language regarding negotiation in good faith.

Good faith also would include coming to the mediation with a willingness to be open to another perspective. Parties need not agree with one another, but only attempt to understand the differing viewpoints and, at the very least, not summarily and without consideration reject what the other party has to say. And from the lawyer's perspective, an additional guideline may be appropriate, such as allowing the client to discuss the matter directly with the other side and with the mediator.[170] The focus again is on the free flow of information between the disputing parties, a hallmark of the communication and participation necessary in the mediation process. As a requirement, it is important that the necessity of good faith be communicated to the participants prior to mediation. Consequently, conduct comprising good faith should be included as an integral part of the description and definition of the mediation process itself. Although a good faith requirement in mediation also could be established by legislation, court rule, or rules of practice in mediation,[171] the focus here is on incorporating such a standard into the rules of conduct or ethical considerations for lawyers.

B. The Minimal Meaningful Participation Standard

Others urge that the load should be lightened somewhat, and call for a standard of minimal meaningful participation in mediation.[172] This would include a level of preparation and participation that is somewhat less onerous than that advocated by a good faith standard, but nonetheless could be quite effective in focusing lawyer representatives on the importance of adequate levels of participation in mediation. This preparation is critical because mediation relies significantly upon communication.

Communication is essential to the mediation process, so that parties are able to achieve greater understanding of each other's perspectives and positions in their effort to reach mutually satisfactory resolutions. Dean Sherman acknowledges that this prerequisite certainly is aided by the candid and sincere participation of parties and lawyers, and that the truthful disclosure of relevant information should be encouraged in the interests of promoting a

170. Sternlight, *supra* note 5 (going into excellent detail about how to allocate the various actions and roles between lawyers and clients depending upon the barriers to resolution).

171. Kovach, *supra* note 147, at 597.

172. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?* 46 SMU L. REV. 46 at 2079, 2096 (1993).

mutually acceptable settlement.[173] Although Sherman acknowledges that mediation works best if parties "demonstrate a willingness to listen and attempt to understand the position and interests of others and communicate positions in detail, as well as explain the rationale" for any proposal, he urges that such a level of communication not be mandated and enforced by sanctions in rules and court orders.[174] His opposition to a mandatory approach seems to stem from the view of mediation as a voluntary, consensual process in which the parties are empowered to seek their own solutions with the aid of a mediator facilitator.[175] He also notes that many of the court rules mandating mediation are justified as only requiring participation in a non-binding process that does not undermine parties' right not to settle.[176]

Sherman suggests an alternative participation requirement that is the "minimal meaningful participation" standard. Sherman contends that because mediation is a relatively unstructured ADR process, little by way of formal participation is needed.[177] The standard is justified, however, since some level of process involvement is necessary to ensure that the process is not futile,[178] and that it would assist in achieving a central objective of mediation—encouraging the parties to communicate in the interests of settlement.[179] The minimal meaningful participation standard does not direct a comprehensive presentation of the case but, rather, requires little more than the parties briefly discussing their positions as to the relevant issues, listening to the other side, and reacting to the other side's positions.[180] Sherman notes that the failure to address or to disclose information as to all issues may suggest weakness or lack of candor to the other party and thereby lower its willingness to make offers, but that is a strategic risk a party should be entitled to take.[181] Apparently, this is an attempt to balance what is essential in mediation with the litigants' right to control litigation.[182]

173. Edward F. Sherman, *Good Faith Participation in Mediation: Aspirational, Not Mandatory*, DISP. RESOL. MAG., Winter 1997, at 14.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *See* Sherman, *supra* note 172, at 2096-2103.
179. *Id.* at 2096.
180. *Id.* at 2096-97.
181. Sherman, *supra* note 173.
182. Sherman, *supra* note 172, at 2101-03.

Conceding that an objective of mediation is to identify the underlying interests of the parties in hope of finding a solution that satisfies both sides, Sherman maintains, nonetheless, that disguising true interests and bottom lines realistically cannot be prohibited.[183] He fears that courts would become entangled in judging subjective negotiation behavior, and that severely could abridge litigant autonomy.[184] Thus, Dean Sherman acknowledges a concern with devising standards of participation conduct that are consistent with the goals and objectives of mediation, but contends that, similar to the "professionalism" codes, such standards should be aspirational rather than mandatory and enforceable by sanctions. To the extent that such an aspirational benchmark would assist in educational efforts, it is certainly worth additional deliberation and reflection.

C. The Ethic of Care Standard

In other contexts, commentators have called for an ethic of care in lawyering.[185] An ethic of care standard has been discussed more generally, particularly in light of how it would alter the parameters of lawyers' general ethical responsibilities.[186] The care ethic or morality consists of a rather broad perspective on individuals' conduct. For example, an "ethic of care has been defined as a practice of extending care and compassion to vulnerable individuals and groups who have been harmed or are in harm's way."[187] An ethic of care standard has been used to consider "critical questions about the law and its impact on vulnerable groups and individuals,"[188] and it also is viewed as a foundation of moral and philosophical thought.[189]

An "ethic of care" standard was proposed by Carol Gilligan as a contrast to an "ethic of justice or rights."[190] She contended that a

183. *Id.*

184. *Id.*

185. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

186. Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993).

187. Francis Carleton & Jennifer Nutt Carleton, *An Ethic of Care and the Hazardous Workplace*, 10 WIS. WOMEN'S L.J. 283 (1995).

188. *Id.*

189. *Id.* at 283.

190. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 8, 33 (1982).

rights orientation is only one form of moral reasoning and that there is another, termed an "ethic of care." This care ethic looks not at rights and duties, but rather on the connections between people.[191] Such an approach involves a "relational ethic" that makes "creating and sustaining responsive connection to others" a priority.[192]

An ethic of care also may entail a responsibility to take concrete steps to minimize harm to the parties. The ethic of care that Gilligan discussed often is considered to be a distinctive feminist ethic, or voice, of women,[193] although this point is now much debated.[194] Others contend that such a care ethic should be a part in the moral understanding of every person, which also includes every lawyer.[195] Adoption of an ethic of care has been urged as a means to change the world of legal practice.[196] Yet the current codes of legal ethics provide little awareness of the possibility of considerations of care.[197]

Although some of the discussion of an ethic of care relates to the lawyers' viewpoints, more generally, such an ethic also has been urged in terms of the relationship between lawyers and clients.[198] Elements of the skill set included in an ethic of care include empathy and listening.[199] This is most appropriate and fitting for mediation. The mediation process is one that is based in large part on communication, and listening is a critical element of the communication process. Just as the care ethic is contrasted with the rights and justice orientation, so, too, the adversarial system may be contrasted with the mediation paradigm. Whereas the foundation of the adversary system is the protection and establishment of rights, in mediation, resolutions can be achieved without a decision—or often without even a discussion—of rights or justice. It seems most apt, then, that such a care ethic be a starting point for standards of

191. Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship,* 22 J. CONTEMP. L. 383 (1996).

192. *Id.* at 386.

193. Ellmann, *supra* note 186, at 2665; Carrie Menkel-Meadow, *What's Gender Got to do with It?: The Politics and Morality of an Ethic of Care,* 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996). I have purposely stayed away from the discussion of gender issues in this piece though certainly the differences are worth exploring, as others have done.

194. Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn,* 43 HASTINGS L.J. 1071 (1992).

195. Ellmann, *supra* note 186, at 2667.

196. *Id.*

197. *Id.*

198. Zwier & Hamric, *supra* note 191, at 384.

199. Shalleck, *supra* note 194, at 1078.

conduct in mediation. And in fact, the ethic of care has been recognized as a moral foundation of mediation.[200]

Demonstrating an ethic of care consists of integrating care considerations and empathy into one's work. Commentators agree this could have a variety of impacts on the lawyer-client relationship, ranging from more client autonomy[201] to more attorney control.[202] An ethic of care also is viewed as encompassing a "Golden Rule" of communication.[203] More specifically, this ethic places emphasis on listening with a goal of understanding the other's thoughts, feelings, and desires.[204] This, too, is an important ingredient in the mediation process. Because part of the mediator's goal is to assist the parties in their communication and understanding—but not necessarily agreement—of the other's point of view, having the attorney representatives come to the process with a mindset open to the goal of understanding clearly would aid such objectives.

Advocates of the care ethic urge movement away from self-interest to "other interest," and an ongoing realization and acknowledgment of "human interdependence."[205] This concern with self-interest juxtaposed with "other interest" was expressed by another commentator who noted that perhaps we have fallen short of the genuine objectives of the mediation process if all we have is merely enlightened self-interest.[206] Even enlightened self-interest, in and of itself, would be an advance in terms of conduct at mediation, however. And although we might hope that one day lawyers and clients alike would sincerely consider the interests of the other participants at mediation, and the process be one based upon the interdependence of people, we also must acknowledge that at this point, many of the cases which are mediated are first in the adversary system, inviting that mindset to the table.[207]

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200. Zwier & Hamric, *supra* note 191, at 389.

201. Menkel-Meadow, Symposium, *Case Studies in Legal Ethics, Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 803 (2000).

202. Ellmann, *supra* note 186, at 1077.

203. Zwier and Hamric, *supra* note 191, at 403-404 (citing TOM RUSK, THE POWER OF ETHICAL PERSUASION 7-8 (1993)).

204. *Id.* at 405.

205. Menkel-Meadow, *supra* note 193, at 279.

206. Symposium, *supra* note 108.

207. In part, Professor Robinson hopes to guard against those with the adversarial mindset taking advantage of those who participate more cooperatively. *See* Robinson, *supra* note 5.

In the view of Professor Robert Baruch Bush, a new ethic for those lawyers who represent parties in mediation would involve a "different conception of human nature of who and what we are . . . humans are not separate, unconnected, disconnected individuals, but beings with intrinsic connections despite our separateness."[208] Professor Bush also has noted that Professor Len Riskin, in his seminal article on *Mediation and Lawyers*, addressed the specific question of mediation ethics for the lawyer during mediation.[209] One theme that was discussed by Riskin was an ethic of caring and connection, with an assertion that such an ethic is the foundation of mediation, which explains why mediation really requires a different philosophical map for lawyers.[210]

Although some are concerned that such a care or cooperative ethic may put clients at risk,[211] an ethic of care does not mandate that the lawyer care equally for everyone.[212] It is plausible that a lawyer, in the context of mediation, is able to care for his client, and represent her interests, while simultaneously revealing care for the other party, by demonstrating empathic listening and understanding. The skills involved in active listening are those that mediators themselves utilize to uncover areas of mutual interest or integrative potential. It is often because of this focus on interests that a mutually agreeable resolution is achieved.[213] Moreover, when involved in conflict, often what individuals desire most is to have someone listen to them. Although in many cases the mediator fulfills this role, it is even more effective if the other parties at the table do so as well, especially those at the center of the conflict.[214]

D. The Communication Standard

Commentators discussing the role of the lawyer representative in mediation also have recommended an ethic of communication.[215] This is distinct from the current requirements that lawyers commu-

208. Bush, *supra* note 206.

209. *Id.*

210. *Id.*

211. Robinson, *supra* note 5.

212. Ellmann, *supra* note 186, at 2701.

213. Note the difference between focus on interests and a mediation model that is just about reaching a settlement number.

214. This need underlies the parties' desire for apologies, etc. Deborah L. Levi, *The Role of Apology in Mediation,* 72 N.Y.U. L. REV. 1165, 1167-68 (1997).

215. *E.g.*, Bush, *supra* note 206.

nicate with clients about the matter they are handling.[216] Rather, this entails communication of a different sort. Such an ethic recognizes that the basis for all human relationships is communication itself.[217] This ethic places importance upon determining ways to "walk through the conflict process in a human and humane way."[218] Such an ethic would require additional focus on teaching and training in communication.[219] Ethical standards for representatives in mediation also might embrace an empathy ethic, which also may be considered part of the communication process.

E. The Standard of Altruism

There may be merit in also examining a separate ethic of altruism.[220] Putting empathy into action was one way in which altruism was illustrated.[221] This is similar to the ethic of care, as one's focus is on another. Application of the "Golden Rule" for lawyering also emerges in the altruism concept as well.[222] Establishing a golden rule for mediation is another proposal deserving of additional thought and consideration.

F. Additional Ethical Standards

Still, others might see a need to craft an ethic of cooperation or collaboration. Although this may be considered as integral to other ethical precepts such as good faith and care, as we initiate discussions and proposals, it may be helpful to delineate additional components in detail.

Likewise, an ethic of honesty or fairness might be imposed. There is much concern, as discussed earlier, about the effect or application of *Rule* 4.1 and its comments[223] in the context of mediation.[224] Although an honesty ethic could be part of good faith, and

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216. *See* J. Nick Badgerow, *The Lawyers Ethical Professional and Proper Duty to Communicate with Clients*, 7 KAN. J.L. PUB POL'Y 105 (1998) (focusing on the fiduciary nature of the attorney-client relationship as well as the lawyer's rules of professional conduct).

217. Bush, *supra* note 206.

218. *Id.*

219. *Id.*

220. *E.g.*, Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?* 8 GA. ST. U. L. REV. 385, 418 (1992) (emphasizing that lawyers should regard themselves as a "helping profession," and work to build positive connections with people who come into "legal contact" with one another).

221. *Id.* at 389-90.

222. *Id.* at 408.

223. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1999).

224. Alfini, *supra* note 106.

likely is inherent in the care ethic, there may be good reason to isolate this aspect of conduct, particularly in light of the often implicit endorsement of deceit provided by *Rule* 4.1.[225] In fashioning an actual code of conduct, the foregoing are elements, or more explicit actions, which could be included in specific rule delineation or as more broad generalizations, such as application of the Golden Rule.

Others have recognized a need for an emotional range in lawyers, noting that it is often absent.[226] This element likely could be a subpart of the ethic of care or of altruism. A distinct ethic of emotional recognition, however, would place more emphasis on this ability. The skill to recognize human emotions may be included in a number of ethical considerations, but a distinct consideration may be better.

Considerations of ethics in mediation also bring forth and embrace the tenets of therapeutic jurisprudence.[227] Therapeutic jurisprudence ("TJ") is defined quite broadly as an approach to the law and legal processes positing that the actions taken should be beneficial or therapeutic for the individual, most often the client, though some recognize that such a practice is also beneficial or therapeutic for the lawyer as well.[228] TJ takes as its particular focus the effect of law on the health of the individual. In other words, anything that enhances psychological or physical well-being would be considered to be within the realm and purview of TJ perspectives.[229] Although the definitions of this approach are somewhat broad and difficult to explain more concretely, therapeutic jurisprudence is an interdisciplinary approach to lawyering that focuses on the achievement and maintenance of both the mental and physical health of an individual.[230] Some recognize a resemblance between TJ and ADR, in particular mediation.[231] One of the foundations of therapeutic jurisprudence is self-determination, that is,

225. *E.g.*, Craver, *supra* note 105; Wetflauer, *supra* note 105.

226. *E.g.*, Marjorie A. Silver, *Emotional Intelligence and Legal Education,* 5 PSYCHOL. PUB. POL'Y & L. 1173, 1198-1200 (1999).

227. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 184 (1997) (stating that "[t]herapeutic [j]urisprudence is the study of the role of the law as a therapeutic agent").

228. *E.g.*, Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 50-51 (1997).

229. Winick, *supra* note 227, at 192.

230. *Id.* at 186-87.

231. *E.g.*, Andrea Kupfer Schneider, *Building a Pedagogy of Problem Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000).

that an individual's own views should be honored. This perspective certainly is analogous to the basics of mediation.

Finally, it also may be valuable to consider the use of new metaphors for the lawyer's work because they are powerful in framing people's belief systems.[232] Professor Carrie Menkel-Meadow offered a poignant example when she recommended reclassifying lawyers' "war stories" as "peace stories."[233] It is this type of thinking and the behavior resulting from such thinking that will allow the paradigm really to evolve.

By no means do I purport to have all the answers. In fact, as my thinking progressed on this piece, additional questions kept emerging. Much more work remains to be done on these issues, but I remain unequivocal that it must be done. Others have made specific recommendations for the role of the lawyer at mediation. My concern, however, is that despite the excellent perspectives, in both theory and in practice,[234] lawyers will not be motivated to change conduct unless and until mandated to do so.

Whether called an ethic of care and communication, one of good faith, meaningful participation, or another similar term, a rule or set of rules that recommend or require specific conduct conducive to the mediation process must be enacted. For if mediation is to survive as a formidable, unique process with the characteristics remaining that have made it a process resulting in party satisfaction, then practices and procedures with regard to lawyers' conduct in the mediation process must change, commencing with legal education.

VI. CONCLUSION: ADDITIONAL CONSIDERATIONS—CALL TO ACTION

Assuming, arguendo, the enactment of very different standards of conduct that demand very different skills, values, and attitudes from the lawyer representative in mediation, additional questions are posed. For example, can the same individual represent a client in an adversary system and then transition or transform to serve as a representative in a more cooperative problem solving system?

232. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 221 (1980) ("The use of many metaphors that are inconsistent with one another seems necessary for us if we are to comprehend the details of our daily existence.").

233. With apologies, I do not recall the time and place of the panel that we were both on. But I do remember the comment.

234. Sternlight, *supra* note 5.

To place this query within the language used by others,[235] can outstanding wolves be effective sheep?

I suppose one simple answer is that it depends somewhat upon the personality of each individual. One excellent analysis provides words of caution in looking at attempts to change or modify the conduct of lawyers. In a discussion of research, Professor Susan Daicoff noted that individuals enter law school with specific traits, and a psychological composite that is more disposed toward an adversarial approach to dispute resolution.[236] These include such characteristics as competitiveness, insensitivity to emotional concerns, and preference for viewing matters in a "rights" versus "care" orientation.[237] In fact, reports demonstrate that those who are unable to resolve conflicts of personality and approach under the adversary mindset drop out of law school.[238] Expectedly, these appear to be those individuals who are more collaborative and care oriented.[239] Daicoff also highlights the fact that the legal profession may not desire to change many of these traits, as they are necessary for the practice of law[240]—implicitly within an adversary system. Daicoff notes that there may be merit in requiring change, but also warns to proceed with caution.[241] She hints that there is need for additional study and consideration.[242] And although changing behavior may be accomplished, changing basic character traits is much more complex.[243] Yet if we provide a greater variety of roles for attorneys, perhaps there will evolve recognition that those with different personalities may fit better within different practices.

Although I certainly appreciate the concerns that Daicoff presents, and recognize that the basic personality of individuals is not something easily changed, I also urge that the influence upon new lawyers of education and experience should not be underestimated. Inherent characteristics may account for some of the adversariness and competitiveness,[244] but it also must be acknowledged that some of the antagonism and aggression utilized

235. Robinson, *supra* note 5, at 971.
236. Daicoff, *supra* note 78, at 581.
237. *Id.* at 579.
238. *Id.* at 580 n.243.
239. *Id.* at 585.
240. *Id.* at 548.
241. *Id.* at 593.
242. *Id.* at 595.
243. *Id.* at 589.
244. *Id.* at 585.

in the adversary system is the product of learning and modeling.[245] It seems as if, beginning in law school, lawyers are almost "programmed" to approach each problem with a competitive and adversarial state of mind.[246] Legal education works to magnify those inherent tendencies toward competitiveness.[247]

The adversary system of litigation is the primary frame of reference for lawyers, that with which they are most familiar, and that which is frequently reinforced. As a predictable consequence, it remains difficult, if not impossible, to convince them—sometimes on the way to mediation—to view matters in a more cooperative manner. In an excellent and entertaining discourse on the obstacles to collaboration and mediation presented by the adversary mindset,[248] David Hricik provides an informative look inside the thinking and belief system of the trial lawyer. In utilizing a split personality approach, Hricik's twin, Ernesto, had great difficulty with some of the concepts urged at a symposium, such as duties of good faith and disclosure of information at mediation.[249] This was not surprising because Ernesto had been a trial lawyer for some time; Hricik concludes that Ernesto's voice echoes in the mind of many trial lawyers.[250] If that is true, then it will be with substantial difficulty that transitions from competition to collaboration will be made, particularly if made subsequent to experience in a law practice in which many adversary tendencies are reinforced.

In the view of some commentators, the mindset necessary for a problem solving approach to dispute resolution is "fundamentally incompatible with the mindset of effective trial advocates."[251] In fact, the trial lawyer, as contrasted with the problem solver or dispute resolver, has been analogized to that of the general and the

245. By "modeling," I refer to the phenomenon of learning by observation. In many instances, novice lawyers attend depositions, hearings, settlement conferences, and mediations with more experienced senior lawyers. Though direct teaching may not occur, the neophyte who is eager to learn watches in detail the actions of her superior and then when the opportunity is presented adopts those same behaviors and attitudes—whether effective or not.

246. Daicoff, *supra* note 78, at 579.

247. *Id.* at 580.

248. David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745 (1997).

249. *Id.* at 747-52.

250. *Id.* at 756.

251. William F. Coyne, *Using Settlement Counsel for Early Dispute Resolution*, NEGOT. J. Jan. 1999, at 11; *see also* James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63, 65 (2000) ("The prospect of ADR entering the mainstream of conflict resolution is overwhelmingly related to the extent to which ADR becomes an integral part of the practice and culture of the legal profession.").

diplomat.[252] In other words, the contention is that the battle of litigation must acknowledge a "cease-fire" if mediation is to be productive, and a trial lawyer's temperament, more often than not, is unable to stand down[253]—hence, the wisdom in the use of separate and distinct "settlement counsel" for a mediation or problem solving process.

Closely related to this idea of separate settlement counsel, is the use of collaborative lawyering, which has as its foundation the creative, efficient, and workable resolution of a matter, usually before litigation commences.[254] Lawyers who are selected as "collaborative counsel" or "settlement counsel" agree to foreswear litigation, put away their swords, and instead work together to achieve a final, mutually acceptable resolution.[255] One inherent acknowledgement made by proponents of collaborative lawyering is that litigation or trial counsel who are known for "Rambo" or aggressive tactics are not suitable for such a role.[256] As the two systems—litigation and collaboration—consist of quite different procedures and policies, a distinct protocol was established for the collaborative lawyering process.[257] Essentially, the collaborative lawyering process[258] consists of a team approach to creative problem solving that encompasses elements such as open and honest communication, cooperation, good faith, and willingness to listen.[259] This approach seems strikingly familiar to the conduct urged in the mediation process. One final important consideration is that if the matter is not settled, then trial counsel will take over or go to arbitration or mediation, and settlement counsel will no longer be involved due

252. Coyne, *supra* note 251.

253. *Id.*

254. Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, *in* 16 AMERICAN L. INST. & A.B.A., COURSE OF STUDY MATERIALS, 379, 381 (2000). For more information on American L. Institute and ABA study materials and programs, see http://www.ALI-ABA.org.

255. *Id.* at 382.

256. *Id.*

257. *Id.* at 382-385.

258. For additional review of the collaborative process, see Robert F. Cochran Jr., *supra* note 8; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000); Penelope Eileen Bryan, *'Collaborative Divorce" Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001 (1999); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967 (1999); Robert W. Rack Jr., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, DISP. RESOL. MAG., Summer 1998, at 8.

259. Arnold, *supra* note 254 at 383, 385.

to the confidential and perhaps critical information they may have gotten in the collaborative process.[260]

From the perspective of some then, it appears that those entrenched in the adversary system are not candidates for representation of parties in mediation. However, we know that not all combatants are unable to be peacemakers. And whether we adopt a belief that adversariness is innate, acquired, or a combination both, we also must acknowledge and accept the influence of education and learning. As noted before, education is a key element in moving from an adversarial paradigm to that of collaboration and problem solving.[261] Yet we have not been vigilant in this educational mission. Focus has been placed on training law students to be mediators, but little attention been devoted to the changing role of the lawyer representative in mediation.[262] Recent advances, however, toward reconceptualizing the lawyer role as one of a problem solver are one effort in that regard.[263]

And although changes in legal education continue, these efforts still will not affect most students until and unless rules for lawyering also are modified. When law school graduates enter practice, they look to guidelines or parameters within which to practice. As illustrated earlier, perhaps the context of practice should determine exactly what those rules should be. New rules will necessitate new learning, which, ideally, will assist individuals in a shift to understanding at a higher cognitive level and integration of that learning into everyday practice.

Ethics rules have been, and continue to be, generated on a national basis by the ABA, and then made available to the states for enactment. Adoption of a practice orientation to ethics, as urged in this piece, dictates different methods for the enactment process. Lawyers who represent clients in mediation do so in many jurisdictions, thus the basis of enactment is also an important consideration, whether on a national scale or something more global, such as an international policy. These developments, no doubt, will be considered as matters of multi-jurisdictional law practice and are subjects for additional research, discussion, and debate.

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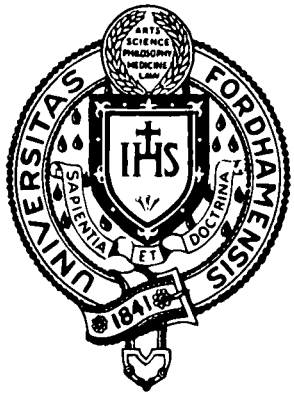
260. *Id.* at 381.

261. Kovach, *supra* note 147, at 619.

262. However, one law school, Hamline University School of Law, in addition to a traditional mediation clinic, does provide a representation in mediation clinic. For more information on this program, see Dispute Resolution Institute, http://www.hamline.edu/law/adr.

263. *See generally* Symposium, *Creative Problem Solving Conference*, 37 CAL. W. L. REV. 1 (2000).

I realize that this essay raised more questions than it answered; that was essentially intentional. I do not purport to have the solutions to many of the issues presented, but I do feel that it is necessary to initiate a dialogue. If lawyers are to have or assume any role in representing clients in the mediation process, then we, as legal educators, must, along with the bar, assume the responsibility to assure that they do so competently—without the zeal and contentiousness of the adversary system. Lawyers must navigate with a different philosophical road map, must adopt different perspectives, behaviors, and skills for a different role. To accomplish this task, new behaviors and performances must be required and demanded of lawyers. This can be done only with adequate education as well as rules to establish the parameters of such conduct.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ETHICS IN ADR: THE MANY "Cs" OF PROFESSIONAL RESPONSIBILITY AND DISPUTE RESOLUTION

*Carrie Menkel-Meadow**

I have been teaching both alternative dispute resolution ("ADR") and professional responsibility for a long time, and I will devote the majority of this essay to reporting on some of the enormous changes and developments in this field. However, I will begin with a mea culpa at a higher level of ethical consciousness than the rules that govern us, or are about to govern us, typically use. I have spent the last five years of my life writing ethical rules for ADR, and I am worried about the future of this field. There are many changes occurring in ADR, and I now fear that, because of all the activity, we are about to encounter the possibility of "conflicts of laws" with respect to ethics in the practice of alternative dispute resolution. If we do not already, we soon will have many different rule systems governing our practice, some of which explicitly conflict with each other and others of which are implicitly or indirectly in conflict.

This field, which I prefer to call "appropriate" dispute resolution,[1] was intended to be flexible, make the world a better place, and encourage different models of problem solving—not only adversarial ones, but conciliatory ones. Yet appropriate dispute resolution is now becoming as complex, law-laden, and law-ridden as the traditional practice of law.

From the outset, I have been a strong proponent of the need for rules, regulations, and best practices standards because I care that ADR is practiced "appropriately." We now call it "appropriate dispute resolution," rather than "alternative dispute resolution," precisely to signal that different processes may be appropriate for

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1. *See* Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEG. J. 55, 62 (1988) (introducing the phrase "appropriate dispute resolution").

different kinds of disputes or in different types of settings. By using that label, we also acknowledge that we must make choices about how to conduct different processes appropriately. We are looking for the most appropriate way to try to resolve disputes, plan transactions, solve international crises, and deal with community and individual human problems. Therefore, ADR really is intended to encompass more than just alternatives to a litigation system.

This broadening of ADR presents the most troubling of the issues in the development of the field in ethics, which is one of jurisdiction. Who has, or ought to have, ethical control over the practice of this multi-disciplinary field, that draws from the teachings and standards of many different professional and non-professional structures and ideologies? There, too, mea culpa. I have been published widely as someone who is concerned about the unauthorized practice of law.[2] I do believe that some forms of evaluative mediation and, these days, hybrid forms of arbitration, multiparty dispute resolution, consensus building—many of the new practices—ultimately prompt third-party neutrals to opine on the law, suggest legal conclusions, or advise people in ways that, although they do not create a technical lawyer-client relationship, do implicate the giving of legal advice and may cause some people to rely inappropriately on the statements of third-party neutrals. Thus, I am concerned about liability issues and whether some dispute resolution practitioners' activities constitute the unauthorized practice of law.[3] I will not focus on that issue in this essay, other than to recognize it as one of the issues posed by the question of determining who ought to regulate this multi-disciplinary practice. Moreover, for those lawyers who want to encourage non-lawyers

2. *E.g.*, Carrie Menkel-Meadow, *Is Mediation The Practice of Law?*, ALTERNATIVES, May 1996, at 57. Whenever I make arguments about the unauthorized practice of law, I think of my good friend, co-mediator, and co-trainer, Howard Gadlin, who is a psychologist by training. *E.g.*, THE CONFLICT RESOLUTION INFORMATION SOURCE, THE GUIDE TO DISPUTE RESOLUTION PRACTITIONERS AND RESEARCHERS (containing Dr. Gadlin's biographical information), http://crinfo.org/documents/h-bio/Gadlin_H.htm. When I complain about non-lawyers opining on the law, Dr. Gadlin suggests that perhaps lawyers should be charged with the unauthorized practice of psychology, since they attempt to facilitate parties' communication with little or no training and, often, little or no skill. For an effort to provide some communication skills generically, see DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1999).

3. *E.g.*, OFFICE OF THE EXECUTIVE SEC'Y, SUPREME COURT OF VA., GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999) [hereinafter VIRGINIA GUIDELINES], http://www.courts.state.va.us/drs/upl/preface.html.

to contribute their additional learning and teaching, how should we combine these multiple disciplines?[4]

Turning to the major ethical concerns in the practice of ADR, we may simplify the discussion a bit by considering what I call the "Four Cs of Ethics and ADR." The first "C," which is largely absent from the rules, is the issue of counseling about ADR. Every lawyer ought to have an ethical obligation to counsel clients about the multiple ways of resolving problems and planning transactions. A few states have included this obligation in precatory language,[5] although very few have done so in required language.[6] I think that this ethical obligation should be mandatory, and I have suggested this in my idealized Ten Commandments of Appropriate Dispute Resolution.[7]

The second "C" of ethics and ADR is confidentiality. Although our current ethics rules do not address confidentiality in detail,[8] there is much regulation of confidentiality issues at the state level,[9] and there soon will be regulation at the federal level, as well.[10] Indeed, Attorney General Janet Reno appointed a federal agency to coordinate federal ADR,[11] and the *Code of Federal Regulations* and *Federal Register* soon will contain proposed regulations for confidentiality in federal ADR.[12] These new regulations raise a

4. Several organizations have attempted to draft ethical rules to transcend disciplinary boundaries. *E.g.*, AM. ARBITRATION ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), http://www.adr.org/rules/ethics/standard.html.

5. *See* Marshall J. Breger, *Should An Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000).

6. *Id.* at 462 app.I.

7. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 167-68 (1999).

8. The current version of the *Model Rules of Professional Conduct* does not treat any of the substantial ethical issues with respect to lawyers serving as third-party neutrals. The traditional protection of confidentiality of lawyers and clients, Rule 1.6, applies only to those in the privity of lawyer-client relationships. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1999). Typically, parties and third-party neutrals are not in this lawyer-client relationship. Rule 2.2, which attempts to deal with the lawyer serving as "intermediary" between two clients, simply assumes that the clients have no confidentiality as between them if they are both using the same attorney. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1999).

9. *See e.g.*, NANCY ROGERS & CRAIG MCEWEN, MEDIATION: LAW, PRACTICE AND POLICY (2d ed. 1994).

10. Notice, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000).

11. FED. ALTERNATIVE DISPUTE RESOLUTION COUNCIL, REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 (2000), http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf.

12. Notice, 65 Fed. Reg. at 83,085.

whole host of issues for those of us who are interested in the law of privilege, evidence, and the Freedom of Information Act. At both the federal and state levels, the ethical issues about confidentiality in ADR conflict with "sunshine laws" and other open government policies,[13] and demonstrate the competing values that inform ADR. Again, the question remains: Who should resolve those issues?

The debate over *Rule* 4.2[14] presents another interesting issue with relevance to whether state ethics rules govern federal lawyers and law enforcement officials. If the federal government has a regulatory scheme for confidentiality or other issues, what do state ethics rules, state evidence rules, or state mediation privileges have to do with ADR practice at the federal judicial or regulatory level? These conflicts of laws/conflicts of rules issues are quite complex. The Honorable Wayne Brazil, a former law professor and current magistrate judge who developed one of the most advanced ADR programs in the federal courts, is a notable founder in our field who has had to deal with these issues.[15] In a recent case, Judge Brazil addressed some of these questions about which level of regulation governs confidentiality of mediation in the federal courts.[16]

This leads me into the third "C," conflicts of interest, as well as into conflicts of rules and laws. We have multiple levels of regulation in ethics and ADR for conflicts of interest for third-party neutrals, lawyers who participate as party representatives and advocates, and former, present, and potentially future parties and clients in ADR proceedings.

There are substantive laws, ethics rules, and court rules about ADR and conflicts of interests at both the federal and state level.

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13. *See* Charles Pou Jr., *Ghandi Meets Elliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, DISP. RESOL. MAG., Winter 1998, at 9 (discussing the balance between openness for oversight and confidentiality for potentially volatile issues); Christopher Honeyman, *Confidential, More or Less: The Reality, and Importance, of Confidentiality is Often Oversold by Mediators and the Profession*, DISP. RESOL. MAG., Winter 1998, at 12 (arguing that claims of "confidentiality" can be exaggerated unnecessarily).

14. Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter," unless the lawyer is authorized by law or given consent by the other lawyer. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999).

15. *E.g.*, WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES (1985); WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES (1988).

16. Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (noting the tension between federal court rules that mandate confidentiality and state law).

At the state level, California, Florida, Massachusetts, Minnesota, New York, and Texas have been most active in addressing potential conflicts.[17] These particular states are notable because they have regulated conflicts of interest and confidentiality in substantive statutes providing for ADR or mediation in evidentiary rules,[18] as well as in procedural court rules.[19] So there are both substantive regulations, procedural rules, and court rules that exist at multiple jurisdictional levels. Determining whether an arbitrator or mediator has a prohibited conflict of interest (involving a former, present, or potential future client) may require consultation with a wide variety of rule systems, including formal law and the many rules created by private associations of mediators and arbitrators.[20]

Because I have written elsewhere about the complexity of conflicts of interest issues in ADR,[21] I will mention just some of the key controversies. The major issue, both at the policy and rule levels, is the extent to which the same individual should be allowed to perform multiple roles as mediator and as advocate, at different times and in different cases, in order to encourage the expanded use of ADR. There is also a question of whether mediators, conciliators, arbitrators, and other dispute resolvers should be allowed to practice in law firms with others who perform the more conventional advocate's role, sometimes for the same or adverse parties.

Under our current ethics rules for lawyers,[22] this situation is very problematic. Should a mediator preside over a matter in which that mediator, or his or her partner, may later represent one of those parties in either a related, substantially related, or unrelated matter? Should there be a time frame limiting that representation,

17. ROGERS & MCEWEN, *supra* note 9, at app.A (summarizing provisions of state confidentiality statutes).

18. *E.g.*, CAL. EVID. CODE § 2025 (West 2000); *see also* ROGERS & MCEWEN, *supra* note 9, at app.A (detailing the evidentiary issues that arise in mediations in areas such as discovery, evidence, public access, non-parties, and protective orders).

19. *E.g.*, ADR L.R. 2-5(d) (N.D. Cal. 2000) (establishing procedure for determining conflicts of interest in ADR context).

20. *E.g.*, AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977), http://www.adr.org/roster/arbitrators/code.html.

21. *E.g.*, Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) [hereinafter Menkel-Meadow, *New Issues, No Answers*]; Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice,* 10 GEO. J. LEGAL ETHICS 631 (1997).

22. MODEL RULES OF PROF'L CONDUCT R. 1.7 (1999) (describing prohibitions and exceptions for conflicts of interest in representation); *id.* R. 1.12 (explaining rules of representation for former judges and arbitrators).

or should it be allowed to occur with client or party consent, or not at all?

If you have not been following the debate, this is where I sometimes fear I have wasted the last five years of my life arguing with the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct (the "Commission" or "Ethics 2000 Commission").[23] In my view, many ethicists, professional responsibility scholars, rule drafters, and practicing lawyers still do not get it—that is, they do not understand what ADR is all about. They do not recognize how the conceptions, purposes, and information flows of ADR practice differ from those of more conventional legal practice. At the same time, there is a risk that conventional advocates will use ADR to "game" the system, leaking information and manipulating the processes in ways that do need to be regulated.

The current report of the Ethics 2000 Commission, which will be presented to the ABA House of Delegates, has at least three ADR-related provisions. First, the new Preamble to the Rules recognizes that lawyers may serve as third-party neutrals and may exercise peacemaking, as well as advocacy, functions.[24] This is a useful, if mostly symbolic, step forward.

Second, the newly proposed Rule 2.4 formally recognizes the role of the third-party neutral within the context of services performed by lawyers.[25] The Rule only states that third-party neutrals may be used, and that lawyers behaving as third-party neutrals should describe their function and explain that they are not representatives of the parties. The Rule suggests that lawyers serving as third-party neutrals should advise unrepresented parties to consult with lawyers if they either want legal advice or wish to understand the details and complexities of ADR processes. There were additional proposals about what might have been included in the rule, such as whether mediators and other third-party neutrals could

23. The Ethics 2000 Commission has completed its report of proposed changes to the *Model Rules of Professional Conduct*, which will go to the ABA House of Delegates this summer. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, FINAL RULES PART TWO (Nov. 2000), http://www.abanet.org/cpr/e2k-final_rules2.html (providing the proposed rule changes and full Commission report).

24. *Id.*, Preamble [3].

25. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 2.4 (Nov. 2000), http://www.abanet.org/cpr/e2k-rule24.html.

give legal information or advice,[26] as well as whether mediators could serve as scriveners for agreements, drafting mediated agreements for the parties without running afoul of conflicts of interests or other rules.[27] Nevertheless, in the interest of simplicity, these suggestions were not incorporated into the final proposed rules.

The third issue treated by the proposed new rules is a departure from current standards or silences on the issue of conflicts of interest. The newly proposed Rule 1.12 treats mediators as arbitrators and judges have been treated by the rules in the past. The rule permits screening, which allows an attorney who serves as a mediator in a law firm to be screened so that his or her partners may subsequently represent one of the parties in the mediator's matter without obtaining client consent.[28]

I still think that the Commission does not understand some of the subtleties and complicated issues involved in determining whether matters are substantially related, unrelated, or even the same for purposes of determining conflicts of interest. In a sense, this new screening rule actually permits a troubling "gray area" in which a conflict still may exist, such as when a screened mediator's partner serves as an advocate in an adversarial proceeding after an unsuccessful mediation in that same matter. The Commission simply chose to draw some bright—perhaps too bright—lines and treat mediators and arbitrators in the same way, where perhaps there are some real differences.

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26. The *Model Standards of Conduct for Mediators* state that mediators never should give legal advice. *E.g.*, AM. ARBITRATION ASS'N ET AL., *supra* note 4, Rule VI, cmt.4. The Virginia standards state that mediators can give legal information, but not legal advice. VIRGINIA GUIDELINES, *supra* note 3. The distinction between these two has always eluded me, *see, e.g.*, Menkel-Meadow, *New Issues, No Answers*, *supra* note 21, at 454.

27. The Judicial Council of Virginia has adopted ethical standards stating that, although mediators are not prohibited from drafting agreements between parties, they are obligated to encourage review by independent counsel prior to either party signing the agreement. JUDICIAL COUNCIL OF VA., STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (Oct. 2000), http://www.courts.state.va.us/soe/soe.htm.

28. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 1.12 (Nov. 2000), http://www.abanet.org/cpr/e2k-rule112.html. The proposed rule contains some ambiguity. It is "clear" ethical practice that mediators almost never serve as advocates in an actual, or substantially related, case that they have mediated. Current ethical disputes are about cases involving the same clients or parties in slightly or very different matters. From these principles, it would seem that a mediator's partners also should not be allowed to serve as representatives in the same or a substantially similar matter (in other words, the old imputation rule should apply here), but this result is not clear from the current version of the rule.

The rule also singles out "partisan arbitrators" as being similar to advocates, even though partisan arbitrators are an entirely separate group currently receiving a great deal of practitioner, if not scholarly, attention. Ethically, is the partisan arbitrator to be "just another lawyer" on the case, subject to the ethics rules for advocates, or is the partisan arbitrator to be more neutral?[29]

I want to explain why this screening rule is so significant. I personally did a 180-degree turn on this issue. As a strict ethicist and someone who deplored conflicts of interest in conventional adversary practice, I began my work in this field thinking that screens for mediators and arbitrators should not be permitted. I have since changed my mind completely, for policy reasons. Specifically, that policy should encourage both traditional adversary practice and the fourth "C," conciliation, within a single law firm.

The practice of law will be better informed if people are permitted to be mediators, arbitrators, and advocates within the same practice units, which in turn will provide greater information resources for clients and lawyers. My utopian hope is that the culture of law practice might change if third-party neutrals, conciliators, and advocates inhabit the same offices. Thus, I have spent a fair amount of the last few years trying to get the screen provision put in place.

I am concerned that there still are complicated issues not covered by the current draft of the rule. As an illustration, a few months ago I was training some extremely sophisticated intellectual property lawyers in mediation, and I talked to them about these ethics issues. Professional responsibility teachers will be shocked to learn that when I described the proposed screen of the new *Rule* 1.12 as a positive phenomenon, these practicing intellectual property lawyers, who serve as both advocates and mediators, understood this new rule as prohibiting them from engaging in their current multiple kinds of practice, where they previously had not been cognizant of the potential conflicts of interests issues. In other words, they had not even conceptualized the possibility that when a lawyer serves as a mediator in one matter, his or her partner cannot represent one of the parties in that mediation in a related, or even an unrelated, litigation matter.

29. *See* Lawrence J. Fox, *The Last Thing Dispute Resolution Needs is Two Sets of Lawyers for Each Party*, *in* CPR INST. FOR DISPUTE RESOLUTION, INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR 47, 47-48 (2001).

It was quite clear to me that these senior distinguished intellectual property lawyers, who were members of the pre-Watergate generation that had not taken professional responsibility courses, did not even recognize a conflicts of interest issue when they were in the midst of one. It was surprising, given all the bar associations' continuing legal education requirements, how little these lawyers knew about conflicts of interest. Most of these quite prominent lawyers have been mediating and representing parties without using screens and thinking the entire time that this was perfectly permissible. When I said, "The good news is that now you are going to be able to perform both of these roles, provided you screen in appropriate cases," they looked at me in horror, realizing that they would now need to engage in all the complexities involved in screening, such as the segregation of files and fees and the prohibition on discussions with firm partners on screened matters.

I offer that example to demonstrate: (a) the lack of knowledge that still exists about our very basic rules of conflict of interest, and (b) the significant effort that will be required to apply the complex conflict of interest rules and screening to the ADR environment.

Finally, I will review a number of other very interesting developments in the regulation of ethical issues in ADR. For the last five years, I have had the honor to chair the Commission on Ethics and Standards of Practice in ADR ("CPR-Georgetown Commission"),[30] which develops some best practices in the field. This is where my heart really is, in trying to make the field responsible for acting appropriately and with good practices, while acknowledging that, perhaps, we are still too new and young to fully regulate what ought to happen. At the same time, we have been concerned with the *quality* of the field, and, in particular, with the role of lawyers who practice ADR in its myriad forms.

The CPR-Georgetown Commission has published two different documents,[31] which I think are quite useful for teaching profes-

30. The Center for Public Resources Institute for Dispute Resolution-Georgetown University Commission on Ethics and Standards of Practice in ADR [hereinafter CPR-Georgetown Commission] is co-sponsored by the Center for Public Resources in New York and Georgetown University and funded by the William and Flora Hewlett Foundation.

31. CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE FOR THE LAWYER AS THIRD PARTY NEUTRAL (1999) [hereinafter CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE], http://www.cpradr.org; CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2000) [hereinafter CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES], http://www.cpradr.org.

sional responsibility to students and training practicing mediators, arbitrators, and other third-party neutrals.

The first document, which has been out for about a year and a half, discusses our proposed ethics rules for lawyers who act as third-party neutrals. This document concludes that mediators may be lawyers and, therefore, they should be subject to all the ethics rules governing lawyers who practice law or any other profession.[32] In a sense, this proposed rule, though far-reaching and complex, evades the question of what happens when mediators are not lawyers. It fails to address the potential competition that we lawyer-mediators may have with those who mediate from another discipline, and who may not be subject to our conflict of interest rules, fee rules, and other ethics rules.

The second document, *Draft Principles for ADR Provider Organizations*,[33] is somewhat inspired by the wonderful work of legal ethicist Ted Schneyer.[34] This document is interesting because no other body has attempted a similar project. Essentially, *Draft Principles for ADR Provider Organizations* is an attempt to recognize one of the major changes in the legal profession, that is, that since organizations are providing legal services, there are situations in which these organizations should be responsible, both in liability and in ethics discipline, for the actions of their member service providers. The document also specifies some best practices for organizations that hold themselves out as either providers of ADR assistance, referrals, or direct services. These organizations would include such entities as courts, which maintain rosters of mediators and arbitrators; solo practitioners, like me, who hold themselves out as mediators, arbitrators, and consensus builders; and other third-party neutrals.

Draft Principles for ADR Provider Organizations has not been adopted by any regulatory entity, jurisdiction, state, or professional association, and so has no force of law. However, it does try to elucidate a series of best and responsible practices involving such issues as a graduated scale of information to be provided to parties in ADR.[35] For example, if parties in the dispute have greater involvement in choosing their provider of ADR services, because

32. CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE, *supra* note 31.

33. CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES, *supra* note 31.

34. *E.g.*, Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1 (1991) (discussing the law firm's role in regulating ethical behavior of lawyers and suggesting that discipline should be meted out at the firm level in appropriate cases).

35. CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES, *supra* note 31.

they reviewed résumés or interviewed candidates for mediators and arbitrators, then the referral organization would have a concomitant lesser responsibility for the assigned ADR provider. If an organization, like a court, assigns an ADR provider without party choice or input, then that referral organization should assume greater responsibility for ensuring competence, proper credentials, and training, as well as for assuring that the assigned person provides ethically permissible services.

This is fairly controversial material. For example, those who work in the dispute resolution field know the American Arbitration Association often handles complaints about conflicts of interest, including the circumstances under which an arbitrator should reveal financial interest, past cases, or other conflicts that may affect the arbitrator's ability to remain neutral. An organization referring providers of dispute resolution services has an uncertain responsibility in assigning a third-party neutral to a case, as this activity is currently unregulated. However, several organizations that maintain panels and lists of mediators, arbitrators, and other third-party neutrals have promulgated their own internal ethical regulations, though they vary widely.[36]

Draft Principles for ADR Provider Organizations also is concerned about quality control, particularly in information and competence. When an organization suggests an ADR process or recommends a particular provider, it has an obligation, in the CPR-Georgetown Commission's view, to provide a lot of information about what it all means—both information about the process itself, the choice of neutral, and the type and quality of the neutral.

I would say, in a sense, there is a fifth "C" in the Ethics of ADR, and that is choice. One of the values underlying *Draft Principles for ADR Provider Organizations* recognizes the fact that parties increasingly have less choice about whether to go to ADR and which provider to use. Therefore, the entity recommending ADR—or, to use another "C," coercing it, such as in the mandatory referrals of some courts—should have some responsibility for assuring the competence and integrity of the process.

The CPR-Georgetown Commission's *Draft Principles for ADR Provider Organizations* might be a useful document to teach and study. In particular, it might be interesting for professional responsibility students to take a look at the larger question of entity or organizational ethical responsibilities at the more general level and

36. *E.g.*, JAMS-ENDISPUTE, ETHICS GUIDELINES FOR ARBITRATORS, http://www.jamsadr.com/ethics_for_arbs.asp; AM. ARBITRATION ASS'N ET AL., *supra* note 4.

then to examine the specifics to see whether they would make different choices in these areas than the CPR-Georgetown Commission has made.

Draft Principles for ADR Provider Organizations also contains a very interesting taxonomy of all the different forms of ADR and all the different kinds of provider organizations, including courts, public entities, administrative agencies, private individuals, lawyers, and non-lawyers. It is a very nice way to educate people who do not know much about the field.

For people who are primarily professional responsibility teachers, rather than ADR teachers, scholars, or practitioners, if you do not learn this material, you are doing so at your own peril. This is one of the many ways in which the legal profession and legal practice is changing dramatically. Virtually every state and federal court requires some form of ADR at least to be considered by the lawyers in a litigation matter,[37] and, increasingly, transactions and contracts contain ADR clauses. So if you teach professional responsibility, I urge you to get up to speed on the content of ADR—its aspirations, visions, and hopes—and also to realize that if you are looking for some interesting, complex, and new issues to teach your students, you will not find a more fertile field for both your mind and heart than that of thinking about the possible technical violations in ethics and what constitutes good practice in ADR.

37. *E.g.*, AM. ARBITRATION ASS'N, STATE STATUTES, http://www.adr.org (providing ADR statutes in all fifty states and the District of Columbia); 28 U.S.C. § 651(b) (2000) (requiring all district courts to devise and implement ADR programs).