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THE PRACTICE OF MEDIATION

A Video-Integrated Text

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CHAPTER 12

THE ETHICS OF MEDIATING

§12.1 INTRODUCTION: IS MEDIATION A REGULATED PROFESSION?

Up to now, we have concerned ourselves primarily with questions of mediation skill and technique. But technique alone provides us with no anchor to ground decisions about how to act when confronted with difficult ethical challenges at the bargaining table. This chapter is spent analyzing such in-role or micro ethics questions, many of which have no clear or agreed-upon answers.

Unlike the traditional professions, such as law, medicine and accountancy, mediation is a comparatively new field of professional endeavor. No state in the country licenses mediators. In no state are mediators subject to a binding ethical code with a formal disciplinary body to enforce rules and impose sanctions for rules violations. In theory, the potential of malpractice liability exists as a mechanism to police instances of mediator misconduct, but in practice it is very rare.[1]

By the same token, the regulation of mediation is increasing. A 2006 survey of state mediation ethics codes reports that twenty-seven states now have court-connected mediation programs that include statutory or judicially adopted standards of ethical conduct for court-appointed neutrals.[2] (The vast majority of these ethics codes have been adopted within the past five or ten years, with significant variations in language from state to state.) Most states with court- and agency-connected mediation programs also have statutes or court rules that regulate the qualifications of mediators eligible to receive appointments. (There are hundreds of such rules and statutes, with approaches to credentialing also varying widely.[3])

1. Michael Moffitt, *Suing Mediators,* 83 B.U. L. Rev. 147, 153–154 (2003).
2. Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators,* 2006 J. of Dispute Resol. 387, 395, 423–429 (2006). A handful of states now have formal disciplinary boards to enforce state ethical codes for court mediators. *See, e.g.,* Rules 10.700-1-.880, Florida Standards of Professional Conduct for Certified and Court Appointed Mediators, Rules of Discipline (2006).
3. Sarah R. Cole, Craig A. McEwen & Nancy H. Rogers, *Mediation: Law, Policy & Practice* 11-4–11-8 (2001).

In addition, some voluntary mediator organizations and private alternative dispute resolution (ADR) providers have adopted their own standards of conduct[4] for mediators who are members of their associations or approved members of their panels. Groups specializing in particular forms of mediation, such as child custody mediation and the mediation of claims arising under the Americans with Disabilities Act sometimes have their own specialized set of standards.[5] Thus, anyone wanting to "hang out a shingle" as a mediator needs to consult the governing standards in his or her state and practice area.

This regulatory picture is further complicated by questions about the extent to which practicing mediators are bound by ethics rules imposed by their own professions of origin. Until 2005, for example, it was unclear whether and how the American Bar Association Model Rules of Professional Conduct applied to lawyer mediators. No provision of the Model Rules expressly referred to mediation. One commentator noted that the Rules as a whole were a poor guide for lawyer mediators, because they were drafted with client representation, not mediation or other ADR activities, in mind.[6]

In 2005, the ABA amended the Model Rules to add two new rules pertaining expressly to mediators. Rule 2.4, "Lawyer Serving as Third-Party Neutral," recognizes the role of the mediator and counsels lawyer mediators when speaking to parties to distinguish their role clearly from that of representative counsel. Rule 1.12, "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral," provides guidance to mediators for resolving certain kinds of potential conflicts of interest.[7] Other questions about how the Model Rules apply to lawyers engaged in mediation remain unresolved.

The closest thing to a "universal" or "general" set of standards for mediators mediating civil disputes are the Model Standards of Conduct for Mediators (Model Standards), first promulgated in 1994 and revised in August 2005. A joint effort of the American Bar Association's Section of Dispute Resolution, the American Arbitration Association and the Association for Conflict Resolution (a leading organization in the field), the Model Standards are "designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."[8]

We reproduce here some of the major provisions of these Standards.[9] Read them now to get an overall sense of mediation regulation before you tackle the Problems discussed later in this Chapter.

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4. Susan Exon's 2006 survey lists thirteen states as having professional organizations that have adopted standards for general civil mediation. Exon, *supra* note 2, at 395. According to her survey, as of December 2006, only fourteen states had no mediation standards of conduct imposed by the courts for court-connected mediation or by private mediation organizations for their members.
5. *See* AFM-AFCC *Standards of Practice for Divorce and Family Mediators* (1984); ADA *Mediation Guidelines* (Feb. 16, 2000). Both can be found at www.mediate.com.
6. Margaret L. Shaw, *Ethical Obligations and Responsibilities of the Mediator and Mediation Provider Organizations; Mediator Immunity*. (Unpublished materials on file with authors.)
7. Amendments to Rules 1.12 and 2.4 of the Model Rules are contained in Appendix B, at ●●●. These provisions are also discussed in §12.2, *infra*.
8. Preamble, The Model Standards of Conduct for Mediators (2005).
9. The Standards in their entirety are set out in Appendix B, at ●●●.

The Model Standards of Conduct for Mediators (August 2005)

. . . **Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. . . .

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. . . .

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

Standard I. Self-Determination

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes. . . .

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Standard II. Impartiality

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality. . . .

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

Standard III. Conflicts of Interest

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. . . .

C. A mediator shall disclose, as soon as possible, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation. . . .

D. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

E. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

Standard IV. Competence

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understanding and other qualities are often necessary for mediator competence. . . .
3. A mediator should have available for the parties information relevant to the mediator's training, education, experience and approach to conducting a mediation. . . .

Standard V. Confidentiality

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution. . . .

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation. . . .

Standard VI. Quality of the Process

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants. . . .

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards. . . .

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation. . . .

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps, including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

NOTES AND QUESTIONS

1. Writing in 1994, mediation scholar Robert Baruch Bush observed that, despite the proliferation of mediator ethics codes around the country, all codes

suffer from two major problems. First, they are typically framed at a level of generality that fails to provide concrete guidance to mediators. Second, they sometimes are internally inconsistent; where values are in conflict, mediators are often told to choose both values.[10]

2. Have the drafters of the 2005 Model Standards succeeded in resolving these problems? *Compare* Michael L. Moffitt, *The Wrong Model, Again: Why the Devil Is Not in the Details of the New Model Standards of Conduct for Mediators*, Disp. Resol. Mag. 31 (Spring 2006) (arguing that the Model Standards fail to resolve tensions among competing, and co-equal, mediation standards) *with* Joseph B. Stulberg, *The Model Standards: A Reply to Professor Moffitt*, Disp. Resol. Mag. 34 (Spring 2006) (argument by Reporter to the Joint Committee that developed the Standards that they adopt a hierarchy of norms in which certain obligations trump others). Here is a short extract from Professor Moffitt's article:

> [F]or a document that purports to provide ethical guidelines for practitioners, the Model Standards ignore the very prospect of any ethical tensions in the practice of mediation. Instead, they merely set out a series of absolute, hortative prescriptions, such as the following: "Mediators shall conduct a mediation based on the principle of party self-determination." "A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality." "A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants. . ."
>
> But. . .[c]omplex cases and the reality of human interaction produce instances in which two or more competing values are pitted against one another. . .The first failing of the Model Standards is that their structure suggests that such tensions do not arise. . . .Instead, the standards tell us, in absolute terms, that we who mediate are simply to uphold every one of these standards at an absolute level.
>
> In lawyers' ethics, we see a model of hierarchical values. Lawyers have a duty to protect a client's interests and confidences. They owe a duty of candor to the court. They have a duty to provide pro bono legal services to those who cannot afford to pay. In an idealized setting, an attorney can accomplish each of these to an absolute level. But when push comes to shove, in the moment of greatest ethical tension, attorneys' ethical codes provide guidance about which of these ideals trumps. An attorney's duty to provide competent service to existing clients trumps the duty to provide pro bono services. And an attorney's duty of candor to the court trumps even the duty of client loyalty.
>
> Perhaps the Model Standards could maintain their current structure if the sponsoring organizations were willing to articulate an overarching ethical norm — a single value that would trump others. But that's not what the Model Standards include — probably because there is nothing close to a consensus among mediation practitioners about which values should be seen as highest. Is impartiality more important than party self-determination? More important than informed consent? More important than "procedural fairness"? Lawyers may be able to say that they are foremost officers of the court. Doctors may be able to say that they first ought to do no harm. Mediators, at the moment at least, have yet to articulate such an overarching ethic.

10. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Disp. Resol. 1, 43–44 (1994).

3. How do you read the Model Standards? Do you think they are written at an appropriate level of specificity? Do they envision a clearly facilitative, evaluative or transformative approach to the mediator's role? You will be in a better position to assess these questions after working through the Problems (most of which are based on actual cases) in this chapter.

However one reads the Standards, they state explicitly that until "adopted by a court or other regulatory agency, they do not have the force of law." This means that mediators have some discretion to bring their own personal values to the task of mediating. In our view, this factor, plus the inability of any ethics code to "answer" many tough dilemmas, make mediation ethics a rich topic to explore. Consider the following cases and issues:

§12.2 SHOULD I MEDIATE THIS CASE? ISSUES OF COMPETENCE, CONFLICTS OF INTEREST AND DISCLOSURE

Problem One

You are a mediation clinic student nervously arriving at court for your first week of court-annexed, small-claims mediation. You have completed thirty hours of pre-mediation training, including conducting one videotaped mediation simulation. Prior to enrolling in the clinic, you also took a negotiation course in which you completed seven out-of-class negotiation simulations.

The caseload is light this week, and there is only one case available for you to mediate. The parties have been sent to mediation by the presiding magistrate, who informs them that they should try mediation, but if the case cannot be settled, it will be tried later that morning. How will you introduce yourself to the parties? Will you voluntarily disclose that you are a student? Why or why not? What precisely will you say if one the parties asks, "So how many cases have you actually mediated?

The Model Standards urge but do not require mediators to make available to the parties information about their mediation experience. Should court-based mediators, working with parties who have no choice as to selection of the neutral, have a heightened duty to inform parties of their experience and background?

Conflicts of Interest and Disclosure. Standard III of the Model Standards makes clear that mediators have an affirmative obligation to disclose promptly any potential or actual conflicts of interest, to seek the consent of the parties to continue mediating in the face of a possible conflict and to withdraw notwithstanding party consent if the mediator's conflict of interest "might reasonably be viewed as undermining the integrity of the mediation." It also counsels mediators not to establish post-mediation relationships with the parties that might raise questions about the integrity of the proceedings.[11]

11. In 2005, the ABA revised the Model Rules of Professional Conduct to address two types of potential conflict of interest problems facing lawyer mediators: subsequent legal representation of mediation participants by lawyer mediators with mixed mediation and client representation practices; and negotiating for future employment with a party or a party's lawyer while serving as a mediator. ABA Model

For an example of a conflict of interest disclosure in *Wilson v. DiLorenzo*, click on Track 12-A. Was this disclosure necessary, in your opinion? Was it desirable? Was it adequately detailed, given the circumstances?
Now consider this recent case:

Problem Two

You are assigned to mediate a campus dispute arising from a brawl between two undergraduate students at a campus bowling alley. Under the campus disciplinary code, if the students are unable to resolve their differences through mediation, the case will be referred for further disciplinary proceedings by the university.

One of the participants in the brawl is a good friend and fraternity mate of your brother, who is four years younger than you. You are somewhat close to your brother. You have met your brother's friend casually once or twice, most recently about six months ago. (He struck you as immature.) No other mediators are presently available to mediate this dispute; if other mediators have to be found, it will mean a delay of two or three weeks.

Would you mediate this case, if all parties agreed, after disclosure? Why or why not? If you decided you were comfortable mediating, what ***specifically*** would you say to the parties to secure their informed consent to your serving as the mediator? Would your answer change if, instead of mediating solo, you were co-mediating the case and your partner had no prior relationship with any of the parties?

Are there conflicts of interest that the parties should not be able to consent to or waive? Can you think of examples? What factors are important in determining this?

§12.3 DO I HAVE ANY RESPONSIBILITY FOR THE "FAIRNESS" OF THE PARTIES' AGREEMENT?

Impartiality vs. Fairness: The Problem of Unequal Bargaining Power. Imagine that you are mediating a small-claims case in which a retired government lawyer sues his neighbor, a community college dropout, for $500 to replace a nine-year old bicycle the plaintiff claims the defendant irreparably damaged when she ran over it while backing up her car. The defendant is prepared to pay the entire $500, wrongly assuming that she is responsible for the full replacement cost of the bike rather than its depreciated value (which is virtually nothing). If you were the mediator, what would you do?

Rule 1.12 states: "... a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a...mediator or other third party neutral, unless all parties to the proceeding give informed consent, confirmed in writing." It further provides: "A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter that the lawyer is appearing personally and substantially as a...mediator or third party neutral." Sections of the ABA Model Rules of Professional Conduct expressly referring to mediators are set out in Appendix B, at ●●●.

The ideal of a wholly impartial mediator who does nothing more than facilitate the parties' discussions and help them make self-determined decisions rests on an assumption that the parties have roughly equal bargaining power.[12] But much mediation, including much mandatory mediation, occurs between parties with unequal power. ADR critic Jerold Auerbach has attacked mediation on the ground that "compromise is an equitable solution only between equals; between unequals, it inevitably reproduces inequality."[13]

As we said in Chapter 1, no would voluntarily choose (or presumably want to preside over) a dispute resolution process that produces significantly unfair outcomes. What are the differing sources of power in negotiation? What, if anything, can and should a mediator do to balance power? What does it mean for an agreement to be "fair"? What, if anything, should a mediator do if a negotiation between parties with unequal power threatens to produce an unfair agreement? Can a mediator be concerned with fairness while also remaining impartial and neutral? No more important or contested ethical questions confront the practicing mediator. And as suggested in Chapter 3, we suspect that the way individual mediators approach these difficult issues may be correlated with whether they will adopt a facilitative or evaluative view of their role.[14]

The Meaning and Sources of "Power" in Negotiation. When people think about power, they often think about its objective trappings: wealth, position, influential friends, and so forth. There is no doubt that such endowments can bestow considerable negotiating power. As Roger Fisher has observed, "by and large, negotiators who have more wealth, more friends and connections, good jobs, and more time will fare better in negotiations than those who are penniless, friendless, unemployed, and in a hurry."[15]

But objective power or status in the world does not necessarily translate into leverage at the bargaining table. Negotiating power can result from the legitimacy of one's arguments, a good alternative to negotiation or creative ideas for resolution.[16] It can derive from a sense of righteous indignation, a determination not to give in or the ability to appeal to moral principle. It can result from personal

12. Empirical studies suggest that negotiations between persons with relatively symmetrical power produce higher settlement rates, more effective bargaining patterns and higher satisfaction than negotiations involving persons with asymmetrical power. Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv. Negot. L. Rev. 1, 16–19 (2000) (collecting studies).

13. Jerold Auerbach, *Justice Without Law* 136 (1983). Of course, unequal power also produces injustices in litigated cases. *See generally* Herbert M. Kritzer & Susan Silbey, *In Litigation: Do the "Haves" Still Come Out Ahead?* (2003) (studies tending to show, across a wide spectrum of litigation, that "repeat players," which tend to be relatively wealthy institutions with long-term lawyers, fare better in litigation than "one-shotters," who tend to be individuals with fewer resources and no lawyers or "one-shot" lawyers). But some ADR critics worry that the impact of resource and power disparities may be greater in informal dispute resolution procedures, because they lack the openness and formality associated with courts. *See, e.g.*, Richard Abel: *Informalism: A Tactical Equivalent to Law,* 19 Clearinghouse Rev. 375 (1985).

14. *See* §3.8, *supra.*

15. Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 Am. Behav. Scient. 149, 151 (1983).

16. *Id.*

abilities such as self-confidence, quick-wittedness or good communication skills. It can result from having the status quo, or a body of legal rules, on one's side. In addition, real power does not provide any bargaining leverage unless its holder is aware of his power. Conversely, the *perception* of power can often provide a negotiator bargaining leverage even if it not real.[17] Thus, assessing who has actual power at the bargaining table is a complex task.[18]

Even more important, power relationships are fluid and dynamic, not static, in most negotiations. Because power derives from many sources, it often shifts (sometimes from moment to moment), depending on the stage of the negotiations and the topic under discussion. A recently jilted wife may be at a significant power disadvantage during the early stages of a multisession divorce mediation if she is in a state of shock and denial about her husband's decision to divorce her and is discussing complex financial questions about which her husband knows more than she does.

Later on, if her denial turns to rage and the subject shifts to the kids' schooling or religious training, the balance of power may be all on her side. Or the husband's apparent advantage in bargaining skill may be more than offset by the shame he feels for walking out on his family. As two prominent scholars have written (closely analyzing power relationships in lawyer-client interviews): "power is not a 'thing' to be possessed; it is continuously enacted and re-enacted, constituted and reconstituted. The enactments and constitution are subtle and shifting; they can be observed only through close attention to the micro-dynamics of individual. . .encounters."[19]

Nevertheless, there will be occasions at the bargaining table when power disparities will be significant and obvious. What should the mediator do when these occasions arise? One commentator asks: "Is the mediator a 'disinterested referee' or an 'empowerment' specialist?"[20] If there is a conflict between the mediator's duty to act impartially and the mediator's duty to promote "party participation" and "procedural fairness," which duty takes precedence?

"Procedural" Power Balancing. As we have noted, almost everything a mediator does — from deciding who gets to speak first, to controlling the length of time each person speaks, to steering the conversation in certain directions and not others — can affect the substance, and potentially the outcome, of the discussions.

Consider this recent case two of our students mediated, and state whether you would be "very comfortable," "somewhat comfortable," "somewhat uncomfortable" or "very uncomfortable" with the following possible "procedural" interventions to balance power.[21]

17. Richard Shell, *Bargaining for Advantage* 107–108 (1999).
18. On sources of power in negotiation, *see, e.g.*, Fisher, *supra* note 15; Adler & Silverstein, *supra* note 12; Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 16 Mediation Q. 75 (1987); Mark D. Bennett & Scott Hughes, *The Art of Mediation* 117–118 (2d ed. 2005).
19. Austin Sarat & William Felstiner, *Symposium: Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1447, 1453 (1992).
20. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law,* 74 Wash. U. L.Q. 47, 93 (1994).
21. For useful suggestions on various procedural methods to balance power, *see* Bennett & Hughes, *supra* note 18, at 118–120.

Problem Three

The would-be tenant was a first-generation immigrant from Brazil who spoke broken and somewhat limited English, was small in stature and totally unfamiliar with United States courts. He brought a small-claims action against a large local realty company for failure to return $2,250 he had put down on an apartment he had rented. He appeared at the mediation by himself. The defendant was represented by the property manager, who was large and burly, by an assistant property manager and by the company lawyer, who was loud and aggressive.

The parties agreed that the monthly rent for the unit was $750 and that the plaintiff's payment of $2,250 covered the first and last month of the year-long lease, plus an additional $750 security deposit. They disagreed about what had transpired between them: The plaintiff claimed that the defendant had pulled a "bait and switch" on his scheduled move-in day, offering him a much less attractive apartment than the one he agreed to rent. The defendant admitted that the company had switched apartments but blamed this on the plaintiff's announcing his intention not to move in three days before the lease term was set to begin, and then showing up on his original move-in date, having changed his mind again. They also claimed that the new apartment they later offered was "identical." Finally, they defended on the ground that the plaintiff had signed an agreement that stated in bold letters: **"Failure to rent will result in forfeiture of the entire deposit"** and that by refusing the substitute apartment, he was entitled to nothing. (The plaintiff claimed that he did not understand this, and in any event that it was unfair.)

Mediator questioning revealed that the defendants had been able re-rent the original apartment within 48 hours of the plaintiff's changing his mind, and that, while they claimed spending an extra $200 in advertising fees, they had no receipts in support of that claim. Defense counsel offered plaintiff $500 to settle the case, and then put enormous pressure on him, including threatening him in the hallway during a mediator caucus, calling him "dishonest," and stating that if he insisted on going to court, "we will see that you get nothing."

If I were the mediator in this case, I would feel comfortable taking the following ***procedural*** steps at this point to balance power:

a. at the first natural break, change my own seat to sit next to the plaintiff, if I wasn't already doing so. (VC) (SC) (SU) (VU)
b. to reduce "ganging up," insist that the assistant property manager wait outside. (VC) (SC) (SU) (VU)
c. rule all threatening statements by the defendants out of bounds. (VC) (SC) (SU) (VU)
d. call timeouts more often to give the plaintiff extra time to think through his situation and decide what he wants to do. (VC) (SC) (SU) (VU)
e. mediate only in caucus to protect the plaintiff from the higher power defendants. (VC) (SC) (SU) (VU)

Informational Power Balancing. If you are at least somewhat comfortable with all these steps, what about taking steps to ensure that a weaker party has the *information* he needs to make an informed decision and achieve a reasonably fair outcome? The problem is especially acute when one party is represented by counsel

and the other is not. Commentators disagree sharply about the propriety of such interventions.

Arguing in favor of at least some forms of "informational" power balancing, Jacqueline Nolan-Haley writes:

> Parties choose the legal system to resolve disputes primarily because they want what courts have to offer, namely, a resolution of their disputes based on principles of law. When parties are required to resolve disputes differently, through the mediation process, their bargaining should be informed by knowledge of law. . . .[H]ow legal rights are acknowledged or ignored determines in large measure whether parties achieve "equivalency" justice in court mediation. . . .The few rules and statutes that specifically refer to unrepresented parties require that mediators encourage them to consult with independent legal counsel. However. . .the "independent counsel" rule is an illusory concept for the majority of Americans who cannot afford lawyers. Thus, there is no real system in place to protect unrepresented parties in court mediation. Will those whose cases are shunted from the courtroom to the mediation room receive a fair shake? I believe they will if their bargaining is informed by law. If not, court mediation is an impoverished alternative to judicial adjudication that demeans both the courts and the mediation process.[22]

Arguing strongly against any efforts by the mediator to protect the rights of the parties, Robert A. Baruch Bush observes:

> [I]f we adopt the protection-of-rights conception, mediators cannot effectively serve this role without undermining their usefulness altogether. . . .[M]ediators who try to protect substantive rights and guarantee that agreements are fair must adopt substantive positions that inevitably compromise their impartiality, either in actuality or in the parties' eyes. . . .The mediator has to create an effective environment for bargaining, develop information, and persuade parties to explore different options, search for areas of agreement and exchange, and finally accept something different from their initial demands; and the ability to do all this depends on maintaining the trust and confidence of both parties in the mediator's complete impartiality. Thus, making protection of rights the mediator's primary and direct role prevents the mediator from serving many other crucial functions. . . .[23]

Do you find one perspective more persuasive than the other? Why? Consider the following variation on the previous case:

Problem Four

You take a mediator's caucus and decide to consult the court clerk about the enforceability of the "deposit forfeiture" clause that the plaintiff admits he signed.

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22. Nolan-Haley, *supra* note 20 at 51, 100.

23. Robert A. Baruch Bush, *Ethical Standards in Mediation*, 41 Fla. L. Rev. 253, 259 (1989). Should preserving impartiality and its appearance "trump" the goal of informed party decision making? Specifically interpreting the Model Standards, Reporter Joseph Stulberg argues that under their structure,

> If a party or counsel ask me for my assessment of the law governing a contested matter, I can respect that exercise of party self-determination (Standard I(A)) and, if qualified, provide that information (Standard VI(A)(5)), but I can do so only if I can remain impartial (Standard II(B)), so Standard II takes priority.

Stulberg, *The Model Standards: A Reply to Professor Moffitt*, Dispute Resol. Mag. 34 (Spring 2006).

The clerk (a lawyer with ten years of experience as chief housing court clerk) informs you that most judges view such clauses as void as against public policy and not enforceable. He says that state law is clear that all unused deposits are the property of and to be held in trust for tenants, and that landlord deductions from security deposit accounts — as well as all other charges and "penalties" — may only be made for "provable, actual damages" suffered by the landlord. Of course, the tenant in this case does not know this.

If I were the mediator in this case, I would feel comfortable taking the following ***informational*** steps to balance power ("VC" means very comfortable, "SC" means somewhat comfortable, "SU" means somewhat uncomfortable, and "VU" means very uncomfortable):

a. tell the defendant's representatives in caucus about the likely nonenforceability of the forfeiture clause and encourage them to make an offer more reflective of the likely trial outcome. (VC) (SC) (SU) (VU)
b. ask the plaintiff in caucus whether he has consulted a lawyer or would like to do so. (VC) (SC) (SU) (VU)
c. suggest to the plaintiff in caucus that he might want to talk to the clerk about the forfeiture clause during the next defendant caucus without telling him why. (VC) (SC) (SU) (VU)
d. tell the plaintiff in caucus that you have consulted with the clerk, and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)
e. tell both parties in joint session that you have consulted with the clerk, and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)

Balancing Bargaining Ability. A third variation on the problem of power imbalance arises when the mediator becomes aware of significant disparities in the parties' native bargaining ability or knowledge about negotiation. This can be especially pronounced when people are required to enter a court mediation process that they do not fully understand. What kind of negotiation coaching, if any, is appropriate to assist a weaker party?

Problem Five

In the previous case, you decide that you are not comfortable telling the tenant about the nonenforceability of the forfeiture clause. But you are concerned enough about the power imbalance that you are considering terminating the mediation and sending the parties to court. In your first caucus with the tenant, you plan to explore whether he wishes to continue mediating. Before you can do that, however, he blurts out that he will accept the $500 being offered by the defendants as full and final settlement of his $2,250 claim.

If I were the mediator in this case, I would feel comfortable saying:

a. "You know that you have the right to make a counteroffer and needn't accept the realty company's offer, don't you?" (VC) (SC) (SU) (VU)
b. (Assuming the tenant is open to making a counteroffer:) "You know, whatever counteroffer you make, it's likely that they're going to come back with an offer

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that's higher than their previous offer but lower than what you're asking for. So it probably makes sense to ask for more than what you are actually willing to accept, so that you have some negotiation room. Shall we talk about that?" (VC) (SC) (SU) (VU)

c. "Also, whatever demand you make will also be stronger if it's accompanied by a convincing rationale. What are some reasons or justifications you could come up with to support your counteroffer?" (VC) (SC) (SU) (VU)

d. "Can't come up with any? Well, you could offer to accept $750 on the assumption that, win or lose, it will likely cost the defendant that much in additional attorney's fees if they take the case to trial. Or you could ask for $1,500 and let the realty company keep only your first month's rent. Or you could take the position that you will only pay for actual damages that the company can prove it suffered when you decided not to rent the apartment." (VC) (SC) (SU) (VU)

"Process" Fairness vs. "Outcome" Fairness. Compare your answers to Problems Three, Four and Five. Were they similar or different? Mediators sometimes distinguish between power balancing to ensure the fairness or integrity of the *process*, as opposed to the fairness of the *outcome*. Is the distinction a valid one? Is balancing information more offensive to ideals of impartiality and neutrality than balancing the process or the parties' negotiation abilities? Why or why not?

Fairness and the Presence of Lawyers. In some of the preceding scenarios, you may have felt that a serious power disparity was created — and perhaps needed to be corrected — because one of the parties was represented by the attorney and the other party was not. Although it is much less common, such disparities can exist even when both sides have lawyers.

Assuming that you felt some obligation to protect an unrepresented party from an unfair settlement, would you feel the same compulsion in a situation where one party's lawyer was outmatched by the opponent's? If the lawyer were unprepared? Simply incompetent? Suppose in Problem Five, for example, the tenant had an attorney who didn't know about the nonenforceability of the security deposit forfeiture clause. As the mediator would you act any differently than if the tenant were unrepresented? Why or why not? If you would act differently, what ***precisely*** would you do in each scenario?

What Is a "Fair" Agreement Anyway? In each of the above problems, any urge to act as more than an impartial referee arises in large measure out of concern that significant bargaining disparities may produce an unfair agreement. Is a mediation outcome significantly at variance with the likely court outcome necessarily "unfair?" Because of their legal training, many lawyer mediators assume so.

It is important to point out, however, that parties in mediation often reject legal norms as controlling their negotiation, because these values conflict with their notions of "street justice" (*"The law may say that I'm entitled to double my security deposit because of the landlord's technical violations of the statute, but, honestly, all I really want back is the amount I gave him."*) or because other personal considerations (privacy, certainty, putting the dispute to rest quickly, etc.) take precedence over legal ones. The question for the mediator in legal

disputes is how much assistance is appropriate in helping the parties make *informed* decisions about whether to vindicate their legal rights or to waive them? Empirical studies consistently demonstrate high levels of party satisfaction with mediation outcomes. But can self-determined satisfactory-to-the-parties decisions be considered fair if they are not informed? Can they even be considered "self-determined?"

Neutrality vs. Fairness: The Problem of Affected Third Parties. Yet another fairness problem arises when equally matched negotiators want to craft an agreement that, while not unlawful, may be harmful to the rights of third parties. The culture among many family mediators, for example, is that "outcome neutrality" takes a back seat to the "best interests of the child" when parents want to make an arrangement that ill-serves their children. Family mediation codes are sometimes to similar effect.[24] Thus, because some child development experts view it as developmentally harmful for infants and young toddlers to be shuttled back and forth each night between parents,[25] family mediators might urge parents not to agree to such terms, or even terminate the mediation rather than help to effectuate them.

In what other situations, if any, is it appropriate for a mediator to depart from the norm of outcome neutrality by taking into account the interests of persons or groups not at the table? Writing in the early 1980s about environmental mediation, MIT professor Lawrence Susskind argued that "environmental mediators ought to accept responsibility for ensuring that. . .the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected."[26] Writing in sharp response, Joseph Stulberg replied that "most mediators believe that a commitment to impartiality and neutrality is the defining principle of their role. . . .[The] demand for a non-neutral intervenor is conceptually and pragmatically incompatible with the goals and purposes of mediation."[27] With whom do you agree? In an environmental dispute, what variables might affect your answer?

Is "Outcome Neutrality" Actually Achievable, or Is It Merely an Ideal? Several research studies suggest that even when the parties are considering resolutions that could not reasonably be characterized as immoral, unconscionable or harmful to third parties, mediators often favor certain outcomes over others and steer the parties, consciously or unconsciously, toward outcomes that the mediators find acceptable.[28] Some commentators suggest

24. For example, the 2001 ABA Model Standards of Practice for Family and Divorce Mediation, while stating that mediation "is based on the principle of self-determination," also assert that "[a] family mediator shall assist participants in determining how to promote the best interests of children."

25. *See, e.g.,* Judith Wallerstein, Julia Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce*: A *25 Year Landmark Study*_____ (2000).

26. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 Vt. L. Rev. 1, 18 (1981).

27. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 Vt. L. Rev. 85, 86 (1981).

28. *See* David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 Law & Soc. Rev. 613 (1989) (micro-analysis of divorce mediation in which mediators steer parties toward a division of two properties under which the wife would keep the marital home); Joseph P. Folger & S. Bernard, *Divorce Mediation: When Mediators*

that neutrality is more a myth than a reality in mediation.[29] Would it be better and more honest for mediators to abandon the pretense of neutrality altogether and, instead of subtle manipulation, simply state forthrightly, "*Look, obviously I can't impose a result here, but I have to say that what you're proposing to do really troubles me. I think you ought to. . . .*"?

Substantive Fairness and the Model Standards. Except in limited situations where the mediation is being used to further criminal conduct[30] (*see* Problem Six, below), the Model Standards say nothing about the problem of unfair agreements. By contrast, some mediation ethics codes around the country authorize the mediator to indicate nonconcurrence with or to refuse to draft an agreement that the mediator believes is unconscionable or inherently unfair.[31] Which approach is preferable, in your view?

§12.4 MEDIATION AND THE PROBLEM OF CRIMINAL AND OTHER UNLAWFUL CONDUCT

Perhaps you are not troubled by possible unfairness created by various kinds of imbalances at the bargaining table. Or maybe you believe that duties of impartiality and neutrality tie your hands in trying to correct any imbalances or unfairness you do encounter. What about situations in which you are being asked to help the parties craft an unlawful agreement? Or situations in which a mediated agreement may enable one or both of the parties, without your assistance, to continue to act unlawfully in the future? Consider these cases:

Problem Six

In the following scenarios, indicate whether you would be very comfortable, somewhat comfortable, somewhat uncomfortable or very uncomfortable continuing to serve as a mediator and helping the parties settle their dispute on the terms they propose. What considerations guide your answer? Would it matter if, under court or agency rules, you are expected to sign the agreement as mediator? If you would not be comfortable helping the parties consummate their deal, what ***specifically*** would you do?

a. The parties in an employment discrimination claim filed with the EEOC agree to characterize the bulk of the payments to be made to the plaintiff as (nontaxable) "compensation for physical injury medical expenses" instead of (taxable) damages for lost wages so as to reduce the plaintiff's income tax burden in the coming fiscal year. Both are represented by able counsel. The plaintiff

Challenge the Divorcing Parties, 10 Mediation Q. 5 (1985). On the difficulty of achieving neutrality in divorce mediation, *see* Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process,* 14 Mediation Q. 215 (1997).

29. *See* Sara Cobb & Janet Rifkin, *Deconstructing Neutrality in Mediation*, 16 Law & Soc. Inquiry 35, 37 (1991) (arguing that mediator neutrality is a "folk concept" lacking any empirical support).

30. Standard VI(A)(9), *supra*.

31. *See* Exon, *supra* note 2, at 403–405, collecting statutes.

has claimed he suffered "health problems" on account of being fired but has presented no evidence in the mediation of any damages other than the pay he lost. In exchange for this characterization, the plaintiff has agreed to accept $10,000 less than his earlier communicated "final" demand. You are a lawyer mediator in private practice who is appointed to handle approximately ten mediations a year at the local EEOC office on a reduced fee basis. (VC) (SC) (SU) (VU)

b. You are a staff mediator in a local small-claims court. The plaintiff, an elderly widow we will call Mrs. Rosen, sued for return of $1,000, allegedly loaned to a younger man, Mr. Schwartz. There was no written loan agreement. In his answer to the complaint, the defendant denied borrowing any money from the plaintiff. In mediation, however, when confronted with Mrs. Rosen's righteous anger as well as a witness to conversations about the loan, he admitted that he borrowed the money and now offers to repay the debt in full, over six months.

   In caucus with the plaintiff to discuss the defendant's proposed payment plan, Mrs. Rosen now tells you that Mr. Schwartz is a scam artist who preys on vulnerable widows by taking them out to dinners, romancing them, and then "borrowing" money with no intention of paying it back. The plaintiff has learned that he did this with two other women in her neighborhood (who have not themselves sued) and is continuing to do it with others. She then takes out a cell phone and calls one of these alleged victims, who, on the phone with you, confirms that the same thing happened to her (conduct, that if proven, constitutes larceny). Despite her belief that the defendant is victimizing others, Mrs. Rosen tells you that she wants to accept the $1,000 and settle her case quietly. (VC) (SC) (SU) (VU)

c. You are a mediation clinic student co-mediating a landlord-tenant dispute in your local housing court. The landlord has brought an eviction action against two unmarried cotenants for nonpayment of the last two months' rent, totaling $1,800. Under state law, tenants are subject to eviction upon proof that they have failed to pay their rent on a timely basis. The male tenant, the single father of an eleven-year old son, admits that he did not pay rent during this two-month period because he was injured on the job and was unable to work. The female tenant is unemployed and has never contributed to the monthly rent. All parties are unrepresented. If the case is not settled, it will go to trial this afternoon.

   The male tenant offers to pay the entire $1,800 rent arrearage today if the eviction case is withdrawn. The landlord agrees to accept this offer, but only if the tenants agree (a) that the girlfriend will vacate the apartment within thirty days, and (b) that the apartment will not be occupied in the future by more than two persons, including the tenant's son. The landlord states that she only recently learned that the girlfriend is an African American and that she does not approve of interracial cohabitation. Rental discrimination on the basis of race is unlawful under both state and federal fair housing laws, but it is not a crime. In caucus, the male tenant indicates that while he is repulsed by the landlord's attitudes, he wants to accept the deal because he doesn't want an eviction on his record and needs to "keep my son in his local school." The

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> girlfriend says, "Look, he needs the apartment and he pays the bills, so whatever he says, I'll do." (VC) (SC) (SU) (VU)

Standard VI-A of the Model Standards provides: "If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation." Note first the use of the word "should" rather than "shall" in this Standard. This formulation presumably means that the mediator is free to exercise discretion in deciding how to proceed in the face of different kinds of proposed criminality, including doing nothing. Is this desirable? Second, note that this language only addresses criminal agreements, not otherwise unlawful ones. Do you agree with the way the drafters of the Standards have drawn these lines?

Withdrawal of the Mediator or Termination of the Mediation as Remedies in Cases of Serious Party Imbalance or Criminality. Standard II of the Model Standards affords mediators discretion to withdraw from or terminate a mediation if a serious party imbalance threatens the mediator's ability to act impartially. Standard VI affords mediators similar discretion to withdraw from or terminate the mediation to avoid participating in a settlement that "furthers criminal conduct."

But in the case of criminal agreements, what does withdrawal really accomplish if the parties can negotiate the same unlawful terms themselves without the mediator's assistance? In cases of serious power imbalance or other unfairness, what good does termination of the mediation really do if, as research suggests, the stronger party is very likely to come out ahead anyway if the matter is referred to court?[32] Is mediator withdrawal designed to serve justice? To relieve the mediator from having to make tough ethical decisions? To protect the good name of mediation? On a process level, if you intended to withdraw from a mediation based on an imbalance of legal information or bargaining ability, how exactly would you explain or announce this to the parties?

Before the 2005 amendments to the Model Standards were promulgated, mediation scholar Jon Hyman proposed that the drafters include a specific provision expressly urging mediators to discuss questions of fairness, justice and morality with the parties.[33] This suggestion did not find its way into the Standards. Should it have? In Problem Six (c) above, what might such a "justice" conversation sound like?

Note finally that Standard V-A of the Model Standards does not allow the mediator to breach confidentiality to prevent the implementation of unfair or unlawful agreements, unless "otherwise . . . required by applicable law." Thus, the Standards' drafters appear to have taken the view that, unless state or federal law expressly requires otherwise, preserving the confidentiality of the process trumps any duty on the part of the mediator to blow the whistle on unfair, unlawful or criminal agreements, no matter how egregious. Do you agree with this approach? For example, suppose the mediator in Problem Six (c) withdraws

32. Kritzer & Silbey, *supra* note 13.
33. *See* Jon Hyman, *The World of Conflict Resolution: A Mosaic of Possibilities,* 5 Cardozo J. Conflict Resol. 205–206 (2004). These ideas are further elaborated in Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation,* 6 Cardozo J. Conflict Resol. 19 (2004).

from the mediation rather than assist the parties in concluding a racially discriminatory settlement agreement. Should the mediator also be afforded *discretion* to inform the state's human rights commission or local EEOC office about the landlord's practices? Why or why not? Would it matter if the mediator knew that the landlord owned many rental properties around the city?

§12.5 ETHICAL AND POLICY ISSUES REGARDING CONFIDENTIALITY

Of all the ethical and policy issues pertaining to mediation, none is as difficult to describe concisely as confidentiality. The notion that confidentiality is an essential part of successful mediation is considered axiomatic by most practitioners and commentators.[34] However, no consensus exists regarding the best way to create confidentiality in mediation. There are many variations in approach from state to state, and judicial protection of mediation confidentiality has been uneven at best.

The Costs and Benefits of Mediation Confidentiality. A often-cited article[35] makes the following primary arguments for protecting confidentiality in mediation:

> *Effective mediation requires candor*. . . . Mediators must be able to draw out baseline positions and interests which would be impossible if the parties were constantly looking over their shoulders. Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede. Confidentiality insures that parties will voluntarily enter the process and further enables them to participate effectively and successfully.
>
> *Fairness to the disputants requires confidentiality*. The safeguards present in legal proceedings, qualified counsel and specific rules of evidence and procedure, for example, are absent in mediation. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. . . . Mediation thus could be used as a discovery device against legally naive persons if the mediation communications were not inadmissible in subsequent judicial actions. . . .
>
> *The mediator must remain neutral in fact and in perception.* The potential of the mediator to be an adversary in a subsequent legal proceeding would curtail the disputants' freedom to confide during the mediation. Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to

34. *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Dispute Res. 37 (1986); Ellen E. Deason, *Reply: The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 Marq. L. Rev. 79, 80–85 (2001); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1 (1995); Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 Seton Hall Legis. J. 1 (1988). *But see* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. Disp. Resol. 1, 32 (1986) ("Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected.")

35. Freedman & Prigoff, *supra* note 34, at 37–39.

favor one side or the other. This would destroy a mediator's efficacy as an impartial broker.

Privacy is an incentive for many to choose mediation. Whether it be protection of trade secrets or simply a disinclination to "air one's dirty laundry" in the neighborhood, the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.

As persuasive as these arguments may be, recognizing a principle that broadly prohibits the mediation participants from testifying about what occurred during the mediation process comes at a high price to courts and to the public:

- It may deprive the courts of critical evidence. For example, a disputant in a mediation who alleges that he agreed to the settlement terms only after being coerced to do so by a mediator would have little recourse if confidentiality were strictly enforced. Obtaining relevant information about what occurred during the mediation is often necessary if the court is going to be able to "do justice."[36]
- It may prevent other potential litigants and the general public from learning important information. In a products liability context, for example, should a mediator be free to refuse to testify about what a crib manufacturer said during the successful mediation of a previous lawsuit about an allegedly defective crib design when cribs of the same design were subsequently kept on the market and one later allegedly killed an infant? Commentator David Luban has noted that such information can be important not only because it "might save lives" but also because it "informs public deliberation about an issue of substantial political significance."[37]

Sources of Confidentiality in Mediation. Confidentiality in mediation can be created in a variety of ways. Federal and state rules of evidence provide protection against disclosure in court of certain party communications made during the negotiation process. In private mediation and in some court and agency settings, confidentiality agreements signed by the parties can expand the scope of protection of the process by contract. Almost all states now have confidentiality statutes that apply to at least some forms of mediation, although what degree of protection is afforded, to what kinds of communications, in what forms of mediation, subject to what exceptions, varies greatly from state to state. In an attempt to create some uniformity of approach, the National Conference of Commissioners on Uniform State Laws disseminated the Uniform Mediation Act[38] in

36. In the frequently cited case of *Olam v. Congress Mortgage Co.,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the court compelled a mediator to testify in a case in which the plaintiff alleged that she signed a "memorandum of understanding" during a court-sponsored voluntary mediation under duress and sought to avoid its enforcement. In compelling the mediator to testify, the court argued that

> the mediator is positioned in this case to offer what could be crucial, certainly very probative, evidence about the central factual issues in this matter. There is a strong possibility that his testimony will greatly improve the court's ability to determine reliably what the pertinent historical facts actually were. Establishing reliably what the facts were is critical to doing justice. . . .

37. David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2653 (1995).
38. *See* Appendix B for excerpts from the Act.

2003, recommending that it be enacted in all the states. As of 2007, eight states plus the District of Columbia had approved some version of the Act.[39]

Rules of Evidence. The Federal Rules of Evidence have been adopted in all the federal courts. They also provide the model, with minor exceptions, for the rules of evidence adopted in forty states. Under the Rules both "offers to compromise" and "evidence of conduct or statements made in compromise discussions" are not admissible to prove "liability for or invalidity of [a] claim or its amount."[40] This provision is designed to exclude evidence of settlement offers ("*We offer to settle this case for $30,000*") that may not have much probative value in establishing liability and to encourage frankness in discussing the underlying facts of the dispute ("*We admit that our crib could have been designed differently*"), so as to promote the voluntary resolution of disputes.

Suppose you were mediating our premises liability case, *Resnick v. Stevens Realty*. In joint session, defense counsel stated, "*Ok. So what if the fire escape stairs were only about a foot and a half above ground, as our maintenance man says? We still don't understand how the intruder could have gotten into the alley, which we keep securely locked. In light of that, we won't pay a penny more than $50,000. And that's our final offer.*" If the case did not settle, but instead proceeded to trial, could Josh Resnick or you as the mediator be compelled to testify as to any of the above statements as evidence of Stevens' liability? In jurisdictions adopting Rule 408, the presumptive answer would be no.

Rule 408 thus provides a great deal of protection against subsequent disclosure of settlement discussions in court proceedings. But many would argue that even more protection is needed. Why?

First, the rule only protects against the giving of testimony regarding settlement offers and settlement statements in *trials*.[41] It does not prevent the information from being pursued in discovery (and thus potentially brought into a trial). If the above statements in mediation led to later deposition questioning of the defendant ("*In our mediation last month, Mr. Stevens, I believe your attorney conceded that the fire escape stairs were only a foot and a half above ground. Is that correct? What's the name, address and telephone number of the maintenance man he referred to? Was it you who spoke to the maintenance man about this subject? Tell me everything you remember about that conversation. Have you had any other conversations about the fire escape stairs with anyone other than your attorney? Before my client's assault occurred, how long had the stairs been left so low to the ground?*") all such questions would be unobjectionable. The legal standard in discovery proceedings is whether

39. *See www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp*, (last visited April 30, 2007).

40. *See* Fed. R. Evid. 408 (Dec. 1, 2006). Rule 410 provides comparable protection in criminal plea negotiations. In states not adopting the Federal Rules of Evidence, some protect only offers to settle, not factual statements and admissions made during settlement discussions. *See, e.g.*, Conn. Code Evid. §4-8 (2000).

41. Because Rule 408 is a rule of evidence, applying only to court testimony, it does not apply to statements made to the press or public. Thus, if Josh Resnick wanted to tell his family, friends, former neighbors or the local newspaper about Mr. Stevens' monetary offer or his mediation statements, he could do so freely, consistent with this rule.

the questions asked are "reasonably calculated to lead to the discovery of admissible evidence,"[42] not whether they are themselves admissible.

Second, Rule 408 does not preclude disclosure of settlement information for any purpose other than proof of "liability for, invalidity of, or amount of a [disputed] claim." For example, if either party in *Resnick* later claimed that no settlement had been reached, statements made during mediation that might support or refute such a claim would not be inadmissable under Rule 408.[43]

Confidentiality Agreements. For these reasons, private mediators and ADR provider organizations often try to create an additional zone of privacy around the mediation process by crafting confidentiality agreements for the parties to sign as part of their agreement to mediate. Confidentiality clauses can be useful, because they enable the parties to tailor an agreement to their needs in a way that is consistent with the voluntary nature of mediation.[44] But these clauses are subject to limitations, the most important of which is that no private contract can create an enforceable privilege not to testify if a judge decides that the testimony of a party or mediator is needed at trial. The general rule is that the courts have the right to every person's evidence and that only legislatures or courts themselves can create enforceable privileges to refuse to testify. In addition, even if they are enforceable against the parties who signed the confidentiality agreement, they may not be enforceable against nonsignatories.

Mediation Confidentiality and Privilege Statutes. Mediators, attorneys and policy makers seeking additional protection for mediation confidentiality have therefore sought to persuade state legislatures to provide it. Today, virtually every state has enacted some form of mediation confidentiality or privilege statute. Most mediation privileges "create a right to block compelled disclosure in discovery and other proceedings not governed by the rules of evidence."[45] Thus, a mediation privilege is broader than an evidentiary exclusion such as FRE 408. Generally, however, while a mediation privilege may prevent certain information from compelled disclosure in litigation proceedings, it does not prevent information from being disclosed outside of court.

The details and scope of protection afforded by state mediation confidentiality statutes vary so greatly that it is difficult to generalize about them. Among the most significant variables are the following:

- **What types of mediations are covered by statute?** Some state statutes provide confidentiality for all forms of mediation, whether public or private. More commonly, only mediations sponsored by state courts and agencies are covered. Some states afford confidentiality only to mediators with

42. Fed. R. Civ. Pro. 26(b)(1).
43. See Fed. R. Evid. 408(b); *see, e.g., Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (Rule 408 is inapplicable when the claim is based on a wrong committed during the course of settlement discussions).
44. Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 450 (1984).
45. *See generally* Sarah R. Cole, Craig A. McEwan & Nancy H. Rogers, *Mediation: Law, Policy and Practice* §9.12 (2d ed. 2006), for an excellent survey of this subject, which provides much of the basis for the discussion that follows.

specific credentials, such as lawyers or persons who have completed court-approved mediation training programs.

- **What stages of mediation are covered by statute?** Some statutes provide confidentiality only to statements or conduct made at the bargaining table. Other statutes afford protection to conversations during pre-mediation screening and intake procedures and/or post-mediation conversations regarding reconvening the mediation or enforcing an agreement.
- **What information is protected by statute?** Sometimes mediation confidentiality statutes are structured like testimonial privileges and protect only confidential oral communications between the parties themselves or between the parties and the mediator. Other statutes are broader, providing protection for documents and evidentiary submissions to the mediator in preparation for mediation, mediator notes and impressions, the identities of the parties in mediation and, occasionally, communications made by non-parties attending the mediation.
- **Who holds the privilege?** Only holders of a privilege or their designated agents have standing to invoke the privilege or to waive it. Some mediation confidentiality statutes grant the privilege only to the disputants to prevent their statements and the statements of the mediator from being used in future proceedings. Other statutes afford the mediator an independent privilege to prevent the parties from revealing the mediator's statements, even if the parties are willing to waive their own privilege. A surprising number of confidentiality statutes are silent on this important question.
- **What exceptions to confidentiality are recognized by statute?** Almost all mediation confidentiality statutes are subject to exceptions — often significant and wide-ranging. These range from specific exceptions for parties seeking to enforce a mediation agreement or set it aside on grounds of perjury, fraud or duress; to exceptions in order to prove child or domestic abuse or other threats of violence during the mediation process; to broad or elastic exceptions for all criminal cases or in all cases where the "interests of justice" outweigh the need for confidentiality.

The net effect of all this legislation is a far from uniform approach to mediation confidentiality. And, as a recent study suggests, the courts may be less reliable protectors of confidentiality than might be supposed. In 2006, James Coben and Peter Thompson studied 1,223 federal and state court cases dealing with mediation between 1999 and 2003.[46] Overall, the authors uncovered 152 opinions during this time period in which courts considered a confidentiality claim. Of these claims, confidentiality was upheld in whole or in part in just 50 percent of the cases.[47]

46. *See generally* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 49–51 (2006).
47. *Id.* at 58–59. Although some, perhaps most, of the decisions rejecting confidentiality are no doubt correct, the authors note critically that "few of these decisions involve a reasoned weighing of the pros and cons of compromising the mediation process." Instead they provide a relatively cursory justification for the result reached.

If parties are entitled to make informed choices about whether they wish to participate in mediation, what should the mediator tell the parties at the start of the process about the *limits* of confidentiality?

Problem Seven

You are a mediator in community mediation program in a state in which a recently enacted statute, applicable to all mediations that are not court-ordered, provides in part that

> All oral or written communications received or obtained during the course of a mediation shall be confidential. No mediator shall be compelled to disclose any such communications unless the disclosure is necessary to enforce a written agreement that came out of the mediation, the disclosure is required by statute or regulation, or the disclosure is required because the court finds that the interest of justice outweighs the need for confidentiality."

In your opening statement, what ***precisely*** will you tell the parties about the confidentiality of the process?

What about confidentiality in situations where one side is represented, the other is not and there is little or no discovery available to either side? Consider this case:

Problem Eight

You are mediating a claim for damages and a restraining order arising out of an incident in which the ex-lover of a female police officer allegedly hit her with her billy club, threatened her with more harm, stormed out of their apartment and then left threatening messages on her telephone answering machine. At the court-mandated mediation (which is taking place two hours before the potential trial in the case), the plaintiff appears with a lawyer and the defendant is unrepresented. After the mediator's opening, in which the parties were promised that "what's said in this room stays in this room," the plaintiff's attorney presents a summary of his client's claims and the history of the dispute. The mediator then turns to the defendant for his "uninterrupted" opening statement. As the defendant starts an emotional and lengthy defense, talking unguardedly about his feelings and conduct, the plaintiff's lawyer begins to write furiously on his legal pad. What, if anything, will you say or do at this point?

"External" vs. "Internal" Confidentiality. The preceding discussion of confidentiality has focused on "external" confidentiality: the process of keeping those *outside* the mediation process — judges, other litigants or their lawyers, the press, and so forth — from learning about what took place in mediation. But as we have seen, mediators also commonly promise an extra layer of privacy through the caucus process, during which they promise each party not to share information

with the other party unless that party consents. This type of confidentiality, which has been labeled "internal" confidentiality,[48] raises difficult questions as well.

"Leaking." One question has to do with subtle leaking of information by the mediator in ways that do not exactly reveal confidential caucus communications but nonetheless may signal important strategic information to the other side. Have a look at one of our mediators in the *Resnick* case conveying the defendant's last offer to the plaintiff and "interpreting" for the plaintiff and his lawyer what the bargaining authority of the defendant might be. Track 12-B.

Did this mediator's conduct violate his earlier promise to the parties to keep confidential "what you discuss with the mediator"? Does it matter that he did not at any time reveal what the parties actually *said*, but only his impressions of what they would and would not *do*? Does it matter if sophisticated parties sometimes expect their mediator to "move the discussions" in this way? If the mediator's actions make you uncomfortable, consider the comments of Judge Richard Posner on mediation as an aid to settlement:[49]

> Since the mediator can meet with the parties separately and his discussions with them are confidential, they are likely to be more candid with him than they would be with each other, enabling him to form a more accurate impression of the actual strengths and weaknesses of their respective positions than they can and to communicate this impression to them in a credible fashion. He can thus help them to converge to a common estimate of the likely outcome of the case if it is litigated to judgment. *To do this, however, the mediator must be not only a conduit of information between the opposing sides but also an impediment to transparent communication between them. When a mediator formulates a proposal to one party, that party will infer that the proposal reflects information conveyed to the mediator by the other party. But so long as the information is fuzzied up by the mediator, that other party will be giving up less in the way of strategically valuable information (should mediation fail and the case go to trial) than if he had to communicate with his opponent face to face.* (Emphasis supplied.)

Internal Confidentiality: Any Limits? Promising a party that "*I won't reveal anything you tell me privately in caucus unless you give me express permission to do so*" can sometimes put the mediator in a difficult if not untenable bind. Consider this scenario:

Problem Nine

You are mediating a small claims case between a plumbing contractor and a homeowner concerning the contractor's $3000 claim for unpaid services plus interest at twelve percent. The original contract called for payment in full upon completion of the job, and made no provision for the payment of interest. In caucus with the homeowner, he admits the debt and proposes to pay it in fifteen monthly payments

continues on next page >

48. Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, 108 (2003) (distinguishing external and internal confidentiality).
49. Richard Posner, *Economic Analysis of Law* 576 (6th ed. 2003).

of $200, plus interest at the rate of six percent on the outstanding principal balance. He then states: "Confidentially, it doesn't much matter what the payment plan is, because I am planning to consult a lawyer in the next couple of weeks in order to declare bankruptcy. I'll make payments until my bankruptcy petition is filed, but after that, this guy will be lucky to get ten cents on the dollar. Of course, I don't want you to tell him that!"

When you advise the homeowner that he needs to be aware that the refinancing of a debt under false pretenses may not discharge the debt under Federal bankruptcy laws and that when the plumbing contractor discovers his bankruptcy petition, he might decide to sue him for fraud, the homeowner says, "Thanks for the tip, but let me worry about that. Just convey my proposal to pay the debt on these terms."

If you were the mediator, what specifically would you do?

§12.6 PURSUING SETTLEMENT: WHAT ARE THE ETHICAL LIMITS?

Standard I-B of the Model Standards states that "A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others." In our experience, this is a lot easier said than done.

First, staff mediators in high-volume courts and agencies are often under substantial pressure, whether stated or otherwise, to "move the docket." Second, from a psychological standpoint, just as litigators naturally feel better about cases they win than those they lose, mediators tend to see cases they are able to resolve as "notches in their belt." Third, because they want to succeed in resolving their dispute, consumers of private mediation services often select mediators based on their settlement rates. But this shared definition of a "successful" mediation raises an important question: How far may the mediator go, and what tactics may he or she use, in the pursuit of settlement?

Voluntary Decisions: How Much Pressure Is Too Much? As we saw in Chapters 9 and 10, mediators employ a wide variety of persuasive tactics in seeking settlement. Sometimes they use the waning moments of the mediation to take advantage of the scarcity principle to obtain final resolution. Sometimes they use more overt tactics, including various exhortations to "keep moving" that can significantly raise the pressure on disputants. And some use environmental factors — round-the-clock sessions, for example — to close a deal. When does the use of pressure in mediation cross the line into coercion?

The question is a difficult one to answer. Just because an agreement is reached under circumstances in which a party seems to feel pressured does not necessarily mean that the mediator has acted inappropriately. Pressure can result from the parties having scheduled insufficient time for the mediation, taking into account the complexities of the case. A pressured decision toward the end of a mediation can be the product of the parties' failing to negotiate in earnest early on. In the later stages of the negotiation, it can be a function of the difficulty a party has in letting

go of conflict or making decisions about distasteful compromises. Indeed, savvy bargainers sometimes even feign indecision in an effort to gain the mediator's help in winning further concessions in the closing stages.

Review the following segments of the closing portion of the mediation of *Resnick v. Stevens Realty*. The mediation as a whole lasted approximately two hours and fifteen minutes. The first ninety minutes or more were spent on factual exchanges and legal and evidentiary assessments of the case. When actual bargaining began, the plaintiff began with a demand of $110,000, and the defendant countered with an offer of $30,000. In the final stages of the mediation, the mediator engaged in shuttle diplomacy, by going back and forth rapidly between the parties and trying to find a convergence point at which they might be willing to settle.

As you watch selected portions of this interchange, ask yourself: Did any of the mediator's interventions cross the line from "appropriate" persuasion into "inappropriate" pressure or coercion? Be specific. If none of the mediator's specific interventions crossed that line, did his approach as a whole? Why or why not? Track 12-C.

Note that we did not show you the private consultations that took place between the clients and their lawyers, because as mediators, you would not have seen them.[50] Is a mediator entitled to apply more pressure when dealing with represented parties on the assumption that their counsel will "protect" them? Suppose that the parties in this case had taken similarly aggressive positions but were not represented. What, if anything, should the mediator have done differently?

Informed Decisions: What Is Adequate Disclosure? In addition to using tactics such as imposing deadlines to try to change a party's stance, mediator persuasion sometimes takes the form of manipulating the information available to a disputant through both active statements and passive nondisclosures. Let's begin with the problem of strategic silence, which could lead the parties to make decisions without important relevant information. Consider this case:

Problem Ten

A complex construction dispute was sent to a mandatory, court-appointed mediation two days before its scheduled trial date. An hour before the mediation was scheduled to begin, the presiding judge informed the mediator that an unexpected emergency would cause at least a two-month delay in the trial. The parties did not know this. The mediator thought to himself, "If I tell the lawyers the trial is off, the pressure to settle now will be substantially dissipated." In response to one of the lawyers' reference in the opening joint session to "our trial the day after tomorrow," the mediator said ***nothing***. I am:

a. very comfortable with what the mediator did;
b. somewhat comfortable with what the mediator did;
c. somewhat uncomfortable with what the mediator did;
d. very uncomfortable with what the mediator did.

50. We focus on what an attorney can do to protect a client at the bargaining table in §13.5, *infra*.

How much help are the Model Standards in helping a mediator decide what to do in such a case? On the one hand, if one takes seriously the duty to conduct a mediation "based on the principle of party self-determination"[51] and "procedural fairness,"[52] it seems hard to justify the mediator's silence. Weren't the parties and their lawyers entitled to know about the court delay in order to make an informed, self-determined choice whether to conduct the mediation that day or to postpone it? For all the mediator knew, a postponement to allow the parties to engage in further trial preparation might have made future negotiations that much more productive.

But if one takes a close look at the mediator's general disclosure obligations in the Model Standards, they fall far short of stating any general duty on the mediator's part to provide the parties useful or salient information. Standard VI(A)(4) states: "A mediator should promote honesty and candor between and among all participants, and *a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation*." (Emphasis supplied.) This language, which tracks both the formal rules governing negotiations by lawyers[53] and the law of fraud,[54] draws a distinction between affirmative misrepresentations of "material facts" (prohibited) and "passive" nondisclosures — that is, remaining silent in the face of another's ignorance of important information (generally not prohibited, at least between bargaining equals).

The terms *knowingly*, *material* and *fact* have each developed a substantial judicial gloss.[55] Under conventional understandings of these terms, many common forms of bluffing and other negotiation misstatements designed to mislead one's negotiation counterpart (*"I don't think the commercial property you're selling is worth more than $500,000"* or *"My client won't settle for a penny less than $10,000"*) would, even if untrue, pass ethical muster. On the other hand, a statement by a lawyer negotiator that knowingly overstates the assets or understates the liabilities of a company for sale would be considered a misstatement of material fact. Some negotiation scholars have criticized the ABA for adopting a minimalist, "only positive fraud is barred" approach to negotiation ethics.[56]

Whatever one's reactions to these standards when applied to lawyer negotiators, how appropriate are they when applied to mediators? The rules governing

51. Standard I, Model Standards of Conduct for Mediators (2005).
52. Standard VI(A), *id.*
53. *See* Rule 4.1(a), ABA Model Rules of Professional Conduct (2002), portions of which are set out in Appendix B, *infra*. The rule states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."
54. A very useful summary of the ethics of negotiation and the law of fraud is contained in G. Richard Shell, *Bargaining for Advantage* 200–233 (1999).
55. *See, e.g.*, Annotated Model Rules of Professional Conduct 409–415 (5th ed. 2003).
56. *See, e.g.,* Gerald Wetlaufer, *The Ethics of Lying in Negotiation*, 72 Iowa L. Rev. 1219 (1990). Some contend that lawyers who appear at mediations in a representative capacity should owe a higher duty of truth-telling than is expected of lawyers in unassisted negotiations. Arguments in favor of such a "candor in mediating" requirement include protecting the integrity of mediation, encouraging its greater use and insulating the mediator from having to deal with untruthful information. By and large, such efforts have failed to catch on. The American Bar Association's Standing Committee on Ethics and Professional Responsibility recently concluded that lawyers do not owe a higher duty of candor to the mediator in caucused mediation than they owe to opposing counsel in conventional, face-to-face negotiations. Formal Opinion 06-439 (April 11, 2007). But doesn't mediation pose a greater risk of distortion than ordinary negotiation if the mediator "massages" and then selectively leaks (already untruthful) information not directly heard or assessed by the other side? If so, does this warrant a different standard of truth-telling?

lawyer negotiators are premised on notions of zealous representation of the client and adversary relationships between the lawyers. How applicable are these premises to the mediator? Is the mediator, even when acting in a persuasive mode, *negotiating against* the parties? How much silence is acceptable in the name of "getting an agreement"? Should the mediator have a higher duty of disclosure to the parties than they have to each other? In Problem Ten, what if the lawyers learned the next day of the mediator's concealment? If such nondisclosures were commonplace, what impact would this have on the public's perception of mediation?

Informed Decisions: "Tailored" Evaluations. What about the case in which the mediator *does* provide information to the parties but "tailors" her legal evaluations or other messages to make them more palatable. We talked about these kinds of persuasive interventions in Chapters 9 and 10. At what point does this kind of message "packaging" cross the line into impermissible deception or misrepresentation? Consider this case:

Problem Eleven

A charge of employment discrimination by an African-American complainant against his former employer, a corporation owning six auto dealerships in the greater metropolitan area, was the subject of an EEOC mediation. The complainant was very intelligent and appeared on his own; the respondent was represented by corporate counsel. After four hours of factual exchange, evidentiary presentations and extreme positional bargaining, the defendant offered $15,000 to settle the case, but the complainant was still demanding $30,000.

The mediator thought to himself, "The economic damages for lost pay in this case are fixed at about $20,000. If this case went to trial, it's unlikely that a jury would award damages for emotional distress. The only real question in this case is whether the defendant unlawfully discriminated against the defendant when it fired him from his job. On that issue, I'd say the plaintiff has a 75 percent chance of prevailing."

In caucus with the defendant, the mediator said, "From where I sit, you have a ***very weak case on liability and a very significant chance of losing***." In caucus with the plaintiff, the mediator said, "From where I sit, you have *real risks in your case on liability and a significant chance of losing.*" I am:

a. very comfortable with what the mediator did;
b. somewhat comfortable with what the mediator did;
c. somewhat uncomfortable with what the mediator did;
d. very uncomfortable with what the mediator did.

At first glance, the mediator's inconsistent statements seem deceptive. But are they really? After all, a 25 percent chance of losing could be fairly characterized as "significant." The plaintiff could also have asked for a more specific prediction if he wanted one. And what if the mediator honestly thinks that accepting this offer is in the plaintiff's best interest, especially given the difficulty of finding lawyers to take on such relatively small Title VII cases. Should that matter?

This case example illustrates the difficulty of drawing clear lines about what is acceptable and unacceptable mediator "persuasion" and being able to effectively

regulate it. The harnessing of uncertainty is one of the central ways that professionals — and mediators are no exception — gain power for themselves.[57] In the hands of a skillful mediator and in the hurly-burly (and unrecorded privacy) of mediation, questions of deception and truth-telling are subtle and difficult to police.

We have endorsed the appropriate, careful use of legal evaluation because we believe that parties' decisions should be well informed where possible and because many disputants welcome it. But if mediators deliberately exaggerate the risks of trial or the benefits of settlement in their legal evaluations — even for laudable purposes — this is a cause for concern, especially in the case of unrepresented parties on whose trust and confidence the mediator may be trading.

Informed Decisions: "Stunted" Legal Evaluations. A related ethical issue for evaluative mediators involves their tendency to provide "stunted" evaluations. In our experience, mediators are often comfortable giving legal information or predictions that emphasize each party's potential litigation *risks*, because these kinds of evaluations generally narrow the bargaining range between the parties. But they often fail to include legal information or advice that emphasizes each party's *strengths,* because this may pull the parties farther apart.[58]

Watch how one of the mediators in *Wilson v. DiLorenzo* gives the defendant and his attorney a very direct evaluation about his failure to comply with contractual deadlines and the litigation risks (including the risk of punitive damages) that this might entail for him. (Later on, he gives this party an even tougher evaluation on his failure to register as a contractor with the state.) The mediator states that he did not provide any of this information to the plaintiff; instead he focused on *her* potential trial weaknesses. Track 12-D. If one believes that informed decision making is an important ingredient of self-determination, can this approach be justified?

Self-Determined Decisions: Battling Lawyer Interference. Sometimes the parties may be fully informed about the pros and cons of different possible resolutions of their case but are impeded in making autonomous decisions by their own lawyers or other advisors, who may or may not be acting for "client-centered" reasons. What, if anything, should the mediator do when this occurs? Consider this case:

Problem Twelve

You are mediating an automobile accident case in which a meek and mild-mannered plaintiff, who suffered a serious back injury in the accident, is being represented by a very pugnacious lawyer. Liability on the part of the defendant is all but conceded, but damages are disputed. The plaintiff's attorney has made it clear from the beginning of the mediation that he expects to do almost all of the talking for his client and will consult with the client privately for his views only if he sees reason to do so. The attorney has also taken very aggressive negotiating positions throughout the

57. Sissela Bok, *Lying: Moral Choice in Public and Private Life* 19–20 (1999).
58. *See, generally* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. Tex. L. Rev. 769 (1997).

mediation, with the result that, after more than two and a half hours, the parties are still $100,000 apart, with the defense offering $250,000 to resolve the case, and the plaintiff's lawyer demanding $350,000. Throughout the mediation, the plaintiff has given strong nonverbal signals that he wants to avoid a trial.

The insurance company attorney representing the defendant now makes what she says is "one last-ditch effort to settle this case: We will offer $300,000, but if the plaintiff doesn't accept it now, the offer will be withdrawn and we will go to trial." When you convey this offer to the plaintiff and his counsel, the plaintiff opens his mouth as if to accept it, but counsel places his hand on the plaintiff's sleeve and says, "Tell her this is our answer: We're going to trial!"

If I were the mediator in this case, I would say (choose the best answer from those provided):

a. "It looked as if you were about to say something, Mr. Peterson, but your attorney interrupted you. What were you about to say?"
b. "I have a sense that you'd like to accept this, Mr. Peterson, but you are concerned about disappointing your lawyer. Am I wrong?"
c. "With your permission, counsel, and before terminating the mediation, I would like to have a short private caucus with your client. Can you step outside for a few minutes?"
d. Nothing. The client has selected his attorney and established a relationship with him. It is not my role to intrude in the attorney-client relationship.

Information vs. Advice. Standard Six of the Model Standards provides in part that

> mixing the role of a mediator and the role of another profession is problematic and thus a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

The Standards, in common with a number of other codes and the views of some commentators,[59] condone the mediator's providing the parties with legal *information*, but not legal *advice*. What does this mean?

The dichotomy between *information* and *advice* is not very helpful to the practicing mediator.[60] Almost *any* information an evaluative mediator provides to a party, even of the most general kind ("*You have the burden of persuasion in this case*" or "*You know, of course, that it will take nine months or so to get a trial date*" or "*The letter from your neighbor is hearsay.*") is usually not plucked out of the air. Rather, it is calculated to *advise* the party about the risks and disadvantages of litigation should the case go to trial. Some argue that it is only when applicable legal principles are applied to the facts of a particular case that (permissible) information becomes (impermissible) advice.[61] But many mediation parties,

59. *See, e.g.*, ABA Standards of Practice for Lawyer Mediators in Family Disputes, Standard IV(C) (1984) (Mediators may "define the legal issues" but may not advise the parties, based on the mediator's understanding of the legal situation).
60. Stark, *supra* note 58, at 784–786.
61. *See, e.g.*, Carrie Menkel-Meadow, *Is Mediation the Practice of Law? 14 Alternatives to the High Cost of Litigation* 57, 61 (1996).

especially those who are unrepresented, need to have general legal principles applied to the facts of the case in order to understand what the mediator is talking about (*"So does that mean my neighbor's letter won't be accepted by the judge?" "Unfortunately, probably not."*) If evaluative mediation is appropriate because it can promote informed party decision making, should the ethics of the mediator's intervention turn on the relative *explicitness* of the mediator's information?

Is Mediation the "Practice of Law"? On the other hand, the distinction between providing information and advice in some mediation ethics codes becomes more understandable when one considers the fact that (a) many practicing mediators are not lawyers; (b) unauthorized practice of law rules that prohibit the practice of law by non-lawyers exist in almost all states but vary greatly around the country; and (c) advice-giving constitutes the "unauthorized practice of law" in some states, but not others. This state of affairs has created considerable uncertainty about the kinds of behaviors in which non-lawyer mediators may appropriately engage.

Courts around the country have developed five different tests to determine what the practice of law is:[62]

- The "*Commonly Understood*" Test. This broad (and circular) test asks whether the activity in question is commonly understood to be part of the practice of law in the community. Factors would include whether lawyers in the community, rather than non-lawyers, routinely provide the particular service.
- The "*Client Reliance*" Test. This test asks whether the parties who receive a particular service subjectively believe that they are receiving "legal" services. Evidence of such reliance may be established by examining advertisements or written materials received by the person pertaining to the services in question.
- The "*Affecting Legal Rights*" Test. This test subsumes within "the practice of law" all activities that may affect a person's legal rights — an extremely broad test. Mediations involving litigation matters by definition involve parties' legal rights.
- The "*Attorney-Client Relationship*" Test. This much narrower test asks whether the relationship between the person providing services and the person receiving them is tantamount to an attorney-client relationship. Applying this test in the context of mediation, one might ask whether the party to the mediation reasonably views him- or herself as a "client" and the mediator as his or her "lawyer."
- The "*Applying Law to Facts*" Test. This test asks whether the service involves relating the law to specific facts, as some contend occurs when a

62. This section is adapted from the Connecticut Council for Divorce Mediation (CCDM) Mediation Standards (2001), for which Jim Stark served as Reporter. They can be found at *http://www.ctmediators.org/professional_standards.htm#mediation. See also* David Hoffman & Natasha Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?* Dispute Resolution Magazine 162–165 (Winter 2000), Virginia Guidelines on Mediation and the Unauthorized Practice of Law (Dept. of Dispute Resolution Services of the Supreme Ct. of Virginia, 1999) at pp.2–4.

mediator evaluates the strengths and weaknesses of the parties' legal claims by applying legal principles to the particular fact situation.

The "applying law to facts" test is fairly common, though by no means universal.[63] In states that adhere to it, mediators who are not licensed attorneys in that state (or admitted to practice under a local student practice rule) make legal predictions about the potential resolution of legal issues at their peril. However, almost all mediation ethics codes, including the Model Standards, are written for both lawyer and non-lawyer mediators. Does it make sense to subject lawyer mediators to the same restrictions on the giving of legal advice as non-lawyer mediators? Why or why not?

§12.7 ON DEVELOPING JUDGMENT: SOME CONCLUDING THOUGHTS

Although it may not seem so from reading this chapter, some ethical questions confronting mediators do have ready answers. For example, if you have a potential stake in the outcome of a case, you should disclose it. If a party shows clear signs that he or she is unable to understand the mediation process, you should promptly terminate it. If your idea of mediating is to "beat up the parties" to settle on terms *you* find acceptable even if the parties don't, you should probably find yourself a new vocation.

Given the early state of its development as a distinct profession, however, it is fair to say that there are a great many unanswered questions about the ethics of mediating. Lawyers who face tough ethics dilemmas can usually consult a substantial body of case law and/or more experienced lawyers for answers. And because they ordinarily represent the same client over a period of months or years, they usually have the luxury of time to seek such guidance. Mediators, by contrast, often have to make split-second decisions. As a beginning mediator, facing a difficult ethical question in the hurly-burly of a mediation, what can you do?

There are no panaceas. When co-mediating or mediating under supervision, you can take a mediator's caucus to discuss carefully what to do next. On the rare occasions when you can postpone or reschedule a mediation, you can try to find respected mediators or ADR organizations to consult. Even if you are able to get help, however, the lack of professional consensus on some very fundamental ethical questions affords you great discretion to act based on your own personal judgment and sense of your professional role. Put differently, you will still be faced with tough choices, implicating competing visions about the most important goals and characteristics of good mediation.

Ultimately, as in all your professional work, your own experiences will be your best teacher. Take the time to review them carefully, if possible with a trusted colleague or mentor. Over time, developing habits of careful reflection on one's work enables professionals to develop confidence in their capacity to make good decisions when confronted with difficult challenges.

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63. For example, the District of Columbia Court of Appeals appears to have adopted the narrower "attorney-client relationship" test in concluding that mediation is not the practice of law because "ADR services are not given in circumstances where there is a client relationship of trust and reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel." D.C. Ct. App. R. 49, comment. (1995)