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MEDIATOR ACCOUNTABILITY: RESPONDING TO FAIRNESS CONCERNS

*Judith L. Maute**

I. INTRODUCTION

Mediation and newer forms of dispute resolution provide much-needed options to the traditional litigation forum. The adversary process is too contentious, expensive and time-consuming for many disputes. Nevertheless, some thoughtful lawyers and legal scholars voice concern that mediation may cut short legal developments on important issues of public concern and reinforce existing power disparities between parties.¹ Traditional commitment to mediator neutrality may undermine protection of parties' legal rights.

Not all mediation programs trigger these concerns. Some experienced divorce mediators have set ground rules and refined the process to guard against patently unfair agreements. These recognized techniques may serve as a guide for other forms of mediation. In recent years leading lawyers and judges have supported developing forms of dispute resolution. Funds are available for new programs. Many new programs are being started, motivated by both an entrepreneurial and public spirit. Unfortunately, enthusiasm for the idea is not always translated into carefully devised screening of disputes and safeguards to insure minimal societal fairness of the mediated agreement. My comments are directed primarily at these programs.

Response to criticisms must occur at three levels: (1) to screen and identify for special treatment mediable disputes that displace adjudication; (2) to expand upon the mediator's accountability for outcome; and (3) to create a workable system of public review. Evolving ethical standards should provide further guidance for satisfying accountability in specific mediation contexts.

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1. See generally Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 [hereinafter Delgado]; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Hazard & Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42 (1988).

According to theory, a mediator's accountability for fairness is limited to process, not outcome.² Questions of accountability versus neutrality address fairness in the abstract; greater focus should relate to specific contexts.³ Accountability should vary with the nature of a dispute and circumstances of mediation. For example, interpersonal and non-legal disputes handled through a community mediation program may still fit the traditional model.

This Article focuses on mediation of disputes that would otherwise be resolved through the legal system. Where a private settlement supplants public adjudication, the mediator is accountable for a procedurally fair process and a minimally fair substantive outcome. Procedural intervention to insure access to relevant information and independent advice is consistent with neutrality. For these cases, the neutrality principle must be modified to protect public values jeopardized by the private settlement. As to substantive fairness, the probable litigated outcome should serve as a reference point; the parties are free to find a solution that better serves their personal values and concerns.⁴ The mediator, however, should refuse to finalize an agreement where one party takes advantage of the other, where the agreement is so unfair that it would be a miscarriage of justice, or where the mediator believes it would not receive court approval.⁵ Completed agreements failing this standard should be vulnerable for a limited time period to rescission on request of a party or during public review. If rescission is not possible and the mediator failed to use appropriate safeguards to insure minimal fairness, the disadvantaged party should have recourse against the mediator for malpractice.

In evaluating a mediation program designed to handle disputes susceptible to legal resolution, several levels of inquiry are in order. What disputes are suitable for mediation, considering the parties and the public or private nature of the conflict? Does the mediation process satisfy basic standards for procedural fairness? Are there adequate safeguards to prevent a patently unfair result?

Part II articulates the traditional commitment to mediator neutrality, which is criticized for subverting public values protected through formal adjudication. Responsive to critics, Part III argues the need for public checking mechanisms for mediation of disputes that would otherwise be handled through the courts. Three mechanisms are suggested: preliminary screening, increased mediator accountability for both process and outcome, and finally, public review. Part III identifies some specific criteria for evaluating whether a dispute is suitable for mediation. This can help the bar decide what types of mediation programs to encourage and help individual lawyers screen cases for referral to mediation. Increased mediator

2. N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 146 (1987) (citing Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 UTAH L. REV. 85, 86-87 (1981)).

3. Coulson, *Must Mediated Settlements Be Fair?*, 1988 NEGOTIATION J. 15, 17.

4. Center for the Development of Mediation in Law, Training Materials 25, 37-38 (August 1983) [hereinafter Training Materials] (copy on file with author).

5. *Id.* at 25.

accountability raises many complex issues. During the mediation, the mediator must intervene to avoid patently unfair agreements. Accepted mediation techniques can protect both mediator neutrality and public values of fairness. Accountability for fairness relates to all mediators, but raises quite different ethical issues for lawyer and lay mediators. During a final, public review process, mediated agreements should be evaluated against minimal standards of fairness to protect both the immediate parties and the public interest.

II. MEDIATOR NEUTRALITY VS. ACCOUNTABILITY

Effectiveness of a dispute resolution process is tested by whether it is inexpensive, prompt, procedurally fair and results in final, optimal solutions that satisfy the parties.⁶ Mediation is negotiation facilitated by a neutral third party who assists the participants in arriving at a mutually acceptable agreement.⁷ Conventional thinking maintains that mediator neutrality is "absolutely essential" to building the trust needed for the process to work.⁸ Classic neutrality maintains that the mediator is both impartial and uncommitted as to outcome. Assured of neutrality, the parties confide their real concerns to the mediator who can help clarify their values, identify the potential zone of agreement, and orchestrate the negotiation to successful conclusion.⁹

Theoretically, mediator accountability is satisfied by ensuring a procedurally fair process that treats parties with dignity and respect and stops intimidating or abusive behavior. The mediator is responsible for assuring access to relevant factual and legal information.¹⁰ Substantively, absent abuse of the mediation process, any settlement agreed to by the parties is deemed fair. Voluntary compliance is more likely when parties reach their own agreement. Even though settlement may not be the most desirable outcome, the settlement decision rests with the parties. The mediator is responsible to insure that parties "understand their choice and to explore with them their enlightened self-interest, but not to impose [one's] values on them."¹¹ Coercing the parties into an agreement the mediator deems fair is an unacceptable response to issues of power imbalance.

6. S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 7 (1985) [hereinafter *DISPUTE RESOLUTION*].

7. *Id.* at 8.

8. J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 244-50, 260-63, 349-54 (1984); *DISPUTE RESOLUTION*, *supra* note 6, at 108-13; N. ROGERS & R. SALEM, *supra* note 2, at 137; Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91-97 (1981).

9. *DISPUTE RESOLUTION*, *supra* note 6, at 91.

10. N. ROGERS AND R. SALEM, *supra* note 2, at 137; *see, e.g.*, *ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY* (Society of Professionals in Dispute Resolution 1986) *reprinted in* N. ROGERS & R. SALEM, *supra* note 2, at 263-267; *MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION* (Association of Family and Conciliation Courts 1984); *STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES* (1984).

11. Patton, *A Brief Outline of the Mediation Process* (Jan. 14, 1982) (unpublished paper) (copy on file with author).

Instead, the ultimate recourse is refusal to sign and file an agreement with the court.¹²

Opinions are split on the question and extent of mediator accountability. The issues are whether, when and what intervention is proper to avoid a patently unfair agreement.

Initially, the problem is definitional. Fairness is in the eyes of the beholder. Fair compared to what? To the probable adjudicated outcome? What makes that the best result for these parties? After all, courts have limited ability to order relief and secure compliance. Aversion to enforcement difficulties encourages judges to issue technical orders in absolute terms. Dictating fair outcome as defined by the probable result ignores all the costs, traumas and uncertainties of litigation. Where parties understand a predictable outcome they have likely bargained "in the shadow of the law," with deviations reflecting individualized negotiation about unique concerns.¹³ The parties are best able to reach an agreement which maximizes their individual preferences. Indeed, the accommodation of nonlegal principles is a prime advantage of private settlement that makes the outcome more acceptable and enduring.¹⁴ Moreover, the amorphous fairness standard is almost meaningless for the many disputes suitable for mediation involving stakes too small or personal to litigate.

These arguments fall short of the mark. They cannot sustain criticism that public values may be subverted by private settlement. Private justice is also public justice.¹⁵ Settlement cuts off any public airing of claims, including those implicating public values that may need authoritative resolution. A private truce can be bought to keep secret information the public needs to know. Formality in litigation exerts control over prejudicial bias and may equalize power disparities.¹⁶ It aims for a fair trial and outcome. Public justice transcends the immediate parties; decision rests with an impartial decisionmaker using societal standards.¹⁷ The decision is subject to public scrutiny on appeal and by commentators. Private settlement prevents these safeguards from operating.

III. PUBLIC CHECKS ON PRIVATE JUSTICE: THE NEED FOR SCREENING, INCREASED ACCOUNTABILITY AND PUBLIC REVIEW

Mediation intercedes to facilitate an agreement the parties could not otherwise reach on their own. It may substitute for public adjudication—often a desirable and appropriate end. Nonetheless, checking mechanisms are needed to protect

12. *Id.* See also J. FOLBERG & A. TAYLOR, *supra* note 8; Stulberg, *supra* note 8, at 86-87.

13. See Cooter, Macks & Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

14. J. FOLBERG & A. TAYLOR, *supra* note 8, at 246.

15. Fiss, *supra* note 1; Hazard & Scott, *supra* note 1.

16. Delgado, *supra* note 1, at 1368-75; See, e.g., Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (racially discriminatory exercise of preemptory challenges in civil case violate equal protection); Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *modified*, 895 F.2d 218 (1990).

17. Hazard & Scott, *supra* note 1, at 57.

public values of fairness and the need for authoritative, public resolution. Protection of the latter value is foremost at the preliminary screening stage when evaluating disputes suitable for private resolution. Screening can also protect for fairness by excluding disputes where there are vast disparities in bargaining power between the parties. Where mediation acts in place of adjudication, additional safeguards are needed during and after the mediation. The mediator is properly held to a higher standard of accountability. The process should enable both parties to obtain relevant information about the law and how it might apply to the instant facts. When disparities in power or knowledge disable a weaker party from effective bargaining, the mediator must intervene to avoid a patently unfair agreement at odds with the probable outcome of adjudication. Finally, these mediated agreements should receive meaningful public review to confirm they are within legal bounds and do not subvert important public values.

A. *Screening for Mediation Suitability*

Some mediation adherents maintain any dispute is mediable. Although the process is widely adaptable, not all disputes *should* be mediated. Adequate response to legitimate criticism demands careful screening of disputes suitable for mediation. First, what are favorable conditions for successful mediation? Professor Lon Fuller's insights assist this inquiry. Accounting for public values of fairness and the need for authoritative determination, which disputes are good candidates for mediation? What disputes are inappropriate for mediation because they involve matters of public importance or require the formal protections of adjudication?

A main objective of mediation, Fuller says, is to make parties aware of the social norms applicable to the relationship, and to persuade them to accommodate to the structure imposed by those norms.¹⁸ This assumes the applicable norms are both known and discoverable. In practice, often norms are created through the structured mediation process.¹⁹ A central quality of mediation is its "capacity to re-orient [the] parties' relationship towards a new, shared perception based on mutual respect, trust and understanding."²⁰ A heavily interdependent relationship

18. Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307-08 (1971). Others subscribe to a more limited objective: simply to reach an agreement that is acceptable to the parties. Although consistent with mediation theory of party autonomy, it ignores knowledge and power differentials that, unaided, may distort outcome. By incorporating relevant social norms, the mediation must address how the legal system might regard the dispute.

19. *Id.*

20. Fuller, *supra* note 18, at 325-26.

between two persons exerts internal pressure for agreement;²¹ mediation can resolve bargaining impasses by reorienting the relationship.²²

These ideas help identify suitable categories of disputes for mediation. Where the law is settled and can be adequately explained to the parties, the mediation can guide their efforts towards agreement that approximates or improves upon articulated social norms.²³ By contrast, if the dispute involves important unsettled questions of law, private mediation subverts the public values protected through formal adjudication. Mediation is inappropriate for such cases. Consider, for example, sexual harassment. Developing case law seeks to define limits of institutional liability. The personal aspects and adverse publicity of such conflicts could tempt efforts at private mediation. The unsettled state of public law, combined with power imbalances that created the initial harassment opportunity, renders mediation of such conflicts inappropriate.²⁴ Public disposition through courts or administrative agencies better protects against power imbalances and private prejudice.²⁵

21. *Id.* at 312. The model he suggests is based on collective bargaining, and envisions mediation best suited to disputes (1) between only two parties (2) in a relationship of heavy interdependence pressuring for an agreement (3) that will combine elements of economic trade with (4) elements of a written constitution to govern future relations (5) negotiated by agents, not principals, and (6) the employer occupies a dual role as director of an enterprise and coequal with union in negotiating and administering the agreement. He anticipated some form of mediation in environmental disputes, although more than two parties are necessarily involved. *Id.* at 334-37.

22. See also N. ROGERS & R. SALEM, *supra* note 2, at 41-59 (providing working guidelines for a lawyer to use in determining whether a client's dispute should be referred to mediation). The long list of indications and contraindications primarily relate to the client's concerns, and not to issues of fairness or the public interest in having an authoritative, public determination.

23. Law is a relevant reference point for the mediation. To ignore law would deprive the parties of its value in helping them reach a fair agreement. Yet the law and predictions of how it would apply to the instant facts need not bind the parties, excluding the parties from using their own sense of fairness as a basis for decision. Law is a relevant indicator of what relief would be available in litigation, an indicator of societal standards relevant to the dispute, and an expression of relevant principles or values which may aid the parties' own resolution of the issues. Training Materials, *supra* note 4.

24. But see Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 J. LAW & INEQUALITY 21, 29-30 (1984) (approving use of mediation in a university context where a student claimed sexual harassment by a professor. The student was offered, and declined resort to an ad hoc hearing procedure.) I disagree. The university's formal hearing procedure is important, both as a precursor to the articulation of public values through formal adjudication, and in its own right. It forces the hearing panel members to identify institutional values relating to harassment, which in turn push for formal clarification of what conduct is unacceptable. With mediation a harassment problem may stay hidden, risking recurrent incidents. The hearing procedure better serves academic institutional values: it grabs the attention of the person against whom the complaint was made more effectively than the informal, relatively friendly mediation process; it provides due process and fact-gathering which protect against the professional taint arising from the allegations triggering the process; if the allegations are substantiated, the outcome can provide meaningful remedies for the victim and educational efforts extending beyond the immediate parties. Mediation may produce acceptable results for the parties themselves, but the institutional interests in education and deterrence are lost.

25. See generally Delgado, *supra* note 1; Edwards, *supra* note 1.

Where the internal affairs of a relationship are unsuited for a system of act-oriented rules, mediation can help re-orient the relationship.²⁶ For example, nonviolent disputes in an ongoing marriage or between neighbors can badly disrupt relationships. However, the conflict may be so personal or involve such small stakes that the legal system cannot provide a satisfactory solution. Indeed, resort to the law is likely to make things worse by solidifying positions and increasing hostility levels. Mediation can help adjust the parties' perspectives on the relationship to find an acceptable common ground for peaceful coexistence.

Polycentric disputes, involving complex and multifaceted problems, are also inappropriate for adjudication. Through mediation the parties can create norms that address the problems better than the awkward resolution possible with adjudication based on act-oriented rules.²⁷ For example, environmental disputes involve competing claims of government regulators, advocacy groups, industry, local community needs and affected property owners. Litigation could tie up a project for years on procedural matters unrelated to its merits and impact on the environment. Mediation involving all interested parties can enable a compromise that addresses substantial issues eluded by protracted litigation.²⁸

Essentially private disputes between parties of relatively equal power are good candidates for mediation.²⁹ By definition, the private nature of the dispute means there are no important public values that will be compromised or subverted through private settlement. Inappropriate for private mediation are constitutional claims, or those seeking authoritative statement on the respective obligations of the government and its citizens. Public adjudication is needed "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."³⁰ Some disputes appear private, but raise important public concerns that could be subverted by purely private settlement. For example, settlement of some products liability claims could impede needed legal developments or suppress information of public health threats.³¹ Economic incentives may pressure for generous private settlement to avoid risk of adverse precedent or negative publicity. A claimant may stand to receive excessive gain at the expense of the public interest and non-party third persons. These cases are suitable for mediation only if an adequate checking mechanism were in place.

26. Fuller, *supra* note 18, at 330-31.

27. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

28. Edwards, *supra* note 1, at 678; Fuller, *supra* note 18, at 334-37. See generally V. Huser, Presentation at University of Oklahoma Law Center (Jan. 30, 1986) (describing environmental mediation process and success stories) (unpublished manuscript) (copy on file with author).

29. See generally Delgado, *supra* note 1, at 1367; Edwards, *supra* note 1, at 676; Fuller, *supra* note 18, at 312.

30. Fiss, *supra* note 1, at 1085; See also *supra* note 24 (discussing explication of institutional values through the formal hearing process of sexual harassment claims in a university setting).

31. Edwards, *supra* note 1, at 671-72.

Relative parity in bargaining power largely avoids the public concern for fair resolution of essentially private disputes.³² Mediating conflicts between a person or institution of low power or status and one of much higher status or power risks an agreement dictated by the stronger party.³³ Compromise is an equitable solution only between equals; between unequals, it "inevitably produces inequality."³⁴ In screening out unsuitable disputes for mediation, doubts should be resolved against those involving significant power disparities. Mediation is no haven for the poor or powerless.³⁵ Stripped of adjudication's formal protections, the private context leaves the weaker party vulnerable to prejudices and coercion. The outcome may reflect more the stronger party's choice than mutual understanding and good faith compromise.³⁶ The private setting is likely to reinforce the imbalance at the loss of court protection for the weaker party.

The mediator must assess whether the parties are suitable for mediation. Are they capable of dealing fairly with each other? This inquiry has two components: (1) Is each party able to stand up for its own interest? (2) Is each party open to reaching a result that is fair to the other? Several factors go into this determination. Each person should participate voluntarily, not coerced to mediate. The parties must be able to communicate with each other, including both self-expression and the capacity to hear the other. The emotional charge between them must not be so intense that it disables one or both. Each person should be able to identify and assert what is personally important as a solid and realistic basis for choice-making. Each should be able to keep track of the mediation process and to make effective use of outside support should that be appropriate.³⁷

To summarize, the following criteria suggest a dispute is a good candidate for mediation:

1. Essentially private dispute between parties of relatively equal power.
2. Basic applicable law is settled and can be adequately explained to parties.
3. Internal affairs of relationship unsuited for system of act-oriented rules; polycentric disputes involving complex, multi-faceted problems.
4. All necessary parties are included, willing to deal fairly with each other and able to participate effectively in the process.

Conversely, the following items are negative indicators for mediation:

1. Dispute involves important unsettled questions of law affecting the public interest; authoritative public adjudication needed.

32. If, however, the parties are business competitors in a highly concentrated market, private settlement incurs the risk of antitrust liability, thus mediation is contraindicated. Conversely, it is also advised against when the client cannot effectively represent one's own interests and will not be represented by counsel during the mediation sessions. N. ROGERS & R. SALEM, *supra* note 2, at 55, 51-52.

33. Delgado, *supra* note 1, at 1371; Hazard & Scott, *supra* note 1, at 54-55.

34. J. AUERBACH, *JUSTICE WITHOUT LAW?* 136 (1986).

35. Delgado, *supra* note 1, at 1391.

36. Edwards, *supra* note 1, at 678-79; Hazard & Scott, *supra* note 1, at 56.

37. See generally Training Materials, *supra* note 4, at 21-22.

2. Substantial differences in respective power, bargaining ability or vulnerability to private negotiation pressure which cannot be corrected through mediation process, supplemental information or independent legal advice.

Consider, for example, the litigation in *Brackenbury v. Hodgkin*³⁸ as a prime candidate for mediation. Mrs. Hodgkin, an aging widow, asked her daughter and son-in law to move from Missouri to Maine so that they could care for her and the family farm, closing the letter "you [shall] have the place when I pass away." The family relationship badly deteriorated shortly after Mr. and Mrs. Brackenbury arrived. Petty legal actions were instituted; mother deeded the property to a sympathetic son, and the Brackenburys sued for breach of contract, contending their entering into performance precluded revocation of the offer for a unilateral contract. Contrary to prevailing unilateral contract doctrine allowing for revocation anytime before completed performance,³⁹ the Supreme Judicial Court of Maine held the offer for a unilateral contract was accepted when the offeree entered into performance of the specified acts. The opinion purported to apply standard contract law; dicta suggests instead the decision was influenced by a misogynist assessment that Mother was exceedingly difficult to deal with. Accordingly, the court imposed a trust in favor of the Brackenburys. Mother could not use the property to strike another bargain providing for her care. When the litigation was done, Mother was effectively held captive in her own home, to receive what care (and abuse) the Brackenburys saw fit to provide.⁴⁰

Imagine, instead the case arose today. Now the law of unilateral contracts has changed; section 45 of the Restatement of Contracts (Second) provides that part performance of an offer seeking acceptance only by performance results in a binding option contract (precluding revocation), with the duty to perform conditioned on full performance. Hopefully, most lawyers today would respond to such an intrafamilial dispute by considering settlement first, with litigation as a distant last choice. Effective counseling about the law and the emotional and economic costs of litigation should encourage the parties to find a face-saving, peaceful end to the situation. If private settlement efforts fail, mediation could provide the optimal structure for venting anger, generating options, and eventually finding a fair, equitable solution. This is the type of dispute where mediation may best serve its primary functions. The parties are empowered to exercise autonomy, choice and self-determination. Mediation evokes recognition, acknowledgement, and some understanding or empathy for the other party's situation.⁴¹ I have used the *Brackenbury* facts in contracts class for simulated exercises in counselling, negotiation and mediation. Once the students realize they are free to settle on

38. 116 Me. 399, 102 A. 106 (1917).

39. *Pettersson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928).

40. J. DAWSON, W. HARVEY & S. HENDERSON, *CONTRACTS: CASES & COMMENT, MANUAL FOR TEACHERS*, 97 (5th Ed. 1987).

41. Bush, *Efficiency and Protection, or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253, 268-69 (1989).

terms different from the likely adjudicated outcome, they generate a wide range of potential remedies. Mother may agree to compensate the Brackenburys for the harm and costs of reliance on her promise. Brackenburys may realize that their claim of full ownership to the family farm for a few months work is inequitable. Sometimes the mediator has helped the parties identify specific problem areas in the interpersonal relationship, to preserve both the contract and the family relationship.

Brackenbury exemplifies a dispute well-suited for mediation. There is no substantial power disparity. Mother has the desired economic resource; she has the emotional and legal support of one or more of her other children. As Mother dealing with her sole economic resource to obtain dignified care, her claim to terminate the care-taking relationship has strong emotional appeal. Legally, facts exist to support a claim of material breach, excusing any contract duty to perform. Brackenburys have the power of relative youth and the equitable appeal of their claim to compensation for their reliance. Current law limiting revocability of offers further supports their bargaining position. Clearly, the internal affairs of an intimate family relationship cannot be resolved by reference to external, act-oriented legal rules. If both sides are represented by counsel more interested in resolving the dispute than claiming a litigation victory, in mediation the parties may reach an optimal negotiated result that far surpasses the rigid zero-sum solution of adjudication. The process could also involve other family members with competing claims to the property or alternative resources available for the solution.

The very private nature of mediated solutions makes it more difficult to tell a true story of a mediation that should instead have been litigated. A simulated mediation presented at a dispute resolution workshop will need to suffice.⁴² A male employee at a paint factory became sexually dysfunctional. Eventually, his treating physician identified his job exposure as the probable cause; mixing batches of paint exposed him to toxic chemicals. He filed a third party products liability suit against the chemical supplier. Mediation was proposed to facilitate stalled settlement talks. Many factual questions arose during the mediation. It was uncertain whether the disorder was reversible or potentially life-threatening to the plaintiff and others working in close proximity to the paint chemicals. Did the chemical supplier or the employer have notice of an unreasonably dangerous work condition, triggering a duty to warn or take other precautions? While the products liability claim did not involve novel questions of law, substantial doubt existed around application to these facts. The highly personal nature of the claim reinforced standard power differences based on relative size and sophistication and availability of economic resources to litigate aggressively. Understandably, the worker was reluctant publicly to discuss the disorder. On the defense side, damage control gave strong incentives to settle. Settlement would suppress scientific evidence suggesting a causal relationship between the disorder and

42. American Association of Law Schools Miniworkshop on ADR in the Curriculum (Jan. 6, 1986).

chemical exposure. Without causation, the chemical supplier would have no duty to warn or prevent harm. Defense counsel and corporate officers privately conceded their willingness to pay off this early claim, even at a premium, rather than have public adjudication expose what might be the tip of an iceberg.

Many of us in the audience objected strongly that this case should not be mediated. If the chemical exposure produced the harm, that information needed to be disclosed to the public. Although the scientific evidence could be challenged, it was substantial enough to warrant public review. Protection of the public interest and absent third persons called for formal, authoritative determination. Depending on the court's view of the scientific evidence, it could trigger other actions removing the chemical from the market, warnings on proper usage, or further administrative inquiry to prevent widespread harm. Instead, a generous mediated settlement might include a premium reflecting the added value of private settlement at the expense of future claimants.

Undoubtedly, private negotiated settlements entail the same risk of selling short the public interest in favor of a generous settlement to the plaintiff.⁴³ Mediation compounds the problem somewhat: the parties have been unable to reach private settlement; presumably they are willing to proceed with public adjudication. Mediation pushes them to further consider private settlement; the usual process omits protection for unidentified absent third parties and the public interest. In this type of private suit, participation by union health and safety representatives could guard against the risk that plaintiff's silence will be bought at the likely expense of others. Additionally, the presiding judge could be assigned review authority to confirm that the private settlement (and likely confidentiality provisions) will not subvert the public interest in workplace safety.⁴⁴

The power imbalance is less troubling. As a practical matter, the superficial differences in power and litigative capacity exist in most products liability actions. These actions need not be generally disqualified from mediation. American corporations are main supporters of developing alternatives to litigation, both because of saved legal expenses and the corporate time that is better devoted to productive activities.⁴⁵ If the legal principles and their application to a specific product are reasonably well settled, and the plaintiff is represented by counsel in the mediation, societal concerns for fair and efficient dispute resolution are furthered.

43. Owen Fiss also voices this concern. See Fiss, *supra* note 1.

44. See *infra* text accompanying notes 101-03.

45. See Lavelle, *Congress Now Considering Dispute Resolution Measure*, N.L.J., Feb. 5, 1990 at 1; ADR: *A Conversation*, N.L.J., Feb. 27, 1989 at 51; Wilkinson, *ADR Is Increasingly Effective, Averts Litigation in Many Cases*, N.L.J., Apr. 4, 1988 at 22.

B. Mediator Accountability for Public Value of Fairness

Unless mediation practice departs from the absolute commitment to neutrality it may coerce settlement seriously at odds with societal norms.⁴⁶ Where access to court is short-circuited, the mediator is accountable for the quality of private justice and its effect on public interests. Some intervention is required to protect the public value of fairness.

Accountability does not conflict with that neutrality properly required of the mediator. Absolute neutrality may be more theoretical than real. Current literature departs from the traditional view, and refines its definition.⁴⁷ Earlier authorities often used "neutrality" to mean both that the mediator is unbiased and uncommitted regarding outcome.⁴⁸ Some authorities now distinguish between impartiality and neutrality.⁴⁹ A mediator is generally expected to be impartial as to the parties, having no pre-existing loyalties that distort one's ability to facilitate the process even-handedly. Many modern authorities do not consider strict

46. See generally J. AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 34, at 135-36.

47. See, e.g., Bush, *supra* note 41. This thoughtful work evaluates the unique qualities of mediation to better define the mediator's role and ethical obligations. Professor Bush identifies two current conceptions: efficiency (facilitate agreements in as many cases as possible) and protection of rights (ensure neither party's rights are compromised by settlement process). Both conceptions, he argues, are fundamentally flawed. A sounder conception of the mediator's role is based "on what mediation can do that other processes cannot." The empowerment function relates to the capacity of mediation to encourage parties to exercise autonomy, choice and self-determination. Drawing on Professor Fuller's earlier work, the recognition function can produce understanding and empathy of common humanity, even in the face of bitter conflict. *Id.* at 258-273.

Fulfilling the empowerment role requires the mediator to ensure that the parties act with full information and understanding in making their decisions. . . . Therefore, the mediator should push for the parties to disclose and otherwise marshal all information to resolving the dispute . . . the mediator should push for the parties to fully comprehend all the information before them, including the range of issues presented and each party's positions. Therefore, the mediator should summarize, clarify, question, and test for comprehension before allowing decisionmaking to proceed.

Id. at 278.

The parties should understand fully the consequences of either reaching or failing to reach settlement. Empowerment also relates to the mediator's obligation to provide information on the law and legal advice. While the law need not control the parties' decision, information about the law "as an indication of what is obtainable from the legal marketplace, . . . as an indication of societal standards, . . . [or] as an expression of underlying principles . . . which the parties might want to consider in approaching their own resolution." *Id.* at 280, citing *Training Materials*, *supra* note 4.

I agree with Professor Bush to a large extent. Without adequate factual and legal information, mediation participants lack genuine capacity to assent. By providing such information, the parties are given the choice to approximate the likely result of adjudication, or to find a particular solution that works better for them. My point, arguing for checking mechanisms to protect public values, formalizes the mediator's accountability to the public legal system where the private settlement of a legally-based dispute supplants public adjudication.

48. See references in N. ROGERS & R. SALEM, *supra* note 2, at 139.

49. See generally sources cited *infra* notes 50-58.

neutrality as to outcome possible or essential.⁵⁰ The mediator "should be concerned with fairness . . . [and] has an obligation to avoid an unreasonable result."⁵¹

Accountability relates to the ethical, moral and legal obligations imposed on mediators who facilitate disputes that would otherwise be resolved in court. Accountability and impartiality are consistent. Enhanced responsibility for procedural and substantive fairness is essential to protect public values at risk from private settlement. Ethical standards should guide the mediator on discharging this responsibility in the diverse law-related mediation contexts.⁵² Public review of settlements plus risk of malpractice liability should act as safety nets protecting individual and public concerns for fairness.

Accepted mediation techniques reflect minimal accountability to use procedures adapted to prevent unfairness.⁵³ Ethics codes urge the mediator to stop intimidating or abusive behavior.⁵⁴

Mediation is a facilitative process, directed towards creating a context for pursuing the parties' mutual sense of fairness.⁵⁵ The usual process of generating and evaluating options takes account of how the law might view a dispute as a

50. Honeyman, *Bias and Mediators' Ethics*, 1986 NEGOTIATION J. 175, 176 (obligation to disclose personal and situational biases). *But see* Smith, *Effectiveness of the Biased Mediator*, 1985 NEGOTIATION J. 363, suggesting that at least in the context of international mediation, mediator bias—in the sense of having some national alignment and predisposition is common, and does not impair the process. *See also* Susskind and Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAVIORAL SCIENTIST 255-79 (1983) (traditional mediator has a clear limit on what would be considered a reasonable settlement in keeping with community standards of justice.)

51. ABA Standards of Practice for Lawyer Mediators in Family Disputes (1984) Standard III D, reprinted in 17 FAM. L.Q. 451. *See also* Center for Dispute Resolution Code of Professional Conduct for Mediators (Denver, Colo.) [hereinafter Code of Conduct], reprinted in DISPUTE RESOLUTION, *supra* note 6, at 116-22.

52. *See, e.g.*, ABA Standards of Practice for Divorce Mediators, reprinted in 17 FAM. L.Q. 451 (1984), stating an "obligation to avoid an unreasonable result." IV.C. To that end, guidance calls for procedural intervention, assuring participants have sufficient information and knowledge on which to make their decisions, advising them to obtain independent legal review before making agreement, and diffusing manipulative or intimidating negotiation techniques. Limited intervention on the substantive terms is authorized: a mediator shall not direct the negotiations based on one's interpretation of the law and predicted application to the facts; if the agreement being approached is unreasonable, the mediator must suspend or terminate the process. V.B.

The ABA Standards carefully preserve the role of independent counsel; in so doing, an unrepresented mediation participant gets minimal protection against a patently unfair result. This is satisfactory only if interpreted to present risk of later accountability to a mediator who finalizes a dubious agreement without both parties obtaining independent legal advice. If the agreement is patently unfair when judged against prevailing legal norms and nothing indicates it resulted from unique party preferences, public review should allow rescission. Should such relief be unavailable, the harmed participant should have malpractice recourse against the mediator.

53. N. ROGERS & R. SALEM, *supra* note 2, at 146, n. 31.

54. *Id.* at 146.

55. Training Materials, *supra* note 4, at 41. *See generally* Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICHMOND L. REV. 325, 363 (key principle of divorce mediation is to "facilitate the fulfillment of the client's moral and legal family obligation.").

relevant reference point from which to evaluate options according to the parties' mutual sense of fairness, and recognizing where the law reflects societal norms and underlying values.⁵⁶ Selection among alternatives eliminates unworkable options, including those at odds with one party's sense of fairness.⁵⁷ As options are generated and discarded, discussion may focus on understanding the other's perspective, "to experience the other's reality."⁵⁸ A grossly unfair agreement is at risk of non-compliance by the disadvantaged party. Upon realizing its unfairness the burdened party may refuse to perform, and take one's chances with the formal legal system. Thus, a successful mediation consistently focuses on questions of fairness as perceived by the participants, with reference to the applicable law.

Law plays at least a supporting role in any law-related dispute.⁵⁹ It provides a basis to inform and test the subjective fairness of an agreement as viewed by the parties.⁶⁰ Participants need enough information about the law so they can bargain within the legal framework, or choose against following legal norms in preference to creating their own norms.⁶¹ When parties are adequately informed of the approximate legal outcome and voluntarily agree to deviate from that standard because of their personal preferences and values, the finalized agreement should include a provision that it was entered voluntarily, with adequate information, and reflects personal preferences which improve upon the predicted legal outcome.

The mediator should know enough about the law to assess whether an agreement is within the range of legally acceptable outcomes. If it is not, the parties should be told of this assessment and the potential problems when the agreement is publicly reviewed.⁶² Later review thus gives participants added incentive to find common ground within legal limits of fairness. Whenever a mediation would affect important legal rights, the parties should be advised to obtain outside review by independent counsel to review and help process the final agreement.⁶³

56. Training Materials, *supra* note 4.

57. See, e.g., Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 JUDICATURE 263, 269 (1986), Honeyman, *Five Elements of Mediation*, 1988 NEGOTIATION J. 149.

58. Training Materials, *supra* note 4, at 44.

59. Riskin, *Toward New Standards For the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 335-36 (1984) [hereafter Riskin, *Neutral Lawyer*].

60. *Id.* at 337.

61. *Id.* at 336.

62. See Training Materials, *supra* note 4, at 25. Mediator will not generally offer opinion as to what is fair, subject to three exceptions: (1) if one party takes advantage of other; (2) the parties are moving towards agreement that mediator believes is so unfair that it would be a "severe miscarriage of justice; (3) a court would not accept the agreement.

63. See, e.g., ABA Standards of Practice for Lawyer Mediators in Family Divorce Disputes, *supra* note 51, criticized for overly protecting independent counsel's role in Riskin, *Neutral Lawyer*, *supra* note 59, at 349.

See also Training Materials, *supra* note 4. In these materials, Gary Friedman includes lawyer review as part of the initial contract between the mediator and parties. He makes clear the parties should view the lawyers reviewing the agreement (as well as other technical experts such as

Review by independent counsel also begins to bring the private resolution back into the public domain. This lawyer protects public concern for the quality of individualized justice by advising the client-participant against an unfair agreement, helping with further negotiations, or pursuing litigation.⁶⁴

If a proposed agreement is outside the range of acceptable outcomes, further intervention is warranted. A mediator may not finalize an agreement believed to be illegal, grossly inequitable, or based on false information. The parties must be told of the problem, and efforts redirected towards generating new, acceptable options, or the mediation should terminate. Mediator withdrawal remains the ultimate weapon to prevent an unfair agreement.⁶⁵

Extent of mediator accountability for fairness varies by whether the mediator is a lawyer, and whether the parties are independently represented by counsel.

1. The Lawyer-Mediator

A lawyer-mediator practices law in the sense of using legal knowledge to solve problems.⁶⁶ Legal knowledge facilitates the mediation. Where a dispute is legally related, the lawyer-mediator cannot divorce legal knowledge from the mediation process. The lawyer-mediator cannot avoid the higher accountability to approximate or improve upon the likely result of litigation simply by concealing one's status as a lawyer. Mediation skills are acquired and that career route pursued because deficiencies in the legal system create the professional opportunity.

accountants) as consultants, not as "professionals' who take over what the parties should be doing, or who inject their views of how the parties should be looking at their lives." Training Materials, *supra* note 4, at 19, 25.

If an agreement appears imbalanced, based on the probable adjudicated outcome, but is an acceptable outcome in terms of mediator accountability, external review is strongly advisable to guard against later challenges. One party may be willing to pay the other's cost of obtaining independent review in order to conclude settlement. Legal fees can be paid by a non-client with client consent provided there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and confidential information is protected. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) [hereinafter MODEL RULES].

64. See, e.g., Rifkin, *supra* note 24, at 27-29, recounting divorce mediation where wife frequently advised to consult with her lawyer. Lawyer strongly objected to her mediated settlement. Wife terminated relationship with lawyer and presented agreement to court pro se. Nevertheless, lawyer appeared in court and objected to settlement. Judge spoke with wife at length before accepting the agreement. Lawyer's outspoken objections clearly put wife on notice that she was trading off more favorable financial settlement to avoid damaged relationship with her children. Judge's participation served as check to insure agreement subverted no important public values.

65. See, e.g., Code of Conduct, *supra* note 51, at 116-22.

66. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980) relating a general body and philosophy of law to the client's specific legal problem. See also Riskin, *Neutral Lawyer*, *supra* note 59, at 335, n. 20; Comment, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 521 (1986) [hereafter cited as Comment, *The Mediator-Lawyer*].

Where the parties are not independently represented, the lawyer-mediator jointly represents them in a limited capacity.⁶⁷ Conflicts questions presently aside, the "neutral lawyer" is engaged in the practice of law. When mediating a litigable dispute, the neutral lawyer is accountable both to the legal system and the clients. Discipline and malpractice liability should provide downside risks for failing to satisfy the obligation. Where the mediation substitutes for legal process, the neutral lawyer has a duty to protect the public value of fairness.

A neutral lawyer mediates disputes where separate lawyers for the parties are non-existent or play a limited role.⁶⁸ Whether law is the foundation for decision-making or plays a supporting role to their own sense of fairness,⁶⁹ the mediator should ensure the parties have sufficient information to make informed decisions on whether to settle privately or proceed to court. Unless they understand their respective legal positions and what might happen in court, they cannot make informed decisions about whether agreement is a satisfactory alternative. Lacking such information, the parties cannot test a proposed agreement against their own sense of fairness—key to successful mediation.

Substantial questions exist about the applicability of the ABA Model Rules of Professional Conduct to lawyer-mediators. The substantive provisions of Rule 2.2 Intermediary superficially fit the mediation process.⁷⁰ A non-binding comment, however, states "[t]he Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer."⁷¹ Other ethics codes, such as those for Arbitration in Commercial Disputes, may apply instead.⁷² A technical distinction can be made between the lawyer who serves as an intermediary to resolve a problem between two clients and a mediator hired to facilitate negotiation in a non-representational capacity.

Mediation scholars debate whether Rule 2.2 applies. Professor Riskin opposes using Rule 2.2 for mediation because the concept of "representation" envisions a duty of undivided loyalty inconsistent with a neutral posture toward all parties.⁷³ Professors Rogers and McEwen take seriously the disclaimer comment, and so mention Rule 2.2 only in passing; applying instead Rule 1.7, the general conflicts provision.⁷⁴ One student commentator argues the rule applies,

67. See generally Riskin, *Neutral Lawyer*, *supra* note 59.

68. *Id.* at 332.

69. *Id.* at 357.

70. See *infra* notes 78-84 and accompanying text.

71. MODEL RULES, *supra* note 63, Rule 2.2 comment. Only the blackletter text of the rules is authoritative; comments are guides to interpretation. *Id.*

72. *Id.*

73. Riskin, *Neutral Lawyer*, *supra* note 59, at 341-42.

74. N. ROGERS & C. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 9.2 (1989). See also G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 309-10 (1985). This leading reference on the rules makes no comment on the mediation disclaimer, and its treatment could support either view, that Rule 2.2 applies or does not apply to mediation. In "*mediation*" the lawyer represents *all* parties, as contrasted with "the typical arbitration in which a lawyer serves as a neutral third party, but 'represents' *nobody*." *Id.* at 309-10. The intermediary represents clients who, "though technically adverse, share a more compelling interest

but needs further revisions to accommodate the mediation process.⁷⁵ Another notes that Rule 2.2 completely excludes "nonrepresentational" mediation, and proposes a new rule designed for divorce mediation to fill the gap.⁷⁶ Two state ethics opinions apply Rule 2.2, either directly⁷⁷ or indirectly.⁷⁸ By contrast to the numerous ethics opinions on mediation under the Code, surprisingly few arise under the Model Rules. One could speculate that Rule 2.2 states the general principles well enough that state ethics administrators *assume* it applies to mediation without getting into the precise questions generating academic debate.⁷⁹

As written, Rule 2.2 contemplates a more expansive representation than that of the usual mediation. It assumes prior representation of both clients before undertaking to act as an intermediary. In that context, it properly holds the lawyer to high standards of evaluating the suitability of joint representation and protecting each party's legitimate interests. Intermediation between clients is proper where a reasonable lawyer would find agreement is feasible, the clients are adequately informed of the potential risks, and they consent to the common representation.⁸⁰ Before undertaking mediation the lawyer must reasonably determine the matter can be resolved "on terms compatible with the clients' best interests, . . . each client will be able to make adequately informed decisions . . . and . . . there is little risk of material prejudice" to either client's interests if the mediation fails.⁸¹ One

in reaching agreement *as a group*." *Id.* Cf. Fuller, *supra* note 18, at 334-36. "Intermediary" and "intermediation" are used interchangeably with "mediator" and "mediation." To illustrate a proper application of Rule 2.2(a), Hazard and Hodes describe a lawyer's joint representation of husband and wife to process an amicable divorce in which the lawyer may suggest changes where the proposed agreement unduly favors one party. They cite recognized works on the mediation process as supplementary authorities on the lawyer as intermediary. G. HAZARD & W. HODES at 314-36; *see also* Riskin, *supra* note 59; Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982), Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219 (1982).

75. Comment, *The Mediator Lawyer*, *supra* note 66.

76. Comment, *Model Rule 2.2 and Divorce Mediation: Ethics Guidelines, or Ethics Gap?* 65 WASH. U. L.Q. 223 (1987) (Comment by Wendy Woods).

77. Kentucky Bar Advisory Op. E-335, 53 Ky. Bench & Bar, Summer 1989, at 47.

78. Florida Bar Comm. on Professional Ethics, Advisory Op. 86-88 (1986), *discussed in* Hobbs, *supra* note 55 (Rule 2.2 guidelines "instructive;" apply by analogy).

79. For example, when questioned about mediation, the Wisconsin ethics hot line refers callers to Rule 2.2. Telephone interview with Keith Kapp, Ethics Consultant, State Bar of Wisconsin, October 16, 1990).

80. *See also* MODEL RULES, *supra* note 63, Rule 1.2(c), allowing a limited scope of representation.

81. *Id.*, Rule 2.2(a)(2). If Rule 2.2 were to apply to the usual mediation context, substantial comment revisions are warranted. Besides clarifying the coverage issue, another comment overly restricts when mediation is allowed. A lawyer cannot undertake mediation if contentious litigation is imminent, or contentious negotiations are contemplated. If literally applied, this comment would eliminate mediation by a trained lawyer in many situations where it is most valuable. The legitimate conflict of interest question concerns whether the limited joint representation can adequately protect both clients' interests. Successful mediation allows venting of hostility so the parties can generate viable options addressing the underlying concerns. Initial contentiousness should not preclude representation unless the lawyer should reasonably doubt mediation will succeed. The comment furthers the adversarial presupposition from the Code. *See* Comment, *The Mediator-Lawyer*, *supra* note 66, at 516-17; Riskin, *Neutral Lawyer*, *supra* note 59, at 349-52.

must seriously assess the propriety of joint representation before seeking client consent. The lawyer must find impartiality is correct for the situation and will not affect any other responsibilities owed either client.⁸² Only after consulting with each client on the implications of mediation—risks, advantages and effect on privilege—may the lawyer obtain consent to the joint representation.⁸³ During intermediation, the lawyer must consult with each client, providing information about factual, legal and equitable considerations to enable adequately informed decisions.⁸⁴ The lawyer must withdraw if either client requests, or upon failure of any condition for the joint representation.⁸⁵ After withdrawing, the lawyer may not represent either party concerning the dispute.⁸⁶

These basic principles similarly apply to the context where individuals seek the aid of a professional mediator for the sole purpose of helping them resolve their dispute. However, where the lawyer-mediator has no prior professional relationship with either party, Rule 2.2 may impose unreasonably high standards that will hamper lawyer participation. Given the very limited professional undertaking, the lawyer-mediator probably lacks sufficient information to determine the "matter can be resolved on terms compatible with the clients' best interests, . . . and that there is little risk of material prejudice to the interest . . . [of either] if the contemplated resolution is unsuccessful."⁸⁷ Ethical concerns cause many lawyer-mediators to avoid private caucuses with either party, and a participant is unlikely to share publicly private information relating to whether resolution is in one's best interests. Nor can the mediator be sure that the attempted mediation presents no material risks or prejudice. "Agreements not to disclose, subpoena, or offer in evidence information conveyed during a mediation . . . do not fully protect those data from disclosure."⁸⁸

Court-annexed mediation presents unique problems in complying with Rule 2.2: the lawyer-mediator may not be free to simply withdraw if either party requests. The halted mediation may, in the eyes of the court, materially prejudice the party refusing to continue. Moreover, full conflicts screening may be impossible in many court-annexed or community mediation programs where lawyers volunteer, and are assigned specific disputes with identified parties only at the appointed time for the mediation. Instead, a limited conflicts screening should suffice. If, to the best of the lawyer's and parties' knowledge, neither the lawyer, nor the lawyer's firm has previously represented either party, the volunteer mediator should be allowed to proceed. It is unrealistic to charge the volunteer lawyers and their firms with the full implications of a "representation" including

82. MODEL RULES, *supra* note 63, Rule 2.2(a)(3).

83. *Id.*, Rule 2.2(a)(1).

84. See generally Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984).

85. MODEL RULES, *supra* note 63, Rule 2.2(c).

86. Applied to mediation of conflicts, continued representation of either client after mediation fails violates the lawyer's continuing duties to a former client. See MODEL RULES, *supra* note 63, Rule 1.9.

87. *Id.*, Rule 2.2(a)(2).

88. ROGERS & MCEWEN, *supra* note 74, at § 8.23.

the far-ranging effect on imputed disqualification. Given that the entire mediation may take an hour, the only question of imputed disqualification should relate to successive representations on substantially related matters. The full consultation envisioned by Rule 2.2(a)(1) and (b) may not be feasible or warranted. As an alternative, the mediation program should provide a written brochure that simply and clearly explains the process, its advantages and risks. Before beginning the session, the volunteer mediator can confirm the parties have read and understood the brochure, and provide further explanations if needed.

Basically, those entities responsible for regulating the legal profession have three choices. First, they can adapt Rule 2.2 to better fit the usual mediation context; this runs the risk of diluting the protection given to clients in the context originally intended. Second, they can construct in ethics opinions guidelines for mediation, starting with other provisions of the Model Rules, but drawing on Rule 2.2. This has the advantage of flexibility, to address new situations and problems as they arise. Third, they can adopt a new rule designed only for limited representation by the neutral lawyer in mediation. I think the latter is the wisest alternative, and undertake to draft a proposed rule in another article.⁸⁹ This avoids stretching Rule 2.2 beyond its intended application. Rule 1.7, the general conflicts provision, provides a sound starting place. Many of the principles underlying Rule 2.2 may apply to regulate the permissible scope of a limited representation in mediation.

Although further guidance is needed, the Model Rules should apply to regulate neutral lawyering as a limited joint representation. As developed above, the lawyer-mediator is practicing law, and in the typical mediation receives a fee for services. Lawyers' ethical rules should therefore regulate one's behavior, in addition to other mediation-specific ethical rules. Rule 1.2(c) permits a lawyer contractually to limit the scope of representation if done so at the outset. Rule 1.7 permits limited representation of multiple clients with conflicts if consent is given after adequate disclosure.

Ethics opinions split on whether mediation is "representation" triggering conflicts of interest problems.⁹⁰ Under the strict but unworkable Code conflicts provisions, avoiding the representation label was the pragmatic way to allow mediation. It did not, however, accurately assess the lawyer's undertaking. Properly interpreted, the Model Rules avoid the need for this facade. They explicitly allow limited representation assumed with consent after adequate disclosure.⁹¹

Under case law the client-lawyer relationship is easily assumed, without need of formal retainer.⁹² A neutral lawyer who mediates represents both clients in

89. See Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS ____ (forthcoming) (1990-91).

90. See generally Silberman, *supra* note 74; Riskin, *Neutral Lawyer*, *supra* note 59, at 337-46.

91. MODEL RULES, *supra* note 63, Rule 1.2(c).

92. See, e.g., *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978).

a limited capacity.⁹³ Whether that is proper requires closer examination of the dispute and a determination of whether the lawyer reasonably expects the parties can reach a fair settlement through mediation. Part 2 of the Model Rules addresses the lawyer's role as Counselor, as distinguished from Advocate. The lawyer-mediator must clarify one's non-partisan role. The neutral lawyer provides legal information in a non-adversarial fashion to help the parties understand their legal positions and uncertainties.⁹⁴

Specific guidelines should define the mediator's accountability for public values of fairness to the parties, absent persons, and the legal system.⁹⁵ Professor Riskin argues the neutral lawyer is bound to help the parties reach an agreement that does not violate minimal standards of societal notions of fairness.⁹⁶ This is a good start for increased mediator accountability. However, it does not state a meaningful standard for potential discipline, civil liability, or court review. I propose instead a standard that the agreement approximate or improve upon the probable outcome of litigation. This incorporates the relevant substantive law, difficulties of proof, and acknowledges the personal preferences resulting in a maximal private settlement at odds with probable legal outcome. By undertaking to mediate a dispute capable of legal resolution when the parties are not independently represented, the lawyer mediator assumes responsibility to tell the parties enough about the applicable law and its uncertainties so their settlement decision is adequately informed. The proposed standard is satisfied if the parties knowingly and voluntarily agree to deviate from the probable litigated outcome and the agreement embodies their personal preferences.

Suppose, for example, a divorce mediation in which the husband is willing to give the wife a generous settlement so that he can quickly remarry, and alleviate guilt feelings associated with the dissolution. Where the mediator accurately explains the applicable law and its probable application to their situation, the agreement should recite this fact, briefly allude to the personal preferences attributable to the variance from the probable legal outcome, and that the agreement is voluntarily entered to reflect these personal preferences.

Where parties are independently advised, the mediator is accountable for assuring a fair process, free of abusive behavior that coerces settlement favoring the stronger party. A lower standard of accountability is warranted where the parties retain a mediator to facilitate negotiation, and do not expect legal information. Here there is no representation; liability should ensue only for failing

93. Oregon State Bar Legal Ethics Op. No. 488 (1983) approves of limited representation in the mediation context, as does Professor Riskin.

94. Riskin, *Neutral Lawyer*, *supra* note 59, at 335-36.

95. See generally Comment, *The Mediator-Lawyer*, *supra* note 66.

96. Riskin, *Neutral Lawyer*, *supra* note 59, at 354.

to ensure the process is fair. This should apply whether or not the mediator is a lawyer.⁹⁷

2. The Non-Lawyer Mediator

For non-lawyer mediators, accountability raises delicate unauthorized practice issues. It is hard to assess unauthorized practice restrictions because genuine concern for the public is mixed with lawyers' collective economic concerns.⁹⁸

Most mediators are laypersons; many serve as volunteers. A large portion come from mental health, social work and other disciplines. Unlike most lawyers, these mediation professionals are trained in interpersonal skills and are better equipped to mediate problems in relationships. Dispute resolution professionals are now a distinct professional category, with resulting pressure to expand and solidify their position. When moving into areas traditionally handled by lawyers, mediation poses an economic threat to the legal profession. Antitrust questions discourage the bar from taking positions unjustified by the public interest.⁹⁹ Unauthorized practice inquiries should properly focus on whether consumers are harmed when a non-lawyer performs services that a lawyer might do.

Private mediation of legal disputes outside litigation can affect important legal rights. A party cannot evaluate the fairness of an option without minimally adequate information about the law. Mediation that does not assure each party has such information is likely to reinforce existing disparities in knowledge, resources and power. Unauthorized practice rules prohibit non-lawyers from giving legal advice and drafting legal documents. There is the dilemma. Mediation process must accommodate the parties' need for information with the mediator's limited ability to give complete and accurate information. Restrictions against a lawyer's assisting another's unauthorized practice should be narrowly construed. Better informed parties are more likely to reach optimal, reasonably fair agreements.

97. This standard is similar to that proposed in Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 1986 HARV. L. REV. 1876, 1886-94. The mediator has a general duty of procedural openness, "to ensure that neither disputant was allowed to abuse the contractarian process." A material breach entitles the injured party to seek rescission and restitution from the other party, but not necessarily damages from the mediator. Equitable and policy considerations of proximate cause should limit mediator liability to those cases where breach caused detrimental reliance or consequential harm apart from ill-formed contracts, or where identifiable third persons with substantial interests in the dispute were excluded from negotiations.

The standard I propose applies only to law-related mediations where the parties have some independent counsel. Disputing parties are entitled to higher protection where the lawyer-mediator assumes a limited joint representation. Recourse available under this standard may overlap with that available on public review of the settlement.

98. See generally Silberman, *supra* note 74.

99. Antitrust concerns lurk behind other areas of lawyer regulation. See Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONSTITUTIONAL L.Q. 487 (1986). Recent constitutional challenges to the integrated bar could risk loss of the state action exemption to antitrust law. See *Keller v. California State Bar*, ___ U.S. ___, 110 S.Ct. 2228 (1990).

Lawyers should be encouraged to prepare brochures, video-tapes, or act as legal advisors to mediation teams without risking discipline for aiding in the unauthorized practice of law. Such involvement outside the context of representation better responds to parties' needs for accurate legal information.¹⁰⁰

Where private agreement occurs instead of adjudication, public fairness values require safeguards. The amount of legal information needed for sound decisions varies with the kind of dispute. Essentially private disputes bearing little relation to law are not the concern. The need for legal information increases with proximity to law. For routine, low stakes consumer cases and other common problems unlikely to be litigated, brochures can suffice. Private mediation programs can distribute brochures prepared by lawyers which state the legal principles relevant to these disputes.

By contrast, divorce mediation requires the parties have more precise legal information, including normal terms of separation, support, child visitation and taxes.¹⁰¹ Public concerns warrant greater lawyer involvement, whether as part of a mediation team¹⁰² or as independent counsel to review proposed agreements.¹⁰³ Besides the safeguards described above, official supervision and review of agreements should confirm that they satisfy minimal standards of societal fairness.¹⁰⁴

C. Public Review of Private Justice

When mediation supplants adjudication of private disputes¹⁰⁵ limited public review should confirm the agreement is within legal bounds and does not subvert an important public value. The benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome.¹⁰⁶ The reviewing body should set aside mediated agreements failing to satisfy minimal societal fairness. Where a dispute is litigable and the law reasonably settled, this standard can protect the quality of justice in mediation. Limited court review acts as a safety net in the last instance, rejecting patently unfair agreements. Review should occur promptly, before the parties detrimentally rely on the

100. See generally ROGERS & MCEWEN, *supra* note 74, at § 9.5.

101. Boston Bar Ass'n Legal Ethics Op. 78-1 (1979), cited in Oregon Legal Ethics Op. No. 488 (1983).

102. Oregon Legal Ethics Op. No. 488 (1983).

103. Professor Riskin criticizes the ABA Family Mediation Guidelines for placing too much emphasis on independent, partisan representation. This can impede neutral lawyering. Riskin, *Neutral Lawyer*, *supra* note 59, at 350-52.

104. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, *supra* note 1, at 671-72; Riskin, *Neutral Lawyer*, *supra* note 59, at 353-58.

105. That is, the dispute is otherwise suited for public adjudication in that the relationship is properly determined under a system of act-oriented rules. See generally Edwards, *supra* note 1, at 671; Hazard & Scott, *supra* note 1; Fuller, *supra* note 18.

106. Hazard & Scott, *supra* note 1, at 56.

agreement. It may be summary, confirming the agreement is knowing, voluntary and not in gross derogation of law and equity.

Public review of mediated agreements is critical for disputes between unequals that might otherwise go to court. I am sympathetic to the values of autonomy, mutual understanding and respect. Without some supervision and review, there is little confidence that mediation will protect public values of fairness and need for authoritative resolution. Especially for court-referred mediation, participation is not wholly voluntary. The threat of public enforcement gives court-annexed mediation coercive power to achieve agreement despite lack of voluntary consent by the weaker party. Mediation involving juvenile offenders, crime victims and offenders, landlords and tenants, and divorcing spouses is often annexed to the formal legal system. Agreement may finally determine the parties' respective obligations, avoiding formal adjudication. Absent prompt and limited review, the risks of private settlement are too great to warrant public sanction. The extent of review may vary, depending on the amount of risk to public values. Summary review may be warranted for some tort claims, while the more public aspects of prison complaints, consumer, and employment disputes warrant more exacting review.¹⁰⁷

IV. CONCLUSION

At its best, mediation offers hope for resolving many kinds of disputes without the lingering hostility of litigation. It respects autonomous choice-making and party participation better than the formal adversary system. At its worst, mediation ends disputes to the detriment of the uninformed, powerless, or ineffective bargainer. Mediation is not a cure-all properly used for any dispute. Some of my criticisms and suggested reforms may be radical. If accepted, they undoubtedly would change some forms of mediation and the judicial system's supervisory role. I do not want to undermine the growth of mediation programs, but merely to encourage carefully developed procedures for mediating law-related disputes. Absent minimal accountability for fairness, private mediation risks second class justice.

107. Assuming those cases do not present unsettled questions of public law or importance, and one properly addressed in mediation. *See supra* text accompanying notes 18-45.

