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Mediation Paradigms and Professional Identities: Can Mediators Activate a New Movement for Justice?

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Mediation is more than just one particular method for resolving disputes. It is also an expression of a set of positive values about how people should deal with one another. This chapter articulates some general principles of ethics that are the essence of mediation and that can also be used in a wide range of situations beyond mediation.

This chapter applies Kuhn's (1970) concept of revolutionary paradigm shift to Simon's (1978) provocative critique of the ideology of advocacy. Simon argues that, although our present adversary system of processing disputes is supposed to foster values of individuality, autonomy, responsibility, and dignity, in practice it undermines those very values.

Mediation is a paradigm that can lead to a peaceful and evolutionary revolution in the way people think and act in general. Kuhn defines paradigms as both "entire constellation(s) of beliefs, values, techniques and so on shared by the members of a given community" and also "one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining

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puzzles of normal science" (p. 175). The mediation paradigm is based on affirmative principles designed to fulfill the ideals of the adversary paradigm but which encourage people to act on their best, rather than worst, motivations and thus to provide more satisfying results.

Although mediation is no panacea for curing all the ills of society, it does offer significant potential for improving society (Middleton, 1982). Mediation techniques and processes can be used in most sectors of society to help balance competing pressures to manage institutions efficiently, meet individual survival needs, and allow the greatest possible freedom for individuals to pursue happiness.

The principles set forth here are not new. Many representative attorneys, mediators, and others (hereafter referred to as service providers) have used these ideals in their practices for some time with little explicit expression or public recognition of these principles. Indeed, the values embodied in mediation described here are generally consistent with, and extend beyond, the stated values of the legal profession.

Although this analysis is based on a study of dispute resolution in the American legal system, it will hopefully be useful for a wide range of people in addition to lawyers. Mediation services are being provided by nonlegal professionals as well as lay people in community mediation programs, and even by some elementary school students (Amsler, 1983). Moreover, this analysis is intended to transcend many differences in the field of mediation. For example, these principles apply regardless of whether one believes that mediation should develop as a discrete new profession or as a part of existing professions. In addition, they can be applied in the many different situations in which mediation processes are used, including community, family, consumer, organizational, institutional, labor, business, environmental, and international mediation (Waxman, 1983; Nader and Singer, 1976). Obviously, the principles would be applied differently depending on the specific values and customs in the particular situations (Markowitz and Engram, 1983).

Problems of the Adversary Philosophy

Simon (1978) reviewed the literature of American jurisprudence in order to describe the prevailing adversary philosophy. He catalogued the following parade of horribles with disputants, attorneys, judges, and the public experience. (See also Nonet and Selznick, 1978; Winks 1980–81; Riskin, 1982.)

Unequal Access. The ideology of advocacy assumes that justice will result when all interested parties can present their claims in court in the form of a series of battles where impartial judges sort out the merits of the claims and declare the winners. However, legal rights are not generally self-enforcing. Because most people cannot afford to hire attorneys (American Bar Association, 1977; Eakeley, 1975) they do not have the practical ability to have their

battles fought and their theoretical rights enforced. The enormous costs and potential disruptive effects on society would make it impossible to provide universal access to the legal system by providing attorneys for everyone (Ehrlich and Wortham, 1978; Trister, 1978; Simon, 1978; Lande, 1980). In the current political realities, the issues are the extent that the federal government will limit and restrict funding for legal services for the small proportion of the public with the lowest income levels, ("Congresscan. . .," 1984) and how to expand services offsetting legal aid cuts by impressing private attorneys into service without compensation (Uelmen, 1984).

Procedural Rules Frustrating Substantive Justice. Procedural rules were developed originally to limit arbitrary and abusive actions by the courts. They have become so overwhelming that powerful individual disputants can manipulate the system and subvert the ends of substantive justice. For example, the statute of limitations and statute of frauds can defeat otherwise meritorious claims if the claims are not made in the required time or if contracts are not put in writing. Similarly, the rules of evidence may prevent consideration of relevant evidence, and the system of proof makes decisions, such as liability and damages in an auto accident case, dependent on the availability and credibility of witnesses' testimony. Procedural rules often divert attention from the merits of a dispute and may result in substantively unfair results.

Narrow Choices of Remedies Available. Our adversary legal system is not designed to resolve conflicts that are not recognized causes of action. In addition, remedies are usually only in the form of financial awards that are intended to make the plaintiff whole. However, even a full recovery does not normally include compensation for attorney's fees, emotional distress, and time lost in the process of getting the recovery and other nonmaterial values (Riskin, 1982). Legal remedies usually do not address disputants' needs for acknowledgment and release of their emotions nor do they encourage the maintenance of interpersonal relationships and social harmony.

Game Psychology Undermines Respect for Law and Justice. In the battle model of justice, disputing parties and their attorneys pursue their self-interests with little responsibility for fairness in process or results. They can rationalize that it is the courts' responsibility to be concerned about fairness, not theirs. In addition, the potential for all-or-nothing results provides adversaries with great incentives to do everything legally possible to achieve their goals. Thus, in practice, everything that is not prohibited becomes almost imperative. Adversaries may feel bound to take all arguable positions that advance their interests, regardless of their relation to the merits of the dispute. This cynical approach even infects pretrial negotiations by encouraging positional posturing based on speculation about possible court results rather than honest discussions of differing perceptions of fairness and real needs.

Alienating Experience. Most disputants find litigation a very unpleasant experience that prolongs or aggravates the original dispute. When testifying at trial or depositions, witnesses find that their behavior is rigidly controlled

by a strange etiquette. They may be interrupted, badgered, and humiliated. The adversary game perspective creates an incentive to shade testimony in self-serving ways. This can be used later as justification by opposing attorneys to do whatever they can to discredit witnesses. Even when attorneys believe that a witness is telling the truth, they may feel that their duty of zealous representation requires them to discredit the witness in any legally permissible manner.

Tyranny of Advocacy. Although lawyers are agents—who carry out clients' wishes—many lawyers usurp decision making by clients for various reasons. Attorneys must make many procedural decisions which they (sometimes correctly) believe that clients will not understand or will expect the lawyers to decide for them. Clients look to lawyers as experts and advisers. This expectation can create a subtle incentive to slant the presentation of choices in favor of the lawyers' recommendations. Thus, sometimes clients merely ratify the decisions that lawyers have made already. Often, as a matter of efficiency, attorneys do not consult the clients at all about litigation decisions. At trial, litigants represented by attorneys are not allowed to participate except through their attorneys or as witnesses. It is said that the legal system steals the disputes from the disputants.

Conflict Avoidance and Escalation. Many people are intimidated by lawyers and the legal system and believe that legal remedies will be impractical, ineffective, or too expensive. They may be unaware of other methods for resolving disputes. As a result, they choose to live with small problems rather than dealing with them as they arise. As the situations deteriorate, frustrations increase, positions harden, defensive measures are taken, and opportunities for resolving the conflict are lost (Shonholtz, n.d.). Once the spiral of escalation begins, it is very difficult to stop. Ironically, some disputes grow big enough to litigate because of people's fear or dislike of the legal system (Nader and Singer, 1976).

Shadow of Law. The adversary system of resolving disputes exerts a powerful influence on disputes that are in the process of being litigated. This system casts a heavy shadow over both the generation and resolution of disputes even when they are not litigated. Mnookin and Kornhauser's classic article (1979) demonstrates how legal rules and procedures used for adjudication create different bargaining endowments for each party that significantly affect the process and results of negotiations out of court (See also Simon, 1978, pp. 85-91). The legal system and the attitudes associated with it have a major impact on private negotiations since parties and attorneys are aware that, should they fail to reach agreement, the dispute would be decided by the courts. Thus, many private negotiations that do not enter the legal system are nonetheless profoundly affected by parties' beliefs and values that are formed in relation to the system.

It is likely that many of the problems cited above are inherent in the inevitable tension between the need for social stability and the ideal of individ-

ual autonomy (Simon, 1978; Nonet and Selznick, 1978). However, some revised theoretical formulations may be useful for describing problems more accurately, promoting better practices and mechanisms for dispute resolution, improving individuals' experience of control over their lives, and increasing people's ability to resolve conflicts with each other.

The legal system, as the primary channel for regulating conflict in our society, has evolved over time in response to changing needs and expectations (Tigar and Levy, 1977). This analysis of mediation principles is intended to serve as a next step in that continuing process of evolution. (See lists of ethical principles for mediation in Brown, 1982; Gaughan, 1982; Milne, 1983; Moore, 1983, Raiffa, 1982).

General Principles for Conflict Resolution

The goal of dispute resolution processes should be the full expression and resolution of conflict in terms of the participants' perceptions of justice and injustice (Shonholtz, 1981). This perspective recognizes conflict as a natural part of life that should be accepted as a source of knowledge about people's values and desires, a vehicle for communication, and a basis for lasting commitment to resolutions reached (Nonet and Selznick, 1978).

The antithesis of healthy dispute resolution is the sublimation of conflict (Simon, 1978) where disputes are translated into drawn-out procedural battles which absorb disputants' energy and numb their frustration until they decide to give up fighting. The classic example of sublimation is the "settlement on the courthouse steps" where, after lengthy and expensive pretrial preparation, litigants finally surrender their chance for a resolution of the merits of the conflict out of fear of the results of the litigation process. The great challenge for mediators and advocates alike is to help disputants figure out what they are really fighting about and to develop resolutions based on the substantive merits.

Both the adversary and mediation paradigms for resolving conflict attempt to balance competing values and interests after carefully considering all relevant issues. This fundamental assumption recognizes that all values cannot be realized fully, nor can all needs be met fully; tradeoffs, choosing less of one value in order to produce more of a conflicting value, must be made. Although there are techniques for redefining needs and realizing additional resources to increase the total satisfaction of all parties, resources do have real limits. Often, people must choose between competing interests.

The principle of balance is intended to provide just results in both adversary and mediation paradigms. However, the factors to be balanced differ according to the paradigm. In the adversary paradigm, the factors include potentially conflicting sources of constitutional, statutory, and case authority; competing versions of relevant facts based on the weight and credibility of admissible evidence; and the sympathies of the triers of facts and law.

In private negotiations under the shadow of adversary law, an additional factor is relative bargaining power based on the will and resources of the parties and their attorneys.

In the mediation paradigm, the principle of balance applies to competing perceptions of needs and conceptions of fairness and to comparisons of all possible solutions. The relative bargaining power of participants may be a factor in reaching the balance, although often mediators use various techniques to identify and de-emphasize power as a basis for decision making.

The following principles of conflict resolution express the highest aspirations of both adversary and mediation paradigms, and may be used in all kinds of dispute resolution processes:

1. Individuals providing services for resolution of disputes should be competent to perform the services offered for each dispute in which they are involved.
2. Individuals undertaking to act as neutrals should do so impartially as between disputing parties. All service providers should disclose all potential conflicts of interest fully and proceed only with the consent of all affected parties.
3. Parties' legitimate needs for confidentiality should be recognized and defined explicitly at the outset of the process.
4. Parties and service providers should provide all accurate and materially complete information needed to understand and resolve the parties' disputes.
5. Parties and service providers should attempt to resolve disputes through careful consideration of all options, within the time, financial, and practical limits of each situation.
6. Parties are the primary decision makers who should assume as much responsibility as feasible and accept the consequences of their decisions.
7. Parties should base their decisions on their principles of fairness and perceptions of each party's needs and interests for the present and future.
8. Parties should respect the legitimate needs and interests of others including other parties and those not represented in the dispute, especially minor children.
9. Everyone involved in a process of dispute resolution should make determined efforts to minimize negative behavior, such as violence, intimidation, and unnecessary expense.

Limits of the Principles

Obviously there are some limits to the applicability of these principles. First, all the parties must be able to consider and make decisions in the context of the particular process. For example, a woman who is very competent as a

mother but who cannot effectively assert her interests with her overbearing husband should not participate in a mediation with him. (See, for example, Kelly's excellent literature review on the adult experience of divorce, 1982).

A second limitation is where a party, attorney, or other person involved is acting on bad motivation. Clearly it is foolish to be open, honest, and respectful with someone who is intentionally lying, cheating, or stealing. Fisher and Ury (1981) describe useful techniques consistent with the principles described here for dealing with people who are more powerful or who use dirty tricks. However, there is no guarantee that these methods will prevent obstructive parties from persisting in their conduct.

A third limitation on the usefulness of these principles is parties' awareness and acceptance of adversary principles and attitudes. The cultural traditions of adversary advocacy and competition (as opposed to cooperation) are rooted deeply in American society. Although mediative philosophies and practices are long established in other cultures and have been applied in limited contexts in our society (Folberg, 1983), many people are consciously or unconsciously committed to an adversary approach to life. Thus, it would be unwise to persist in defining one's negotiation goal as reaching a mutually satisfying result if one's negotiating partner persists in single mindedly seeking only his or her own self-interest.

Evaluation of Proposed Rules and Standards for Lawyers and Mediators

The principles described above will be used to analyze the American Bar Association's (ABA) Model Rules of Professional Conduct adopted in August 1983, and the Standards of Practice for Family Mediators adopted in principle by the Family Law Section (FLS) of the ABA in July 1983. Since the professional conduct of lawyers is regulated by state and local bar associations, the ABA Rules and FLS Standards do not have binding legal authority but are proposed as models for adoption by the state and local bar associations (Reaves, 1984; American Bar Association, 1984; for a pro and con discussion of the Model Rules, see Moser, 1983; and Freedman, 1983). As discussed in the final section of this chapter it is unclear whether the FLS Standards are recommended as voluntary guidelines or legal requirements and whether violation of these could result in professional discipline or malpractice liability.

Competence. *Individuals providing services for resolution of disputes should be competent to perform the services offered for each dispute in which they are involved.*

This principle is consistent with the ABA Rules. Rule 1.1 states "A lawyer shall provide competent representation to a client." Competent representation requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." In practice, most attorneys are conscientious about accepting only those matters that they are competent to handle.

This principle is also consistent with the FLS Standards. The preamble to the Standards states that it is essential that mediators be qualified. Standard I.A.4 states that a mediator has a continuing duty to "assess his or her own ability and willingness to undertake mediation with these particular participants and the issues to be mediated." In practice, most divorce mediators have training and experience in the legal or mental health professions and address only those aspects of disputes that they are competent to handle and refer clients to any additional services needed. Community mediation programs that use nonprofessional mediators generally require their mediators to complete in-house training. In addition, these community programs use care in assigning mediators to cases depending on their individual competencies.

Although it is easy to agree that mediators should be competent, it is not so easy to define competence. Is mediator competence the skill of facilitating negotiation? Or providing all necessary and appropriate information so that participants can make informed decisions? Or leading participants to the fairest possible result? Or the result that best meets all participants' needs? Or the result best approximating what the courts would have decided? Is competence measured by the percentage of disputes reaching agreement? Can competence be determined from the mediator's education, training, and experience? Is competence a function of compliance with all applicable requirements, standards, and procedures? Who is the best judge of mediator competence—mediation participants, other mediators, lawyers, researchers, judges, or legislators? Is competence purely subjective and completely dependent on the perceptions and values of different evaluators?

Impartiality and Conflict of Interest. *Individuals who have assumed the obligation to be neutral in dispute resolution processes, such as mediators, arbitrators, and judges, have a duty to be impartial as between the parties. All individuals providing services for resolution of disputes (whether compensated or not) have a duty to disclose fully any prior relationships with parties, their attorneys, and others associated with any party, as well as any other potential conflicts of interest. Such service providers should proceed only if they can perform their duties properly and if they obtain the fully informed consent of all affected parties.*

This principle is consistent with Canon 3 of the ABA's Model Code of Judicial Conduct which states: "A judge should perform the duties of his office impartially and diligently." Although the roles of judges and mediators differ radically as to patterns of decision-making responsibility, there are significant parallels between the roles. For example, both judges and mediators encourage disputants to resolve disputes themselves (as when judges participate in settlement conferences), both control the order of their processes according to certain rules and customs, and both scrutinize certain agreements to protect against unfairness (Raiffa, 1982).

This principle is also consistent with ABA Rule 1.7, which provides that an attorney may represent a client where there is a potential conflict of interest only if the attorney believes that the representation would not be adversely affected and all affected clients consent after consultation.

The new Rule 2.2, covering attorneys' work as intermediaries, is generally consistent with the principles here, although the rule is somewhat more restrictive. Under section a of this rule, lawyers may properly function as intermediaries if: (1) each client consents after consultation about the risks, advantages, implications, and effect on attorney-client privilege; (2) the lawyer believes that matters can be resolved consistent with clients' best interests, each client will be able to make adequately informed decisions, and there is little risk of material prejudice to any client if the contemplated resolution is unsuccessful; and (3) the lawyer reasonably believes that he or she can be impartial without any improper effect on any of the clients. Under section c, an attorney must withdraw if any of the above conditions is not satisfied at any time in the process and shall not continue to represent any of the clients in that matter.

There is an important inconsistency between this rule and the suggested principle that relates to the risk that mediation will not produce agreement. Under this rule, attorney-mediators must assess the risk that mediation will be unsuccessful and prejudicial to the parties and refuse to accept the case if there is more than a little risk. The official comment to the rule states: ". . . a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations." The problem with this view is that such contentious disputants may be the ones who need mediation the most (Phillips and Piazza, 1983). They should be allowed to make their own informed assessments of the risks and be allowed to mediate even if there are substantial risks.

The issue of contentious mediation participants illustrates a conceptual problem with Rule 2.2. Under this rule, lawyer-mediators are conceived of as representing multiple clients rather than providing a service where they do not function as representatives of any client (Silberman, 1982). Representation is an adversary concept which usually means advocating one interest as opposed to another. Since mediation does not include the concept of the mediator as an opponent of any party, it makes more sense to consider mediation as representation of none of the participants rather than all of the participants (Sander, 1983).

The prohibitions of the FLS Standards extend far beyond the principle suggested here as well as the comparable provision in the ABA Rules. Standard III.A states: "A lawyer-mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation." Similarly, Standard III.B states: "A mediator who is a mental health person [sic], shall not provide counseling or therapy to either party or both during or after the mediation process. If the mediator has provided marriage counseling to the participants, or therapy to either of them beforehand, the mediator shall not undertake the mediation."

The Standards are extremely overbroad and inappropriate even if they are not adopted as mandatory requirements subjecting mediators to possible discipline. First, the Standards are inconsistent with the principle that dispu-

tants should be the primary decision makers in matters affecting their lives. The Standards would substitute the judgments of the ABA Family Law Section for the judgments of properly informed disputants as to which service providers they should employ. Second, it is difficult to see the danger if after a mediation, a mediator provides legal or therapeutic services to a former mediation client, providing all other mediation participants consent or if the later services are unrelated to the subject of the mediation. Third, it is unclear where the legal profession derives legal or moral authority to govern the conduct of mental health professionals.

Confidentiality. *Participants in dispute resolution processes need certain opportunities to communicate privately and confidentially so that they can feel able to communicate honestly and completely. Dispute resolution service providers have a duty to develop explicit agreements as to what communications are confidential as concerns third parties and the individual participants.*

The ABA Rules are generally consistent with mediation principles. However, confidentiality practices under the adversary philosophy create opportunities and incentives for misrepresentation. The preamble states: ". . . a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." ABA Rule 1.6 generally prohibits attorneys from revealing information relating to representation of a client, with several exceptions. Attorneys may reveal such information with clients' express or implied authorization when it is necessary to prevent clients from committing criminal acts likely to result in imminent death or substantial bodily injury or in disputes concerning lawyers' conduct. The legal system provides great potential for abuse because confidential discussions precede the evidentiary hearings that are the basis for decision making. This practice allows or encourages manipulation of evidence at hearings, distorts decision making, and is contrary to the principle of honest and complete communication (Bok, 1982).

There are two technical differences between confidentiality under the ABA Rules for attorneys and confidentiality as generally practiced in mediation. One difference is that attorney confidentiality is generally recognized by state laws of evidentiary privilege and rules of professional conduct as protecting communication from everyone except the attorney and client. Mediation confidentiality agreements between participants and mediators provide narrower protection, because those who are not party to the agreements might be permitted to subpoena mediators as witnesses despite the agreements. This could create significant problems since there are few, if any, statutes authorizing mediators' privileges. In addition, it is unclear whether state laws regarding attorneys' and therapists' privileges would apply when those professionals act as mediators. Such state laws probably would not apply to nonprofessional mediators in community mediation programs.

The second difference is that the ABA Rules do not require attorneys

to inform clients of the extent and limits of their confidentiality rights, whereas good mediation practice calls for explicit discussion of these matters at the beginning of the process.

The FLS Standards are generally consistent with the approach recommended here. Standard II states: "The mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both participants." Standard II.B states: "The mediator shall inform the participants of the mediator's inability to bind third parties to an agreement not to disclose in the absence of any absolute privilege." Standard III.F states: "The mediator shall not communicate with either party alone or with any third parties to discuss mediation issues without the prior consent of the mediation participants." Standard I.A.7 states: "The mediator shall discuss the issue of separate sessions and shall reach an understanding with the participants as to whether and under what circumstances the mediator may meet alone with either of them or with any third party." Standard VI.B states: "The mediator shall obtain an agreement from the participants in the orientation session as to whether and under what circumstances the mediator may speak directly and separately with each of their lawyers during the mediation process."

In addition to these practices, mediators typically make agreements with the disputants at the outset of the process that: (1) specify whether statements made in mediation are inadmissible in court, (2) specify whether a mediator may be called to testify as a witness in later litigation, and (3) prohibit lawyer-mediators from later counseling or representing any participant in a related matter. Some mediators communicate individually with participants or their attorneys. Those mediators should develop explicit agreements as to whether and how such communications may be disclosed to other participants.

Honest and Complete Communication. *Parties and service providers should provide all accurate and materially complete information needed to understand and resolve the disputes.*

The ABA Rules are generally consistent with this principle, although the Rules authorize suppression of some useful information and allow certain deceptive communications. Many of the Rules deal with these issues. Rule 1.2, on the scope of representation, prohibits attorneys from counseling or assisting clients to engage in fraudulent conduct. Rules 3.1 and 3.2 prohibit the abuse of legal procedures by taking frivolous positions or using dilatory tactics. Rule 3.3(a), which covers candor toward tribunals, prohibits lawyers from knowingly (1) making false statements, (2) failing to disclose material facts if silence would produce a fraudulent result, (3) failing to disclose adverse controlling legal authority not disclosed by opposing counsel, and (4) offering false evidence. Rule 3.4, which covers fairness to opposing party and counsel, prohibits attorneys from: (1) hiding or destroying evidence, (2) falsifying evidence, (3) making frivolous discovery requests or responses, and (4) alluding, in trial, to facts that are not legally relevant or supported by admissible evi-

dence. Rule 4.1, which covers truthfulness in statements to others, prohibits lawyers in the course of representing clients from knowingly: (1) making a false statement of material fact or law, and (2) failing to disclose a material fact if disclosure is necessary to avoid assisting a client in a fraudulent act. Rule 7.1 prohibits attorneys from making false or misleading statements in advertising. Given all these rules, however, lawyers, according to Rule 4.1, have "no affirmative duty to inform an opposing party of relevant facts."

Rule 3.4(e) is inconsistent with mediation principles and practice because it bars or limits introduction into the process of information that is not relevant to a legally recognizable issue or that is inadmissible, although directly relevant, under the laws of evidence. Thus, in divorce mediation spouses can frame the issues in terms of the history of the family relationships and detail needs for the future even when these matters are not directly relevant to the legal issues being considered. Similarly, mediation can incorporate relevant information, such as hearsay statements of children and other relatives, even though they are inadmissible in court.

Moreover, the ABA Rules permit much dishonest behavior under the theory that anything not prohibited is permitted. Thus, it is no violation of Rule 3.1 to take an arguable but insincere position. Nor is it a violation of Rules 1.2, 3.3, or 4.1 to fail to disclose material facts as long as at least one of the five elements of fraud is absent, such as a change of position in reliance on the misrepresentation or the existence of legally recognized damages.

In adversary matters, most attorneys and clients feel ethically bound to communicate truthfully. However, parties and attorneys have strong incentives to distort presentations of facts and law because of the risks that the triers of fact and law will make unfavorable decisions. These patterns result in cynicism about the legal system as well as some unjust decisions.

In contrast, the FLS Standards require participants to be fully informed about the facts and the law—possibly more so than they want or can afford. Standard IV.A states: "The mediator shall assure that there is full financial disclosure, evaluation, and development of relevant factual information in the mediation process, such as each would normally receive in the normal discovery process." This approach excessively limits the procedural options for mediation participants. For example, in adversary discovery processes, divorcing spouses normally hire one or two appraisers to evaluate a family home. In a mediation process, spouses with good understanding of real estate issues may have reached an agreement as to the value of their property without hiring an appraiser. Nonetheless the FLS Standards apparently would require them to hire an appraiser in any case. Despite the great emphasis placed on developing and disclosing factual information, the Standards do not require that discussions of participants' beliefs, intentions, and feelings be honest.

Similarly, Standard IV.C requires mediators to "assure that the participants have a sufficient understanding of appropriate statutory and case law,

as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process." However, "lawyer-mediator(s) shall not direct the decision of the mediation participants based on the lawyer-mediator's interpretation of the law as applied to the facts of the situation" and may only "define the legal issues." Again, the FLS Standards purport to expand consideration of substantive issues but only by limiting participants' procedural options.

It is unclear whether the term "defining the legal issues" will be interpreted to include providing information about the law and local judicial tradition, such as anticipated arguments for each position and assessments of probable court results. If not (and the Standards are interpreted narrowly), even spouses who had been separated five years, who had limited assets and income, and who had been fully informed of the benefits of consulting independent attorneys would be barred from receiving legal information from their lawyer-mediator. They would be forced, effectively, to hire two additional attorneys to receive the information they need to make properly informed decisions. Under the principle proposed here, attorney-mediators would be allowed to provide legal information but not be able to provide legal advice as to what decisions individual participants should make.

Careful Consideration of Options. *Every process of dispute resolution should be designed to analyze all possible options for resolving the dispute within the time, financial, and other practical limitations of each situation.*

Choice of processes: This analysis should begin with a consideration of the possible process for resolving the dispute, including: (1) discussions between the parties without outside intervention, (2) mediation, (3) negotiation through representatives, (4) arbitration, (5) litigation, and (6) variations of the above, especially considering the actual services providers in the local area that might be used.

This seems self-evident and many attorneys incorporate this approach as part of their initial evaluation and screening process. Perhaps this is so obvious that the ABA Rules do not address this issue, although the comment to Rule 2.7 on the attorney's role as an adviser does indicate that recommendations to consult with other professionals, such as psychiatrists and accountants, may be appropriate. Curran's (1977) national survey research findings show that people are very discriminating in the services they use to deal with problems; the use of legal or other services varies depending on the type of problem and demographic factors. Lawyers can be very helpful in explaining the various services available and should routinely evaluate and discuss what services might best address client's needs. (See Hayes, 1983 for discussions of the considerations in choosing a process; see also for how and when representative attorneys shoud refer clients to mediation.)

The FLS Standards deal with this issue properly. Standard I.A.1 states: "The mediator shall define the process in context so that participants understand the difference between mediation and other means of conflict resolution available to them."

2. Procedures Within the Chosen Process: When parties are selecting a particular mode of conflict resolution, they should consider the procedural choices available within alternative processes, including the scope of services, areas of protection covered and excluded, and the fees and costs. Before parties become committed to any process of dispute resolution, service providers should make explicit agreements with their clients about the scope of services and protection, and estimated total expenses.

The ABA Rules provide for much less involvement of clients in decision making than suggested here, and the Rules are relaxed about the discussion of fees. The comment to Rule 1.4 on communication states: ". . . ordinarily (lawyers) cannot be expected to describe trial or negotiation strategy in detail." The comment to Rule 1.2 on the scope of representation states: "In the question of means (of pursuing clients' objectives), the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." This comment also states: "Within (the limits imposed by law and the lawyer's professional obligations), a client also has a right to consult with the lawyer about the means used in pursuing those objectives." Rule 1.5, concerning fees, does not require lawyers and clients to agree on the fee arrangement before beginning representation but authorizes lawyers to "communicate" arrangement "within a reasonable time after commencing the representation." Thus, attorneys apparently have no duty to obtain the approval of clients or even consult clients on procedural issues. Clients must take the initiative to exercise their right to find out what their attorneys are doing. Nor do attorneys have a duty to reach agreement on fees before clients become committed to the representation. To be consistent with the suggested principle, attorneys should consult with clients about options for discovery, settlement negotiations, pretrial motions, trial tactics, and other issues to the maximum extent reasonably possible. Moreover, attorneys should always reach agreement with clients about fee arrangements and estimated total expenses before clients commit to retain the attorneys except where there is a legitimate reason not to do so.

Under FLS Standard I.A, divorce mediation participants must always be informed of the procedures and fees at the initial meeting. However, mediators and participants apparently have limited discretion to deviate from the procedures mandated by the Standards. The Standards are extremely detailed and set out numerous mandatory procedures that must be explained to and accepted by the participants. In practice, mediators usually discuss procedures and fees at the outset and assist participation in developing an agenda for the overall process. Periodically, throughout the process, mediators and participants refer to and change the agenda as needed.

3. Substantive Choices: As part of the process of informed decision making, parties and service providers should consider all plausible solutions to the problems involved in the conflict.

The ABA Rules do not explicitly deal with this subject. The comment

to Rule 1.4 regarding communication between lawyers and clients, states: "... a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party." It is not clear whether providing "facts relevant to the matter" would include a discussion of all plausible solutions. This general duty is limited by the availability of time and other practical exigencies.

In practice, when lawyers represent clients in adversary processes, they usually discuss the clients' goals and various possible strategies that might accomplish the goals, based on the law and local customs. Unfortunately, when disputants or opposing attorneys negotiate with each other, they often engage in positional bargaining rather than a process of joint problem solving through systematic examination of alternatives suggested here (Fisher and Ury, 1981; Raiffa, 1982).

FLS Standard V.C appropriately states: "The mediator shall assure that each person has had the opportunity to fully understand the implications and ramifications of all options available." In practice, this is standard operating procedure. Many techniques for eliciting and explaining options are described by Doyle and Straus (1976).

Disputants' Decision-Making Responsibility. *Disputing parties are the primary decision makers. They should assume as much responsibility as feasible for making decisions and for accepting the consequences of their decisions.*

The ABA Rules grant substantial decision-making authority to attorneys, sharply limiting clients' decision-making roles. Although ABA Rule 1.2 nominally designates clients as the ultimate authorities in determining the purposes of attorneys' services and whether to accept settlement offers of plea bargains, the rule maintains a very narrow concept of clients roles. As described above under the ABA Rules, clients cannot expect attorneys to describe trial or negotiation strategy in detail or to consult with them on important tactical decisions. Clients' decisions seem limited to starting and stopping the process, since attorneys have the responsibility for making most decisions in litigation. Clients' participation is reduced further by attorneys' limited responsibility to explain the process to clients. Thus, it is understandable for parties who receive unfavorable results in an adversary process to deny responsibility for the problem and its consequences since, from their perspective, most of the critical decisions have been made by the courts, attorneys, or opposing parties.

Although mediation is generally considered to be a process that encourages participants to take responsibility for making decisions about their lives, the FLS Standards assign mediators and the consulting attorneys significant decision-making responsibilities that seriously limit participants' autonomy. Standard I.A.3 states: "The mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process."

The Standards specifically assign participants the responsibility "to define the issues to be resolved" (I.A.2) and a "right to suspend or terminate the process at any time" (I.A.3). These Standards are similar to the ABA Rules in that they give the parties responsibility to begin and end the process but offer only limited authority to shape the process.

Indeed, the Standards give mediators unilateral authority or require them to take actions that create a real potential for manipulation of participants by mediators. Standard III.C states: "The mediator shall disclose to the participants *any* biases relating to the issues to be mediated both in the orientation session and also before those issues are discussed in mediation" (emphasis added). Standard I.A.4 establishes that it is a continuing duty of mediators to assess participants' ability and willingness to mediate the dispute, and Standard V.A requires mediators to suspend or terminate the process if the *mediator believes* that any participant lacks the willingness or ability to meaningfully participate. Similarly, Standard V.B requires mediators to suspend or terminate the process if the *mediator believes* that the agreement being approached is unreasonable. Also, FLS Standard III.E establishes a mediator's duty to "promote the best interests of the children," and to state the basis of a belief when any proposed agreement does not protect the best interests of the children.

Taken together, these Standards present a grave threat that mediators will subtly or not-so-subtly dominate the process. There is the danger that the mediator's mandatory repeated disclosure of any biases may pressure participants to follow the mediator's values rather than their own. The Standards would prohibit mediators from exercising judgment about when to disclose relevant biases. For example, disclosure by the mediator of bias at the beginning of the process could be used by one participant to improperly justify a rigid bargaining position, whereas disclosure toward the end of the discussion would allow participants to receive needed information and still give them great autonomy.

In addition, participants face the danger that mediators will terminate the process suddenly if the mediators believe that the process or results will be unfair. Apparently under the Standards, mediators have no general duty to disclose or discuss the bases of their beliefs so that participants can make their own judgments about fairness. Only Standard III.E which regards the interests of children, approaches the appropriate balance by providing that mediators must "assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular parenting formula." That standard further requires mediators to inform parents of the basis of the beliefs that a proposed agreement does not protect the children's interests. In addition to this procedure, mediators should ask the parents why they prefer the proposed agreement and then try to develop a solution meeting the needs of children and parents. Only if the parents persist on a seriously inappropriate course should mediators withdraw from the process.

The Standards are also extremely intrusive, as at least nineteen require mediators to follow particular disclosure requirements. Presumably, participants are free to disregard the approaches mandated by the standards and choose courses of action they believe are more appropriate for their needs. However, the potential disciplinary and malpractice consequences for mediators would create a great pressure on participants to follow the standards even if they conflict with the participants' (and the mediator's) legitimate perceptions of their needs.

The pressure is particularly heavy concerning employment of independent attorneys. At least seven of the standards establish the role of the consulting attorneys. Standard I.A.6 states: "The mediator shall inform the participants that each should employ independent legal counsel for advice." Standard IV.C states: "If the participants or either of them choose to proceed without independent counsel, the mediator shall warn them of the risk involved in not being represented including the possibility that any agreement they submit to a court may be rejected in light of both parties' legal rights or may not be binding upon them." Standard VI.D states: "While the mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed." Thus, many divorcing spouses would feel forced to hire consulting attorneys even though they may believe this to be unnecessary.

This analysis show that both the ABA Rules and FLS Standards would, in the name of protection, deprive disputants of a great measure of power to make decisions affecting their lives. That the ABA Rules would define clients' role narrowly is not surprising given the legal profession's long tradition of adversary advocacy. It is surprising that the FLS Standards also greatly restrict parties' decision-making authority since a primary goal of mediation is to help people retain decision-making power in their lives rather than surrendering it to expensive professionals and impersonal bureaucratic institutions.

Instead of the FLS approach, it would be better to foster disputant autonomy by explicitly dividing responsibilities for the process between the participants and service providers and to give participants as much responsibility as they are willing and able to assume. The provider's role should include sharing as much knowledge as the parties want and reducing the gap of knowledge between providers and parties. Thus, in each case, providers and parties should assess their proper role on the continuum from manipulation to abandonment of parties (Friedman and Anderson, 1983; Emley, 1982).

Participants' Principles of Fairness and Perceptions of Need. *The goal of dispute resolution systems should be to provide procedures which produce resolutions as close as possible to parties' perceptons of fairness. In evaluating fairness, parties should consider: (1) how to satisfy each party's real needs and interests for the present and future; (2) the full range of issues involved, including financial, emotional, and relationship issues; (3) the*

law, and the values embodied in the law, as significant though not necessarily determinative factors; and (4) a priority for fair substantive results over procedural regularity.

The ABA Rules are based on assumptions of the philosophy of adversary advocacy. The preamble states: "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."

Unfortunately, the Rules' assumptions about justice too often are wrong. As discussed above in the description of problems in the adversary system, it is incorrect to assume that all opposing parties will be represented. Even where parties are each well represented, the underlying ideology of adversary advocacy often defeats the very ideals of justice and individual dignity that the system is supposed to maintain.

Even when the legal system is not abused, it still is not directed toward future problem solving. The adversary system is geared primarily toward vindication of legal rights based on past events and current self-interest, rather than meeting parties' current and future mutual needs. Although the courts briefly flirted with the idea of defining constitutionally required due process in terms of substantive fairness when they struck down labor and consumer protection statutes in the first third of the twentieth century, the prevailing interpretation now only requires that minimal procedures have been followed where government intervention is involved (Lockhart and others, 1975). In disputes where no government intervention is needed to exercise legal rights between private parties, even this minimal procedural compliance is not required (*Flagg Brothers* v. *Brooks,* 1978).

One of the most serious problems of the adversary paradigm is that substantive conflicts too often are translated into procedural disputes. Simon (1978) calls this tendency "procedural fetishism" and he argues that it robs litigants of the integrity of their purposes and values and creates a tremendous pressure toward sublimation of conflict. Moreover, the legal system is generally incapable of addressing the emotional and relationship aspects of conflicts. It either ignores these issues or translates them into monetary values.

Fairness. The FLS Standards do not explicitly set forth a basis for defining fair decision making, but rely heavily on mediators' beliefs about fairness and consulting attorneys' interpretation of the law. Standard III.D states: "While the mediator must be impartial as between the mediation participants, the mediator should be concerned with fairness. The mediator has an obligation to avoid an unreasonable result." Standards V.A and V.B, which require mediators to suspend or terminate mediation when the mediator believes that the proposed agreement is unreasonable or a participant is not willing or able to participate meaningfully, are framed solely in terms of mediators' perceptions of fairness. Thus, the FLS Standards seem to defeat a basic principle of mediation that participants' principles of fairness should govern the resolution of conflicts.

Participants' Needs. As discussed above, the focus on participants' needs is addressed only in the context of the mediator's duty to promote the best interests of the children by assisting parents to examine their children's needs apart from their own needs (Standard III.E). This approach should be broadened to include consideration of each participant's present and future needs in all relevant contexts.

Emotional and Relationship Issues. Under Standard V.D, participants must confirm that they understand the connections between emotions and the bargaining process. It is unclear whether this is intended to legitimize emotions as valid issues for discussion or to delegitimize participants' decision-making ability because their emotions interfere with proper bargaining. The former view is recommended here with the expectation that when participants' emotional states do interfere with good decision making, mediators should explicitly address this issue with the participants and develop plans for dealing with the problems. Such plans might include arranging for individual counseling or possibly just allowing time to pass.

Mediators' practices and styles vary greatly on these issues, both in terms of general philosophies as well as in their application under different circumstances. Some mediators prefer to focus on the practical, financial, and legal issues and deal with the emotional and relationship issues only where they represent obstacles to agreement. Others prefer to focus on the emotional and relationship issues, believing that, once those underlying areas of conflict are resolved, the technical solutions will fall into place. A third approach focuses on developing strategies for dealing with these issues depending on the circumstances in individual cases.

Role of Law. The FLS Standards place great reliance on the law as a determinative factor in decision making. This emphasis on legal rules is based on a virtual requirement that participants consult independent attorneys as discussed above. Should they fail to do so, mediators must warn them that their decisions may not be given effect and must discourage them from executing their own agreements.

In practice, mediators vary widely on what is the proper role of the law in mediation. Some believe that the law should be emphasized heavily as the sole or primary basis for negotiation. Others believe that the law should not be discussed at all because it would overshadow participants' perception of their needs and feelings. This approach suggested here represents a middle position on this issue and follows Nonet and Selznick's (1978) view that people's purposes should take precedence over particular rules, policies, and procedures when necessary to achieve substantive justice.

Role of Procedure. The FLS Standards seriously limit parties' participation in the process. The Standards require participants to receive extensive and detailed disclosure from mediators and advice from their attorneys and subject participants to the risk that mediators will terminate the process. In effect, participants may only proceed if they receive approval from the professionals they have hired.

In practice, mediators differ on the role of procedure in mediation. Some have established highly structured procedures (Coogler, 1978) and may experience conflict when participants' needs vary from or are not addressed by the pre-established procedures. Other mediators are more flexible and establish very limited procedures or freely adjust procedures according to participants' substantive needs.

Respect for Others. *Parties should respect the legitimate needs and interests of others, including other parties and those not represented in the dispute. Dispute resolution processes should involve continuing efforts to identify the mutual, overlapping, and complementary interests of the parties. These processes should recognize explicitly the effects of disputes and their resolutions on others, especially minor children.*

Although the ABA Rules are generally consistent with the principles suggested here, adversary philosophy and practices often take priority over rules that encourage fair treatment of others. Various rules address this issue, including: Rule 3.4, on fairness to opposing party and counsel; Rule 3.5, on impartiality and decorum of tribunal; Rule 4.4, on respect for rights of third parties; and Rule 4.1, on truthfulness in statements to others. Unfortunately, there is an internal conflict in the Rules between advocates' duties to zealously represent clients and advocates' duties to others. Clients' interests almost always take priority. The comment to Rule 4.4 states: "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons." Any concern for the interests of others is primarily based on an assessment of the best means to achieve clients' self-interests. There is no general professional ethic as to the treatment of children. Concern for children's interests varies depending on the individual lawyer's values.

FLS Standard III.E establishes a duty to promote the best interests of the children as discussed above but does not address the issue of participants respecting the needs and interests of the other disputants and those not represented in the process.

Mediators typically work to help participants to identify the interests that underlie their positions so that they can develop options that meet the needs of each participant. Fisher and Ury (1981) have distilled the essence of this philosophy; they recommend that parties "separate the people from the problem" and address both relationship and substantive issues. Using such techniques, one can simultaneously respect and vigorously disagree with honorable opposing parties.

Mediators generally agree on a special responsibility to address the needs of minor children affected by disputes. However, mediators differ as to whether this responsibility should be characterized as representing the children or the family, because of the term's connotations of adversary representation and the uncertainties in defining this representational relationship.

Minimizing Negative Behavior. *Every person involved in a dispute resolution process should take whatever steps are appropriate to avoid or minimize negative behavior*

such as: (1) violence; (2) psychological warfare, including intimidation, threats, and infliction of mental distress; (3) unnecessarily increasing costs, risks, or delays; (4) denying or avoiding responsibility for one's acts; (5) unnecessary blaming and other judgmental behavior; (6) using positional pressure tactics; and (7) bluffing and deception.

The ABA Rules are narrower than the approach suggested here. Rule 4.4, on respect for rights of third persons, states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." In addition, Rules 3.1 through 3.4 require attorneys to be honest towards tribunals, fair to opposing parties and counsel, and to avoid taking frivolous positions and using delaying tactics. However, the Rules do not address the negative behaviors listed in items four through seven above, and, unfortunately, much practice under the adversary paradigm involves some degree of these negative behaviors.

The FLS Standards are generally consistent with the approach suggested here. Standard V.E states: "The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants." It is not clear whether sincere but inappropriate blaming behavior or denial of responsibility are included in this Standard.

Fisher and Ury (1981) suggest useful techniques for dealing with dirty tricks, which can be summarized as identifying the questionable tactics explicitly and discussing the legitimacy and desirability of the tactics. If the tricksters insist on using inappropriate tactics, mediators should withdraw from the process because mediation cannot work properly if participants use hard-ball adversary tactics (Doyle and Straus, 1976).

Conclusions

This chapter translates values embodied in mediation into a set of general principles for dealing with conflict that can be used by disputing parties, professionals, and others assisting in resolution of conflicts. These principles have been compared with the ABA's Model Rules of Professional Conduct, which are applicable to attorneys generally and the ABA Family Law Section's Standards of Practice for Divorce Mediators. This analysis shows that there is a significant level of consistency between the principles expressed here and those reflected in the ABA Rules and FLS Standards. However, there are some important differences as well.

It is beyond the scope of this chapter to provide more detailed analysis and recommendations regarding the ABA Rules. It must suffice here to suggest that lawyers and others concerned with our system of law and justice re-evaluate the adversary advocacy paradigm to determine what changes in values, practices, and rules might both improve the social order and increase individual autonomy.

The FLS Standards as now drafted have critical defects. First, they are

inconsistent with the principle of participant responsibility for decision making because they assign such large responsibilities to mediators and consulting attorneys that participants are left with only relatively passive roles instead of retaining primary decision-making responsibility. Moreover, despite the extensive detail of the Standards, they do not identify the proper basis for decision making as being participants' needs, interests, and values. Instead the Standards focus on the mediator's beliefs and biases, the best interests of the children, and the law.

A second major defect in the Standards is the serious potential for heavy-handed intrusion of regulatory bureaucrats into a process that is designed to be very private. Assuming that the Standards are adopted as mandatory requirements, they would lead to new and counterproductive ways to define behavior as professional misconduct and malpractice and go far beyond current professional standards.

In effect, these Standards would create a double standard between lawyer-mediators and other lawyers. To illustrate this double standard, consider how advocates would feel if they were subject to professional discipline by an organization dominated by mediators. Then add a litany of rules that prescribe how advocates (but not mediators) would be required to practice. Then draft detailed rules subjecting advocates to possible discipline if, in their initial meetings with clients, they failed to (1) define adversary representation in the context of alternatives such as mediation; (2) define in detail the scope of representation, rights, responsibilities, risk, fee arrangements, and evidentiary privileges created by the attorney-client relationship; (3) elicit acknowledgement from clients that they understand the connections between their emotions and the litigation process; (4) ensure that clients have a sufficient understanding of the law and local judicial traditions; or (5) refer clients to mediation if opposing counsel developed a personal grudge or otherwise aggravated the parties' adversarial relationship. Obviously this hypothetical situation would be unfair. Yet the FLS Standards apparently suggest such a draconian regime. Rather than encouraging responsible experimentation, the FLS Standards seem to require all mediators to conform to the philosophies and practices prescribed by the drafters of the Standards.

A third major problem with the FLS Standards is the narrow conception of the roles of professionals and other service providers. The Standards suggest that providers are impersonal, disembodied experts who are to provide a standard commercial service. In contrast, mediators and lawyers and other providers are human beings who should share their biases and experiences with parties because they have affirmative value and because the providers really care about the parties and are not merely trying to avoid possible manipulation of parties.

A fourth problem with the FLS Standards is that they create the appearance of the bar as a parochial and self-interested profession that would put its perceived interests ahead of the public's interest, contrary to the admonishment in the preamble in the ABA Rules. The irony of the approach

of the FLS is that it does not appear to recognize that the advancement of diverse practices in mediation is not only in the public interest but in the bar's legitimate self-interest as well. Just as lawyers and bar associations support federally funded legal services for the poor because the bar's interest and the public interest overlap, so do enlightened and courageous lawyers truly support mediation.

In addition to these problems, there are serious uncertainties about the intended uses of the Standards. It is unclear whether the Standards are intended to be voluntary guidelines or mandatory requirements that, if technically violated, could result in professional discipline or malpractice liability. At the same time that the Council of the ABA Family Law Section approved the Standards in principle, it also adopted a companion resolution that states, in relevant part: "The American Bar Association Section of Family Law... strongly recommends that where the process of mediation is mandated or permitted, the practice be *guided* by *strict ethical* and *legal standards*" (emphasis added).

More specifically, are the Standards intended as a model for mediators to voluntarily use and adapt in developing their own agreement-to-mediate forms? Are the Standards intended to be used by state and local lawyer referral services wishing to maintain the integrity of new mediation referral panels by creating a condition that any lawyer who chooses to join a panel would agree to follow these Standards? Are the Standards intended as extensions of existing rules of professional conduct? If so, would violation of these more demanding Standards be the basis for disciplinary punishment, or would these Standards be similar to ABA Rule 6.1 (which requires lawyers to provide public interest legal services) where violations are not to be enforced through a disciplinary process? Are the Standards intended to be used in connection with state laws regarding negligence per se that could create a presumption of malpractice liability if mediators fail to comply strictly with the Standards?

To address these problems and uncertainties, the FLS Standards should be reviewed to determine if it would be appropriate to develop revised Standards consistent with the fundamental values embodied in mediation. Both the FLS Standards and this critique might be considered as early drafts of a mediation policy strategy in a one-text revision process.

Recommendations

The mediation community should organize a process to develop: (1) a new consensus on basic values and a paradigm of mediation, (2) strategies to assess and address problems in our system of dispute resolution, and (3) programs to educate related professions and the public generally about mediation philosophies and practices.

In discussing the application of his theory of revolutionary paradigm shifts in science to other fields, Kuhn lists issues to analyze in studying communities that define paradigms: (1) How does one elect and how is one elected to membership in a community? (2) What is the process and what are the

stages of socialization to the group? (3) What does the group collectively see as its goals; what deviations, individual or collective, will it tolerate; and how does it control the impermissible aberration? (p. 209).

I recommend that the mediation community explore these questions for our community.

Mediation is the new paradigm that is succeeding the old ideology of adversary advocacy. Because revolutions are not self-executing, we, in the currently amorphous mediation community, must take responsibility for developing the next paradigm consensus according to the value and beliefs of our evolving paradigm. Just as mediation requires the active participation of disputants, the development of the mediation movement requires the active participation of movement members to face our challenges, establish our priorities, and make the necessary commitments. Success in meeting our goals will depend on the will and resources of the mediation community.

Develop a Strategy. To advance the mediation paradigm, we should: (1) marshal existing knowledge and collect additional information as needed, (2) define the problems and needs to be addressed, (3) evaluate all feasible options for addressing unmet needs, and (4) reach consensus on goals, priorities, and strategies.

Following the principle that decision processes should involve all those affected by particular decisions, the process of developing a new mediation paradigm should include: (1) practicing mediators; (2) local, regional, and national mediation organizations; (3) individuals and groups in the legal profession, such as the ABA Special Committee on Alternative Dispute Resolution; (4) organizations of the mental health professions; and (5) appropriate representation of diverse public interests, such as former and prospective mediation participants.

There will need to be some organizing group to coordinate research, solicit input, develop a draft strategy, and generally facilitate the process of building the new consensus. After a draft strategy is developed, it should be submitted to local, regional, and national mediation organizations to identify areas of consensus and acceptable diversities. This process should be done in a process involving a series of hearings and conventions, beginning with the most local organizations and ending with the ABA and other national professional organizations. After a consensus is reached, any needed legislation should be enacted.

Institute a Research Program. To develop a fully informed strategy, we should research existing theoretical and empirical knowledge, and collect additional information needed to answer the following questions:

1. What theoretical foundations of basic and applied philosophy and social sciences should be used in building consensus about a mediation paradigm?
2. What are the current systems for resolving conflict, where do they work well, and what are systemic problems?

3. What are the economic and noneconomic costs of our system of dispute resolution, and what qualitative improvements and quantitative efficiencies can produce net benefits for individuals and society?
4. How effective are different techniques of conflict resolution, and how do disputants experience them?
5. How extensive are unethical practices by providers of dispute resolution services? What are the numbers and nature of complaints made to professional organizations, courts and insurers regarding professional misconduct? How many mediators and other providers are exploiting the miseries and anxieties of divorcing families? What false and misleading information about mediation has been disseminated?
6. How can individual service providers with different training and experience, and various professional organizations most productively collaborate in their mutual interests and in their clients' interests?
7. How does the development of mediation relate to political-economic philosophies of liberalism?
8. How does the development of mediation relate to other social trends for the future?

Define Needs and Priorities. Mediation can be developed to address many different individual and social problems and needs. Thus it is important to define priorities for addressing needs such as:

- Promoting individuals' capacity and responsibilities for making decisions about their lives
- Increasing people's perceptions of justice of dispute resolution processes and results
- Developing agreements carefully tailored to people's mutual and overlapping needs, interests, and values
- Fostering mutual respect and cooperation
- Using shared values of fairness rather than power as a basis for resolving disputes
- Promoting joint future problem solving
- Promoting access to appropriate conflict resolution service for the large segment of the population that cannot afford traditional legal services or qualify for subsidized legal services
- Providing a broader range of choices of methods for resolving disputes
- Encouraging private and informal processes for resolving disputes
- Reducing the volume of unnecessary and harmful litigation
- Reducing the costs of resolving divorce-related and other disputes
- Improving relationships between service providers and disputants
- Reducing clients' dependence on professionals to the lowest levels necessary to serve clients properly

- Improving relationships between individual professionals as well as relationships among related professions
- Building harmonious and decentralized communities through community mediation programs
- Developing flexible social systems able to satisfy basic human needs and to anticipate and adapt to new problems.

Evaluate Options to Address Needs. There are many possible ways to enlist the cooperation of mediators and disputing parties to address identified needs other than to impose coercive regulation. For example, Nonet and Selznick (1978) have defined a broad concept of institutional regulation that includes elaborating policy through a mix of mechanisms such as formulating guidelines, allocating resources, creating incentives, and providing services, in addition to enforcing rules. We must choose the combinations of options that best address needs we identify as priorities. Some options include:

1. Definition of qualification to act as mediators or other dispute resolution service providers, possibly in terms of mediators' education, training and experience, and types of disputes mediated,
2. Development of education and training programs to provide necessary skills,
3. Development of mechanisms for supervising mediators and other service providers,
4. Analysis and monitoring of client referral mechanisms to assure truthful and nondeceptive advertising,
5. Development of a consensus about when mediation is appropriate and how to assist potential mediation participants in evaluating individual mediators,
6. Development of programs to educate the public about mediation philosophies and practices,
7. Development of innovative mechanisms for handling complaints of disputants against mediators and other service providers,
8. Provision of organizational and technical assistance to help develop local and regional mediation organizations,
9. Development of interdisciplinary programs to help lawyers, mental health professionals, and others work cooperatively to assure that clients' legal and emotional needs are being addressed optimally,
10. Development of a consensus as to what professional organizations should have primary and secondary responsibilities for governing matters relating to mediation,
11. Enactment of any needed legislation such as state statutes creating mediators' evidentiary privilege, reauthorization of the federal Dispute Resolution Act (28 U.S.C. App. II) and appropriations by federal, state, and local governments for research and development.

Develop a Relationship with the Legal and Mental Health Professions. The legal and mental health professions have special mutual needs. Lawyers have developed fine skills for identifying potential problems; analyzing practical, financial, and legal issues; negotiating agreements; advocating positions; and using government, business, and labor rules and institutions to advance particular interests. Many mental health professionals would appreciate learning these skills and developing relationships with likeminded attorneys who can work on their clients' legal problems in ways that are consistent with their therapeutic approaches. In addition, mental health professionals have their own legal needs.

Similarly, lawyers can benefit from associations with mental health professionals. Therapists have important skills in identifying emotional and relationship dynamics and in communication skills, especially active listening. Lawyers can benefit by learning these skills, which can improve their effectiveness in interviewing, advising, negotiating, and advocating. In addition, many lawyers' clients experience various levels of emotional distress during the period of representation. It is useful for lawyers to develop relationships with counselors who can help clients with emotional issues that lawyers are often unable to handle. Moreover, lawyers can benefit personally from counseling services because many lawyers suffer from burnout level workload stress, anxiety over lack of work, and internal conflicts between their personal perceptions of fairness and their professional duties in zealously representing their clients' interests.

Mental health professionals can make special contributions to developing a mediation paradigm by applying their skills in conducting and evaluating appropriate research and clinical programs.

Finance Mediation Research and Development. A research and development program such as proposed above will cost money. One of the challenges for the mediation community is to secure financing for the necessary activities involved.

Normally, a research and development program of such public interest should be funded by the federal government. Indeed, the government enacted the Dispute Resolution Act on February 12, 1980 to fund such a program. The Act authorizes expenditures of $11 million per year for fiscal years 1981 through 1984 for research and development and to establish a Dispute Resource Center and a Dispute Resolution Advisory Board. This act is a dead letter, however, as no funds have been appropriated under this statute. The mediation community should work closely with Congress and the administration in 1985 to reauthorize the Act with any needed amendments for the rest of the decade.

Even if and when such federal funds are made available, additional funding for development efforts will be needed, preferably from constituent interests in proportion to their ability to pay. Because the legal profession is a relatively rich profession, the contributions from lawyers and bar associations should be proportionately large.

If people sharing mediation philosophies can develop a consensus on our new paradigm and if we can work through and transcend personal and professional power struggles, together we will be a new movement for justice.

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