The Role of the Attorney-Mediator:

Professional Ethics and Party Autonomy

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Introduction

The practice of law has been enhanced by the relatively recent addition of alternative dispute resolution. While alternative dispute resolution encompasses a range of different practices, mediation constitutes a large, popular and growing segment of the field. Some practitioners advocate mediation as a better form of dispute resolution than litigation and other alternative dispute resolution methods. [FN1] Mediation is a non-adversarial process whereby two or more disputants cooperate with a third-party neutral to reach agreement by and among themselves. [FN2] Attorneys are ever more frequently participating in the practice of mediation either as advocates for one of the disputants or as third-party neutrals. Today, some attorneys mediate as a full time occupation and for many more attorneys mediation is a significant part of their professional practice. [FN3]

One of the fundamental indicia of a profession is the existence and enforcement of a professional code of ethics. The profession of law is no exception. [FN4] Today, there is substantial uncertainty as to what, if any, professional standards of ethics apply to attorney-mediators acting as third-party neutrals. [FN5] Where the practice of mediation has become a considerable part of many attorneys trade, it is important for the organized bar and for members of the bar to know whether existing legal standards of ethics apply to this practice or whether some other standards apply or perhaps no standards at all. [FN6]

The American Bar Association has recently participated in the drafting of a proposed uniform standard of ethics to apply to third-party neutrals who mediate. [FN7] However these standards have neither been publicized nor adopted by the House of Delegates of the American Bar Association. Furthermore, standards of ethics adopted by the American Bar Association have no force and effect until and unless adopted by the state body regulating lawyers and the practice of law. [FN8] Therefore, it is appropriate at this time to contemplate the issues involved in forging standards of ethics for attorney-mediators because this debate is only beginning. [FN9]

Part I of this paper explores the relationship between mediation from other dispute resolution methods and outlines activities which attorney-mediators engage in that may create special professional obligations toward disputants. Part II frames the ethical dilemmas surrounding the role and scope of confidentiality, self-determination and legal representation in the special case of the attorney-mediator. Part III details several examples of mediator ethical dilemmas and describes the various issues in each. Part IV critiques the existing standards of ethics governing or purporting to govern attorney-mediator, concluding that they are deficient. Part V then applies the general principles underlying ethics codes critiqued in Part IV, as well as other standards, to varius ethics scenarios. Through systematic analysis, it is posited that reforms to attorney-mediator ethical standards should emphasize the importance of client self-determination, not just in decision making within the process, but also stressing the right to determine the process itself. Such rights should include the right to determine what type and scope of legal skills shall be incorporated into the process by the attorney-mediator. Finally, Part VI, the conclusion, summarizes and synthesizes the prior analysis and argues for difinitive American Bar Association action.

I. The Special Role of Mediation in Dispute Resolution

It is important to explore the role of mediation among dispute resolution methods to understand what special demands it makes of the attorney practitioner. The major formal dispute resolution methods include litigation, arbitration, negotiation and mediation. [FN10] Certain other practices, such as the mini-trial, neutral evaluation and various hybrids of dispute resolution methods exist, but account for relatively little activity of lawyers and will not be discussed here.

The first significant division among these methods is between litigation and the rest. Unlike non-adversarial mediation, litigation is an adversarial process wherein the disputants vie against each other under the auspices of a formal judicial proceeding for the purpose of winning. [FN11] Typically, disputants engaged in litigation are represented by counsel. The rules of evidence and the jurisdictional body of law are applied by the counsel in advocacy of her clients position. Litigation is the traditional and accepted method of formal dispute resolution used by attorneys. The traditional role of the litigator is to zealously advocate the interests of the client. [FN12]

The other formal dispute resolution methods are categorized as alternative dispute resolution. Within the last several years alternative dispute resolution has gained wide acceptance as providing additional valuable ways to solve disputes. [FN13] Alternative dispute resolution methods are touted as often being faster, less expensive and less adversarial than litigation. Unlike litigation, alternative dispute resolution is not subject to the rules of court, thus relieving the participants from the necessity of potentially costly and time consuming discovery, interrogatories, depositions, wasted time/opportunity costs and the attendant lawyers bills

consequent to in-court representation. [FN14] Indeed, alternative dispute resolution has been heralded by some as a good "substitute" for litigation because it "benefits the clients, the courts and society to a greater extent than complete adjudication." [FN15]

As among alternative dispute resolution methods, the second important division is between arbitration and negotiation, which belong in one category, and mediation, belonging in another. Both arbitration and negotiation are based on an adversarial model. While neither method need be hostile, the philosophy underlying each approach is that each party will apply tself to the process for maximum gain. It can be argued that the use of "principled negotiation" practices obviates the need for such positional advocacy by inviting all participant to care for each others interests. [FN16] However, existing standards of ethics for lawyers require putting the clients interests above the interests of the adversary or a third-party. [FN17]

The undeniable similarity between a mediator and an arbitrator is that each must be absolutely impartial and neutral at all times and to all parties. [FN18] Thus, it is widely recognized that the attorney-mediator and attorney-arbitrator must substitute for the ethical duty of zealous or diligent representation a duty of impartiality. [FN19] The traditional role of an arbitrator is to sit as an adjudicatory authority, to have the dispute submitted to her and to render a decision. [FN20] This is the classic third-party neutral role. As will be shown, the differences between the role of attorney-mediator and attorney-arbitrator can result in different professional demands.

Mediation, by definition, requires the parties to cooperate together in a non-adversarial process to reach a mutually satisfactory agreement. The emphasis in mediation is on compromise and agreement, not on individual success. As regards the appropriate role of an attorney, the attorney-mediator fills a substantively different slot than the attorney-negotiator (advocate) or attorney-arbitrator (adjudicator). Clearly, the mediator is not the advocate of any one participant nor the passive adjudicator of an ultimate decision (whether binding or not). A mediator, by contrast, is an active participant in the problem solving process and interacts with all participants so as to promote an agreement beneficial to all participants. [FN21]

Customary mediator practices include: eliciting facts; defining the issues, leading the parties through brainstorming sessions, helping to generate options, helping to asses and select options, identifying objective standards of fairness, breaking through impasse, documenting and finalizing agreements, and potentially representing the agreement in a court. [FN22] Such involvement can create a special relationship between the attorney-mediator and the disputants whereby the attorney is, in practice, exercising her professional judgment on behalf of the interests of multiple parties with conflicting interests. [FN23]

The possibility of forming a lawyer-client-like relationship is particularly great where the attorney frames the law as applied to the specific facts put forward by disputants, communicates a legal evaluation, or drafts legal documents. [FN24] Such a relationship avoids ethical problems where the attorney acts as an advocate for a client in a negotiation, an arbitration or a mediation because the attorney-advocate is bound to comport with the ordinary rules of conduct requiring zealous or diligent representation of her client. Likewise, where the attorney acts as an arbitrator, the applicable standards of conduct for an impartial and detached third-party neutral should control. [FN25] However, the fundamental difference between the role of arbitrator (one to whom parties submit their dispute for resolution) and a mediator (one with whom the disputants work to reach agreement for themselves) suggest the need for different standards of ethics. [FN26]

II. Exploration of Attorney-Mediator Ethical Challenges

A. Confidentiality and Self-Determination

It is generally agreed that mediators should uphold the ethical principles of confidentiality and client self-determination. [FN27] However, there is disagreement as to the contours and content of these terms. The

confusion as to precisely what ethical standards govern attorney-mediators is well recognized by scholarly commentators in the legal profession. [FN28] It is unclear to whom confidentiality ought to be owed (just private one-on-one communications with a disputant or all communications in a mediation?) and what exceptions to confidentiality operate (must abuse be disclosed? [FN29]). [FN30] The existing standards of ethics for attorneys provide clear guidance on the question of confidentiality. [FN31] But, these standards are premised on an attorney relationship with a single client. Application of attorney-client confidentiality to multiple clients is problematic at best, impossible at worst. [FN32]

Even less clear is the proper ethical balance between the principle of client self-determination on one hand and, on the other, the rendering of legal advice, legal drafting, legal evaluation and representation. There are many attorney-mediators who take for granted the precept that rendering legal services in the context of a mediation is unethical. [FN33] Some think self-determination by clients is incompatible with rendering professional advice by the attorney-mediator. [FN34] This issue arises most often where the mediator is also a licensed professional in the fields of therapy or law. However, another central principle in mediation is to assure the participants make decisions based on adequate information. [FN35] In the case of an attorney-mediator who is asked a relevant question of law requiring her professional legal judgment, her failure to respond may, in effect, deprive the disputant(s) adequate information on which to base their decision.

The lawyer's customary duties of confidentiality, representing client interests and assuring adequacy of information are activated when a lawyer practices law on behalf of another. [FN36] However, whether mediation constitutes the practice of law is itself at issue. [FN37] Thus, analysis and resolution of the above ethical dilemmas requires an exploration of the relationship between mediation and the practice of law.

B. The Relationship Between the Practice of Law and Mediation

For the attorney-mediator, a seminal issue is whether her conduct is governed by the disciplinary ethics standards of a bar association. Some scholars assert that mediation is not the practice of law - thus not subject to ethics codes. [FN38] As noted above, some practitioners earnestly believe they do not practice law when they mediate. Furthermore, many non-bar dispute resolution organizations prohibit or discourage the practice of law by mediators in their standard of ethics. [FN39] However, some scholars posit that lawyers should and do practice law when they mediate. [FN40] Some bar associations have explicitly recognized mediation to be the practice of law and encouraged lawyers to run mediation clinics from their law offices. [FN41] Malpractice insurance for lawyers now covers mediation. [FN42] Furthermore, even if mediation were finally determined not to be the practice of law when conducted by an attorney, that attorney may remain subject to state bar disciplinary authority anyway because mediation is related to law. [FN43] As the following examples point out, it is necessary for attorneys who mediate often do not know to what standard they will be held.

III. Examples of Actual Ethical Dilemmas Faced by Mediators

The uncertainty of mediators over the scope of confidentiality, role of self-determination and proper extent of professional assistance in mediation was highlighted in a recent study of mediators conducted by Robert A. Baruch Bush. [FN44] Professor Bush compiled information on ethical dilemmas faced by mediators. The examples provided are based on actual, not hypothetical, situations experienced by the mediators surveyed. The following examples from Professor Bush's study include, where appropriate, the reasons why responding mediator felt the situation presented an ethical dilemma. These examples shall be used to test the advisability of various possible ethical rules for attorney-mediators to be discussed later in this paper.

A. Situations Involving Confidentiality

Typical confidentiality dilemmas include example #1, where an agreement is about to be reached that the

other party would probably not accept if the confidential information were disclosed. and, #2, where disclosure of the confidential information would probably convince both parties to reach a good settlement, and, otherwise, no settlement is sure.

Example #1
In a business mediation over repayment of a loan, the parties agree to a settlement in which one of the major items is assignment to Lender of an interest in a lawsuit Borrower has filed against a third party. Borrower tells the mediator confidentially that the lawsuit is somewhat tenuous and that he may not even have enough funds to carry through with it, though he hopes to. Assuming Borrower says flatly that he does not want the other party to know this, and resists any suggestion to disclose the information himself, should the mediator disclose it, or else discontinue the mediation? If the latter, would this not be a form of disclosure in itself? Should the mediator, therefore, simply maintain the confidence and proceed, no matter what? If so, confidentiality is preserved, but at the expense of the values of consent and fairness.

Example #2
In a personal injury case, the bottom lines of the two parties, as communicated to the mediator in caucus, overlap. Injurer tells the mediator that he would go as high as $40,000; Victim says he will take as little as $30,000. The mediator knows that "a figure in the middle will leave everyone happy," and that all she has to do is to suggest it to wrap things up.

B. Situations Involving Neutral Evaluations

Other issues are raised where the mediator is asked to make a binding evaluation of one contentious issue in a mediation, as in example #3 or asked to make a non-binding recommendation as in example #4.

Example #3
In a divorce mediation, all issues have been settled except one--the value of a business that is a major asset of the marriage and must be valued in order for the property settlement to be finalized. The parties simply cannot agree, after much discussion, on a figure. They turn to the mediator and ask her to make a decision, which they will accept as binding, on what the value of the business is in dollar terms. Should the mediator agree to decide this issue for the parties, especially since they have specifically requested it? Or should the mediator refuse to take on a decisional role, even at the parties' request? If the mediator accepts, she guarantees the settlement of the dispute, but she takes control of the outcome from the parties' hands, seemingly undermining the value of self-determination. However, since this taking of control is specifically requested by the parties, perhaps it does not conflict with self-determination. Nevertheless, if the parties know that the mediator can be called upon at some point to simply decide the outcome, this knowledge may undermine both the potential for self-determination and the confidence in the mediator's complete impartiality as regards outcome.

Example #4
In the mediation of a business contract dispute, plaintiff originally claims $200,000 damages and defendant offers to pay $75,000. After three hours of discussion, the parties are stalled at 150 versus 110, $40,000 apart. No further progress is produced by caucuses, etc. The parties ask the mediator to tell them his opinion as to what would be a reasonable settlement, based on what he has heard. That is, they ask for a mediator's recommendation. Should the mediator give one or not? The question is similar to that above, with the difference that, since a recommendation

would not be binding, there is both less risk of imposition and less certainty of settlement. However, the risk to perceptions of impartiality may be even greater, especially if the recommendation will lead to further discussion.

C. Situations Involving Power Imbalance

Another category of ethical dilemmas is comprised of situations where one party is taken advantage of or actually bullied as in example #5. This situation is exacerbated where the bullying disputant asserts groundless legal arguments in support of his position as in example #6. An interesting variant on this theme occurs where the power imbalance is between lawyers of the disputants, as in example #7.

Example #5
In a divorce mediation, with no lawyers present, Wife is a middle-aged woman who has never worked outside the home or dealt with complex economic issues, instead deferring to Husband for this. Now, Husband, a business executive, is taking advantage of this to dictate terms of a property settlement to Wife, and she is prepared to accept. If Wife had any knowledge of such matters, she would realize the terms are grossly unfair to her.

Example #6
In a divorce mediation, Husband, a construction worker, states that he built the family house himself and, therefore, it is legally his own personal property. He is adamant about this, and Wife, who seems uncertain of her ground and intimidated by him, is prepared to accept this claim and give Husband the house, although there is little other property to divide. The mediator sees that Wife is being bullied, and knows that Husband's legal argument is absolutely groundless.

Example #7
In a personal injury mediation, the mediator sees that Victim's attorney is preparing to settle for half the value of what is clearly a solid $500,000 claim, primarily because the other attorney is a far better advocate and negotiator. The Victim's attorney has misread both the Injurer's attorney and his own case, and so has grabbed at a low initial offer. Injurer's attorney, realizing the situation, has capitalized on it and is nailing down the unfair settlement.

D. Situations Calling for Advice on Fairness and Legality

The mediator may be called upon by one disputant to comment on the legality or fairness of a potential agreement, as in examples #8 and #9, or she may have formed an unsolicited conclusion as to the legality or fairness of matters under discussion which would be material to the informed decision of one disputant as in examples #10 and #11.

Example #8
In a divorce mediation, Husband is asserting that Wife's heart condition automatically makes her legally unfit to be the primary custodian of the children. Wife asks the mediator if this is so. The mediator, an experienced divorce attorney, knows to a certainty that Husband is wrong about the legal rule.

Example #9
In a divorce mediation, Wife has received a property settlement offer from Husband that, in the

mediator's opinion, is a very generous offer. Wife asks the mediator whether she thinks it is a good deal.

Example #10
In a community mediation between an employer and employee over alleged damage of merchandise by Employee, Employer threatens to withhold wages unless Employee pays for the damage. Employee says Employer has no right to do so. The mediator, a lawyer, knows that withholding wages is illegal unless pursuant to a wage garnishing action in court.

Example #11
In a personal injury mediation, Victim is about to refuse an offer from Injurer that, in the mediator's opinion, is as much as or more than Victim is likely to get if the case actually goes to trial. Victim does not ask for the mediator's opinion, but there is still time to offer it before the refusal is voiced.

IV. Critique of Current Ethical Standards

A. The Model Code of Professional Responsibility

The American Bar Association Model Code of Professional Responsibility (the Code) is ill-suited to the practice of attorney led mediation. [FN45] It is evident that the Code was not drafted with mediation in mind. It is all but impossible to apply the Code's over-arching requirement of zealousness to an attorney-mediator who is bound to be impartial. [FN46] The Code neither prohibits nor provides direction for attorney-mediators seeking mediation guidelines.

The Code is comprised of Disciplinary Rules (D.R.) and Ethical Considerations (E.C.). [FN47] Violation of a D.R. is grounds for disciplinary action by state bar authorities. The E.C.s serve as merely aspirational non-mandatory ideals. Lawyers often pay much closer attention to the D.R.s and less to the E.C.s. [FN48] Unfortunately, there are several D.R.s which render mediation ethically risky and only one E.C. which seems to encourage mediation. E.C. 5-20 seems to supply support for the permissibility of mediation practice by attorneys. E.C. 5-20 reads:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved. [FN49]

However, E.C. 5-20 has been overshadowed by several D.R.s which seem to restrict mediation. For example, D.R. 5-105(C) permits multiple representation only "if it is obvious that [the lawyer] can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of [the lawyers] independent professional judgment on behalf of each." [FN50] Among the problems for would-be attorney-mediators is attempting to determine when it is "obvious" that each of the disputants' divergent interests can be "adequately" represented.

Likewise, D.R. 5-105 requires the lawyer to decline or discontinue employment that is likely to (1) adversely affect her exercise of independent judgment on behalf of a client or (2) to involve her in representing differing interests. [FN51] D.R. 5-105 would seem to all but close the possibility of disciplinary-free mediation apparently opened by E.C. 5-20. State ethics committees have interpreted the Code to prohibit

mediation or severely restrict it. [FN52] In Maryland, a lawyer may not serve as an "impartial advisory attorney" in a mediation if there is a risk of impairment of her independent judgment or unauthorized law practice. [FN53] Wisconsin has found it to be an irresolvable conflict for an attorney to be a legal advisor to a divorce mediation. [FN54] Similarly, a 1972 New Jersey ethics committee holding prohibited lawyers from representing both the buyer and seller in a real estate transaction in any phase of the preparation or execution of the sales agreement. [FN55]

B. The Model Rules of Professional Conduct

The American Bar Association replaced the Code with the Model Rules of Professional Conduct (the Rules) in 1983. In states where they have been adopted, the Rules serve as the basis of state ethics standards for lawyers. The Rules reformulated the ethical guidelines governing representation of multiple clients with adverse interests. [FN56] Rule 2.2 sets forth a relatively precise set of standards for the attorney to meet, including under what conditions representation is proper, when representation is improper and the need to keep all client adequately informed. The text of Rule 2.2 reads as follows:

> MODEL RULES OF PROFESSIONAL CONDUCT (1992).
> Model Rule 2.2:
> (a) A lawyer may act as intermediary between clients if:
>
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
>
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
>
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
>
> (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
>
> (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Unfortunately, Rule 2.2, while facially applicable to mediators, is defined not to apply to mediation in the comment to the rule. The comment states:

> The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. [FN57]

The comment goes on to suggest that the attorney-mediator, while not subject to the constraints of Rule 2.2, may fall under the purview of another "applicable" code of ethics. The comment states:

> In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association. [FN58]

This language has led many scholars to conclude that the Rules do not apply to attorney-mediators. [FN59] However, other scholars have used the term "intermediary" and "mediator" interchangeably and argue that Rule 2.2 does apply to attorney-mediators. [FN60] It is generally recognized, however, that Rule 2.2 does not apply to attorney-mediators. [FN61] In fact, based on the assumption that Rule 2.2 does not apply to attorney-mediators, in 1991 the A.B.A. Standing Committee on Dispute Resolution determined that the suggestion that attorney-mediators look to other codes of conduct beyond the Rule was "inadequate, owing to the significantly to the enormous growth in alternative dispute resolution processes generally and to the increasing use of mediation in particular." [FN62]

C. Other Ethics Guidelines for Mediators

There are two relevant categories of other ethics codes for mediators: first, codes designed to apply to attorneys only; and, second, codes designed to apply to all mediators, including attorneys. Mediator codes share certain provisions, including the centrality of neutrality and impartiality, the importance of confidentiality, admonitions against contingency fees, and the need to describe the process of mediation to disputants in advance. [FN63] Codes designed for attorneys also typically have provisions requiring that the giving of legal information, if it is to be given at all, must occur in the presence of all parties, that the lawyer may not represent any one disputant subsequently in the same matter as was the subject of the mediation;, and that the attorney must describe the difference between mediation and traditional attorney-client representation. [FN64]

1. Ethics of Legal Advice or Information

The above mentioned similarities, however, fail to resolve substantial conflicts in the treatment of the proper role of legal practice as performed by the mediator for the disputants. There are some codes which would absolutely prohibit attorney-mediators from rendering professional legal advice to disputants. For instance, the Center for Dispute Resolution Code of Conduct states:

> Mediators are not lawyers. At no time shall a mediator offer legal advice to parties in dispute. Mediators shall refer parties to appropriate attorneys for legal advice. This same code of conduct applies to mediators who are themselves trained in the law. The role of an impartial mediator should not be confused with that of an attorney who is an advocate for a client. [FN65]

This provision of the Center for Dispute Resolution Code of Conduct has been criticized for being in "direct conflict with the cost reduction goals achieved through lawyers' involvement in mediation as facilitators using their attendant legal expertise." [FN66] Nevertheless, several scholarly proposed codes of conduct retain an absolute ban against legal advice for attorney-mediators. [FN67]

Other codes seem to hedge on the permissibility of legal advice by attorney-mediators. For instance, the American Bar Association Standards of Practice for Lawyer Mediators in Family Disputes (A.B.A. Standards

of Practice) requires the mediator to assure that the disputants make decisions based on "sufficient information and knowledge" but prohibits any legal advice or description clearer than what is necessary to "define the legal issue." [FN68] Specifically, Standard IV(c) states:

> The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process. [FN69]

It is unclear how precisely the legal issues can be framed to suit the questions and needs of the parties. There is no explanation of whether the attorney-mediator is to provide more detailed information when a disputant does not receive independent counsel as a remedy for insufficient understanding. It is also unclear whether, under the letter of this provision, a mediator may provide an interpretation of the law as applied to the facts of the situation where she does not "direct the decision" of the disputants based on her interpretation. Such a possibility seems an obvious loophole allowing for the provision of legal advice.

Still another Section of the American Bar Association has also demonstrated uncertainty over the proper role of legal information as provided by an attorney-mediator. The American Bar Association Section on Dispute Resolution proposed a rule which, as of 1993, actually contained two substantively different options for the section dealing with legal information. [FN70] The section reads:

> (c) If either of the parties do not have independent legal counsel, the lawyer-mediator shall give legal information to a party only in the presence of all parties in the matter. The lawyer-mediator shall advise unrepresented parties or those parties whose independent counsel does not accompany them about the importance of reviewing the lawyer-mediator's legal information with an independent counsel.
> (c) The lawyer-mediator shall advise those parties whose counsel does not accompany them about the importance of reviewing the lawyer-mediator's legal information with such counsel. [FN71]

Evidently the proposal is meant to resolve the issue over the propriety of legal advice by labeling such communication as "legal information."

The distinction is without a difference in the situations which the rule was meant to address. As has been noted in scholarly journals, the mere framing of a legal issue, particularly when framed by an attorney, is not a neutral activity. [FN72] Rather, as put by one scholar: "just by raising some legal principles [s]he feels are relevant (and omitting others [s]he feels are not) the mediator is applying law to specific facts, and in the process may benefit one party at the expense of another." [FN73]

2. Ethics of Confidentiality

The proper scope of confidentiality within mediation is at issue among the codes and in the scholarly literature. There is substantial agreement regarding the need for confidentiality as between the parties to a mediation and all others outside the mediation. [FN74] However, there is sharp disagreement about whether confidentiality should exist as between disputants. The proper exceptions to confidentiality outside the

mediation will not be discussed here.

For example, the code of ethics for attorney-mediators proposed by commentator Sandra E. Purnell would require disclosure of all intra-mediation communication by and to all disputants. [FN75] The Purnell code, at I.D, states:

> Before beginning the mediation process, the mediator must:
> Obtain an agreement from both parties that all information disclosed during mediation will be kept confidential as to any non-participants but will be disclosed to each participant. [FN76]

By way of contrast, the code proposed by commentator Robert Bush would require a veil of secrecy over all private communications between a disputant and the mediator unless consented to by the confiding disputant. [FN77] The Bush' code, at Standard III.D. states:

> A mediator is absolutely obligated not to disclose, directly or indirectly, to any party to mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. [FN78]

The Society of Professionals in Dispute Resolution Ethical Standards of Professional Conduct (SPIDR Standards) require, at Standard B.6, that "a commitment by the neutral to hold information in confidence within the process also must be honored." [FN79] This treatment rather begs the question of whether there is any pre-existing (or default) duty to hold such communication in confidence. Apparently there is not.

3. Ethics of Assuring Fairness in Result and Equality in Bargaining

The codes promulgated by dispute organizations seem to reject any affirmative duty by the mediator to assure the substantive fairness of the result of a mediation in favor of a mere duty to raise question about the fairness. For instance, the A.B.A. Standards of Practice state at Standard III(c):

> The mediator must be impartial as between the mediation participants. The mediator's full task is to facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and feasibility of proposed options for settlement. [FN80]

Similarly, the SPIDR Standards state, in part, at Standard B(6):

> The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. [FN81]

This section would certainly permit significant integration of the mediators opinion of fairness into the mediation process. The charged term "educate" rather than a more neutral word, such as "communicate" or

"indicate" appears to give broader license to the mediator to exact a measure of agreement from the parties about her opinion concerning "possible" results or else the mediator can withdraw.

An example of a scrupulously non-interventionist code is the Joint Committee's Standards of Conduct for Mediators (the Joint Committee's Standards). [FN82] The Joint Committee's Standards were proposed in April, 1994 by representatives from the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. Standard VI states, in part:

> A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. [Comments] . . . A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct or if a party is unable to participate due to drug, alcohol or other physical or mental incapacity. [FN83]

Thus, under this code, a mediator need not withdraw due to substantive unfairness in the agreement, but only when the process is unfair or illegal. Evidently, so long as disputant A and B both have equal time to talk they need not have equal justice. What is left unaddressed is whether the mediator is permitted to communicate observed unfairness in the agreement or to withdraw as a result of same or whether she must grind through a fair process producing a legal, sober, thoroughly discussed yet unconscionable resultant agreement.

Among scholarly mediator ethicists, however, there is deep disagreement as to whether a mediator has a duty to protect a weaker disputant from being exploited and to assure substantive fairness. Under the Purnell code, bargaining equality and fairness of the agreement are made absolute rules of conduct, rendering failure to comply "grounds to discontinue mediation and [to] make any agreement reached unenforceable." [FN84] At Rule II. B and D, the Purnell code states:

> **B. Equality in Bargaining.** Neither party will be permitted to take advantage of the other; the mediator will intervene when necessary to prevent either party from dominating discussion, coercing, threatening, or intimidating the other party, or otherwise creating an imbalance in the interaction.
>
> **D. Fairness.** The parties will attempt to reach an agreement that they consider to be fair to themselves and that complies with legal standards of fairness to themselves and to third parties. In addition, if the parties reach any tentative agreements that the mediator considers seriously unfair, she will inform the parties of her opinion and the reasons for it. Should the parties commit themselves to an agreement that the mediator considers substantially unfair, she shall be free to withdraw from the mediation. [FN85]

Commentator Judith Maute, in her proposed code at (c)1-3 would only require the attorney-mediator to make an independent assessment of the fairness of an agreement where the parties are not separately represented, and then only severe inequity will suffice to prevent finalization. [FN86] The relevant section states:

> (c) When the parties are not separately represented, the mediator may prepare a written agreement resolving the dispute subject to the following conditions:
> (1) the terms approximate a likely adjudicated outcome, or the parties are adequately informed and voluntarily agree to different terms;

(2) the parties are informed of their right to seek independent legal advice, and urged to do so when the agreement addresses important legal rights;
(3) the lawyer may not knowingly finalize an agreement reasonably believed to be illegal, grossly inequitable, or based on false information. [FN87]

V. The Proper Role of Attorneys and Law in Mediation

The sampling of actual ethical dilemmas set out in Part III above serve to point out the problems inherent in establishing a set of per se rules governing the previous situations. The situations involving confidentiality demonstrate the inadvisability of a rule which would compel intra-mediation disclosure against the will of the mediation participants. Clearly, in example #1 the Borrower would resist a process which exposed his confidence, thus tending to de-legitimize the mediation process itself. On the other hand, where the mediator can help the disputants to settle within what (s)he knows to be a mutually acceptable range, then the essential purpose of mediation is served. [FN88] Thus, a per se rule prohibiting any such disclosure would likewise be undesirable where it serves to defeat the parties interests and expectations.

The attempted compromise embodied in the Joint Committee's Standards is a step in the right direction. The Joint Committee's Standards, at Standard V., suggest "a mediators shall maintain the reasonable expectations of the parties with regard to confidentiality." [FN89] This code correctly identifies the need for flexibility in confidentiality, but fails to provide sufficient guidance to the mediator or information to the disputant on what considerations to take into account and when. The code merely states that the expectations of the parties "depend on the circumstances and any agreements they make" and that "the mediator should discuss these expectations with the parties." [FN90]

The better rule is one which provides flexibility, but requires definite understanding, [FN91] as reached by the disputants, at the outset [FN92] as to what rules shall govern. The requirement of pre-mediation determination (as opposed to possibly having to argue later about the "circumstances") preserves party autonomy without jeopardizing certainty in the process. In addition, if the parties agree in advance, for instance, to keep all private in-caucus communications strictly confidential regardless of materiality, then no ethical issue is raised in situations such as example #1. The right measure by which to determine whether multiple representation is proper in a mediation is the "client's understanding of [and consent to] the mediation process." [FN93] Where a mediator with strict personal morality would find it personally impossible to conduct such a mediation, then she need not agree to mediate between parties requesting those procedural terms. The principle is that the decision initially and ultimately should belong to mediators, not to the bar association (as enforced through a code) or the individual mediator.

Similarly, disputants in situations involving evaluations, legal advice and representation are ill-served by rigid rules prohibiting lawyers from offering lawyering skills in the mediation context. [FN94] Future disputants stand to lose vital, timely, fair and cost-effective legal services should such a ban take effect. [FN95] It is in the interests of lawyers and the organized bar to meet the next wave of dispute resolution boldly, by allowing integration of the special talents of lawyering into mediation when the parties so desire. As with confidentiality, the decision as to what type and how much lawyering to be permitted in a given mediation ought to be left up to the parties to the greatest practicable extent. Indeed, many parties seek a lawyer to mediate their dispute precisely because they expect the benefit of supporting legal skills. [FN96]

Again, the Joint Committee's Standards hold out some promise of a good resolution only - to dash these hopes in the next sentence. Unfortunately, the tone of these standards is unduly hostile to the potentially beneficial role of professionalism where consented to by informed disputants in a mediation. In this respect, the standards admonish mediators "to refrain from providing professional advice." [FN97] However, the standards go on to recognize that the mediator may take on "an additional dispute resolution role" at the

request of the parties. [FN98] While the standards suggest the assumption of such an additional role may create "increased responsibilities and obligations that may be governed by the standards of other professions" they give no hint just what those ethics might be. [FN99]

The Joint Committee's Standards is the recognition that mediators can and do wear more than one dispute resolution hat is important. In this respect the drafters of the code probably contemplated Med-Arb, the process whereby disputants participate in mediation which, if unsuccessful, results in arbitration, possible with the mediator serving as arbitrator. [FN100] However, this provision of the code should also apply to the mediator who, at the request of the parties, may undertake the additional dispute resolution role of a lawyer.

Thus, upon integrating lawyerly skills, the attorney-mediator "assumes increased responsibilities and obligations that [are] governed by the standard of [the legal] profession." [FN101] Unfortunately, since the legal profession has yet to articulate and institutionalize a clear national standard for attorney-mediators, we end up just where we started - with no direct rules. Ironically, if the attorney-mediator were to look to Model Rule 2.2 for such guidance, he would be refered back to some other code, [FN102] which, would be the Joint Committee's Standards if they are adopted as new uniform ethics - and back and forth he would go, like the proverbial "hot potato."

Richard E. Crouch has proposed a very good method of permitting the introduction of legal advice by the attorney-mediator while assuring proper protections of the disputants rights and expectations. [FN103] Professor Crouch has proposed a code of ethics based on extensive pre-mediation discussion and contractual agreement among the disputants as to the mediation process. [FN104] The Crouch code, in pertinent part, states:

> 2. The undertaking of mediation itself should be set forth in a written contract which both parties sign before entering into mediation. All the warnings, waivers, and informed consents contemplated by this unique form of [dispute resolution] should be embodied in the contract, but that does not relieve the attorney who participates in mediation from his or her obligation to explain the understandings effectively. The attorney should be honestly satisfied that the parties fully understand and genuinely consent to the conditions of mediation as required below. After signing, nothing happens for three days.
>
> 3. The parties should be warned that their interests are presumed to be conflict on most points, and that they are waiving any objections to the conflict of interest a lawyer necessarily has when serving in any way the opposing parties in a conflict. It should be explained that this compromise of loyalties is being allowed only because they consent to it . . . [FN105]

Situations involving substantive unfairness and power imbalance may be inappropriate disputes for resolution in mediation. [FN106] Nevertheless, the bar should not require lawyers to paternalistically interfere with every act that appears unfair, particularly where the disputants have based a pre-mediation contract on substantive non-interference by the mediator. However, certain procedures and outcomes are so unfair as to require the organized bar to refuse participation to maintain integrity. I would suggest the organized bar require attorney-mediators to prohibit processes and agreements which would constitute defense to contract formation, with the exception of lack of consideration. Such prohibition would include: mistake, misrepresentation, fraud, illegality incapacity, lack of consent, duress and coercion.

Procedures and substantive agreements which are unfair or imbalancing, but to which the parties have agreed to in principle after informed consent should not be per se prohibited by a bar ethics rule. Of course, an outcome can not be consented to with specificity at the outset of a mediation, but the role of the mediators

comments or advice regarding the agreement can be determined in advance. However, as with my confidentiality suggestion, each attorney would remain free to set higher standards of fairness for mediation prior to assenting to become a mediator. Parties should be made aware, however, that such a higher standards (such as the need to offer unsolicited remarks about the fairness of an agreement) reflect the mediator's personal standards, and are not the policy of the bar and that a bar association list of attorney-mediator is available.

It is axiomatic that, lacking incapacity, people can and should be relied on to make their own decisions. Our form of government is based on the concept of self-governance. [FN107] The Tenth Amenedment to the U.S. Constitution explicitly recognizes that all power lies with the people, except those enumerated functions [delegated to the federal government or reserved to the states]. [FN108] Thus, it should follow that the choice of the people as to how to adjust their rights and responsibilities privately between themselves need not and must not be unduly interfered with. Since certain disputes are complex, people may want or need an attorney-mediator to assist them. People may even decide to delegate a certain amount of their automony to their chosen attorney-mediator so as to more efficiently adjust their affairs. None of this should be objectionable to a free people. Absent some severe inequity, no bar association should stand in the way of people who invite a member of that bar to assist them in this way. However, where the legal rights of people must be respected, it is prudent for the bar to require the attorney to fully consult with the disputants as to the implications of such representation and to require the clarity and effect of a contract with respect to their choice.

I suggest that the American Bar Association adopt two new Model Rules governing attorney-mediators. First, the final version of the Joint Committee's Standards should be adopted - assuming all three participating organizations can ultimately agree on a uniform document. [FN109] This will serve as a basis for uniform expectation for the bar, mediators and disputants. Further, attorneys will not be put by the bar at a market disadvantage due to the imposition of a higher set ethics than other practitioners in the mediation market. Second, the American Bar Association should adopt a rule recognizing that attorneys may practice what is now known as intermediation while mediating. As asserted above, whether the attorney conducts a mediation subject to the non-intercessory style Joint Committee's Standards or, on the other hand, one which permits use of legal skills on behalf of the disputants would depend on the terms of the pre-mediation contract negotiated by the parties. In this way, attorneys can provide a truly full service - including certain mediation services which would be prohibited by lay-mediators as unauthorized practice of law.

Finally, in addition to the prohabition against participating in procedures or outcomes which would prevent contract formation (fraud, mistake etc.) the bar should also create an aspirational duty to refuse or withdraw from mediations with lesser, but still serious, forms of power imbalace, intimidation, coercion and intractable conflicts between the parties. [FN110]

VI Conclusion

Disputants can benefit significantly in the course of mediation from an attorney-mediator who applies legal skills on their behalf. Relevant attorney-mediator skills include legal advice, evaluation, drafting and potentially representation of the agreement in court. Such mediation can cost less, move quickly and result in better agreements than other forms of dispute resolution - especially litigation. Where the use of professional legal skills creates a lawyer-client relationship, additional ethical standards should apply when an attorney-mediator assumes such a role.

The American Bar Association, as the nations premier legal organization, should take affirmative steps to promote attorney-mediation by encouraging accredited law schools to teach mediation. [FN111] and by promulgating appropriate amendments to the Model Rules. The amended Rules should recognize the existence dual styles of ethics governing attorney-mediators - a non-intercessory neutral code (to be based on the Joint Committee's Standards and adopted by the House of Delegates) and a professional attorney-

mediator code (to be based on the existing Rule 2.2). The amended Rule 2.2 should include specific provisions dealing with the situation of the attorney-mediator, should explicitly allow the attorney-mediator to represent all parties, should premise itself on party self-determination as assured through pre-mediation contractual agreement, should include minimum safeguards for procedural and substantive fairness and should encourage attorney-mediators to participate in a bar association lawyers list of pro-bono independent counsel for mediation disputants in need thereof.

Footnotes:

1 Kenneth R. Feinberg, Mediation--A Preferred Method of Dispute Resolution, 16 Pepp.L.Rev. S5, 12 (1989) (noting that mediation is"preferable not only to litigation, but often to other alternative means of dispute resolution as well").

2 Allison Smiley, Professional Codes and Neutral Lawyering: An Emerging Standard Governing Non-representational Attorney Mediation, 7 Geo.J.Legal Ethics 213, 215 (1993).

3 Karen A. Zerhusen, Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator, 81 Ky. L. J. 1165, 1165-1167, (1992/1993).

4 Carrie Mendel-Meadow, Professional Responsibility for Third-Party Neutrals, 504 PLI/LIT 323, 323-326, (1994).

5 Id at 323.

6 Richard A. Salem, The Dilemmas of Mediation Practice - Ethical Dilemma or Benign Neglect? 1994 J. Disp. Resol. 71, 71-72 (1994) (arguing that "guidance for mediators facing ethical dilemma is long past due.").

7 Joint Committee's Standards of Conduct for Mediators, drafted by representatives from the American Bar Association, American Arbitration Association and the Society of Professionals in Dispute Resolution. Appendix C.

8 Smiley, supra note 2 at fn3.

9 Joint Committee's Standards, supra note 7 at 1 (stating in the Introductory Note that the Standards represent a "step in the development" and a "beginning, not an end.").

10 Feinberg, supra note 1.

11 Id.

12 American Bar Association Model Code of Professional Responsibility, Cannon 7 (1981) (requring zealous representation).

13 Cletus C. Hess, To Disclose or Not to Disclose: the Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct, 95 Dickinson L. Rev. 601, 601-602, (1991) (pointing out the increased use of alternative dispute resolution by the public).

14 Feinberg, supra note 1.

15 Susan M. Gabriel, Judicial Participation in Settlement: Pattern, Practice and Ethics, 4 Ohio St. J. on Disp. Resol. 81, (1988).

16 Roger Fisher and William Ury, Getting to Yes 41-57 (1981).

17 A.B.A. Code, supra, note 8; also American Bar Association Model Rules of Professional Conduct, Rules 1.3 and 1.7 (requiring diligent representation).

18 Mendel-Meadow, supra note 4.

19 See appendices for wide recognition of third-party neutral ethical requirement of impartiality.

20 Stephen B. Goldberg, ET AL., Dispute Resolution Negotiation, Mediation and Other Processes, 199-201 (1992).

21 John S. Dzienkowiski, Lawyers as Intermediaries: Representation of Multiple Clients in the Modern Legal Profession, 1992 U. Ill. L. Rev.
741, 776, (1992).

22 Ellen Waldman, The Role of Legal Norms in Divorce Mdiation: An Argument for Inclusion, 1 Va. J. Soc. Pol'y & L. 87, 107 (1993).

23 Id at 147

24 See Andrew S. Morrison, Is Divorce Mediation the Practice of Law? A Matter of Perspective, 75 Calif,. L. Rev. 1093, 1124 (1987) (it is also unlikely that a consumer can distinguish between legal information that a lawyer provides in his capacity as a lawyer and that which he provides only in his capacity as a divorce mediator").

25 See, for example American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes. Appendix J.

26 In fact, many codes of ethics specifically for mediators exist or have been proposed. See, for example Appendices A, C,D, and F-I.

27 Id.

28 Smiley, supra note 2 at 228 (arguing that it is unfair to force attorney to "extrapolate" ethical rules from the "hodgepodge" of different guidelines now existing).

29 According to Cambridge attorney and mediator John A. Fisk, private communications in a mediation revealing abuse are beyond the lawyer-client relationship. Fisk was quoted as saying: "a lawyer is a mandated secret-keeper, and a mediator is not a mandated reporter of abuse in Massachusetts at this time. But we [Fisk and his partner] advocate that a mediator should disclose because we think we should elevate the mediation profession . . . [clients] have not hired me as a lawyer, they have hired me as a mediator." Barbara Rabinovitz, Reconcilable Differences: Two Lawyers Tout Healing Powers of Divorce Mediation, Massachusetts Lawyers Weekly, pg. 41, Feb. 14, 1994. (

30 Hess, supra note 13.

31 Id. See A.B.A. Model Rules and A.B.A. Model Code.

32 Dzienkowiski, supra note 21.

33 Mediation "experts" Emily Brown and Peter Maida of the Washington D.C. area assert that "a mediator practices neither law not therapy when working with clients as a mediator. To do so is unethical." Emily Brown and Peter Maida, Battling Over Divorce Battles, The Washington Post, Editorial, pg. 20, July 14, 1993.

34 See infra Part III (c)(1) Ethics of Legal Advice and Information

35 S.P.I.D.R. Ethical Standards for Professional Conduct. Appendix J.

36 Morrison supra note 24.

37 Id.

38 Sandra E. Purnell, The Attorney Mediator -- An Inherent Conflict of Interests? 32 U.C.L.A. L. Rev. 986, 1015 (1985).

39 See. for example, Joint Committee's Standards, supra note 7. Appendix C.

40 Morrison supra note 24.

41 N.J. Advisory Committee on Professional Ethics, Op. 676 held jointly with N.J. Committee on Attorney Advertising, Op 18, 1994. Appendix F.

42 Id.

43 Morrison supra note 24.

44 Robert Bush, A Study of Ethical Dilemmas and Policy Implications, 1994 J. Dispute Res. 1. (1994).

45 Judith L. Maute, Public Values and Private Justice: A Case for Mediator Accountability, 4 Geo. J. Legal Ethics 503, 507, (1991).

46 A.B.A. Code supra note 12.

47 Id.

48 Feinberg supra note 1.

49 A.B.A. Code supra note 12.

50 Id.

51 Id.

52 Maute, supra note 44

53 Id.

54 Id.

55 Dzienkowiski, supra note 21.

56 A.B.A. Model Rules, Rule 2.2 (1983).

57 Id, Comment to Rule 2.2.

58 Id. See Appendix K.

59 Dzienkowiski, supra note 21.

60 Id.

61 Id.

62 Smiley, supra note 2 at

63 See Appendices.

64 Id.

65 Appendix L.

66 Smiley, supra note 2.

67 See, for example, Appendix I.

68 Appendix A.

69 Id.

70 Appendic B.

71 Id.

72 Morrison, supra note 24

73 Id.

74 See Appendix I.

75 Appendix H.

76 Id.

77 Appendix I

78 Id.

79 Appendix J.

80 Appendix A

81 Appendix J.

82 Appendic C.

83 Id.

84 Appendix H.

85 Id.

86 Appendix G.

87 Id.

88 Paul F. Devine, Are Ethical Standards Enough to Protect the Client? 12 St. Louis U. Pub. L. Rev. 187 (1993) (indicating that current ethical standards fail to guide mediator conduct in his job to foster agreement).

89 Appendix C.

90 Joint Committee's Standards at Standard V, comment. Appendix C.

91 Waldman, supra note 22 at 148 (the rule by which "attorney conducted mediation should be judged is the client's understanding of the mediation process, and the attorney-mediator role, not the likelihood of litigation" as is the test under Model Rule 2.2).

92 Richard E. Crouch, Divorce Mediation and Legal Ethics, 16 Fam. Fam. L. Q. 219 (1982) (arguing for all decisions to be made by disputants in advance).

93 Waldman, supra note 91.

94 Morrison supra note 24 at 1148 (". . .the parties hire a lawyer mediator because they want someone qualified to comment on a number of legal issues . . .they pay for and expect the benefit of the lawyer' legal knowledge").

95 Waldman, supra note 22.

96 See note 94, supra.

97 Appendix C at Standard VI, comment.

98 Id.

99 Id.

100 Goldberg, supra note 20 at 226-228.

101 Applying Standard IV of the Joint Committee's Standards to the attorney-mediator who incorporates the legal profession into mediation.

102 See note 58 and accomanying text.

103 Crouch, supra note 92.

104 Id.

105 Id.

106 Kevin M. Mazza, Divorce Mediation: Perhaps Not the Remedy it Was Once Considered, 14 A.B.A. Sec. Fam. Advoc. 40 (1992) (arguing that certain cases are better left to litigator because "clearly a client who is educationally or economically less well-informed than the opposing party is ill-equipped to understand and digest the same type of information during mediation").

107 See, generally, U.S. Const.

108 U.S. Const. amend X (providing that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

109 Appendix C, SPIDR cover sheet ([SPIDR] is fully confident that a joint code can be developed that represents the interestsof all participating organizations on a timely basis").

110 See note 96.

111 Baryl Blaustone, Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses., 21 Sw. U. L. Rev 1317, (1992) (convincingly extolling the virtues of teaching mediation to law students in required courses rather than electives).