TOWARD NEW STANDARDS FOR THE NEUTRAL LAWYER IN MEDIATION*

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CONTENTS

INTRODUCTION

In mediation, a neutral third party who lacks power to impose a solution helps others resolve a dispute or plan a transaction.[1] Mediation is spreading rapidly across the United States, finding employment in matters that formerly passed through adversary processes.[2] And proponents trum-

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1. *See* Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971).

2. In the United States, until recently the formal use of mediation has been limited mainly to labor-management disputes and to disputes between or among members of certain ethnic groups or communities. In the last decade, however, it has become increasingly popular, especially in divorce cases, but also in environmental, neighborhood, and civil rights matters. Riskin,

pet its promise: where appropriate, mediation has the capacity to produce better, more satisfying dispute resolution and prevention at lower costs, both material and psychic, than ordinary adversary processing. Mediation can be more flexible and more responsive to human values, and it pays less homage to rules of substantive law and to the rules of procedure that tend to dominate even informal negotiations between lawyers. This orientation, of course, means that there is less need for lawyers in mediation than in adversary processes—or none at all.

Mediation has its dangers. To the extent that it diminishes the role of law and lawyers, it withdraws the protection that they normally provide. Many mediation efforts have sought to mitigate such dangers by making room for lawyers. In every such venture, however, a special threat to the mediation process arises: Lawyers for individual parties may, consciously or unconsciously, undermine a mediation by imposing an adversarial and protective way of thinking upon a process that thrives on a more comprehensive vision of human relations.

This Article focuses upon one method of providing legal services while addressing this special danger that lawyers present: placing one lawyer in a neutral position,[3] as either a mediator who uses his legal skills along with other techniques of helping others resolve a dispute or plan a transaction or an "impartial advisory attorney,"[4] who gives legal advice but generally does not try explicitly to facilitate an agreement. These are new forms of lawyering that hold enormous potential for extending mediation services while according adequate protection to the disputants' legal rights. Thus, neutral lawyering can enable lawyers and the bar to fulfill what Justice Burger has called their traditional function of "healing

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Mediation and Lawyers, 43 OHIO ST. L.J. 29, 30-34 (1982). Mediation may be viewed as part of the larger "alternative dispute resolution" movement. For a description of the range of alternatives, see Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

3. Neutral lawyering is developing in other contexts as well. In "mini-trials," which are increasingly popular devices for resolving major disputes that might otherwise result in extensive litigation, a "neutral advisor" normally presides and may render a non-binding opinion on how and on what bases a court would decide the case. *'Managing' company lawsuits to stay out of court*, BUS. WK., Aug. 23, 1982, at 54. A newer device was tried recently in a complex civil trial in U.S. District Judge Charles Richey's court in the District of Columbia. The parties were permitted to share the expense of the preparation of a summary of the evidence by a "neutral summarizer." Middleton, *'Neutral Summarizer' Used in Complex Case*, 68 A.B.A. J. 1559 (1982). Also, the U.S. Court of Appeals for the Second Circuit uses its staff counsel to "mediate" at pre-argument conferences. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974).

In such situations, of course, the parties are fully represented by independent legal counsel. Accordingly, the neutral lawyers do not face the risks and ambiguities that neutral lawyers encounter in the situations upon which this Article focuses, where the parties may choose against retaining independent counsel or may choose to employ independent counsel in a limited role.

For discussions of other situations in which mediation-*cum*-neutral lawyering may be helpful, see Paul, *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A.J. 93 (1976); Riskin, *supra* note 2, at 33-34.

Brown and Dauer's concept of "non-adversarial lawyering" includes neutral lawyering but also embraces situations in which the lawyer is aligned with one particular client. Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RESEARCH J. 519 *passim*. For purposes of my analysis, I designate lawyers in this situation "independent" or "adversary" counsel, even if they embrace a "nonadversarial lawyering" perspective.

4. *See infra* note 21 and accompanying text.

human conflict."[5] It offers a special opportunity for the bar to make a unique contribution to cooperative means of resolving disputes. As Harvard President Derek Bok said recently:

> Over the next generation, I predict that society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of one of the most creative social experiments of our time.[6]

But simply putting a lawyer in a neutral position does not always eliminate the danger that adversarial perspectives will dominate the mediation and reduce or destroy mediation's potential for enhancing relationships and providing satisfying solutions to problems. Much depends on how the neutral lawyer conceives of his task. This perception, in turn, depends importantly upon the impression the legal profession gives its members in regulating the activity of neutral lawyering.

The work of psychologist Carol Gilligan is illuminating in this regard. She has identified two different modes of thinking—or "voices"—used in addressing moral issues.[7] One "voice" stresses independence and autonomy; it operates primarily through rational processes and relies heavily on rules. The other is grounded in relationships; it emphasizes interdependence and caring. In all people, both voices are present. In men, however, the voice of autonomy tends to be stronger and clearer, while in women, on the whole, the voice of caring dominates.[8]

This is shown most clearly by the different ways in which men and women tended to respond to Kohlberg's well-known Heinz' dilemma, which was posed to them in the course of research study. The dilemma is that of a man whose wife is suffering from a terminal illness, which can be cured only by a drug available from a certain druggist at a price that far exceeds the husband's resources and which is ten times greater than the druggist's cost. The question posed is whether the husband should steal the drug.[9]

The men typically said "yes". They based their conclusions, normally, upon rational principles, seeing the issue in terms of rights and rules in a context of competition for a scarce resource. They typically employed a cost-benefit analysis which values life over property.[10]

Women, on the other hand, often did not answer the precise question asked, "Should Heinz steal the drug." Instead, some women considered a different question, "how should he act in response to his awareness of his wife's needs"[11]—a much broader inquiry, which opens a vast array of pos-

5. W. Burger, *Isn't There a Better Way?, Annual Report on the State of the Judiciary*, 68 A.B.A.J. 274 (1982).

6. Bok, *Law and Its Discontents, A Critical Look at our Legal System*, BAR LEADER, Mar.-Apr. 1983, at 21, 28.

7. C. GILLIGAN, IN A DIFFERENT VOICE (1982).

8. *See id.* at 24-63.

9. *Id.* at 25-26.

10. *Id.* at 26-27 *passim.*

11. *Id.* at 31.

sibilities. Thus, one woman said that the husband should have a talk with the druggist. She felt that the two could work something out.[12] Another believed that the husband should not steal the drug because he might, as a result, be sent to prison, leaving the wife without her husband's support.[13]

A hierarchical image of human relationships informs the masculine mode; a web-like image informs the feminine.[14] The import of this dichotomy to dispute resolution is quite direct. The perspective of autonomy dominates the judicial and adversary processes.[15] The perspective of caring and interconnection finds mediation much more hospitable. In fact, one of the great values of mediation is that it can make it possible for disputants to hear the voice of caring. Yet, plainly, as I shall argue below, both voices are essential in most mediations.

Now here is the problem: All those concerned with the functioning of a neutral lawyer in mediation—participants, lawyers, and the bar—are beset with a tension between these two different ways of looking at human relations. For instance, the person who seeks mediation with a neutral lawyer hopes he will achieve a happier resolution through a more open and humane process, but he faces the risk of inadequate protection of the sort that individual legal counsel ordinarily would provide.

A similar conflict between perspectives of autonomy and interdependence will be encountered by individual lawyers as they decide whether and how to serve as neutral lawyers in mediation, and by the bar and the courts as they ponder how to regulate this activity. For the individual lawyer, a neutral position offers the potential of freedom from the constraints of the usual adversary role and the chance to help empower people to deal with their own problems. In helping people resolve their disputes in a more responsible and humane way, the lawyer may herself derive satisfactions not readily available in adversary practice. But the neutral position lacks the safety and comfort associated with the normal, adversary role. Fears of malpractice suits or of professional censure—inspired by the voice of autonomy—are likely to affect the way lawyers carry out their tasks as neutrals in mediation and might even dissuade some from undertaking these activities.

As neutral lawyering offers the bar an opportunity both to fulfill its highest goal of serving the interests of the public and to brighten its long-tarnished image, so it exposes the bar to dangers. By approving this activity, the bar risks more than loss of income. Not only does it render clients and lawyers vulnerable to injury, the bar also endangers its own institutional integrity by authorizing an activity that many people will never see as appropriate for lawyers.

There is much validity and value, of course, in both modes of thinking about human relations. If mediation is to be extended appropriately, maintaining flexibility, informality and openness while adequately protect-

12. *Id.* at 28-29.
13. *Id.* at 28.
14. *Id.* at 62.
15. *See* Riskin, *supra* note 2, at 43-48.

ing interests normally fostered by adversary processes, it must at least permit, and perhaps encourage, everyone involved to hear and respond to both voices. The central focus of this Article is how—through regulating the neutral lawyer—to allow both voices to be expressed harmoniously in mediation.

A number of bar associations have issued ethics opinions that seek to regulate neutral lawyering. Some of these adopt a highly adversarial perspective. They respond strongly to the voice of autonomy and rights, and they threaten to "legalize" mediation just as arbitration was legalized earlier in this century.[16] This approach seems to be gathering support from the bar and other professional organizations. I fear the continuation of this trend, for it could hobble mediation's potential for helping disputants, lawyers, the bar, the courts, and society.

Fortunately, another cluster of opinions has evolved; these embody a better integration of the conflicting impulses toward autonomy and interdependence. They need further elaboration, however, and I intend to offer it in the following pages.

Part I describes the need for legal services in mediation and the use of neutral lawyers to answer that need. Part II contains an analysis of existing and proposed professional ethics guidelines and concludes that some are too restrictive and others insufficiently instructive. In Part III, I proffer standards of conduct that would provide appropriate guidance for lawyers and would accommodate their interests as well as those of the bar and the public.

Most of my examples are drawn from divorce mediation because it has already received sustained attention from bar associations and commentators. The popularity of mediation in divorce is attributable in part to the great interdependence and vulnerability of the persons involved, both before and after the divorce. In addition to the strong interest that divorcing people have in continuing a relationship, or in ending it decently, many want to save time and money and avoid the emotional trauma of adversarial processes. In a variety of other situations, people and institutions have similar constellations of interrelationships and interests. Increasingly, when intending to create, change, or terminate a relationship, they will seek mediation and the use of neutral lawyers. My analysis and proposals will have application in such situations as well.

I. Legal Services and the Neutral Lawyer in Mediation

Because most Americans wish to understand their legal positions, parties in many mediations want or need legal services. They might, for example, wish to know their legal rights, the likely results if the matter were litigated, and the various legal devices available for accomplishing whatever they want to accomplish, along with the consequences of choosing a particular alternative. Each might, in addition, need protection from the other side's maneuvers. Once the participants reach a resolution, they

16. J. Auerbach, Justice Without Law? 4, 7, 34 (1983).

might need a lawyer to draft an agreement or to effectuate it, for instance, by filing it for approval with a court or government agency.

In some mediation settings, such as a number of neighborhood justice centers, the need for this kind of assistance is largely ignored; a few participants have lawyers and a few participants are referred to lawyers, but in the great bulk of such cases no lawyers are involved. In other mediations, where independent counsel participate actively, the need for legal advice is abundantly fulfilled.

In private divorce mediation,[17] practices vary, and a number of arrangements have evolved for the provision of such legal services. In the most common format, both parties consult independent legal counsel before, during, or after the mediation process. These independent lawyers may confront some mild difficulties in understanding their roles, because the clients will be getting counseling from another professional—the mediator, who may be a lawyer, or an "impartial advisory attorney."[18] Most of these problems, however, can be worked out in dialogue with the client against a familiar backdrop of custom and professional obligation.[19] The use of independent lawyers to advise parties in mediation is highly desirable. Yet in many situations, participants in mediation are choosing to employ lawyers only in limited ways, or not to employ them at all.

This Article centers on the duties of the neutral lawyer in situations in which involvement of lawyers for individual parties is either in doubt or is not extensive. When adversary lawyers do not participate in the mediation or do not provide extensive review or advice, when the parties do not know whether they will consult adversary lawyers, when the parties choose against consulting adversary lawyers—when any of these things happen, the neutral lawyer must decide whether and how to accommodate interests normally protected by independent counsel.

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17. A good deal of divorce mediation, much of it dealing with custody issues, is provided at no charge by courts through the services of court-employed mediators. *See* Comeaux, *Procedural Controls in Public Sector Domestic Relations Mediation*, AMERICAN BAR ASSOCIATION, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 80 (H. Davidson, L. Ray, and R. Horowitz eds. 1982). Increasingly, other kinds of cases are likely to receive similar treatment. A recent Colorado statute, for instance, establishes an office of dispute resolution in the state government and authorizes the state supreme court chief justice to appoint a director who may contract with mediators to assist in a variety of civil cases from county and district courts. COLO. REV. STAT. §§ 13-22-301 to 399 (Supp. 1983). Because these processes are under direct control of the courts, such activities are beyond the scope of this Article.

18. *See infra* note 21 and accompanying text.

19. Some guidelines for the "non-mediating" lawyer are provided in Samuels and Shawn, *The Role of the Lawyer Outside the Mediation Process*, 1 Mediation Q. 13 (1984).

Some of the uncertainties associated with using outside attorneys in mediation were recounted in a Boston Bar Association ethics opinion:

> A separation agreement cannot really be evaluated by one who has not participated in the negotiations leading to it and, therefore, cannot judge whether it appropriately reflects the views, needs, strengths and weaknesses of each of the parties. For this reason, some lawyers may decline to advise the parties once they have negotiated a draft agreement with the assistance of the mediator. Other attorneys may undertake a full scale review leading to a reopening of the negotiations with additional expense to all concerned. Still other attorneys may be inclined under the circumstances to focus on the form of the agreement rather that its substance, with resulting potential risk both to their clients and themselves.

Comm. of Professional Responsibility of the Boston Bar Association, Op. 78-1, at 4-5 (1978).

The legal services[20] supplied by neutral lawyers in mediation fall along a continuum. At one extreme is the so-called "impartial advisory attorney" who meets with the parties jointly to answer legal questions or to incorporate the decisions they have reached into a written contract.[21] Such lawyers normally do not function as mediators, *i.e.*, they do not try explicitly to help the parties reach an agreement. In an intermediate position on the continuum is the lawyer who performs the same kind of service as an impartial advisory attorney, but does so as part of a team with a mediator, ordinarily a psychotherapist. Finally, some lawyers serve explicitly as mediators.

These lawyer-mediators differ in the extent to which they emphasize law.[22] For some, the substance of the law and the respective rights of the participants form the foundation for decision-making. For others, the law plays a supporting role to the participants' own senses of fairness.[23]

Lawyer-mediators vary also in the type of legal services they provide. Some advise the parties of their rights, explain what is likely to happen if the matter is litigated, and prepare an agreement in what could be final form. Some of these lawyer-mediators urge the parties to have such agreements reviewed by independent counsel;[24] others insist. A few will actually present the document in court, representing one or both of the parties. Some will, in the alternative, teach the parties how to effectuate the agreement themselves, for example, by filing for divorce *pro se.*

A larger group of lawyer-mediators are willing only to prepare a memorandum of agreement that is not in final form, *i.e.*, one that must be redrafted by a lawyer in order to be capable of having legal effect. Within this group, some mediators tell the parties about their legal positions and what would happen in court, and some do not. Of those who do not, some disclaim—or even hide—any identification with the legal profession; these do not fall within my concept of the neutral lawyer.

Neutral lawyering can enhance the mediation process by giving people access to law in a way that diminishes the likelihood that law will dominate their decision-making. The neutral lawyer can reduce the need for and influence of lawyers on the individual parties. This may enable the parties to reach their own agreement and free them from the adversarial/materialistic perspective, the "lawyers' standard philosophical

20. My notion of legal services is embraced adequately by the "functional" definition of the practice of law given in the ABA Model Code of Professional Responsibility: ". . . the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1979).

21. This concept was first presented in O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 27-28 (1978) and has been used extensively by some divorce mediation programs that follow Coogler's "structured mediation" approach.

22. Mediators also fall along a continuum in terms of the extent to which they suggest alternatives as opposed to helping the parties come up with their own.

23. *See* Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice*, PEOPLE'S LAW REVIEW 42, 43, 47 (R. Warner ed. 1980).

24. *See id.*

map."[25]

Moreover, the neutral lawyer can convey legal information in a non-adversarial fashion. This is not an easy task, of course. It is often difficult for lawyers to make clear predictions of what courts would do. Even where the neutral lawyer can make clear predictions, the parties may have difficulty perceiving her as neutral. In some cases, the best way for the neutral lawyer to inform the parties of their rights is to tell them what she thinks they would be told by individual lawyers. Often this will satisfy the needs of the parties, thus saving legal fees and, perhaps, avoiding unnecessary conflict.

The neutral lawyer who serves as a mediator, or who is otherwise deeply involved in the mediation process, offers additional benefits. Because he is an expert on law, he can help free the parties from dependence upon legal norms so that they may reach for a solution that peculiarly suits them. He can do this by helping them understand their legal positions, including the uncertainties, and by explaining that they have a choice about whether to follow legal norms. If experienced, he can offer a variety of arrangements to fulfill the parties' objectives and, more readily than adversary counsel, help integrate these into the decision-making process in ways that will be responsive to the parties' unique needs. And he can do a better job than a non-lawyer mediator of identifying essential issues, pressing the parties for decisions, and incorporating these into the resulting agreement. In addition, the document prepared by the neutral lawyer, whether an informal memorandum of agreement or a writing suitable for presentation to a court or government agency, should be easier for independent counsel to review than one prepared by a non-lawyer.[26]

I do not mean to suggest that lawyers should dominate divorce mediation or any other mediation activity or that it is always, or even usually, better to have a lawyer than a non-lawyer mediator. First, to the extent that the use of a neutral lawyer diminishes the role of independent counsel, it enlarges the risk that disputants will not receive adequate legal advice. Second, most lawyers are ill-suited, by training and inclination, to the mediator's role. Thus, they present the danger of destroying much of the value inherent in the informal, open nature of most mediation processes by an excessive focus on procedure, rules of law, materialistic values, or protective orientations.[27] At the same time, those lawyers who can serve in neutral capacities in mediation and employ their legal skills offer a unique and valuable service to the parties and have a chance to enoble themselves

25. Riskin, *supra* note 2, at 43-48.

26. This will not always be the case, of course. The lawyer-mediator who puts the agreement into ostensibly final form gives the reviewing lawyers, who may feel an impulse to do *something* for their clients, a very clear target. If, on the other hand, a mediator prepares an informal document, the reviewing lawyers will have to redraft it. While this leaves room for disputes between opposing counsel, it also permits them to agree on how the document should be redrafted.

One seemingly successful device, used by a lawyer-mediator who makes no representations that he is a lawyer and gives no legal advice, is to describe in the memorandum the reasons and goals that lie behind the various decisions.

27. Riskin, *supra* note 2, at 43-48. This may be changing, in part because law schools increasingly are offering mediation training. *See* Riskin, *Mediation in the Law Schools*, 33 J. LEG. ED. 259 (1984).

and the bar. But they need guidance and encouragement. These are the topics of Part II.

II. Existing and Proposed Guidelines

In determining the extent and nature of their work as neutrals in mediation, lawyers will look for guidance to professional ethics and to malpractice law. Malpractice law, in turn, will draw heavily upon professional ethics pronouncements in establishing standards.[28] The problem is that neither existing nor proposed professional ethics declarations provide appropriate guidance or encouragement.

Lawyers' conduct is governed by codes of professional responsibility adopted in every jurisdiction by bar associations or courts. Nearly all of these currently follow, with minor variations, the A.B.A.'s Model Code of Professional Responsibility, although many may soon adopt the A.B.A.'s new Model Rules of Professional Conduct.[29] Bar ethics committees interpret these codes in disciplinary proceedings and in opinions issued in response to inquiries and complaints. Courts interpret them in disciplinary proceedings, as well as in actions for malpractice or breach of contract or claims of ineffective assistance of counsel in criminal cases.

Professional ethics promulgations dealing explicitly with the work of a neutral attorney in mediation have arisen almost exclusively in divorce mediation, and in the last few years. I divide these opinions into two groups in accordance with whether they conceive of the neutral lawyer as "representing" the parties (the "traditional" approach) or as "not representing" the parties (the "progressive" approach). The traditional opinions stress independence and separation, thus seeming to respond to the "masculine" mode described by Gilligan.[30] The progressive opinions, on the whole, show a better integration of the impulses toward separation and connection.

A. *The Traditional Approach*

Bar ethics opinions have invoked a number of canons from the Model Code of Professional Responsibility to restrict the activities of lawyers as neutrals in divorce mediation. Canon 3 is designed to protect both clients and the bar and commands the lawyer to help prevent the unauthorized practice of law.[31] Canon 9 is meant primarily to protect the bar and indi-

28. *See* Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 709-14 (1981). Issues concerning the duties of a neutral lawyer who claimed to represent both parties as a mediator were raised but not addressed in Lange v. Marshall, 622 S.W. 2d 237 (Mo. App. 1981).

29. THE MODEL RULES OF PROFESSIONAL CONDUCT (1983) were adopted by the American Bar Association on August 2, 1983 to replace the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979).

30. *See supra* text accompanying notes 7-14.

31. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1979).

The Code consists of Canons, Ethical Considerations (E.C.'s) and Disciplinary Rules (D.R.'s). The nine Canonns are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers. . . .They embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived." *Id.* Preliminary Statement. The

vidual lawyers by ordering lawyers to "avoid even the appearance of professional impropriety."[32] Three other canons are intended mainly to ensure the lawyer's loyalty to her client by enjoining the lawyer to protect the client by preserving his confidences (Canon 4);[33] exercising independent judgement on the client's behalf (Canon 5);[34] and representing him "zealously within the bounds of the law" (Canon 7).[35] These last two canons are the most troublesome in relation to neutral lawyering because they are inconsistent with the expectations of most parties in mediation, most mediators, and many neutral lawyers. In some of the ethics opinions discussed below, these Canons tend to overshadow Ethical Consideration 5-20, the statement in the Code that has the most potential for encouraging neutral lawyering. It provides:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.[36]

The traditional ethics opinions conceive of the neutral lawyer as engaging in "multiple representation." They see a lawyer-client relationship as the *sine qua non* for giving legal advice and limit the lawyer's authority to represent more than one party by his ability to adequately protect each.[37] Thus, in these opinions, the impulse toward autonomy overshad-

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Ethical Considerations provide guidelines to the lawyer and "are aspirational in character." *Id.* The Disciplinary Rules "are mandatory in character . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

32. *Id.*, Canon 9.

33. *Id.*, Canon 4.

34. *Id.*, Canon 5.

35. *Id.*, Canon 7.

36. *Id.*, EC 5-20.

37. For a comprehensive survey of ethics opinions relevant to divorce mediation, including some dealing with a number of issues outside the scope of this Article—such as those facing non-lawyer mediators and lawyers in interdisciplinary teams, and issues of solicitation and control—see Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982).

Two recent ethics opinions, which were issued after the Silberman article appeared and which do not fall within the scope of my analysis, significantly restrict the activities of neutral lawyers in mediation and rest comfortably along side the "traditional" opinions.

The Board of Professional Responsibility of the Supreme Court of Tennessee ruled two to one that a "non-practicing lawyer" who engaged "with a non-lawyer in the business of offering divorce mediation services to the public" violated DR 3-103, which prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. Board of Professional Responsibility of the Sup. Ct. of Tenn. Formal Op. 83-F-39 (1983). The Board determined that divorce mediation, as described in the inquiry, constituted the practice of law under EC 3-5. This is surprising in light of the fact that the lawyer was "non-practicing" and

> [t]he individuals are informed that the mediators do not and will not provide legal advice or legal services. They are informed and encouraged to seek independent legal counsel and to retain an attorney at the onset of mediation. When an agreement is reached the terms of the settlement are to be submitted to the attorneys to be legally drafted and executed.

Id. at 2.

The Nassau County (New York) Bar Association's professional ethics committee disapproved an advertisement for a "Law Center for Divorce Mediation" for a number of reasons. It noted that it was a violation of DR 2-102(B) for a lawyer to practice under a trade name. More interest-

ows the impulse toward connection.

Two opinions dealt with situations in which an attorney-client relationship was deemed to exist between the mediator and both parties. The Washington State Bar and the New Hampshire State Bar committees ruled that, because of this relationship, the lawyer could not ethically engage in certain activities connected with mediation because he would be unable, in so doing, to adequately protect the individual interests of his clients.[38]

Disciplinary Rule 5-105(C) permits multiple representation only "if it is obvious that [the lawyer] can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."[39] The Washington State Bar committee found that this provision was violated by a "Cooperative Divorce Program," under which a lawyer "represented both parties" in reaching and drafting a separation agreement,[40] and apparently filing it with the court.[41] For similar reasons, the New Hampshire committee opined that a lawyer could not ethically mediate a divorce *between present clients*.[42] Though the precise facts that were submitted to the committee do not appear in the opinion, it is reasonable to infer that they indicated that the lawyer in question was to draft a separation agreement.

The New Hampshire committee had additional concerns: the inability of the lawyer-mediator to invoke the attorney-client privilege to keep revelations confidential[43] and the Canon 9 injunction that the lawyer avoid even the appearance of impropriety. Apparently the committee thought

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ing were its characterizations of some of the statements in the advertisement. The committee thought that the statement "that hiring 'separate lawyers . . . is costly . . . (and) often only complicates matters' [was] without any doubt false, deceptive and blatantly misleading" (and a violation of DR 2-101(A)), especially in light of dangers of representing both parties in a divorce. It also found that the statement "that divorce mediation is 'quicker, . . . less expensive and . . . far less painful' then [sic] representation by separate counsel is not only misleading but is a claim that cannot be measured or verified" and thus violates DR 2-101(B). Bar Association of Nassau County (N.Y.) Committee on Professional Ethics, Formal Op. 82-8, at 2 (Sept. 1982).

38. Letter from Leland Ripley, Staff Attorney, Washington State Bar Association to [name obliterated] (Feb. 20, 1980); New Hampshire Bar Association Ethics Committee Opinion (Mar. 16, 1982), 8 N.H.L.W. 385 (1982).

39. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1979).

40. Memorandum to Washington State Bar Code of Professional Responsibility Committee, Professional Ethics Considerations in Representing Both Husband and Wife in a Marriage Dissolution (author's name obliterated) (1980).

41. Letter from Leland Ripley, *supra* note 38.

42. New Hampshire Bar Association Ethics Committee Opinion (Mar. 16, 1982), 8 N.H.L.W. 385 (1982).

43. A number of other devices might protect the confidentiality of information revealed in the course of mediation. Some jurisdictions have a rule of evidence that protects information disclosed in settlement negotiations. FED. R. EVID. 408; CAL. EVID. CODE SEC. 1151 (West 1966 & Supp. 1983); J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1061 (J. Chadbourne rev. ed. 1972 & Supp. 1982 and W. Reiser Supp. 1983).

Another possibility, now in common use, is to include in an agreement between parties a provision establishing confidentiality. A California appellate court upheld a lower court ruling that a rabbi who acted as a marriage counselor for the parties could not be compelled to testify in violation of an express agreement "that their communications would be confidential and that neither would call him as a witness in the event of a divorce action." Simrin v. Simrin, 233 Cal. App. 2d 90, 94, 43 Cal. Rptr. 376, 378 (Dist. Ct. App. 1965). The court relied on the public policy to preserve marriage and analogized to statements made in an offer of compromise or to aid or

that the attorney could not or, on the facts submitted, had not shaken the obligations toward a client imposed by the Code simply by becoming a mediator for that person and others. The committee's opinion does not apply to other arrangements which might have adequate ethical safeguards or where no previous attorney-client relationship existed.[44]

The Maryland State Bar's Ethics Committee has been more lenient with lawyers who served as "impartial advisory attorneys" in "structured" divorce mediation programs.[45] The committee stressed various dangers: the risk of aiding in the unauthorized practice of law (a violation of Disciplinary Rule 3-101(A); the risk of creating "the impression that the agreement was the product of negotiation between lawyers [which may preclude the clients] from going behind the agreement to explain their original intentions";[46] and the inherent delicacy of the drafting.[47] The committee obligated the lawyer himself to make the determination whether multiple representation was permissible in a given case.[48]

But rather than ruling, as did the Washington and New Hampshire

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settle litigation, which are privileged, and to an evidence rule making communications in conciliation court privileged. *Id.* at 94-95, 43 Cal. Rptr. at 378-79.

In some jurisdictions, statutes create a privilege for communications made in the course of court-annexed mediations. CAL. CIV. CODE SEC. 4607 (West 1983); FLA. STAT. ANN. SEC. 749.01 (West Supp. 1982). There is another way to encourage the kind of disclosure that the attorney-client privilege is intended to foster: The mediator can stress the importance of trust and full disclosure in mediation and point to the possibility that a court would refuse to enforce an agreement against a party who was the victim of concealment. *See In re* Marriage of Modnick, 33 Cal. 3d 897, 191 Cal. Rptr. 629, 663 P.2d 187 (1983), in which the court held that the husband's conduct in failing to disclose the existence of community property amounted to extrinsic fraud that warranted setting aside property terms of the divorce decree.

For further discussions, see Demuth, *Theories for Protecting Mediation*, 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 17 (May 1984); J. FOLBERG & A. TAYLOR, MEDIATION 263-80 (1984).

44. New Hamshire Bar Association Ethics Committee Opinion, *supra* note 38.

45. Maryland State Bar Association Committee on Ethics, Ethics Docket 80-55A (Aug. 20, 1980).

46. *Id.* at 8.

47. An attorney who considers these subtle turns of draftsmanship may find it impossible to remain impartial; an attorney who does not consider them may be rendering a very low quality of legal service.

> . . .If the preparation of a Property Settlement Agreement in mediation can be equated to filling in blanks on forms, then the services of an attorney are probably not necessary. If the preparation of such an Agreement requires the independent judgment of an attorney — to choose what language best expresses the intent of the parties, to allocate the burdens of performance and the risks of non-performance, and to advise whether the Agreement as a whole promotes the best interests of both clients and not just some interests of one client and some interests of the other — then such preparation is likely to place the attorney in a position where he senses a conflict of interest.

Id. at 8-9.

48. An attorney could not blindly take a referral from a lay mediator, fail to make an independent determination of the interests of the parties, and then mechanically recite a litany of legal rights and obligations of the parties topped off with a written separation agreement. An attorney who undertakes multiple representation virtually guarantees the satisfaction of all clients since the attorney is legally and financially responsible to all his clients for any damage resulting from disloyalty. A mediation center might attempt to disclaim liability to clients who later seek to repudiate their agreement based on some alleged misrepresentation or undue influence, but attorneys may not attempt to disclaim liability to a client who feels injured because his lawyer, in trying to protect the rights of another client, prejudiced those of the first (DR 6-102(A)).

Id. at 6-7.

committees, that the attorney could not represent both parties because he could not adequately protect them, the Maryland committee decided that the lawyer might appropriately serve in this capacity, but only if he *could* provide such protection.[49] The Maryland committee felt that a lawyer-mediator who does *not* have a lawyer-client relationship with the parties may not give legal advice because he would not have a duty of loyalty.[50] But a lawyer who has such a relationship with the parties may function as an impartial advisory attorney if he complies with Disciplinary Rule 5-105(C). He may even represent one of the parties in the subsequent divorce litigation if, in so doing, he could comply with Disciplinary Rule 5-105(C) and requirements in Disciplinary Rule 5-102 as to the lawyer's obligation to withdraw as counsel when he may be called as a witness.[51]

The central idea that pervades these opinions—that the lawyer may represent more than one client in the same matter only if he or she can adequately protect their interests—is embraced by the new Model Rules of Professional Conduct, in Rule 2.2.[52]

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49. *Id.* at 4-7.

50. It should be recognized that an impartial arbitrator or mediator is a different role from that of an attorney representing a client. In the former situation, the attorney-client relationship would not *necessarily* exist and, while honesty would remain a fundamental duty of the lawyer regardless of role, loyalty would not. The attorney mediator, like the lay mediator in the same role, has no particular right or duty to give legal advice to the participants nor have the participants, upon hearing such gratuitous advice, received "legal representation".

Id. at 6 (emphasis supplied).

51. Another condition is that the mediation center must meet the requirements of DR 2-103(E)(4) regarding the kinds of organizations from which a lawyer may accept referrals. *Id.* at 3. The Virginia State Bar's Standing Committee on Legal Ethics approved the participation by a lawyer on a panel in a structured mediation program if the program is within the confines of disciplinary rules under Canon 2. Virginia State Bar Standing Committee on Legal Ethics, Informal Opinion No. 400A (1979). This committee did not seem concerned about the attorney's divided loyalties between disputants, yet it did say that the lawyer was representing "both parties in drafting a property settlement agreement." *Id.* Consequently, he could not subsequently "represent one party against the other," subject to an exception established by a previous ethics opinion, which permitted the lawyer to give "non-partisan advice on. . .transferring property and service in drafting an agreed property settlement agreement" and "with full disclosure. . .and consent of both parties represent one of the parties in a 'no-fault' divorce where support and maintenance and property rights are not involved." Virginia State Bar Standing Committee on Legal Ethics, Informal Op. No. 296 (1977).

52. Rule 2.2 of the new ABA Model Rules of Professional Conduct provides:

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer *reasonably believes* that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer *reasonably believes* that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) while acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the

This traditional approach is not helpful to the development of neutral lawyering in mediation. First, it saddles the lawyer with the burdens of the notion of representation. The idea of undivided loyalty to an individual client is inconsistent with a neutral posture toward all the parties. The vision of a lawyer working for the self-conceived interests of a client, usually in opposition to the interests of others, contrasts starkly with the actual and appropriate orientation of a lawyer who acts as mediator or impartial advisory attorney. Second, because the traditional approach is informed by such a limited notion of what lawyers do, it is of no help whatever in encouraging or guiding neutral lawyers who do not have lawyer-client relationships with the parties.[53] Moreover, it fails to recognize that there are ways to accommodate the disputants' interests in protection from one another without imposing the full burden of doing so on the neutral lawyer.

A recent opinion of the Oregon State Bar[54] offers some hope of mild relief, within the traditional approach, from the restrictions of the notion of "representation." The opinion responded to an inquiry concerning whether a lawyer could "ethically participate in family mediation."[55] On the facts submitted, the attorneys, each of whom participated as part of an interdisciplinary team with a non-lawyer mediator, did not conceive of their activity as representation. The Bar disagreed. It viewed the activity as representation, thus joining the traditional approach. Like the other traditional opinions, this one obligated the mediating attorney to comply with the protective requirements of Disciplinary Rule 5-105(C).[56] It went further, however, and defined a limited representational role for the neutral lawyer:

> A lawyer-mediator, however, does not (and may not) act in an adversarial role but must limit his or her services to providing informational assistance to the parties in a neutral fashion. Any representation by an attorney as an advocate must be rendered by independent counsel, and a lawyer-mediator should advise the parties to have their respective attorneys review any agreement that results from the mediation process.[57]

B. *The Progressive Approach*

Happily, some ethics opinions and proposed rules do regulate the role

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lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) (emphasis supplied).

A recently published "practice aid" seems also to follow this approach. Family Law Reporter Practice Aid No. 17 [Reference File] FAM. L. REP. (BNA), 517: at 0001, 0003 (Oct. 26, 1982).

53. The introduction to the predecessor to Rule 2.2, stated that "[t]his Rule does not deal with a lawyer acting as mediator or arbitrator between parties with whom the lawyer does not have a client-lawyer relationship. . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (Discussion Draft 1980).

54. Oregon State Bar Legal Ethics Op. 488 (1983).

55. *Id.* at 2-3.

56. *Id.* at 3. In addition, the opinion permitted the lawyer "to participate only after both parties are fully informed of their right to independent counsel, of the role the lawyer-mediator will play in the process, and of the limitations placed on the lawyer-mediator in acting as counsel for either party in their divorce." *Id.*

57. *Id.*

of the neutral lawyer in mediation in a fashion that could facilitate the appropriate development of this activity. The authors of these opinions clearly envisioned the need to protect participants, but understood that such protection can be afforded without placing the entire responsibility on the neutral lawyer through the notion of "representation." To the contrary, in this perspective, the neutral lawyer does not represent the parties and must tell them so.

Unhappily, in freeing the neutral lawyer from some of the baggage associated with the idea of representation, these ethics opinions leave too much ambiguity about the neutral lawyer's remaining obligations, and the proposed rules lean too heavily upon adversarial assumptions.

1. *Opinions*

Opinions expressing a better integration of impulses toward autonomy with those toward interdependence have issued recently from bar associations or their ethics committees in Boston,[58] Connecticut,[59] and New York City.[60]

These opinions recognized the value of neutral lawyers in mediation and permitted them to perform certain legal services. The Boston opinion, relating to a lawyer who mediated, centered on what legal services the lawyer could ethically perform as part of the mediation. The Connecticut opinion dealt with a lawyer who was described as part of an interdisciplinary team with a counselor and who seemed to function much as an "impartial advisory attorney."[61] The New York opinion concerned a lawyer functioning as either mediator or impartial advisory attorney in a "structured mediation" program.

These opinions each held that a lawyer in the roles that they considered does not "represent" the parties and must so advise them; that he may give legal advice and prepare the separation agreement; but that he may not "represent" either or both parties in subsequent legal proceedings. As the Boston committee observed, there is great value in this service:

> A mediation approach should give the clients a better basis of information as to the applicable law and the normal terms of separation, support, child visitation, taxation and the like than would be available if the parties proceeded without legal advice and may possibly do so at a lower cost both in money and in emotional distress to the participants than full scale legal representation.
>
> Because of these potential benefits of the mediation approach we do not feel it should be barred: if the parties are to be advised as to the legal aspects by a person not engaging in the improper practice of

58. Committee of Professional Responsibility of the Boston Bar Association, Op. 78-1 (1978).

59. Connecticut Bar Association, Formal Op. 35 (1982).

60. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Op. 80-23 (1981) *reprinted in* 7 FAM. L. REP. (BNA) 3097 (Oct. 13, 1981) [hereinafter cited as New York City Bar Op.].

61. Both of these opinions refer to the lawyer as a mediator. In the Connecticut opinion, however, it appears that the lawyer-mediator is called in at appropriate times, much in the manner of an "impartial advisory attorney." *Supra* text accompanying note 21. The lawyer-mediators described in the Oregon opinion appear to be more heavily involved in the mediation itself.

law, that advice must be given by an attorney.[62]

Each of the opinions imposed additional requirements. They directed that the lawyer make certain explanations of the limitations on his protective role and of the advantages of independent counsel.[63] The New York opinion insisted that such lawyers "give legal advice only to both parties in the presence of the other,"[64] and such practice was an implicit assumption of the other two opinions.

Under all three opinions the parties' intelligent assent to mediation is important. The Boston opinion obligated the lawyer to make "sure that the parties understand what they are doing."[65] The Connecticut opinion required that there be "full disclosure,"[66] which would include the possibility that the attorney-client privilege would not protect information revealed by or to the mediator, and that the mediator could not represent either party in subsequent proceedings. Under the New York City guidelines, the lawyer's participation as either lawyer-mediator or impartial advisory attorney is specifically conditioned on the "informed consent" of the parties. The lawyer may proceed "only if [he] is satisfied that the parties understand the risks and understand the significance of the fact that the lawyer represents neither party."[67] The New York City opinion had one other interesting wrinkle: "The lawyer may *not* participate in the divorce mediation process where it appears that the issues between the parties are of such complexity or difficulty that the parties cannot prudently reach a solution without the advice of separate and independent legal counsel."[68] This opinion apparently did not contemplate the possibility that the parties, in such a situation, might consult independent legal counsel as well as

62. Boston Bar Op., *supra* note 58, at 3.

63. The New York City opinion requires that the lawyer "advise the parties of the advantages of seeking independent legal counsel before executing any agreement drafted by the lawyer." New York City Bar Op., *supra* note 60, at 3100. This apparently applies to both the lawyer-mediator and the impartial advisory attorney.

The Boston opinion adds more detail:

> [I]f the husband and wife indicate that they wish to retain attorneys at some stage of the proceeding, [the attorney] should suggest that they speak to these attorneys at the outset both to obtain their advice on whether to follow the procedure and to determine whether the attorneys will, in fact, be willing to do the work the parties have in mind for the lawyers.

Boston Bar Op., *supra* note 58, at 6.

The Connecticut opinion requires only that the mediator stress that "either party may at any time seek independent legal advice." Connecticut Bar Association, Formal Op. 35, at 4 (1982). The model of mediation that was the subject of the inquiry, however, required "that the parties take the agreement to independent legal counsel for review before execution so as to insure that each party has made informed choices." *Id.* at 2.

64. New York City Bar Op., *supra* note 60, at 3100.

65. Boston Bar Op., *supra* note 58, at 6.

66. Connecticut Bar Association, *supra* note 59, at 4.

67. New York City Bar Op. 80-23 *supra* note 60, at 3100.

68. *Id.* at 3099.

Note that this, in combination with the informed consent requirement, imposes on the neutral lawyer who is *not* "representing" the parties an obligation quite similar to that established by DR5-105(C), which permits a lawyer to "represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1979).

the neutral lawyer.[69]

These opinions enhance the likelihood that parties to a mediation will be able to make the most effective use of the lawyer as mediator or impartial advisory attorney. They free the lawyer from some of the protective obligations associated with the concept of representation and with the normal lawyer-client relationship,[70] yet they permit him to contribute most of the information and ideas that adversary counsel would provide. In addition, the parties' interest in securing the kind of service normally associated with independent counsel is accommodated to a degree by requirements that they be told about the advantages of such counsel.

Although these opinions recognize the value of the neutral lawyer in mediation, they leave too much ambiguity about such a lawyer's obligations. Given that she does not "represent" the parties, just how protective of them must she be? The Connecticut opinion did not address this issue. The Boston and New York City opinions relied heavily upon the notion of informed consent to protect both disputants and lawyers. The Boston opinion required the lawyer-mediator to ensure "that the parties understand what they are doing,"[71] and it cautioned that a lawyer may be charged with failing to "fully explain. . .all applicable considerations."[72] The New York City opinion declared that "lawyers may provide impartial legal advice and assist in reducing the parties' agreement to writing only where the lawyer fully explains all pertinent considerations and alternatives and the consequences to each party of choosing the resolution agreed upon."[73]

Such approaches contain two flaws. First, they do not clearly establish what the neutral lawyer is obligated to say. The injunction to explain "all applicable considerations," for instance, is difficult to comprehend in the absence of an understanding of the overall obligations that the neutral lawyer discharges by doing so.[74] Second, even if experts could adequately

69. I assume that this occurred because the statement of facts submitted to the committee asked for its opinion on a situation in which an impartial advisory attorney was used and in which no thought was given to the use of independent counsel.

The New York City opinion conditions the lawyer's participation upon the organization's compliance with the requirements of DR 2-103(D)(4). New York City Bar Op., *supra* note 60, at 3101. These rules permit a lawyer to be recommended or employed by "[a]ny bona fide organization that recommends, furnishes or pays for legal services to its beneficiaries," MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1979), if it meets certain conditions and "if there is no interference with the exercise of independent professional judgment on behalf of his client."

70. The Connecticut and New York opinions caution lawyers against working with nonlawyer mediators who engage in the practice of law in violation of Canon 3, which provides that "[a] lawyer should assist in preventing the unauthorized practice of law". MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 3 (1979). Connecticut Bar Association, *supra* note 59, at 4-5 (1982); New York City Bar Op., *supra* note 60, at 3100.

71. Boston Bar Op. 78-1, *supra* note 58 at 6.

72. *Id.* at 4.

73. New York City Bar Op. 80-23, *supra* note 61, at 3100.

74. Some lawyers who function as neutrals in mediation maintain that they give "legal information" but not "legal advice." Los Angeles lawyer-mediator Joel Edelman explained this in an interview as follows: "I tell people what the statutes and court decisions are that are applicable to their case. What I don't say is, 'This is good for you. This is what you ought to do.'" Jackson, *Private Mediation of Divorce Draws Lawyer Converts*, Los Angeles Daily J., July 4, 1983, p. 1 col. 6. This brief statement, which does not encompass all of Edelman's views on the matter, fails to recognize that many subtle judgments often are required to explain applicable law, and further

describe what the neutral lawyer is to say, there is a fatal defect in an approach that relies upon regulating disclosures; it tends to ignore both the interactive process between professional and client and the client's understanding of the information.[75]

Both flaws result from the failure of the progressive opinions to articulate the overall objectives of the mediation process *or* of the neutral lawyer. According to these opinions, the neutral lawyer has an obligation to explain things to the disputants. And though the obligation is unclear, its existence plainly creates a risk that he will be charged with professional misconduct or malpractice. This risk may dissuade lawyers from undertaking neutral roles in mediation or may influence the manner in which they participate. Thus, the "progressive"opinions do not provide the potential neutral lawyer a sufficient basis for either guiding his conduct or overcoming fears of malpractice liability or professional censure.

2. *Proposals*

There are essentially two different approaches by which professional associations could provide appropriate guidance through ethics promulgations: rules and standards.[76] Rules are "formally realizable."[77] "No one shall mediate who has not passed the XYZ examination" is an example. A standard, principle, or policy, on the other hand, is less precise and "refers directly to one of the substantive objectives" of the regulation.[78] For instance, "No one shall mediate who is not reasonably qualified to do so." A rule and a standard may be designed to serve the same policy objective, say, protecting the public by having only skilled people mediate, but they do so in different ways.

There is often an association between a rule orientation and an orientation toward individualism.[79] Rules can protect individual rights and can guard us from each other to a degree, or at least they can carve out areas of autonomy. Rules make it easier to treat like cases in a similar fashion because they can set out objective characteristics of persons, such as age, test scores, or height.

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that "legal advice" often is meant to include advising a client of his options and the risks and benefits associated with each while not telling him which to choose.

75. In cases involving a physician's alleged failure to obtain the "informed consent" of a patient, courts have relied primarily upon one of two objective standards to measure the physician's performance. One is based upon the disclosure practices of the medical profession and the other upon what the "reasonable patient" would want to know. *See* Riskin, *Sexual Relations Between Psychotherapist and Their Patients: Toward Research or Restraint,* 67 CALIF. L. REV. 1000, 1019-23 (1979).

76. For an extensive discussion of the differences between rules and standards, see Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976). A discussion focusing upon the degree of generality of rules is found in Diver, *The Optimal Precision of Administrative Rules,* 93 YALE L.J. 65 (1983). *See also* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation,* 56 CORNELL L. REV. 409 (1971).

Cf. Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TUL. L. REV. 475, 482-87 (1933) (dividing sources of law and forms of law into rules, principles, conceptions, doctrines and standards).

77. Kennedy, *supra* note 6, at 1687.

78. *Id.* at 1688.

79. *Id.* at 1685, *passim.*

Rules can protect against the arbitrary acts of the rule applier. They do this, however, at some sacrifice to policy objectives, because rules tend toward over- and under-inclusion. For instance, the rule stated above would include some people who were not suitable mediators, even though they had passed the XYZ examination (assuming that the examination was not a perfect measure of suitability for mediation) and it would exclude some suitable mediators who had not passed (or had not taken) the test. Rules constrain arbitrariness at the center of the regulated activity by permitting it at the periphery. They trade precision for certainty.

The standards approach is more hospitable to a perspective that is inclusive of human values and interconnections.[80] Standards include such notions as good faith, due care, and reasonableness.[81] Though these terms may sometimes be invoked in an objective fashion in legal proceedings, they have reference to subjective human conceptions. Standards appear to give less certainty than rules, ordinarily, because they call for individualized application. Someone must decide who is "reasonably qualified." By using standards, we trade ease of application and a kind of certainty for the chance of greater precision in reaching our policy objectives, and we risk arbitrariness in the acts of the person who is regulated by such standards.

Which approach we use as regulators depends in part on the degree of trust we have in the decision-makers. In addition, the choice has important effects on the process that it regulates. A parent who tells his child "don't eat candy" sends a message different from that of the parent who says "eat sensibly." And the two parents likely have different degrees of confidence in their children's judgment and responsiveness to orders, and perhaps different assessments of the hazards of candy.

In most systems of regulation, both rules and standards appear and are interrelated. But the tone of the regulated process depends in some measure upon the extent to which the process is dominated by a rule or a standard and the perspectives with which they are associated.

Neutral lawyering in mediation remains in an experimental stage. Its great promise is to supply some legal services at lower cost and to help integrate legal perspectives into an informal decisional process. But the danger of using neutral lawyers in mediation is that they might—deliberately or not—impose an adversarial/individualistic outlook in such a way as to crowd out the perspective of interconnection upon which mediation thrives. The risk in using rules is that they may heighten the strong tendencies toward individualism that are already present in most lawyers; this could render the perspectives based upon caring and interconnection less available to the participants.

There is another side to this argument, of course. Rules could be seen, not as an impediment to neutral lawyering but as its *sine qua non.* The idea here would be that only rules can provide the safety necessary to

80. Kennedy associates standards with an altruistic perspective on the world and rules with an individualistic perspective. *Id.*

81. *Id.* at 1704-05.

encourage lawyers to try this activity and to safeguard the interests of participants in mediation. For reasons I will set out later, I disagree with this perspective.

Two recent proposals that would govern the involvement of neutral lawyers in divorce mediation rely more heavily upon rules than standards. Most of the rules would not be bad as suggestions, although a few would be. But the specific rules seem to be presented as mandatory, and, moreover, without adequate connection to the goals I believe they should foster. In the interests of providing certainty and protection to lawyers, the bar, and participants, such rules could block achievement of the highest potentials of mediation.

a. *The Crouch Proposal*

Richard Crouch has advanced a proposal[82] that applies to lawyers in neutral roles in the mediation process.[83] In some ways it relies too heavily upon rules, and this could inject an adversarial tone into the mediation.

Some of these rules impose formal requirements designed to enhance the likelihood that the participants' consent to entering mediation or their decisions during the process will be intelligent, and that the agreement will not be the result of overreaching. Before mediation begins, the participants must listen to an oral explanation and then sign a contract with the mediator setting out the assumptions and ground rules.[84] Once the mediation starts, the lawyer *must* interview each party separately.[85] The participants must, after signing the contract, wait three days and re-sign it. A similar procedure is required after agreement is reached.[86]

These firm obligations, though designed primarily to protect the disputants, also will shelter the lawyer who complies with them. Other features of the rule also seem strongly directed toward protecting the lawyer:

> The parties should be warned that their interests are presumed to be conflict [sic] on most points, and that they are waiving any objections to the conflict of interest a lawyer necessarily has when serving in any way the opposing parties in a conflict. . . . The parties must also declare their informed satisfaction with mediation's proceeding on the basis of only that information that was brought out in joint sessions.[87]

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82. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 248-250 (1982).

83. *See id.* at 248: "The rule should explicitly apply itself to any lawyer participating in divorce-related mediation, whether it be as mediator, as post-mediation legal advisor, as draftsman, or any combination of these." Later, Crouch refers to "independent legal counsel unconnected with the mediation." *Id.* at 249. Apparently he sees no role for independent legal counsel *in* the mediation.

84. *Id.* at 248.

85. *Id.* at 249. Few divorce mediators routinely follow this practice. Known as "caucusing," it is common in labor relations and in some other kinds of mediation. Mediators have differing views on the use of this technique. *See* (HOUSTON) NEIGHBORHOOD JUSTICE, INC., MEDIATION HANDBOOK II-E (1983); W. MAGGIOLO, TECHNIQUES OF MEDIATION IN LABOR DISPUTES 52-54, 60-61 (1971).

86. Crouch, *supra* note 82, at 250.

87. *Id.* at 248. Think how different a mediation would be if governed by Professor Hazard's understanding of conflict of interest:

> Clients do not have a conflict of interest simply because their interests diverge or because

The foregoing rules could foster an adversarial atmosphere within which it would be difficult for a mediator to be flexible and open to a perspective of caring and interconnection that is crucial to the flowering of mediation. This is true even though the proposal contains other provisions, both rules and standards, that would seem capable of encouraging the kind of mediation I am advocating.

These helpful provisions include, most importantly, the idea that the lawyer does not represent the parties and must tell them so[88] and that he may give legal advice to both parties in the presence of each other.[89] Crouch even specifies the content of such advice in a useful way.[90]

There are, in addition, provisions relating to what I shall later argue is the ultimate issue in mediation, fairness.[91] The lawyer must "explain the understandings effectively"[92] and "be honestly satisfied that the parties fully understand and genuinely consent,"[93] and he must not "undertake any of the . . . mediation roles. . .unless the lawyer has satisfied himself or herself that, in the lawyer's professional judgment the parties can prudently agree to a full settlement on all the legal issues without the advice of separate, independent legal counsel, and that the parties can intelligently and prudently consent to all the waivers involved. . . ."[94] Before the mediation begins, the lawyer must, in addition, "explain. . .what he or she will do in the event that the lawyer perceives unfairness or overreaching."[95]

But these facilitative provisions are unlikely to foster a flexible, open, caring process, because, as I have already suggested, they are bathed in an adversarial atmosphere. Moreover, the Crouch proposal lacks a sufficient commitment to the overall, and highest, objectives of mediation.[96] This is

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an intense legal dispute could arise between them. If this were true, there would be a conflict of interest between practically everyone whose paths in life might cross. People have conflicts of interest only if, in addition to having divergent interests, one or both wish to pursue them beyond a certain degree of aggression. Whether they wish to do so inevitably depends on circumstances. It also depends on the legal advice they may get, which turns the question into a circle.

G. HAZARD, ETHICS IN THE PRACTICE OF LAW 78-79 (1978).

88. Crouch, *supra* note 82, at 249. Later, however, Crouch refers to "the particular process of mediation and dual representation being contemplated." *Id.* at 250.

The original agreement between the mediator and the participants apparently would deal with whether the lawyer would be available, after agreement is reached, to engage in any representational activities. Crouch's proposal, seemingly, would permit a lawyer who serves in a neutral capacity other than that of mediator (*i.e.*, as a draftsman, or impartial advisory attorney) to "represent" one or both of the parties before a court in connection with the matter if a written separation agreement is produced and if neither party contests or disavows it. *See id.* at 249. Normally, such a non-mediator lawyer would not have been a party to the original agreement between the mediator and the participants.

89. *Id.*

90. The lawyer must give his "best professional opinion, however imprecise, of what a court of competent jurisdiction would do with their case. . ." *Id.* He also must tell them how local law applies to their final agreement. *Id.*

91. *See infra* text accompanying notes 111-19.

92. Crouch, *supra* note 82, at 248.

93. *Id.*

94. *Id.* at 250.

95. *Id.* at 249.

96. The other principal weakness of the Crouch proposal is that these rules do not seem to apply where the parties do, or might, employ independent counsel as well as a neutral lawyer.

a characteristic that it shares with the other recent proposal.

b. *The American Bar Association Standards*

The American Bar Association's House of Delegates recently adopted a proposal developed by its Mediation and Arbitration committee.[97] These "Standards of Practice for Lawyer Mediators in Family Disputes"[98] contain five "Standards," each followed by a number of "specific considerations," which are more specific rules. The "Standards" are:

> I. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.
>
> II. The mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both participants.
>
> III. The mediator has a duty to be impartial.
>
> IV. The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.
>
> V. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm or prejudice one or more of the participants.
>
> VI. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.[99]

The first three "Standards" are so sensible that I have no objection to them, though they are truly "rules" rather than standards, as I use those terms. Standards IV and V really are standards, substantially, since they rely upon phrases such as "*sufficient* information and knowledge"[100] and "harm or prejudice."[101] There is, however, ambiguity about how to interpret these standards.

More importantly, I perceive that a sense of aspiration, a goal of achieving the best possible, is lacking; the proposal seems dedicated instead—in the normal fashion of lawyers—to avoiding the worst.[102] This is

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97. *American Bar Association Standards of Practice For Lawyer Mediators in Family Disputes* were adopted on August 8, 1984 [hereinafter cited as *ABA Standards*]. Explanations of these standards appear in Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 FAM. L. Q. 451, 453 (1984); Bishop, *Mediation Standards: An Ethical Safety Net*, 1 MEDIATION Q. 5 (June, 1984). For a critical analysis, see Lande, *Mediation Paradigms and Professional Identities*, 1 MEDIATION Q. 19, 25-39 (June, 1984).

98. *ABA Standards.*

99. *ABA Standards*

100. *Id.* Standard IV (emphasis supplied).

101. *Id.* Standard V.

102. Professor Lon Fuller distinguished between the "morality of aspiration" and the "morality of duty":

> The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers . . . .
>
> Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. It is the morality of the Old Testament and the Ten

shown most clearly by Specific Consideration III.C., which provides in pertinent part: ". . . the mediator's task is to facilitate the ability of the participants to negotiate their own agreement, while *raising questions* as to the fairness, equity, and feasibility of proposed options for settlement."[103] Under these Standards, the mediator's obligation toward achieving a fair result is discharged, seemingly, by raising these questions, by assuring that "decisions [are] based upon sufficient information and knowledge"[104] and by stopping the mediation if "continuation of the process would harm one or more of the participants,"[105] which could include failing to reach a "reasonable agreement."[106]

The proposal's orientation toward individual rights and adversarial perspectives comes through most clearly on another issue, however, and this is what disturbs me most. A major benefit of using a lawyer as a mediator is his ability to tell the participants what the law provides and what a court would likely do with their case. Of course such neutral lawyering is unusual, problematical, and perhaps even dangerous if not conducted carefully. But this service also offers the greatest opportunities for reducing the costs of divorce, the importance of lawyers, and the dominance of legal rules.[107] Both the progressive ethics opinions and the Crouch proposal permit lawyers to do this under specified conditions.

My concern is simply that the ABA Standards could easily be interpreted so as to prohibit this activity. Standard VI, really a rule, imposes upon the mediator "a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement."[108] Moreover, Specific Consideration IV. C. provides:

> The mediator may *define* the legal issues but shall not direct the decision of the mediation participants based upon the mediator's inter-

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> Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead it condemns them for failing to respect the basic requirements of social living.

L. FULLER, THE MORALITY OF LAW 5-6 (1964).

I am suggesting a bigger role for the morality of aspiration in the regulation of neutral lawyering because mediation ideally calls on people for their finest qualities. The involvement of lawyers, and of a legalistic perspective, can easily undermine attention to these characteristics. There is both promise and danger in my suggestion. As Fuller notes:

> If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own and we may end with the poet tossing his wife into the river in the belief—perhaps quite justified—that he will be able to write better poetry in her absence.

Id. at 27-28.

103. *ABA Standards*, *supra* note 98 (Specific Consideration III. C.) (emphasis supplied). However, committee member Thomas Bishop notes that ". . . the best outcome in mediation is a fair agreement knowingly and freely made." Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 Family L.Q. 461, 464 (1984). Committee chair Leonard Loeb states that ". . . a thorough knowledge of the statutes, law and precedents is a necessary element to determine a fair and reasonable settlement." Loeb, *supra* note 97, at 452.

104. *ABA Standards*, Standard IV.

105. *Id.*, Standard V.

106. *Id.*, Specific Consideration V.A..

107. *See supra* text accompanying notes 20-27.

108. *Family Law Section Standards*, *supra* note 98, Standard VI.

> pretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.[109]

Other provisions in the proposal would support an interpretation that the neutral lawyer is barred from telling the parties how the law applies to their case.[110] The opposite interpretation is feasible, of course, and, from my perspective, desirable. It could be well argued, for instance, that by permitting the lawyer-mediator to ". . . make suggestions for the participants to consider, such as alternative ways of resolving problems and [to] draft proposals. . ."[111] and to "define the legal issues" while not allowing him to "direct the decision of the mediation participants based upon [his] interpretation of the law as applied to the facts of the situation,"[112] the proposal leaves room for the lawyer to tell them a good deal about their legal positions.

The reason for my concern, however, is that the entire document seems so strongly directed toward ensuring a role for independent legal advice that neutral lawyers are likely to interpret their license as being quite limited.

My central worry about both the Crouch and the Family Law Section proposals is this: because they rely upon rules, and because they lack an allegiance to the highest objectives of mediation, these proposals could tend, in the name of protection, to rigidify a process in which informality and fluidity are of utmost value. At this stage in the development of mediator-*cum*-neutral lawyers, there is a need to permit experimentation, with proper safeguards, that might lead to the development of better ways to integrate law with mediation. These proposals lay down too many requirements, probably based upon the assumption that the promulgators already know the best way for lawyers to carry out their neutral tasks in mediation. They seek to shelter both the participants and the lawyers with the same kind of protections that they have in adversarial processes. In doing so, these proposals would tend to deplete the ability of the mediation process to be informal and flexible and to fully honor the human needs of all the participants, including the neutral lawyers.[113]

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109. *Id.* (Specific Consideration IV.C.).

110. *Id.* (Specific Consideration IV.C.). The preamble states that family mediation ". . . not a substitute for the benefit of independent legal advice." *Id.* Additional specific considerations require the mediator to "*inform* the participants that each should employ independent legal counsel for advice at the beginning of the process and. . .throughout the process and before the participants have reached any accord to which they have made an emotional commitment, *id.*, (Specific Consideration VI.A.) (emphasis added); and require the mediator to discourage parties "from signing any agreement which has not been so reviewed." *Id.* If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonanble in light of both parties' legal rights or may not be binding on them. (Specific Consideration VI.D.).

111. *Id.* (Specific Consideration I.C.).

112. *Id.* at 458 (Specific Consideration IV.C.).

113. The Association of Family and Conciliation Courts recently convened three symposia on

III. TOWARD NEW STANDARDS

The ethics opinions and the proposed standards discussed in the previous section fail to provide appropriate guidance and encouragement for lawyers to perform as neutrals in mediation. The "traditional" ethics opinions affix the protective burdens of "representation" upon such lawyers, and these burdens are inconsistent with the tasks required of them. The "progressive" opinions and proposed standards remove some of this weight and, consequently, show a better integration of adversarial impulses with impulses toward interconnection and caring. These opinions leave too much ambiguity about the remaining protective obligations of the neutral lawyer, however, and the proposed rules are likely to potentiate adversarial orientations. The problem is that neither the opinions nor the proposals are based upon a clear understanding of the neutral lawyer's overall obligations in mediation.

The profession and the public need new standards, ones that will encourage appropriate involvement of lawyers in neutral roles by properly accommodating their interests as well as those of the participants, society, and the bar. To accomplish this, the standards must be informed by a clear sense of the neutral lawyer's duties, and these duties must be formulated so as to encourage the kind of behavior we wish to foster.

When people enter mediation using a neutral lawyer, and when the role of independent counsel for the participants is unclear or minimal, all interested parties—participants, neutral lawyers, the bar, and society—take on certain risks in exchange for possible benefits. The participants face a risk of winding up with an unfair agreement or an agreement which, though fair as between the parties, gives them less than they could have achieved through other processes. Neutral lawyers face a perceived risk of professional censure or malpractice liability. By authorizing this activity, the bar encounters a threat to its institutional integrity. There are risks to society as well. With the diminished involvement of lawyers and courts, a danger arises that societal needs or norms embodied in law or procedure will not be respected, and the rights of third parties might thereby be prejudiced.

Any standards promulgated should respond to these dangers. In addition, they should foster behaviors in neutral lawyers that would make it possible for the participants to hear the voice of caring and interconnection and that can help produce processes and agreements more responsive to the human needs of the participants and affected third parties.

In the remainder of this Article, I will propose and explain two interrelated standards designed to do these things. One is based upon a duty to foster a fair agreement and the other upon a subsidiary duty to "maximize" interests.

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divorce mediation standards and ethics. Representatives of over forty organizations participated in the development of MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (1984). These model standards express a greater appreciation of the overall objectives of mediation than either the Crouch or Family Law Section proposals. But they do not deal explicitly with the role of the neutral lawyer.

These standards should be useful in various contexts. Their principal uses should be by bar ethics committees in the promulgation or interpretation of "progressive" ethics opinions, by courts in malpractice actions, and by lawyers in determining their own course of conduct. In addition, the standards could be adopted by other organizations that have developed or are developing guidelines to govern the activities of neutral lawyers in mediation. They could serve nicely as part of the ABA Standards. The various specific considerations in that document then could be seen, not as fixed rules, but as suggestions for fulfilling the obligations in the fairness and maximization standards.

These standards, finally, also could be employed in situations or jurisdictions where the neutral lawyer is deemed to represent both or all of the participants—either because the facts compel it or because of orientation of the decision-maker. In such contexts, they could help continue the process, commenced with the Oregon State Bar Opinion,[114] of defining a new notion of the idea of neutral "representation" in mediation.

A. *Fairness*

The neutral lawyer in mediation should have a duty to assist participants toward an agreement, and through a process, that 1) meets the participants' own senses of fairness; 2) does not violate minimal societal notions of fairness between persons who make agreements; and 3) does not violate minimal standards of fairness toward unrepresented third parties.

The first part of the standard is aspirational and, obviously, subjective. Accordingly, it could create a measure of uncertainty, which could, as I shall explain later, encourage the kind of dialogue that would help make a perspective of caring and interconnection available to participants. This subjective aspect of the standard points the mediator in a direction.

The other parts of the standard are more objective and set the outer limits of the kind of agreements toward which the mediator should be assisting the participants. Under the second part of the standard, the agreement toward which the mediator helps the disputants must not be one which a court would refuse to enforce because of fraud, duress, overreaching, the absence of bargaining ability, or because of substantive unconscionability.[115] Under the third part, the agreement and the process must not offend societal notions of fairness to third parties and other interests.

This fairness standard is supported by some significant currents in the literature on mediation, and it cuts across others. Some writers on negotiation or mediation in general have identified fairness as an important goal.[116] Fairness between the parties is generally recognized as a central

114. *See supra* note 54.

115. For a discussion of the bases upon which courts police the bargaining process by refusing to give effect to certain agreements, see E. FARNSWORTH, CONTRACTS 232-71 (1982).

The New York Court of Appeals recently held that the fact that one lawyer "represented" both parties was not a sufficient basis for rescinding the agreement absent a showing of overreaching. Levine v. Levine, 56 N.Y.2d 42, 436 N.E.2d 476 (1982).

116. R. FISHER and W. URY, GETTING TO YES 88-89 (1981); H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 218, 236, 257 (1982). A recently issued code of conduct for mediators

objective in divorce mediation.[117] Writers on environmental mediation have differed on just how much the mediator should be obliged to do to foster fairness and the interests of third parties and on the consequences of his failure to discharge such a duty.[118] My view is that the neutral lawyer should be obligated to do what is reasonable under the circumstances to enhance these interests.

There are doubtless situations where the mediator need not do much to promote either fairness or maximization—where the parties are evenly matched, for instance, and are represented or advised by capable legal

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provides: "The goal of negotiation and mediation is a settlement that is seen as fair and equitable by all parties. The mediator's responsibility to the parties is to help them reach this kind of settlement." COLORADO COUNCIL OF MEDIATION ORGANIZATIONS, CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS 5 (Jan. 1982).

In describing the work of his proposed "neutral transaction counsel," Roland Paul wrote: "In most respects his activities will be no different from those in the past, except that they will be guided by what he believes to be fair to both parties instead of what he believes to be the most favorable to one party or the other." Paul, *supra* note 3, at 93.

Gerald Cormick argued that "the mediator should keep before both the parties a consideration of the realities of the broader public interest." Cormick, The Ethics of Mediation: Some Unexplored Territory 15 (a paper presented to the Society of Professionals in Dispute Resolution Annual Meeting, Oct. 24, 1977).

117. *E.g.*, Friedman & Anderson, *Divorce Mediation's Strengths . . . . . and Weaknesses*, CALIF. LAW., July 1983, at 36, 38, stresses the potentiality that mediation, where it is appropriate, holds for permitting parties to express their own senses of justice. Diamond and Simborg, on the other hand, emphasize the danger of an unfair agreement where the parties are not equally powerful. Diamond & Simborg, *Divorce Mediation's Strengths. . .and Weaknesses*, CALIF. LAW., July 1983, at 37, 39. *See also* Haynes, *The Advantages of Mediation*, FAIRSHARE, July, 1983 at 9, 12; Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION Q. 33, 36, 37, 39 (1984); *ABA Standards*, III. C., *supra* note 98; note 104, *supra* and accompanying text; MODEL STANDARDS FOR PRACTICE, *supra* note 110. FAMILY MEDIATION ASSOCIATION, PROPOSED CODE OF PROFESSIONAL RESPONSIBILITY FOR PRACTICING FAMILY MEDIATORS, Sec. IV. (Draft 1983). *Id.*

118. Lawrence Susskind has argued that:

> Environmental mediators ought to be concerned about 1) the impacts of negotiated agreements or underrepresented or unrepresentable groups in the community; 2) the possibility that joint net gains have not been maximized; 3) the long-term or spillover effects of the settlements they help to reach. . . An environmental mediator should be committed to procedural fairness. . .[and]. . .concerned that the agreements that they help reach are just and stable.

Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 47-48 (1981). Susskind implies that the mediator who fails to meet this obligation should be held accountable, which means that someone could "chastise, sue or fire" him, *id.* at 4, but he does not explain the mediator's obligation toward fostering these objectives.

Joseph Stulberg responded in a critical fashion. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981). He did not deal directly with Susskind's proposal that the mediator be concerned with fairness. But he seems to think that Susskind would make the mediator the guarantor of the satisfactory resolution of the concerns he raises. My inference is that Stulberg would treat the mediator's obligation toward fairness much as he does the obligation of a mediator with respect to a labor agreement that is discriminatory:

> The mediator should press the parties to examine whether or not they believe that (1) they would be acting in compliance with the law or with principles they would be willing, as rational agents, to universalize; (2) their activities will be acceptable to their respective constituencies and not overturned by public authorities; and (3) in the short and long run, their proposed actions are not contrary to their own self-interest. If the parties listen to these arguments and still find the proposed course of action acceptable, then the mediator can simply decide as an individual that he does not want to lend his personal presence and reputation, or the prestige of the mediation process, to that agreement and he can withdraw. That judgment is one for the mediator *qua* moral agent, not mediator, to make.

Id. at 116.

counsel, and where the dispute will not have a significant impact on third parties.[119] In the situations I am addressing, however: First, the involvement of independent legal counsel is either non-existent, minimal or uncertain; second, neutral lawyers may be giving legal advice; and third, the participants lack some of the protections associated with adversary processes. Society and unrepresented third parties or interests also lack the kind of protection that courts can provide through reliance upon and establishment of precedent and through procedures to protect the interests of third parties. Accordingly, it is essential that the neutral lawyer be responsible for fostering these fairness interests.

The most important and most difficult part of the fairness standard is the subjective fairness notion. Use of this standard would produce better agreements than would the proposals discussed above by affecting the process in two different ways. First, and obviously, the standard would encourage innovation and flexibility, as opposed to the rigidity that the rule-oriented approaches discussed above would foster. Second, and not so obviously, the fairness standard would tend to produce more appropriate attitudes in the neutral lawyer and the participants and thus would markedly affect both the mediation process and the resulting agreement.

The mediator's attitude will reflect the conditions under which his profession permits him to function. The atmosphere in the mediation, in turn, will be highly dependent upon the mediator's attitude. Thus, if the mediator feels constricted or defensive, the entire endeavor may be narrowed.

For instance, the lawyer-mediator who is obligated to impose a three-day cooling off period between the agreement to mediate and the start of mediation[120] might tend to see such a requirement as protective not only of the participants but also of himself. Such reliance on formalities for protection could easily foster an adversarial, formal orientation between the participants and the mediator and, consequently, among the participants. The cooling off period could interfere with such tasks as searching for a true commitment to mediate or determining each participant's idea of fairness. And the adversarial atmosphere could markedly affect all aspects of the process.

More broadly, mediation thrives on trust, and trust requires risk-taking. Participants can exchange some of the protections associated with adversarial/representational processes for a "warmer way of disputing"[121] and the opportunity for a better agreement and relationship. Adversarial rules could potentiate an individualistic perspective, which is already present in most lawyers, and would undercut the cooperative attitude that the lawyer should be cultivating. In contrast, the use of a subjective fairness standard should incline neutral lawyers to join the parties in taking risks.

The subjective fairness standard removes the certainty or illusion of

119. *See* Cormick, *supra* note 113.

120. *See* Crouch, *supra* note 82, at 248.

121. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978).

certainty that flows from fixed rules, and it encourages a constant focus on what really should matter. Accordingly, the neutral lawyer would be encouraged, for reasons both of self-protection and of service to the participants, to probe deeply into the parties' actual senses of fairness, rather than to rely on the apparent safety of procedural devices that are thought, ordinarily, to serve fairness. As Robert Burt has said of professionals in another context,[122] neutral lawyers will have conflicting impulses toward the participants in a mediation. The urge to help them toward the best agreement will battle—ordinarily at the subconscious level—with the desire to get any agreement that will end the matter. These later impulses could be strengthened by the spirit and certainty of rigid, adversarial, protective rules. The uncertainty created by the subjective fairness standard, on the other hand, would enhance the impulse, based on a perspective of caring and interconnection, toward achieving the best outcome for the clients; it would encourage the participants and the neutral lawyer to keep talking until all are satisfied with the fairness of the agreement.[123]

The fairness standard would bring about better outcomes for another reason: it would assist and encourage the mediator and the parties to see law in its proper relation to mediation. In order to decide whether they would be willing to mediate or agree to a particular resolution, most persons would like to know what disposition a court might make of their case. But one of the chief values of mediation is its ability to free participants from the dominance of an adversarial perspective, which tends to keep their ideas of possible solutions closely moored to their legal rights and thus limits their imagination. With fairness as the overriding goal, the participants can choose to see law as occupying a subsidiary position. Thus the mediator can help bring in law, not to govern and define relationships—unless the participants want it to—but to inform and test the participants' own senses of fairness under the subjective fairness standard and, under the objective aspects of the standard, to set limits.

The fairness standard would, for instance, have an impact on the way in which the neutral lawyer decided how hard to press the parties to use outside counsel and whether and how he would give legal advice. Whether information about the participants' legal positions should come from the neutral lawyer or from independent counsel might vary not only with the interests at stake, the complexity of the issues and the skill of the neutral lawyer, but also with how well the participants' ideas of fairness were developing.

Fairness may not be enough. An agreement that is fair between the participants and is not unfair to third parties could be a bad deal for both (or all) of the participants. And all those concerned—disputants, lawyers, the bar, and society—have an interest in preventing such a result. This is the burden of my other standard—the topic of the following section.

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122. R. BURT, TAKING CARE OF STRANGERS 61, 92-123 (1979).

123. *See id.* at 127-137. This is consistent with Lon Fuller's idea that a valuable function of law can be to facilitate human interaction. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 B.Y.U. L. Rev. 89.

B. *Maximization*

Leading writers on negotiation and mediation recognize that an important goal of these processes should be to identify and exploit joint gains.[124] The neutral lawyer in mediation should be under a duty, subsidiary to the fairness obligation, to help the participants do this.

Unlike most adjudicative procedures, mediation does not ordinarily begin with the notion that there is a fixed pie that the parties must slice up. Instead, the idea is that, by working cooperatively, they can enlarge the pie and perhaps share an entire dinner. If such a process is working, the mediatees, although they retain their individual interests, soon take on the characteristics of a group,[125] with a common interest in working out the most satisfactory solution for everyone. This maximization process has at least two aspects. One is to help the parties enlarge whatever will be available to share or divide. The other is to identify and exploit value differences among the participants.

In a divorce mediation, for instance, once the couple reaches general agreement or agreement in principle concerning support, the neutral lawyer's task would be to help maximize assets within the context of that understanding. One way to do this is to minimize their overall tax burden. If the husband has a high income and the wife a low one, their joint tax burden can be reduced, and their total after-tax income increased, by ensuring that some of the husband's support payments to the wife qualify as alimony rather than child support. By increasing the alimony while decreasing the child support, each party can end up with more after-tax income than they would have had if the entire payment had been child support.[126]

Part of the maximization process is to help the participants recognize and acknowledge the value of non-material interests, such as mutual respect, caring, and trust. This enriches the pie as well as enlarging it. The neutral lawyer who is responsive to the fairness and maximization stan-

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124. Fisher and Ury, *supra* note 113, at 58-83; Raiffa, *supra* note 113, at 219; Susskind, *supra* note 115 at 18, 46. John McCrory argues that Susskind's proposals to permit environmental mediators to be sued for failure to maximize joint gains (and for failure to protect unrepresented interests) would inject rigidity into the process and discourage would-be mediators. McCrory, *Environmental Mediator—Another Piece for the Puzzle*, 6 VT. L. REV. 49, 51 (1981). Stulberg maintains that making environmental mediators responsible for maximizing joint gains puts a great burden on them. Stulberg, *supra* note 115, at 112-13.

I do not propose to make mediators *responsible* for maximizing joint gains, but I do suggest imposition of a duty to do what is reasonable to promote joint gains.

125. According to Morton Deutsch, a group consists of two or more persons who (1) have one or more characteristics in common; (2) perceive themselves as forming a distinguishable entity; (3) are aware of the positive interdependence of some of their goals or interests; (4) interact with one another; and (5) pursue their promotively interdependent goals together. In addition, writers concerned with persisting social units indicate that groups endure over a period of time and as a result develop (6) a set of norms that regulate and guide member interaction; and (7) a set of roles, each of which has specific activities, obligations, and rights associated with it.

M. DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 48-49 (1973).

126. *See* Quaglietta, *Minimizing Taxes in Separation and Divorce*, 58 TAXES 531 (1980); White, *Support Allocation Vital*, MATRIMONIAL STRATEGIST, Feb. 1983 at 2.

dards will be inclined to make available to the participants perspectives under which this can occur.

In other cases, however, the challenge will be to enlarge the number of issues,[127] identify differences in the way participants value certain items or issues, and exploit those differences through trade-offs leading toward the most "efficient" contract, *i.e.*, one "that will not permit further joint gains."[128] Sometimes the problem is solved simply by encouraging the participants to focus upon and disclose their true interests. Fisher and Ury tell of the "proverbial two sisters who quarreled over an orange. After they finally agreed to divide the orange in half, the first sister took her half, ate the fruit and threw away the peel, while the other threw away the fruit and used the peel from her half in baking a cake."[129]

In the "real world," participants in mediation may wish to conceal their true valuations in order to enhance their bargaining positions. Somehow, the mediator must try to help them reveal their actual interests, while the pie is being enlarged, in such a way as not to be vulnerable when it is divided.[130]

C. *Malpractice*

For purposes of malpractice liability, the neutral lawyer would not be a guarantor of either fairness or maximization. His conduct would be assessed in terms of whether he exercised reasonable care in assisting the participants toward fairness or maximization. The reasonableness of his care would generally be measured by a standard of what the "prudent neutral lawyer" would have done under the circumstances.

The fairness standard, as I mentioned above, would have implications for the way in which a neutral lawyer decided whether and how to give legal advice. It would encourage dialogue about whether the agreement at issue meets the participants' own senses of fairness and societal notions of fairness. The discussions should include attention to whether each participant can adequately form a subjective understanding of fairness without consulting outside counsel.[131]

Such a dialogue would produce better agreements than those which would result from mediations governed by a rule that compels a neutral lawyer to repeat admonitions and threats about the advisability of independent legal counsel. They would also make malpractice actions exceedingly unlikely. Participants who have exhaustively explored how their own senses of fairness, and society's, are expressed in an agreement are unlikely to sue the neutral lawyer. First, they probably will not see unfairness later. Second, they will have formed a significant bond with the neutral lawyer.

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127. Raiffa, *supra* note 113, at 109.
128. *Id.* at 221.
129. Fisher and Ury, *supra* note 113, at 76.
130. *See* Raiffa, *supra* note 113, at 300-309.
131. *See supra* text following note 119.

Even if a malpractice suit were brought, it probably would be unsuccessful.

Violations of the first part of the fairness standard, which obligates the neutral lawyer to assist the participants toward an agreement that meets their own senses of fairness, would almost never give rise to liability. The standard itself is highly subjective. Even if violation could be shown, it would be difficult to prove resulting damages.

Violations of the second part of the fairness standard, which is grounded on societal notions of fairness in agreements between persons, are more likely to result in liability, but still are not apt to do so. It would be possible to show that an agreement was unconscionable, that the neutral lawyer did not exercise reasonable care in failing to avoid it, and that damages resulted. Such cases would be quite unusual and quite appropriate bases for liability.

The third part of the fairness standard, which deals with societal conceptions of fairness to unrepresented third parties, also would rarely produce liability. The neutral lawyer's duty to the parties should be seen as higher than that owed to outsiders. Egregious cases would give rise to liability, however, and that consideration should impel the neutral lawyer to keep these third party interests in the forefront of the participants' consideration.[132]

Certain kinds of violations of the maximization standard could give rise to liability, while others probably would not. Many of the interests and values at stake in a mediation—such as trust, respect, and cooperation—are not subject to quantification or valuation. Failure to act reasonably to foster such values, even if it could be established, could not be readily associated with measurable damages in a malpractice action.

It is easier to envision how a neutral lawyer might be held liable for failing to adequately foster material interests. A neutral lawyer who failed to tell the couple about the tax advantages of alimony over child support, in the example given above,[133] and instead concurred in their plans to make all payments child support, probably would have breached his duty to exercise reasonable care to help the participants maximize their assets—unless, of course, he reasonably believed that outside counsel or a competent accountant would be consulted and would cover this matter. Whether such belief was reasonable would depend upon the actual conversations that took place in the mediation. It should not be enough for the neutral lawyer to show that he advised the couple to see outside experts, unless he had strong reason to think that they would do so and, perhaps, some basis for predicting that the outside expert would be sufficiently competent to suggest this technique.

If the neutral lawyer failed to discharge this duty, it would be extraordinarily difficult for the participants to prove individual injuries. In a complex negotiation, so many trade-offs occur that it would be hard to demonstrate how the participants would have incorporated this kind of

132. Cormick, *supra* note 116, at 15-16.
133. *See supra* text preceding note 123.

tax-saving device into their agreement. Yet it could be shown that, collectively, they lost a good deal of money, and that amount could be estimated. Accordingly, for purposes of establishing the neutral lawyer's maximization obligation and assessing damages, it seems best to view the group that comprises all mediation participants as if it were a legal entity.[134] The obligations of the neutral lawyer to this entity are very close to those owed to an individual client.

These risks are relatively easy for the neutral lawyer to contain. He can either know the relevant techniques for maximizing such group interests or take reasonable care to see that the participants learn of these techniques.

Techniques for uncovering and exploiting value differences to achieve for joint gains may be less familiar to lawyers. A crucial objective would be to encourage participants to adopt a cooperative problem-solving mode instead of a competitive one. Many techniques are available, but none is sure-fire. In addition, attempts at building trust are likely to engender good relations between neutral lawyer and participant. As a consequence, it seems unlikely that neutral lawyers would be sued or held liable for violation of the maximization duty.

IV. CONCLUSION

The fairness and maximization standards proposed in this Article seem appropriate for all mediators, not just neutral lawyers. Lawyers and non-lawyers might discharge their obligations under these standards differently, however. It would be proper, for instance, for a neutral lawyer—but not a non-lawyer—to supply directly certain information about law.

In maintaining that these standards should govern the activities of neutral lawyers in mediation, I am really suggesting a mechanism by which neutral lawyers can integrate themselves into the mediation process in a fashion that will respect, and not disrupt, mediation's potential for enhancing human relationships, and at the same time will give adequate recognition to the individualistic interests that the law normally protects.

The regulation of neutral lawyering is a test of the bar's ability to help blend the individualistic perspective with views based more upon caring and interconnection. In so doing, it must be concerned not only with serving its constituencies and maintaining its independence and institutional integrity,[135] but also with fulfilling its higher purposes.

Adoption of the proposed standards would lead to disciplined experimentation with neutral lawyering, allowing participants, neutral lawyers, and the bar to reach for and express the highest parts of their natures while

134. This helps us escape the lingering negative connotation in the concept of "lawyer for the situation," which exacerbated the problems that Louis Brandeis encountered during the hearings on his nomination to the U.S. Supreme Court. For a discussion of the ethical issues involved in the activities of Brandeis that came under scrutiny, see Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

135. Regulation of neutral lawyering that has an anti-competitive impact could give rise to anti-trust violations. *See* Bierig, *Whatever Happened to Professional Self-Regulation?*, 69 A.B.A. J. 616, 617-19 (1983).

protecting their more individualistic interests. It would give lawyers a chance to participate, fully and creatively, in a great adventure that could offer exceptional benefits for lawyers and society. Lawyers who work as neutrals under the fairness and maximization standards could broaden their perspectives and give increased attention to the voice of caring and connection. Some will find ways to employ this fuller perspective in their adversarial work. And that could be the true promise of neutral lawyering.[136]

136. For an elaboration of this idea, see Riskin, *supra* note 2, at 54-57.