Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum

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While eschewing the abstract and formalist legal rights of bright line rules, mediation is intended to focus on context and particularity. This, in Trina's view, disempowers the claims and appeals to externally created normative standards that have offered hope to some subordinated people .... Unpredictability of rules, Trina argued, made power, not rights, the currency of mediative discourse.[1]

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I. INTRODUCTION

Many scholars and practitioners have contributed to the discourse on defining models, tools, and strategies being used by alternative dispute resolution (ADR) professionals. A wide range of concepts and perspectives,

frequently in the form of binary descriptors—a polarized "either this or that" approach—have been presented. Some descriptions offer a spectrum from one pole to another or use modifiers such as "lawyer-mediator."[2] Rather than clarifying the issue, these descriptors, for the most part, have articulated the confusion.[3]

Differences in models are often framed as oppositional, rather than expansive.[4] If mediators are to walk their talk and transcend the win-lose paradigm,[5] a framework is needed to recognize the value of a wide range of

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[2] *See* Anthony Atwell, *History of the Association of Attorney Mediators, available at* http://www.attorney-mediators.org/aamhistory.hmtl (last visited Jan. 31, 2005); Cris M. Currie, *Should a Mediator Also Be An Attorney?, available at* http://www.mediate.com/articles/currie.ctm (last visited Jan. 31, 2005).

[3] *See* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 88 (1998) (referring to Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996)) ("Under the Grid, virtually anyone providing generic ADR services can call themselves a 'mediator.' This lack of clarity and precision in definition presents a challenge for regulation.").

[4] In her review of three books (ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION; DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS; and SALLY ENGLE MERRY & NEAL MILNER, POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF AMERICAN COMMUNITY JUSTICE), Carrie Menkel-Meadow articulates her disagreement with narrowing rather than expanding the scope of mediation. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217, 230 (1995).

> Unlike When Talk Works, the other two books fail to display the growing variety of mediation practice. Instead, in different ways, they cabin the practice of mediation by arguing on opposite sides of the same question about whether transformative mediation is possible ... they narrow their focus at a time when we should be expanding our notions of what mediation can do.

Id.

[5] Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 18 n.63 (2003) ("I find it ironic that so many practitioners of mediation who are committed to searching for common ground (myself included) have characterized much of the treatment of this issue in the literature as a debate rather than a dialogue or discussion.").

models.[6] Such a framework, taking the discourse beyond either/or, has been offered by Ellen Waldman.[7]

There is ongoing controversy regarding the inclusion of evaluation as a model of mediation. The pros and cons have been argued in multiple articles and will be addressed again in this Article, in order to recognize a place for evaluation among ADR processes.

To define what mediators are doing we will first look at the similarities among mediators: What basic elements and strategies do we share? To isolate differences in models, we use a framework for defining mediation processes based on their parameters, as defined by Waldman. She names three categories: Norm-Generating, Norm-Educating, and Norm-Advocating.[8] Within this framework, mediators can choose from a range of tools and strategies *and* specify differences in models.[9] The multiple issues and decisions the mediator encounters are addressed by looking at the parameters of each mediation: What norms are being referenced?

Greater attention needs to be given to identifying and comparing models.[10] Waldman's framework would then allow us to compare models based on a number of categories[11]: theory of conflict,[12] empowerment of

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[6] *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1896–97 (1997) ("If the dispute resolution professionals do not agree among themselves about the appropriate content of each process, outsiders cannot possibly understand the consequences of choosing an ADR process.").

[7] *See* Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 756 (1996) [hereinafter Waldman, *The Challenge of Certification*]; Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 769 (1997) [hereinafter Waldman, *Identifying Social Norms*].

[8] Waldman, *The Challenge of Certification, supra* note 7, at 726.

[9] *See* Menkel-Meadow, *supra* note 6, at 1887 ("These definitional differences matter because, while they may begin as behavioral or technique differences in how ADR is practiced, they derive from different philosophies of ADR and its purposes, implicating very important ethical concerns.").

[10] *See* Dorothy J. Della Noce, *What is a Model for Mediation Practice? A Critical Review of Family Mediation: Contemporary Issues*, 15 MEDIATION Q. 133, 136 (1997) ("Thoughtful models will advance mediation beyond its current reliance on and perpetuation of such myths as mediator neutrality and the absence of mediator power and influence . . . and into what Kolb and associates have termed a 'practice frame.'").

[11] *See* Appendix A, Comparison of Mediation Models Chart.

[12] *See* Della Noce, *supra* note 10, at 137 ("The practice of mediation has been criticized for 'its almost complete absence of theory about social conflict and intervention,' which deprives the intervenor of 'intellectual and emotional scaffolding.'").

parties,[13] basis of authority of the mediator,[14] control of the process,[15] and definition of success.[16] This framework lays a foundation for an exploration

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[13] *See* Menkel-Meadow, *supra* note 4 ("As long as the parties understand the roles and different approaches to mediation, an ideology of choice can be satisfied. What is problematic is when the parties do not understand or agree to what they actually receive.").

[14] *See* Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 12 (1986) ("Mediators empower themselves by claiming authority for themselves, their task, or the program based upon values external to the immediate situation.").

[15] *Id.* at 14 ("Mediators work towards settlement by controlling interaction and communication in the mediation session . . . . Management of the shape of the discussion is interconnected with manipulating the substance of discussion so that disputants attend to what can be agreed upon and ignore or give up on issues where there is not consensus.").

[16] There is a longstanding effort to define and measure success in mediation. The initial underpinnings of mediation came from labor negotiation where settlement was clearly seen as the goal. *See* Thomas A. Kochan & Todd Jick, *The Public Sector Mediation Process A Theory and Empirical Examination*, 22 J. CONFLICT RES. 211, 211 n.2 (1978).

> The primary objective of mediation is to get the parties to reach an agreement. Therefore, the ultimate criterion of effectiveness or success of mediation is whether or not the intervention achieves this goal . . . an additional measure of mediation effectiveness is the proportion of issues that are resolved during the mediation process.

Id. The authors list four criteria to measure effectiveness:

> (1) settlement or no settlement, (2) proportion of issues open at the outset of mediation that are resolved during mediation, (3) a subjective measure of movement off the positions held at the outset of the mediation that is designed to measure tacit as well as actual movement, (4) a subjective measure of holding back on concessions.

Id. at 212.

By 1988, the definition was no longer so clear. *See* Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOT. J. 149, 149 n.2 (1988) ("Even within the politically or legally defined terms of a given program, there is much room for doubt as to what, exactly, constitutes effective performance. Clear and consistent standards for selecting, training and evaluating mediators simply do not exist."). In 1990, Honeyman articulated the difficulty in defining success only as settlement. *See* Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOT. J. 25, 25 n.1 (1990) ("The use of settlement rates to determine competence begs the question of what *kind* of settlements the mediator has helped the parties to reach."). Bush and Folger then challenged the emphasis being placed on settlement. ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2 (1994) ("Beyond the level described by such conventional definitions, however, the mediation process contains within it a unique potential for transforming people—engendering moral

of a variety of models and provides a non-adversarial approach to defining them. Unless such a framework is established for comparing and differentiating models, there can be no accurate assessment of mediators' work and no real self-determination of parties. In order for mediators to consider ourselves a profession, we must be able to say simply and clearly what we are doing and act accordingly.

II. A TWENTY-FIVE YEAR CONUNDRUM

A. *Riskin Articulates the Binary and Modifying Descriptors*

In the attempt to define and measure the mediation process, Leonard Riskin and others, in over two decades of mediation scholarship, have intentionally or unintentionally defined mediation models in either binary (either/or) categories or with modifiers that describe the mediator's background, the strategies used, or the goal.[17] Riskin addresses the

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growth."). Going beyond settlement of the presenting dispute, Bush and Folger propose a much larger goal, to further empowerment and recognition. They offer these definitions: "[*E*]*mpowerment* means the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems. *Recognition* means the evocation in individuals of acknowledgment and empathy for the situation and problems of others." *Id.* at 2 (emphasis original). In addition to the effort by mediation practitioners to agree on criteria to measure effectiveness, the courts have played a significant role. *See* Menkel-Meadow, *supra* note 6, at 1871 ("On the one hand is the claim that ADR will ensure speedy, less costly, and therefore more efficient case processing. This strand of the movement has been called the quantitative, caseload-reducing, or case-management side of ADR and is the main reason many jurists and court administrators support ADR."). In her retrospective of the past 25 years, Dorothy J. Della Noce sees the courts as having a major impact on valuing mediation primarily for its efficiency. *See* Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 546 n.3 (2002) ("Despite the clear recognition of the unique social value of mediation in various dimensions of human interaction, th[e] argument cast the potential value of the mediation process to the justice system primarily in terms of improved case management efficiency."). Thus, we are left to sort out how each model defines success, allowing for the differences and clarifying the outcomes consumers may expect, depending upon the model chosen.

[17] *See* Riskin, *supra* note 3, at 11. Riskin identifies the following binary analyses: (1) lawyer-mediators vs. non-lawyer mediators (James Alfini & Gerald S. Clay, *Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., 1994, at 8); (2) "distributive" and "integrative" bargaining (HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33–34 (1982)); (3) "competition" and "collaboration" (Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 73–92 (1982)); (4) "adversarial" vs. "problem-solving" (Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The*

difficulties in discussing conflicts among mediator practices. In his 1996 article, he begins to define the "disagreements [that] arise out of clashing assumptions—often unarticulated—about the nature and goals of mediation."[18] Riskin points out that an exceedingly broad range of activities are being called "mediation," "a process in which an impartial third party,

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Structure of Problem-Solving, 31 UCLA L. REV. 754, 755–62 (1984)); (5) "settlement-oriented" vs. "problem-solving" (Kenneth Kressel et al., *The Settlement-Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67–87 (1994)); (6) "mini-trial" vs. "matchmaker" (JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION: A REPORT FOR THE NEW JERSEY OFFICE OF THE COURTS (1995)); (7) "dealmakers" and "orchestrators" (DEBORAH M. KOLB, THE MEDIATORS 23–45 (1983)); (8) "transformative" vs. "pragmatic, problem-solving" (Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 466–79 (Deborah Kolb ed., 1994)); (9) "communication frame" vs. "settlement frame" (*Id.*); (10) "task-oriented" vs. "socioeconomic" (KENNETH KRESSEL & DEAN PRUITT, MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 423–24 (1989)); (11) "broad" vs. "narrow" (Leonard L. Riskin, *Two Concepts of Mediation in FMHA's Farmer Lender Mediation Program*, 45 ADMIN. L. REV. 21, 60–64 (1993)); (12) "settlement" vs. "resolution" (J. Michael Keating, Jr. & Margaret L. Shaw, *"Compared to What?": Defining Terms in Court-Related ADR Program*, 6 NEGOT. J. 217 (1990)); (13) "facilitative" vs. "evaluative" (Riskin, *supra* note 3, 7–49); and (14) a continuum from "bargaining" to "therapeutic" (Silbey & Merry, *supra* note 14, at 19 (arguing against the evaluative-facilitative construct based on the assertion that the mediators in both categories manipulate the parties into settlement)).

In addition to the binary categories, several authors have identified multi-faceted systems: (1) "trashing," "bashing," and "hashing" (James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991)); (2) a 12 step program (JAMES C. FREUND, THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATORS CAN WORK TO RESOLVE DOLLAR DISPUTES 17, 37–48 (1995)); (3) "hard," "soft," and "principled" (ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 9–14 (Bruce Patton ed., 2d ed. 1991)); (4) "cooperative," "competitive," and "integrative" (DONALD G. GIFFORD, LEGAL NEGOTIATION 14–18 (1989)); and (5) the four orientations described by Riskin: "Litigation Issues," "Business Interests," "Personal/Professional/Relational Issues," and "Community Interests," for which he acknowledges his source as Lela Love. In addition, there are several others which prescribe the process or outcome such as: (1) "meditative mediation" (Shinzen Young, Meditative Mediation (Insight Recordings) (transcript on file with author)); (2) "justice mediation" practiced by the Mennonites (John P. Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 357, 361 (Sally E. Merry & Neal Milner eds., 1993)); and (3) "peacemaking" (Neal Milner, *Linda Colburn: On-The-Spot Mediation in a Public Housing Project*, in WHEN TALK WORKS, *supra*, at 417).

[18] Riskin, *supra* note 3, at 11.

who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction."[19]

B. *Mediators Lack Awareness of "Style"*

Riskin cites Kenneth Kressel, Edward A. Frontera, Samuel Florenza, Frances Butler, and Linda Fish, whose study showed that mediators' "styles" were in fact consistent in a range of settings.[20] Style did not vary according to the type of case, nor were mediators conscious of having a particular style. Most mediators in the study recognized their style only when it was pointed out to them.[21] Dorothy Della Noce argues that policymakers mistakenly address mediation as if it were homogeneous, thereby ignoring significant differences.[22] Mediators who do address the concept of "style" do so as if it were "no more consequential than a whim . . . as easily donned, shed, changed, and mixed-and-matched as the day's clothing."[23] Della Noce argues a model is, by definition, identifiable and reproducible.[24] Carrie Menkel-Meadow argues that the issue goes to the core of the questions around ethical boundaries for the profession.[25]

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[19] *Id.* at 8.

[20] *See* Kenneth Kressel et al., *supra* note 17, at 68 ("Mediator style refers to a cohesive set of strategies that characterize the conduct of a case. It has been observed for some time that mediators do indeed have stylistic preferences, but the exact nature of these styles and their consequences are poorly understood.") (citations omitted).

[21] *Id.* at 72.

> [M]ediator style appeared to operate below the level of conscious awareness; style was something mediators 'did' without full recognizing the underlying coherence or 'logic' behind their style. Mediators were capable of articulating why they adopted the style they exhibited when their style was pointed out to them, but this took a conscious effort and the assistance of other team members.

Id.

[22] *See* Dorothy J. Della Noce, *Mediation Policy: Theory Matters*, VIRGINIA MEDIATION NETWORK NEWS, July 1999, at 4.

[23] *Id.*

[24] *See* Della Noce, *supra* note 10, at 135–36. Della Noce uses the concept of models rather than "styles" to clarify her argument that a model is reproducible.

> The term model is used loosely in the mediation field, often interchangeably with style, approach and orientation. Yet model implies something more substantial than a practitioner's preference or idiosyncratic style. It suggests an example of practice that is capable and worthy of imitation, a clear and detailed exemplar to which a practitioner can refer for guidance.

Id.

[25] *See* Menkel-Meadow, *supra* note 6, at 1921.

C. *Flexibility vs. Self-Determination of the Parties*

Riskin, in direct contrast with the claims that mediators do not change styles, seems to ultimately agree with those who see the best mediator as one who is well versed in many styles and flexible in his or her practice.[26] He thereby concluded that in using his continuum of facilitative-evaluative mediation, it is difficult to identify the actuality of what many mediators are doing.[27] This is in contrast with his goals to give structure and clarity to the discourse among mediation professionals and to promote the effort to define and delineate models being used so that consumers may make informed choices.[28] Joseph Stulberg, in another perspective on Riskin's Grid, argues against the market-demand analysis which maintains that parties' desires should determine the "style" the mediator uses.[29]

If consumers are to make informed choices,[30] mediators must be able to convey enough information to insure self-determination of the parties is maintained. It is unlikely that parties would have the time to learn the fine points of mediation models as a required preparation for mediation.[31] The

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[B]ehavioral variations and techniques in mediation are layered with philosophical, jurisprudential, and ethical differences and consequences .... [T]hese micro behavioral choices are so deeply connected to larger ethical and justice concerns that we cannot possibly regulate behavior without having a deeper sense of what our ethical mandates are.

Id.

[26] *See* Riskin, *supra* note 3, at 40–41 ("The grid can help us envision an ideal mediator for any individual case. She would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants' needs present themselves.").

[27] *Id.* at 38.

[28] *Id.* at 38–39.

[29] Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 992–93 (1997).

[30] Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 300 (2000) ("[P]arty self-determination and informed consent dictate that knowledgeable choices should be made about which process to select for resolving one's dispute . . . this standard should mean that mediation has a definition so that parties can have legitimate expectations about what is in store once they elect mediation.").

[31] *Id.* at 297 ("[I]t seems implausible that parties and advocates who are still barely educated about the differences between primary processes will be able to appreciate the implication of . . . confusing terms and academic distinctions.").

process itself can be explained as it unfolds,[32] with as much transparency as possible[33] (the value of and need for transparency throughout mediation has been little recognized or studied).[34] The frame, the parameters of the mediation, must be explained and understood by the parties or self-determination is impossible.[35] Giving information about the processes to be used is a critical element of self-determination. Mediator credibility and influence rests on how little disparity there is between what the mediator says and what actually happens.

How we define flexibility is key. Moving from one mediation model to another, or one ADR process to another, without parties' consent fails to adequately fulfill the requirements of informed consent and self-determination.[36] Flexibility in tools and strategies may be desirable, as long as the boundaries of the frame are clearly acknowledged and agreed upon.

D. *Theory Informs Practice*

Christopher Moore identifies the mediator's decisions regarding interventions as based in a theory or hypothesis, but maintains that mediators

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[32] *See* Della Noce, *supra* note 10, at 141 ("[O]nce the contours of a model of practice have been shaped around a theoretical foundation, it is appropriate to describe the interventions that the mediator following the model would use and would avoid.").

[33] *See* Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 8 (1997).

> The gap between what a mediator *explains* to the parties and what she tries to *do* with, to, or for the parties is often wide. This reluctance toward transparency is reflected both in the existing prescriptive mediation literature and in the current lack of descriptive research focusing on this question.

Id. (emphasis added).

[34] *Id.* at 7 ("Ironically, the silence that pervades mediation rooms across the country regarding process divisions is paralleled by a concomitant lack of discourse within mediation literature.").

[35] *See* Riskin, *supra* note 5, at 9. In his effort to deal with critiques and commentary on "Understanding Mediator Orientations," Riskin, in 2003, revised his original work. He still strongly maintains that "potential users of mediation often had no reliable way to know or learn what would take place in mediation. The problem was compounded by three disparities between 'theory' and 'practice,' i.e., between conventional explanations of mediation and certain common mediator beliefs and behaviors." *Id.*

[36] *Id.* at 10 ("[M]ost parties and lawyers, and even some mediators, did not recognize the existence of choices about the goals and characteristics of the mediation process; nor did they recognize the existence of issues about how, when, and by whom these choices should be made.").

use a process of trial and error.[37] Moore also proposes a spectrum that describes mediator practices. He defines the binary as procedure-substance.[38] Andrew Schwebel, David W. Gately, Maureen A. Renner, and Thomas W. Milburn define models based on the "central assumptions" mediators make about what will promote change in parties' positions.[39] These categories address the mediator's theories or biases that come from their professional training prior to mediation. There is general agreement that theory informs practice; the interventions chosen by a mediator will reflect the mediator's theory of what resolves conflict. In the "which-came-first-the-chicken-or-the-egg" debate, scholars opt for theory determining practice. Without awareness of the theory one is using, it is unlikely that a mediator can recognize that her or his choice of interventions follows a pattern. Thus, identification of the model being used is predicated on knowing the theory of conflict being espoused.[40]

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[37] *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 28–29 (1986).

> [I]nterventions are often grounded in a theory that identifies a particular cause for the conflict and suggests prescriptive actions . . . . Each intervention is a test of the theory and a hypothesis . . . if these difficulties can be lessened or eliminated, the parties will have a better chance of reaching settlement. If the desired effect is not achieved, the intervenor may reject the specific move as ineffective and try another. If several interventions based on one theory do not work, the intervenor may shift to another theory and begin trial-and-error testing again.

Id.

[38] *Id.* at 41–42.

> There is a spectrum along which mediators place themselves in defining their degree of involvement in the procedure and substance of negotiations. On one side are those who advocate mostly procedural interventions; on the other side are advocates of substantive involvement by the mediator that may include actually forging the decision. Between them are mediators who pursue a role with mixed involvement in process and substance.

Id.

[39] Andrew Schwebel et al., *Divorce Mediation: Four Models and Their Assumptions About Change in Parties' Positions*, 11 MEDIATION Q. 211, 213 (1994) (describing four models of divorce mediation: (1) legal, (2) labor management, (3) therapeutic, and (4) communication and information).

> [O]ne key variable stood out in the published descriptions of divorce mediation approaches. This key variable is the "central assumptions" that the approach makes about what promotes change in parties' positions. Mediators utilize this central assumption to develop change promoting strategies and conditions during sessions, and these, in turn, help parties modify their positions and reach agreement.

Id.

[40] Della Noce, *supra* note 10, at 140.

E. *Waldman's Categories*

Use of Waldman's categories means establishing whether the primary framework is the parties' own norms (Norm-Generating models), or the parties' norms and all other relevant information (Norm-Educating models), or legal and institutional regulations that preclude any agreement outside the pre-existing boundaries (Norm-Advocating models). Without this information, self-determination is suspect and the potential for coercion[41] and manipulation increases dramatically.[42] In naming categories of mediation models as Norm-Generating, Norm-Educating, and Norm-Advocating, Waldman grounds mediation theory in the parameters of the mediation itself.[43] In naming three categories that address the situation and context of the mediation,[44] she goes beyond a binary framework. This construct provides the profession with a way to make sense of the issues[45] and, at the same time, reinforces self-determination of the parties.[46]

Far too many of the mediation books on the market today offer pages and pages of how-to advice devoid of any theoretical or empirical framework. From such books, a practitioner can acquire a set of tricks and manipulations, but no rationale for the purpose and consequences of the various interventions in any given situation.

Id.

[41] *See* Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 502 (1997) ("A coerced settlement is inconsistent with a legitimate mediation process, as is any resolution that lacks voluntary and informed consent of the disputants. A party who is unaware of important information or available alternatives to an offered settlement is prevented from exercising effective self-determination.").

[42] *See* Silbey & Merry, *supra* note 14, at 27.

The mediator wraps him or herself in the same mystical cloth as the jurist, the rabbi or the priest; and while not proclaiming openly that he is the embodiment of the law or of God, he nevertheless proclaims access to knowledge and wisdom derived from a special school of trained neutrality.

Id.

[43] *See* Waldman, *Identifying Social Norms*, *supra* note 7, at 769 ("[I]f mediators, like most professionals, are expected to obtain informed consent to their interventions, they can do so only by providing thoughtful and accurate information about the process. Further discussion and reflection is needed to close the gap between mediation theory and reality.").

[44] *See* Menkel-Meadow, *supra* note 4, at 236 ("[M]ediation is deeply contextual and, when situated in different environments and institutions, it will perform different social tasks.").

[45] Waldman, *Identifying Social Norms*, *supra* note 7, at 708–09.

> **Norm-Generating Mediation** applies to any mediation in which the parties reference primarily their own values and standards. While <u>all</u> mediation operates "in the shadow of the law," Norm-Generating models focus the attention on the interpersonal issues.
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> **Norm-Educating Mediation** is based on the theory that people who are well-informed make better decisions. While guided by their own values, participants will also gather all relevant information throughout the mediation process. In addition, they are encouraged to learn skills of negotiation for use outside the mediation.
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> **Norm-Advocating Mediation** is any mediation in which legal statutes or institutional regulations dictate the parameters of the mediation agreement. Parties must be informed of these restrictions prior to and throughout the mediation.

Waldman's categories provide a way for the mediation profession to explain accurately and efficiently what participants can expect in any given mediation. Both process and substance decisions should be based on the parties' (and attorneys') and mediators' influence regarding the norms being referenced.[47] This furthers self-determination of the parties by giving the

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> [D]rawing a conceptual distinction between these related but separate processes is necessary if mediation theory is to keep pace with actual practice. Although existing classifications fruitfully illuminate certain issues, answers to other increasingly pressing questions remain obscure. As the mediation field moves to assume the insignias of an established profession, it faces a number of challenges. How is mediator education and training to be organized and evaluated? Is licensure or certification necessary to protect the consumer? If so, how are such programs to be established? What core set of ethical principles guide mediator behavior?

Id.

[46] *Id.* at 707 ("Heightened attention to the role of social norms in mediation is necessary to allow mediators to adequately explain their methodologies and to allow clients to supply informed consent to mediator interventions.").

[47] Riskin, *supra* note 5, at 34.

> The [grid] system makes central the idea of participant 'influence' with respect to particular issues. It provides a method for considering the influence that participants aspire to exert, actually exert, and expect others to exert, with respect to any of a wide range of decisions. It does this by dividing mediation decisionmaking into three categories: substantive, procedural and meta-procedural.

Id.

process transparency[48] and defining process differences.[49] If switching from one to another is desirable, the parties understand and consent at the point at which that decision is made.[50]

F. *Mediation Is Evaluative and Facilitative*

Getting beyond a binary framework allows us to entertain the notion that mediation is always evaluative[51] in the sense that a mediator must evaluate the following throughout the process: (1) the capacity, authority, and intention of the parties to negotiate; (2) tools and interventions to use based on assessment of the situation; and (3) their own neutrality and impartiality regarding the outcome *and* their ability to balance power.[52] Mediation is always facilitative in its goal to assist parties in crafting agreements that work for them, in addition to its potential to engender understanding, empowerment, and mutual recognition.[53]

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[48] *See* Moffitt, *supra* note 33, at 8 ("[T]ransparency should be treated as a question which transcends mediation models.").

[49] *See* Riskin, *supra* note 5.

[50] *Id.* at 49 ("[T]he grid system points out that, implicitly or explicitly, procedural and meta-procedural decisions get made, and that it is *possible* to make such processes open and to allow all participants to exercise influence in them.") (emphasis added).

[51] L. Randolph Lowry, *To Evaluate or Not That Is Not the Question*, 38 FAM. & CONCILIATION CTS. REV. 48, 49 (2000).

> [A]t least on one level, all mediators are involved in evaluation—that sense of making judgments on the information presented. Evaluation, at least internally with the mediator, is central to the mediator's work. It is the basis on which decisions are made regarding the management of the process and the parties as well as the resolution of the problem.

Id.

[52] *See* Waldman, *Identifying Social Norms*, *supra* note 7, at 766–67.

> The codes, then, call upon mediators to assume blatantly contradictory stances. On the one hand, they are to promote disputant autonomy by enabling the disputants to decide for themselves how they wish to resolve their disputes .... On the other hand, the mediator is expected to challenge disputants when they are inclining towards agreements that the mediator deems unfair, inequitable, unlikely to hold, disadvantageous to the parties, disadvantageous to third parties, or simply uninformed.

Id.

[53] *See* BUSH & FOLGER, *supra* note 16, at 259 (recognizing the transformative power of mediation and its impact on the society in general).

> [P]eople in the mediation movement are deciding whether mediation will remain one more institution in an individualist society or become a foundational part of a

III. EVALUATION AS A DISTINCT PROCESS

A. *Self-Determination Defines Mediation*

Riskin argues that excluding evaluation as *not* mediation is like closing the barn door after the horse has escaped. "Usage determines meaning."[54] However, if we accept self-determination as the most basic element of mediation,[55] then evaluation of a probable outcome in court by a third party does not fit within this definition of mediation.[56] Differing with Riskin, Kimberlee K. Kovach and Lela P. Love argue that the Standards of Conduct for Mediators defines mediation as "a process in which an impartial third party—a mediator—*facilitates* the resolution of a dispute by promoting voluntary agreement (or 'self-determination') . . . ."[57]

B. *Clarification of "Evaluation" and "Evaluative"*

Clarification of the meaning of the words *evaluation* and *evaluative* among professionals, and with consumers,[58] would lessen the confusion.

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different, relational society that is not a utopian dream but a gradually emerging reality . . . . Not just the mediation movement but the entire society stands at a crossroads, choosing which path to take.

Id.

[54] Riskin, *supra* note 3, at 13.

[55] Kovach & Love, *supra* note 3, at 84. The authors reference three organizations of dispute resolution professionals who developed a set of Joint Standards between 1992 and 1994. The American Bar Association Sections of Dispute Resolution and Litigation, the Society of Professionals in Dispute Resolution, and the American Arbitration Association agreed that "mediation rests upon the principle of self-determination by the parties . . . . [T]he Joint Standards state that mediators should not advise the parties." *Id.*

[56] *Id.* at 105 (arguing that there are dangers in the use of evaluation in mediation).

Mediators use caucuses as a primary strategy. Judges or arbitrators typically cannot use caucuses because of constraints on ex parte communications. Where the neutral must evaluate, receiving evidence or other information out of the presence of one of the parties denies the absent party the right to hear and confront testimony that might be used against him . . . . [E]valuations and opinions arising from a mediation may have serious flaws. Neutrals should warn parties and obtain their informed consent before "mixing" processes.

Id.

[57] *Id.* at 76.

[58] *Id.* at 108–09.

Evaluation has been hotly debated as either a model of mediation or a separate process.[59] I agree with those who want evaluation considered a distinct ADR process in which a professional assesses for the parties the potential outcome in court. Explaining the specific structure of the evaluation process allows the consumer to make an informed choice.

Lela P. Love argues against both *evaluation* and an *evaluative* mediation model based on the harmful potential to compromise the neutrality of the mediator.[60] Love and Riskin both recognize the value of *evaluation*,[61] though Love holds that mixing processes is detrimental. Love acknowledges, however, that mediators do evaluate on process decisions.[62] Riskin believes

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> Without a common understanding of mediation, we will experience trouble developing codes of ethics, finding qualified neutrals, or designing appropriate training programs.
>
> . . .
>
> Giving the same label 'mediation' to activities which involve different levels of intervention into conflict—evaluation and facilitation—misleads and cripples with confusion the genius of an otherwise dynamic and powerful process.

Id.

[59] *See generally*, James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U.L. REV. 919 (1997); Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309 (2000); Della Noce, *supra* note 22, at 4–5; Kovach & Love, *supra* note 3; John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321 (2000); Love & Kovach, *supra* note 30; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Lowry, *supra* note 51; Menkel-Meadow, *supra* note 6; Riskin, *supra* note 5; Riskin, *supra* note 3; Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371 (2000); Stulberg, *supra* note 29; Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (1996).

[60] Love, *supra* note 59, at 939.

> [T]he evaluative tasks of determining facts, applying law or custom, and delivering an opinion not only divert the mediator away from facilitation, but also can compromise the mediator's neutrality—both in actuality and in the eyes of the parties—because the mediator will be favoring one side in his or her judgment.

Id.

[61] *Id.* at 946 n.1 ("While a neutral evaluation can be critical in generating a settlement by expanding parties' information bases and deflating unrealistic positions, the potential harms of a mediator evaluating outweigh the potential benefits.").

[62] Love & Kovach, *supra* note 30, at 303 ("[T]he mediator's role is highly demanding and involves multiple evaluations about helpful sitting and seating

that mediators may alternate between evaluation and facilitation in such a way that the evaluation leads to facilitation.[63] In his effort to address what is actually being done by mediators as opposed to the theories they espouse, Riskin continues to claim that

> many, probably most, mediators engage in behaviors that fit into both categories. They evaluate *and* facilitate...mediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.[64]

If we have any hope of finding clarity, however, it does not come from the Model Standards of Conduct for Mediators in which the vague wording allows for a multitude of interpretations. For example, the preface describes a mediator as one who "facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation."[65]

Mediators are in all cases assessing the parties' capacity and good faith intentions throughout the process. The mediator is also expected to continue to assess her or his own ability to remain neutral and impartial. Mediators assess the nature of the conflict in order to determine what tools and strategies to use throughout the process. Parties would ideally make a choice of mediator based on the model or process offered.[66] Use of a range of interventions provides options and flexibility for mediators to offer parties.[67] Evaluation of the probable outcome in court, however, while being seen by

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arrangements, participant mixes, agenda constructions, session configurations, food breaks, deadlines, reality testing and drafting choices (to name a few).").

[63] Riskin, *supra* note 5, at 15 ("A prediction about what would happen in court, for example—given in the right manner, at the right time, in the right context—can help enable (or empower) the parties to negotiate in *light* of that information and not merely in its *shadow.*") (emphasis added).

[64] *Id.* at 14.

[65] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preface (1994), *available at* http://www.abanet.org/dispute/modelstandardardsofconduct.doc (last visited Jan. 27, 2005).

[66] Riskin, *supra* note 5, at 51 ("[T]he mediator orientation grids . . . can guide participants in choosing a mediator and preparing for a mediation.").

[67] Menkel-Meadow, *supra* note 6, at 1902 ("Different litigants may desire different processes and/or remedies, and offering an adaptive menu of process choices could respond to these different requirements.").

many as permissible,[68] already exists in good standing as a separate process.[69]

Evaluating or assessing the parties, the circumstances, and the mediator's ability to maintain neutrality is an integral part of all mediation. Evaluation of the outcome in court is a specific process that may indeed be helpful, even in directing parties back into mediation. Keeping this as a separate ADR process provides clarity for both the parties and the mediator. Mediators offering both processes need to, at the very least, make clear which one is being used at any given time.

IV. NAMING ADR PROCESSES

Separating evaluation from mediation on the list of ADR structures[70] offers practitioners clarity about the existing set of ADR options. The structures chosen determine the strategies and tools that are appropriate. Processes listed are in (approximate) order from most party control to least party control:
1. Mediation
   a. Norm-Generating
   b. Norm-Educating
   c. Norm-Advocating
2. Evaluation
3. Arbitration

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[68] Welsh, *supra* note 59, at 4 (2001).

[A]s mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator's function, the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role. The parties are still responsible for making the final decisions regarding settlement, but they are cast in the role of consumers, largely limited to selecting from among the settlement options developed by their attorneys.

Id.

[69] *See* Kovach & Love, *supra* note 3, at 77 ("[T]he practice of neutral evaluation has a confirmed role outside the practice of mediation. Statutes and court rules support a variety of evaluative procedures . . . .").

[70] Glossary of ADR Processes, *available at* http://www.law.missouri.edu/csdr/adr_glossary.htm (last modified May 14, 2004). This web site lists the main ADR processes alphabetically and gives a full explanation of each process. Here, I list the range of processes approximating the most party control to least party control: (1) mediation, (2) (early) neutral evaluation, (3) med-arb, (4) arbitration, (5) neutral fact-finding, (6) mini-trial, (7) moderated settlement conference, (8) private judging/consensual special magistrate, and (9) summary jury trial.

If ADR professionals are to identify clearly the structure being used, we must convey the necessary information about the boundaries of the process in order to promote informed consent,[71] a defining element of self-determination of the parties. If mediation is the process being used, consumers need to understand the social and legal boundaries surrounding the model, as well as the basic elements that define what is required of the mediators[72] and parties,[73] thus supporting fairness and informed consent.[74]

The three categories named by Waldman are therefore necessary in the orientation process to explain the model or models proposed by the mediator. All three are called upon during orientation. The mediator must educate the parties about the mediation model and the basic elements (Norm-Educating). The mediator elicits the story and determines the appropriateness for mediation (Norm-Generating). The mediator assesses each party's capacity and willingness to negotiate, self-evaluates regarding ethical standards of neutrality and impartiality, and informs parties of any legal or regulatory standards that might impinge upon their agreement, or that might endanger other parties if not made public (Norm-Advocating).

Use of this framework eliminates the muddle that is the result of labels and categories that do not match what is actually happening.[75] In the

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[71] *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 781 (1999) ("Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity. The principle of informed consent is the vehicle through which autonomy is measured in decisionmaking between physicians and patients, and, to a lesser degree, between lawyers and clients."); Weckstein, *supra* note 41, at 503 ("The key to self-determination is informed consent. A disputant who is unaware of relevant facts or law that, if known, would influence that party's decision cannot engage in meaningful self-determination.").

[72] Love & Kovach, *supra* note 30, at 298–99 ("Knowing precisely the service that will be rendered, and the required skill set to deliver that service, is necessary to target the qualifications and training that will underpin credentialing.").

[73] *Id.* at 297 ("Advocates and parties would be forewarned to consider judiciously what information to present to a neutral who will ultimately give an opinion which may well have a decisive impact on further negotiations.").

[74] Nolan-Haley, *supra* note 71, at 777.

> Mediation shares a common goal of the court system: to achieve justice and fairness in the resolution of disputes. Mediation, however, is different from litigation because it is governed by the principle of consent. Parties must agree to engage in the process and to its outcome. In this respect, the values of mediation are quite different from litigation.

Id.

[75] *See* Menkel-Meadow, *supra* note 4, at 232.

orientation and during the explanation of the agreement to mediate, the mediator establishes a frame into which the parties voluntarily enter. While parties have agency in the process at many points along the way,[76] the mediator sets the stage[77] and offers a space in which an even playing field is said to be maintained. As the mediator listens for the key issues during the orientation,[78] he or she brings out the story from each party helping each to identify her or his self-interests and values (norms). In explaining confidentiality, the mediator gives legal information and explains how the decisions regarding confidentiality will impact their agreement and any future court processes.

Although Waldman identifies three distinct categories, she acknowledges that these inevitably overlap.[79] While all three are used during orientation,

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> I object to the continuing polarized and dichotomous ways of conceiving of mediation as either rights or interests based or individualized or collectivized or political or psychological. Good mediation . . . deals with these levels simultaneously . . . . Other models of dispute resolution, presumed to be more "rights" focused, are themselves more likely to look like a hybrid of "bureaucratized" discretionary justice, rather than rights based adjudication . . . we must stop the kinds of simplistic taxonomies that academic critics . . . love to create that simply do not ring true for many practitioners.

Id.

[76] *See* Moffit, *supra* note 33, at 20 ("[M]any parties experience mediators as authority figures and expect them to play quasi-judicial roles. As hard as mediators may try to dispel these impressions, such preconceptions often impact parties' perceptions.").

[77] *Id.* at 6.

> Many mediators and scholars treat mediation within any model as if it were a black box or a kind of magic show in which the mediator "does her thing" for or to the participants without explaining what "her thing" is or how or why it is expected to work. Indeed, some mediators treat their role like that of a magician's, avoiding explanations as if they were secrets that would ruin the effects of their efforts.

Id.

[78] Bush and Folger point out the differences in how mediators listen to the content of the story. *See* BUSH & FOLGER, *supra* note 16, at 102–03.

> The problem-solving mediator comes to a session ready to hear a barrage of factual and emotional information, which can be sorted and organized into negotiable issues . . . the transformative mediator . . . comes to the session ready to witness an intense interaction and exchange between the parties that, because it involves difficulties faced by each party as well as hostile perceptions of each by the other, is filled with myriad opportunities for empowerment and recognition.

Id.

[79] Waldman, *Identifying Social Norms, supra* note 7, at 756 ("Indeed, in delineating these three models, I do not mean to suggest that they are always, or even usually, used

after the agreement to mediate is signed, the literature strongly suggests that mediators have a pattern of practice that would basically fall into one of a number of specific models.[80]

V. IDENTIFYING BASIC ELEMENTS

As the mediation profession engages in the discourse to understand the differences in mediator practices, we first need to identify the similarities. In addition to defining the parameters in place so that the parties have exercised self-determination, it is also incumbent upon mediators to explain the basic components of mediation.[81] Certain elements would ideally be present: (1) self-determination of the parties; (2) the good faith intention of the parties to negotiate and disclose all relevant information; (3) impartiality and neutrality of the mediator in relation to the parties and the outcome; and (4) a balance of power and fairness. In addition to these four, a fifth must be discussed fully, weighed carefully, and mutually decided upon by the parties prior to signing the agreement to mediate—(5) confidentiality.[82] Each of these elements has been the subject of considerable commentary. Defining our terms points out the complexities of concepts we often assume have commonly understood meanings.

A. *Self-Determination*

Self-Determination is seen as the bedrock of the mediation process, distinguishing it from the other ADR processes.[83] Components of self-determination include: (1) having the necessary information for

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singly. Rather, many mediators will combine these various models, depending on the nature of the dispute.").

[80] *See* Kressel et al., *supra* note 20, at 73 ("There was no evidence that mediator style was a function of case characteristics: all mediators had cases comparable on such pre-mediation factors as level of parental conflict, parental psychopathology, and whether mediation was occurring prior or after the divorce.").

[81] *See* Appendix B, Elements, Strategies, and Categories of Mediation Chart.

[82] While confidentiality has been presented as one of the main advantages of mediation, some argue that there is no evidence to back up the notion that, without it, mediation would be less effective. *See* Scott H. Hughes, *A Closer Look*, DISP. RESOL. MAG., Winter 1998, at 14, 16 ("There is no empirical work to demonstrate a connection between [confidentiality] privileges and the ultimate success of mediation. Although parties may have an expectation of privacy, no showing has been made that fulfilling this expectation is crucial to the outcome of mediation.").

[83] *See* Kovach and Love, *supra* note 3, at 84.

decisionmaking[84]; (2) the ability to make autonomous decisions,[85] including consenting to the mediation[86]; (3) the capacity to articulate one's perspective, to negotiate in one's own best interest, and to evaluate options and alternatives[87]; and (4) the ability to carry out an agreement.

Attorneys must also determine capacity in order to represent their clients. In carrying out the wishes of the client, attorneys must assess the ability of the client to state his or her desires.[88] This applies to mediators as well.[89] It may be difficult in any given situation to sort out capacity from disability because the two may frequently be confused and conflated in our minds. We should not automatically assume that someone disabled in one area is incapacitated in general![90] Nor can we assume that someone who appears to

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[84] *See* Nolan-Haley, *supra* note 71, at 781 ("The principle of informed consent in the lawyer-client relationship is a similar principle to that in medicine. Clients should be educated about their choices and participate in decisionmaking.").

[85] *Id.* at 789 ("Respect for autonomy and its legal equivalent, the right of self-determination, is widely accepted as the intrinsic value of mediation, and the principle of informed consent provides the structural framework through which this value is measured in mediation.").

[86] *Id.* at 790–91 ("[M]ediation autonomy operates as a corrective to paternalism. As a limiting principle, it gives the mediator power to control only the process in which parties' decision making occurs, while the parties retain the power to decide and control the outcome.").

[87] *See* Moffitt, *supra* note 33, at 15.

> In describing common negotiation dynamics, Roger Fisher, William Ury and Bruce Patton distinguish between 'options' and alternatives.' Options . . . are those ideas that could be part of an agreement between the negotiating parties. Alternatives are those actions which a party can take without the consent of the other party.

Id.

[88] Erica Wood, *Addressing Capacity: What is the Role of the Mediator?*, at http://www.mediate.com/articles/woodE1.cfm (last visited Jan. 25, 2005) ("Lawyers also routinely must consider capacity. They must decide whether a client has capacity to execute a will, a durable power of attorney, trust or other legal document—or even capacity to retain the lawyer.").

[89] *Id.* ("The ADA Mediation Guidelines name several factors to be considered: 'The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand.'").

[90] Kathleen Blank, *It Is Not a Disability Issue*, at http://www.mediate.com/articles/blankK1.cfm (last visited Jan. 25, 2005).

> While providing necessary accommodations for people with disabilities can seem challenging to the mediator, the lack of accommodation should not be confused with the lack of capacity to participate. Mediators should presume that people with

be "in control" and "capable" is not in fact experiencing emotions that are clouding their thinking.[91]

Parties must have the capacity to understand and carry out all the requirements of the mediation process in order to meet the definition of self-determination. Mediators must have the ability to explain these requirements and the awareness to know if parties are understanding them.[92] Otherwise, the parties will not be sufficiently informed to exercise self-determination regarding the decision whether or not to participate.[93]

B. *Good Faith*

Efforts to agree on the criteria for "good faith" have also proven difficult. Concerns abound regarding the increased regulation of good faith by the legal system, which many see as jeopardizing the original function of mediation as an alternative to litigation.[94] Some argue for punitive measures for parties who do not show good faith, such as payment of legal and mediation fees. Court-referred cases carry the added weight of judicial

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physical and mental disabilities, like everyone else, have the capacity to participate in the mediation process with the appropriate accommodation.
Id. at 3.

[91] Tricia S. Jones & Andrea Bodtker, *Mediating with Heart in Mind: Addressing Emotion in Mediation Practice*, 2001 NEGOT. J. 217, 218 (2001) ("Exploring the implications of physiologic elements of emotion—how the body responds to emotion—enables us to discuss the impact of emotional flooding and emotional contagion on mediation process. And in understanding the cognitive aspects of emotion, we argue that emotional reappraisal is a critical tool for mediators.").

[92] Judy Cohen, *Fulfilling Your Obligation on Mediation Capacity*, at http://www.mediate.com/ADAMediation/editorial5.cfm (last visited Oct. 22, 2004) ("Mediators need to be concerned when parties face obstacles to self-determination, a core value in mediation. When a party appears to have difficulty comprehending the mediation process, or seems unable to participate actively, the mediator needs to step back and explore those obstacles with the party.").

[93] *See* Weckstein, *supra* note 41, at 508 ("While differing somewhat in language and detail, most modern definitions of mediation contain two common elements: (1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute. In other words, the principle of self-determination is paramount.") (internal citations omitted).

[94] Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 581 (1997) ("Mediation, even within the context of the legal system, should maintain certain characteristics if it is to be a separate, viable alternative to adjudication. Otherwise, mediating will be left as nothing but another pretrial procedural hoop in the litigation process.").

backing in which penalizing bad faith puts mediator confidentiality at risk.[95] The issues involved in making such determinations would clearly threaten the concept of mediation as offering an informal setting.[96]

Many mediators may be unaware of the current arguments for and against sanctions regarding good faith, and may be caught off-guard if the issue arises. While some practitioners propose that detailed criteria be used, for the purposes of this Article I will hold that good faith is defined as the intention and authority to negotiate and to provide necessary documentation or information. Ultimately, the determination rests with each mediator to assess if the parties have met their standards.[97]

C. *Impartiality and Neutrality*

Defining the concepts of impartiality and neutrality addresses the potential ability of the mediator in any given situation to recognize and monitor her or his own biases.[98] This ideal is quite unrealistic. Parties and

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[95] Roger L. Carter, *Oh Ye of Little[Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 392 (2002).

> Zealous enforcement of good faith standards in substantive areas of mediation imperils the confidentiality of the process. Many "good faith" statutes and court rules require mediators to report whether parties participated in good faith . . . . In the event of a hearing on bad faith sanctions, the mediator will likely be required to testify.

Id.

[96] *Id.* at 376–77.

> Commentators opposed to sanctions recognize the problem of bad faith conduct, but believe that the cure is worse than the disease. They see mediation's unique appeal as being its open and safe environment where disputants can freely and comfortably discuss their interests and views. Rules requiring good faith and threatening the imposition of sanctions, they contend, will hang over the parties like a Damoclean sword, inhibiting the process rather than abetting it.

Id.

[97] *See* Kovach, *supra* note 94, at 618 ("[E]ach mediator may have discretion in how she chooses to enforce the good faith commitment. At minimum a mediator should terminate the session in the event she determines that the process will do harm.").

[98] *See* Weckstein, *supra* note 41, at 533.

> *"Impartiality"* is distinguished from "neutrality." The former term . . . refers to performing the mediation function, in word or deed, free from favoritism or bias, and for the purpose of aiding a resolution of the dispute and not to benefit a particular party . . . . "Neutrality" refers to the mediator's relationship, if any, with the disputants or the dispute. It seeks to avoid use of a mediator who, by reason of background, experience, financial interest, or relations with one or more of the

mediators all come to mediation with complex systems of intersecting ideas, experiences, and perspectives that provide the lens through which each individual views the world.[99] Some of these systems are conscious, and others are unconscious.[100] Mediators have little other than self-assessment of their own behaviors based on personal and professional ethics, to guide them. Thus, determining the ability to maintain impartiality and neutrality is based on a highly subjective standard.

If postmodernist theory were acknowledged in mediation as it has been in other disciplines,[101] the idea that no one can be "objective" would be commonly accepted.[102] Mediators are not immune from the influence of their unconscious privileges and attitudes.[103] At present, we use a vague set of criteria to determine impartiality and neutrality, which are monitored by the mediator. Only if an offense by a mediator becomes glaringly obvious might the parties have the awareness to declare it as a reason to end the

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> parties, may be prejudiced or biased for or against a party. Neutrality incorporates concerns with any conflict of interest of the mediator.

Id.

[99] *See* john a. powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1483 (1997).

> At the base of the criticisms of Grillo and other feminists is the reformulation of the self as a site constituted and fragmented, at least partially, by the intersections of various categories of domination/oppression such as race, gender, and sexual orientation. Thus, far from being a unitary and static phenomenon untainted by experience, one's core identity is made up of the various discourses and structures that shape society and one's experience within it.

Id.

[100] *Id.* at 1514 ("As psychoanalysis asserts, unconscious thought processes play a primary role in the interaction between the self and the 'other.' Thus, 'requiring proof of conscious or intentional motivation . . . ignores much of what we understand about how the human mind works.'") (quoting Charles R. Lawrence, *The Id, The Edge, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987)).

[101] JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 41 (2000) ("Postmodern thinking suggests that there is no single definable reality. Rather there is a great diversity in the ways we make meaning in our lives.").

[102] *See* BUSH & FOLGER, *supra* note 16, at 70 ("Mediators enter conflicts. They become participants in the unfolding interaction and have influence on the way it develops.").

[103] *See* Trina Grillo, Anti-*Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 30 (1995) ("[E]ach of us has a limited view of the world . . . we have a better chance of forming a vision of a post-patriarchal, post-racist society both by trusting in our own experiences and by seeking out voices that are drowned out by essentialism in all its forms.").

mediation.[104] Under most circumstances unrepresented parties unfamiliar with mediation might be hard pressed to determine, other than by their subjective sense or feeling, if a mediator had lost impartiality or neutrality.[105] Widely held assumptions about the necessity of impartiality and neutrality may not be substantiated by the research.[106]

D. *Balance of Power and Fairness*

The relationship of the parties invariably represents the roles and hierarchies in which they engage one another in the "outside" world. The hierarchical relations between parties outside the mediation are re-enacted in the mediation.[107] Any idea of balancing power between husbands and wives,

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[104] *See* Deborah M. Kolb & Jeffrey Z. Rubin, *Mediation Through a Disciplinary Prism, in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS 235–36 (Max H. Bazerman et al. eds., 3d ed. 1991). The authors define the role of norms or values in the mediation as relating to the domain of communication theory. They describe one body of research which "portrays the mediator as the manager of meaning between disputants, each of whom may be operating from different beliefs, values and communication systems." *Id.*

[105] *See* BUSH & FOLGER, *supra* note 16, at 72–73. The authors articulate reasons it is difficult for parties to identify loss of impartiality and/or neutrality when it reflects the culture at large and even the parties' own belief systems:

> [T]hose who tell the Oppression Story . . . claim that mediators' moves—their management of the interaction, arguments, and suggestion—typically favor the stronger parties' interests in a conflict. This is sometimes because mediators bring their own oppressive biases to the issues that arise in mediation and sometimes because they stay within an oppressive frame that the parties themselves bring to the table . . . . In this view, mediator influence is pernicious because it perpetuates the evils of inequality and oppression.

(internal citations committed).

[106] Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict,* 41 J. SOC. ISSUES 190 (1985).

> [I]n many cases the mediators' greater closeness to one party forms the basis the mediator's acceptability to the other party . . . . Kolb (1985) makes the point that, in certain instances, mediators attempt to create an impression of neutrality by selectively aligning themselves first with one party, then with the other.

Id.

[107] *See* WINSLADE & MONK, *supra* note 101, at 40 ("[L]anguage is *performative,* and its use a form of social action . . . . The implication of this view is that mediation is a site where social action is always taking place rather than just being talked about. It is where lives and relations are being produced and reproduced."); *see also* Dorothy Della Noce, *Seeing Theory In Practice: An Analysis of Empathy in Mediation,* 1991 NEGOT. J. 271, 273 (1991) ("Discourse (talk and text in its social context) is a material practice; that is discourse has real and practical social consequences.").

employers and workers, landlords and tenants, or parents and children in a two-hour (or longer) session is delusional.[108] While mediation has promoted itself as contextual in comparison with the law,[109] it limits its scope to the issues put forward by the parties. If neither party is aware of, or chooses to raise, issues regarding social-political power imbalances, the mediator is under no mandate to do so.[110] At the same time that we continually address the dilemma of operating "in the shadow of the law,"[111] mediators are offering ever-changing ADR processes[112] as options *within* the legal system,

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[108] *See* Richard Delgado, *Alternative Dispute Resolution Conflict As Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1407–08 (1997)

> ADR seems to be taking hold most strongly in those areas of greatest power imbalance between the parties . . . . [P]owerful parties are able to make lawsuits go away by diverting them to ADR. Recent empirical studies . . . show that mediation produces outcomes that favor the stronger party, even more so than the standard , in-court lawsuits.

Id.

[109] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1564 (1991).

> [W]hile one of the principle justifications for introducing mediation into the divorce process is that context will be substituted for abstract principles, in fact, by eliminating discussion of the past, context—in the sense of the relationship's history—is removed. The result is that we are left with neither principles nor context as a basis for decisionmaking.

Id.

[110] Michael A. McCormick, *Confronting Social Injustice as a Mediator*, 14 MEDIATION Q. 293 (1997).

> [I]mpartiality is central to our utility in conducting a dispute resolution process that allows the disputants to define the terms of any agreement. But, as so many other practitioners and critics have noted, singular reliance on the principal of impartiality too often leaves existing power imbalances unchallenged and thus provides nothing better than second-class justice for the less powerful.

Id.

[111] *See generally* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); *see also* Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 352 n.23 (1990).

> Law is a relevant reference point for the mediation. To ignore law would deprive the parties of its value in helping them reach a fair agreement. Yet the law and predictions of how it would apply to the instant facts need not bind the parties, excluding the parties from using their own sense of fairness as a basis for decision.

Id.

[112] *See* Glossary of ADR Processes, *supra* note 70, at 3.

which are fraught with enormous contradictions and inconsistencies.[113] The meanings proposed here are:

Balance of power: intervention by the mediator at any point that she or he perceives that either party is not demonstrating self-determination; intervention methods and tools vary according to the model used by the mediator; parties should be informed before the agreement to mediate about the model and methods of intervention likely to be used by the mediator.

Fairness: accountability of the mediator to ensure procedures that do not privilege one party over others, to treat all with equal respect, to see that all parties have equal access to information and advice in particular regarding legal norms, and to prevent or end abusive behavior.

Impartiality: the ability of the mediator to maintain non-preferential attitudes and behaviors towards all parties in a dispute; it is the ethical responsibility of the mediator to withdraw if she or he has lost the ability to remain impartial.

Neutrality: the alleged ability of the mediator to remain uninvested in the outcome of a dispute, to be aware of any contamination of neutrality, and to withdraw if he or she has lost it.

Balance of power between parties, and between the mediator and parties, is a relative and shifting proposition.[114] Fairness in outcomes can be seen

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Other ADR Processes: Hybrid and Flexible Tools for Dispute Resolution. One of the most exciting aspects of ADR is the flexibility provided attorneys and their clients in fashioning the most appropriate process to solve a particular problem and resolve the dispute. Although the best-known ADR processes are described above, there is no rule that limits parties or attorneys to these definitions. An experienced ADR provider can extract and combine key elements of various ADR processes to create the best opportunity and process for resolving a particular dispute.

Id.

[113] *See* Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG, Winter 1997, at 3, 4.

There remain some tricky ambiguities in the application of traditional rules of ethics to ADR. Model Rule 3.3 requires a lawyer to disclose "to a tribunal" legal authority in the controlling jurisdiction known to the lawyer to be "directly adverse to the position of the client." Is court-sponsored mediation such a "tribunal?" Is an early neutral evaluation session conducted under a court program's requirements, but held in a private law office, such a tribunal?

Id.

[114] *See* Weckstein, *supra* note 41, at 545 ("Allowing qualified mediators to relate relevant professional information—whether legal, financial, technical, or psychological—will help empower the parties by providing an opportunity to educate them to make informed choices . . . . The choice is still in the hands of the disputants.").

either from the parties' point of view as satisfied or not satisfied,[115] or from society's point of view, in upholding commonly-accepted legal and social standards.[116] In some models, this means that the mediator safeguards the parties' equal access to relevant factual information and advice, and makes sure all parties understand their choices and the consequences of them, in relation to their self-interests.[117] These remedies alone, however, do not fully address the problem of balancing power.[118]

The first critical point in ensuring fairness is in the initial screening process.[119] Mediators are expected to assess their own ability to maintain impartiality and neutrality[120] and to balance power.[121] The reality is clearly

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[115] *See* Maute, *supra* note 111, at 348 ("As to substantive fairness, the probable litigated outcome should serve as a reference point; the parties are free to find a solution that better serves their personal values and concerns.").

[116] Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1327 (1995).

> For some mediation advocates, fair outcomes are in the eyes of the beholder—if parties believe the outcome to be fair, then it is. For others, fair settlements must creatively incorporate a variety of values and goals, rather than exclusively legal ones, and parties should arrive at them without pressure.

Id.

[117] *See* Waldman, *The Challenge of Certification*, *supra* note 7, at 734 ("[A] mediator following the norm-educating model believes the parties should receive information about legal entitlements and relevant financial, technical, or psychological data before making irrevocable decisions.").

[118] *See* Weckstein, *supra* note 41, at 540.

> Susskind's point, that a mediator's activist interventions are *offered equally* for all but may have a *disproportionate effect* on those least able to help themselves is a valid one . . . . There is no bias for or against either party, only a bias in favor of the integrity of the process so that all parties have the opportunity to be informed and, thus, empowered to engage in true self-determination.

Id. (emphasis added).

[119] *See* Maute, *supra* note 111, at 351 ("Screening can also protect for fairness by excluding disputes where there are vast disparities in bargaining power between the parties.").

[120] Charles Pou Jr., *Enough Rules Already! Making Ethical Dispute Resolution a Reality*, DISP. RESOL. MAG., Winter 2004, at 20.

> Many basic training programs treat ethics as a fortieth-hour afterthought. ADR practitioners often are not especially aware of, or thoughtful about, ethical standards. Numerous program administrators complain that trainers often are reticent about taking positions, and that a good percentage of neutrals do not recognize when an ethics issue arises.

Id.

that the ideal of fairness is difficult to quantify or measure. The criteria to evaluate it is, in large part, subjective.[122]

E. *Confidentiality*

No less troublesome than the other elements is the question of confidentiality. Mediators initially promised confidentiality as a sweeping guarantee of protection.[123] At present, there are a rapidly growing number of regulations that differ widely from state to state.[124] The Uniform Mediation Act (UMA) is an attempt to create "a consistent and predictable structure for mediation."[125] After much deliberation, the crafters of the UMA defined confidentiality in relation to court proceedings but did not go further, leaving it up to the parties to define it, in essence on a contractual basis.[126] The UMA also extends protection to mediators, even when the parties wish the mediator to disclose information.[127]

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[121] *See* Maute, *supra* note 111, at 354 ("Compromise is an equitable solution only between equals: between unequals it 'inevitably produces inequality.'").

[122] *See* McEwen et al., *supra* note 116, at 1325.

> Mediation advocates . . . confidently refer to the empirical evidence regarding parties' perceptions of mediation and dismiss the critics' examples as exceptional and not reflective of good mediation practice. Using anecdotes, they contend that well-trained, sensitive, ethical mediators compensate for power imbalances between parties, do not exert pressures to settle, and remain impartial . . . .

Id.

[123] Philip J. Harter, *The Uniform Mediation Act: An Essential Framework For Self-Determination*, 22 N. ILL. U. L. REV. 251 (2002) ("[M]ediators often promise more confidentiality than they can actually deliver as a matter of law and since many parties are unrepresented by counsel, they may rely on this assurance to their detriment.").

[124] *Id.*

> [T]he law governing confidentiality varies by subject matter within a state and by jurisdiction within a substantive area. Moreover, the differences can be quite significant . . . . [T]he parties to a mediation can never know just where a challenge to confidentiality might be brought or even whether it will be directly related to the subject on the table.

Id.

[125] *Id.* at 252.

[126] *Id.* at 256 ("[T]he provision explicitly authorizes the parties to define their own confidentiality by saying that a contract to that end is enforceable.").

[127] *Id.* at 254. "[T]he mediator can refuse a discovery request for or refuse to testify about a mediation communication, but the mediator cannot block others from doing so." *Id.*

At the heart of the debate is the contradiction between the parties' desire to maintain confidentiality and the public's right to know.[128] Since the job of the court is to weigh the needs and interests of the society against individual needs and rights, it always has the power to override confidentiality. The Federal Administrative Dispute Resolution Act spells this out: Confidentiality can be overridden when

> a court determines that such testimony is necessary to . . . prevent harm to the public health and safety, of sufficient magnitude in the particular case outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.[129]

During the explanation of the agreement to mediate, especially in regard to confidentiality, the mediator is practicing Norm-Advocating mediation. The mediator must convey all legal information in order for the parties to exercise informed consent. Confidentiality has legal ramifications and many legal exemptions for parties to consider.[130] Maintaining confidentiality is a complex issue for lawyer-mediators and attorneys representing clients in mediation. As ADR processes continue to evolve, more questions are raised about what is private and what is public.[131]

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[128] See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities*, 38 S. TEX. L. REV. 407, 412–13 (1997) ("To what extent can private parties contract for ADR (without public scrutiny) when what they are contracting for is legal dispute resolution, a function committed to the public sphere? Under what circumstances should courts review private action?").

[129] 5 U.S.C. § 574(a)(4), (b)(5) (2003).

[130] See Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 542–43 (1997).

> The policy issues in the debate over ADR confidentiality seem to fall into two categories—"process" issues relating to what extent confidentiality is necessary to achieve the objectives of ADR within the context of the particular dispute, and "public access" issues relating to claims of overriding public interest in insuring public access to information communicated in the ADR proceeding.

Id.

[131] Concerns abound among legal scholars and practitioners about the right to privacy and have escalated since the passage of the PATRIOT Act in 2001. Act of Oct. 26, 2001, Pub. L. No. 107–56, 115 Stat. 272 (codified at 18 U.S.C. § 1). The purpose and full title of the act are as follows:

> To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in

Confidentiality, as a rare application of the right to privacy,[132] is pivotal in many ways in the mediation process. Parties should address other stipulations regarding confidentiality in addition to the decisions regarding the court. Under the proposed UMA, additional stipulations would be considered a contract once the parties' agreement to mediate is signed.[133]

VI. RECOGNIZING STRATEGIES

Riskin and others have described tools, strategies, and outcomes, but not the boundaries of the processes. These descriptors confuse strategies with "styles" or models. Both evaluation (of the dynamics of the mediation) and facilitation, for example, might be seen as strategies, based on what the mediator theorizes is obstructing movement in negotiation.[134] If we recognize that a combination of relevant external norms[135] and the internal

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Congress assembled, This Act may be cited as the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

Id. The protection of the privacy of U.S. citizens, which was shaky at best, is now more severely threatened. Thus, the fact that parties must come to agreement about whether or not to waive confidentiality before they sign the agreement to mediate presents an unusual opportunity for parties to control the flow of information, even in relation to the court. In addition to the legal decision about confidentiality, the acknowledgment of other people with whom the parties would like to discuss the mediation (informal confidentiality) builds trust by providing an example of transparency between the parties. How information has been conveyed and used is often one of the major issues between parties. Discussing both legal and informal aspects of confidentiality allows the parties to take responsibility for the information they are about to share.

[132] *See* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY xiv (1995).

One hundred years ago, Justice Louis D. Brandeis called the right to privacy "the right to be let alone." Eloquent in its simplicity, Brandeis' phrase seems to sum up what most Americans have in mind when they think of privacy. However, legally, it offers no guidance at all. Coveting an indefinable right is one thing; enforcing it in a court of law is another.

Id.

[133] *See* Harter, *supra* note 123, at 256. ("[T]he provision explicitly authorizes the parties to define their own confidentiality by saying that a contract to that end is enforceable.").

[134] *See* Silbey & Merry, *supra* note 14, at 7 ("The process of mediation, and the role of the mediator in particular, is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so.").

[135] *See* Waldman, *Identifying Social Norms*, *supra* note 7, at 707.

values[136] of the parties are the reference points in all mediations, we can then explain which model or models and what interventions are being chosen by the mediator. Contrary to some early mediation concepts,[137] giving information is not outside the realm of the mediator; it is crucial in order for parties to exercise self-determination.[138]

In an argument about mediator styles, Jeffrey Stempel claims that most mediators use an eclectic mix.[139] In essence, accepting his decree means that mediators will be even less likely to be able to define for parties what they are actually doing. Stempel's argument that parties will have no interest in hearing "bursts of self-conscious rhetoric about changing modes,"[140] is based on his contention that parties expect "one-stop shopping" in mediation[141] and

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> Although the mediation literature is rich with 'thick descriptions' of various mediator styles, it lacks a theoretical framework that takes adequate account of the disparate role social norms play in different mediation models .... Heightened attention to the role of social norms in mediation is necessary to allow mediators to adequately explain their methodologies and to allow clients to supply informed consent to mediator interventions.

Id.

[136] JOSEPH P. FOLGER & MARSHALL SCOTT POOLE, WORKING THROUGH CONFLICT: A COMMUNICATION PERSPECTIVE 71 (1984) ("Any idea, decision or outcome considered during a conflict interaction is assessed according to the values each member holds.").

[137] *See* Weckstein, *supra* note 41, at 522 (quoting Kenneth Kressel, *Frances Butler: Questions That Lead to Answers In Child Custody Mediation, in* WHEN TALK WORKS, *supra* note 17, at 43).

> The persistence of the nondirective theology owes much to the insecurity and lack of experience of the first generation of family mediators and the uncertainty within the field as to how to draw the line between the mediator's mandate to resolve disputes and, at the same time, avoid the act or appearance of favoritism or strong-arming.

Id.

[138] *Id.* at 504.

> [I]t should not be considered improper for the mediator to serve as a source of pertinent information. Likewise, if the mediator's style is to offer that information unless the parties decline it, the mediator should be free to do so ethically. Self-determination extends to the disputants' willingness or unwillingness to be exposed to a mediator's educational efforts or evaluations.

Id.

[139] Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 388 (2000) ("Essentially, the 'war' is over, and eclectic mediation has carried the day and probably will continue to be the dominant form of mediation.").

[140] *Id.* at 384.

[141] *Id.*

care only about the results.[142] What Stempel dismisses as academic concerns, others might call the mediator's ethical responsibility to support parties' self-determination.[143]

What if we were to replace the word "style" with "strategy"? The word *strategy* comes from the Greek *strategos*, which means "a general"; it describes the skill of managing or planning.[144] If mediators each come with a basic theory of what causes conflict,[145] they would then each tend to have a set of strategies to overcome the obstacles identified by their theory.[146]

There are a few common strategies that mediators use to one degree or another: (a) establishing the frame or process; (b) clarifying issues through storytelling; (c) intervention through the use of empathy, tools, and/or information; (d) shifting awareness of self-interests by focusing on the present and future; and (e) reality testing by referencing social and legal norms.

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[142] *Id.* ("[T]hey [the parties] are not nearly as concerned as academicians about the precise techniques deployed as long as the process brings acceptable resolution.").

[143] *See* Carter, *supra* note 95, at 396.

> Empowerment and ADR go hand-in-hand. Autonomy and ADR go hand-in-hand. ADR promotes such democratic values as self-determination and freedom from interference by the state. Early backers of alternative dispute resolution believed they had found a solution to some of the worst problems of adversary justice. As ADR has become "less alternative" and more institutionalized, disturbing trends have emerged.

Id.; see also Menkel-Meadow, *supra* note 4, at 218 (describing the underlying theme of all mediation as "a commitment to democratic participation and democratic theory in the resolution of social, personal and political issues").

[144] *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1979).

[145] *See* Della Noce, *supra* note 107, at 272.

> Theory may seem far removed from the moment-to-moment demands of conflict interaction and resolution. Yet theory—implicit or explicit, sophisticated or naive— shapes the practice of conflict resolution . . . theory is the "why" underlying interventions, the rationale for what intervention is used when and how it is enacted and played out in interaction.

Id.

[146] *See* BUSH & FOLGER, *supra* note 16, at 55–56.

> An orientation to conflict is a worldview of conflict. It tells us how to think about conflict . . . . An orientation to conflict suggests a view of what the ideal response to conflict should be. It prescribes what people in conflict should do to reach successful results—results that the orientation itself defines and prizes.

Id.

A. *Establishing the Frame or Process*

Establishing the frame or process is done in all models, though perhaps more or less overtly. Mediators often claim authority as representatives of the court or as professionals in settling disputes.[147] They control the flow and substance of the parties' communications[148] based on their expertise in helping people reach understanding. Empowering parties, claiming authority, and controlling the process[149] are all part and parcel of establishing the frame or process.[150]

B. *Clarifying Issues Through Storytelling*

Negotiators might agree that we share the idea that taking apart the elements of a dispute will uncover hidden interests and motivations. Thus, storytelling is figural. In the "narrative orientation"[151] and the transformative model,[152] practitioners work to create a shift by encouraging participants to re-think the problem or story.[153] Re-framing what the parties say into new perspectives is one way this strategy is used,[154] though how re-framing is

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[147] *See* Silbey & Merry, *supra* note 14, at 12–13.

[148] *Id.* at 15 ("Control of the substantive issues seems to involve four distinct steps: broadening, selecting, concretizing, and finally, postponing issues.").

[149] *See* Riskin, *supra* note 5, at 32 ("[M]ediators can direct (or push) the parties toward particular outcomes through 'selective facilitation'—directing discussion of outcomes the mediator favors, while not promoting discussions of outcomes the mediator does not favor—without explicitly evaluating a particular outcome.").

[150] *See* Silbey & Merry, *supra* note 14, at 12–13.

[151] *See* WINSLADE & MONK, *supra* note 101, at 3 ("The narrative perception is that people tend to organize their experiences in story form. The narrative metaphor draws attention to the ways in which we use stories to make sense of our lives and relationships.").

[152] *See* Sara Cobb, *Creating Sacred Space: Toward a Second Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1021 (2001) ("[P]roductive moral discussion is not simply talking about values, it is the process of evolving the content of narratives so that there is a shift in the moral corollaries associated with a story.").

[153] *Id.* at 1029.

> This kind of observation is consistent with the features von Foerster attributed to second-order systems in which the process of observing the conflict system brings forth the conflict system. In other words, the nature of the "reality" that is constructed is dependent upon the nature of the descriptions that "observers" make of the system.

Id.

[154] *See* Silbey & Merry, *supra* note 14, at 26.

defined may differ from one model to another.[155] For some, mediation is seen as an exercise of democratic participation,[156] exemplified by the opportunity to have one's story heard. Feeding back what was said during storytelling is seen as a way for the mediator to model a way of listening for common feelings and values.[157] Storytelling is also credited as a way for parties to vent their emotions, allowing them to move on to negotiation.[158]

C. *Intervention Through Empathy, Tools, and/or Information*

Intervention is inherent to mediation since the presence of a neutral is in itself an intervention. The choice of interventions may differ widely in the various models. For example, the use of empathy might figure more prominently in therapy or transformative models, while introducing information would be less likely in those models than in Norm-Educating models. The range of interventions is unlimited. In this area, the mediator's skill and flexibility is paramount.

> Mediators do not ask the parties to accept the validity of the language of relationships for representing disputants' grievances. It is not consensually achieved nor the result of full disclosure but, instead, is imposed upon them. Although the parties engage in the mediator's language, this says nothing about the parties' acceptance of it as the best way to express their differences . . . .

Id.

[155] *See* Moffitt, *supra* note 33, at 37.

> Mediators often talk of "framing" as an extremely important task, but there is no uniform definition of framing within mediation literature . . . . None of us is a blank slate, and none of us can expect to evaluate each incoming piece of observable data independently. Instead, we build up "deeply held internal images of how the world works" and use those to process incoming information.

Id.

[156] *See* Menkel-Meadow, *supra* note 4, at 218 ("In one way or another all of these works suggest a commitment to democratic participation and democratic theory in the resolution of social, personal, and political issues.").

[157] *See* Silbey & Merry, *supra* note 14, at 26.

> Disputants commonly begin mediation by describing their problems in terms of everyday experience as a sequence of personal exchanges; they may also describe their problem in the language of claims and rights typical of legal discourse. The aim of mediators is to convert these accounts into a language of relationships.

Id.

[158] *See* Menkel-Meadow, *supra* note 1, at 1420 ("While mediation promises the 'venting' of feelings and the allowance of emotions that would be inadmissible in a formal court proceeding, the reality, as described by Trina, is a tightly controlled 'permitted' discourse which constantly polices by reminding that 'anger is counterproductive' to good solutions and long-term healthy relationships.").

D. *Shifting Awareness of Self-Interests by Focusing on the Present and Future*

Common to all mediation models is the attempt to shift the parties' perspective of their self-interests. The potential shift the mediator is looking for can be produced by uncovering underlying interests and motivations.[159] This is the meaning of the word *resolve*, which is to loosen, to untie, to separate out the parts, to re-*solve*.[160] Keeping the parties' attention focused on the present and the future rather than on past hurts and wrongs is a frequently used and often problematic strategy.[161] While mediation has marketed itself as more contextual than litigious, allowing parties to maintain control over decisions, in practice it may actually separate issues from context by discouraging discussion of past acts.[162]

E. *Reality Testing by Referencing Social and Legal Norms*

Reality testing, used in multiple ways by mediators, offers an unlimited scope of norms to reference and gives the mediators enormous power to influence the direction of the mediation.[163] In Waldman's theory, reality

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[159] *See* Riskin, *supra* note 5, at 21.

This basic idea appeared in various formulations. Some spoke of the parties' underlying interests, the goals or motivations that prompted their positions. Others talked about healing or repairing relationships, reconciliation, or genuine resolution (as opposed to just settling). And virtually all mediation training programs at that time [when writing the 1996 article] emphasized such approaches.

Id.

[160] *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, *supra* note 144, at 1541.

[161] *See* Menkel-Meadow, *supra* note 1, at 1424.

[T]he past cannot be erased in mediation's focus on the future. It is the claim for reparations, for apology, for acknowledgment, and for affirmative action. In mediation, as in civil rights struggles, we must look back before we can move forward. True resolution of conflicts requires us to deal with, bring forward and not suppress, conflicts and past, as well as current, pains.

Id.

[162] *Id.* at 1419 ("In one of her most trenchant criticisms of the divorce mediation process, Trina suggests that, 'by eliminating discussion of the past, context—in the sense of the relationship's history—is removed. The result is that we are left with neither principles nor context as a basis for decision making.'") (quoting Grillo, *supra* note 109, at 1564).

[163] *See* Moffitt, *supra* note 33, at 14.

testing, in which norms are referenced, would be a primary means of differentiating one model from another.[164]

VII. WHAT IS A MODEL?

A. *Defining Models*

If we use the metaphor of building a house, we can identify different models: Victorian, Ranch, Dutch Colonial, and so forth. Each model provides shelter, warmth, and space, but the ambiance and utility of each may be quite different. If each mediation model is analogous to a set of blueprints for a specific type of house, the processes can be made clear and distinct. At the same time, they are all identifiable as mediation. Recognizing that in mediation, as in housing construction, models may borrow from each other, the categories are still useful in determining key elements that separate one from another.[165]

Use of the words "model," "style," "approach," and "orientation" has been a source of confusion in mediation literature. Dorothy Della Noce defines six criteria for establishing a model.[166] She argues that a model is "something more substantial than a practitioner's preference or idiosyncratic

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> Many mediators feel that it is part of their responsibility to help the parties assess the risks and benefits of failing to settle through mediation. This is commonly referred to as "reality testing" .... [T]he phrase implies that an objective reality exists and suggests that the mediator somehow has access to that reality in a way the parties do not.

Id.

[164] *See* Waldman, *Identifying Social Norms, supra* note 7, at 707 ("This article proposes a refinement of mediation theory in an effort to clarify discussion and comprehension of the field. It seeks to separate out the variety of processes grouped together as mediation and distinguish them based on their divergent treatment of social norms.").

[165] *Id.* at 707 ("Although the models are distinct, reflecting separate approaches to social and legal norms and pursuing slightly different goals, they are not mutually exclusive. A mediator may use each of these models in different cases, or, indeed, when handling different issues in the same case.").

[166] *See* Della Noce, *supra* note 10, at 136. Della Noce says that the six criteria are (1) "A mediation model should be situated within the relevant research in the field" (*Id.* at 136) (2) "Mediation models must be grounded in social conflict theory" (*Id.* at 137) (3) "If a model is constructed in phases, all phases should be thoroughly explicated" (*Id.* at 138) (4) "Explicit contrasts and comparisons to other models should be presented as an aid to understanding" (*Id.* at 139) (5) "A coherent model must identify and provide guidance for the ethical dilemmas that its practitioners will encounter" (*Id.* at 139) (6) "'How to' is not sufficient . . . but it is necessary" (*Id.* at 140).

style. It suggests an example of practice that is capable and worthy of imitation, a clear and detailed exemplar to which a practitioner can refer for guidance."[167]

What is needed is the establishment of criteria to examine differences in mediation models. Waldman's categories allow us to compare models based on their reference to social and legal norms. In the Norm-Generating category, there are several identifiable models, differentiated by the theory of conflict each espouses. Here, the Norm-Educating and Norm-Advocating categories are treated as generic, though greater awareness of this framework would undoubtedly produce distinct models in those categories as well.

B. *Identifying Five Models*

In Norm-Generating mediation, parties primarily maintain a closed system, one which they define and control.[168] While all mediation takes place "in the shadow of the law,"[169] the models used in this category focus heavily on the parties' values, goals, and future relationships. In the Norm-Generating category, there are three basic models generally seen as conflicting with one another[170]: Bargaining/Problem-Solving, Therapy, and Transformative. Much consideration is due these three models, as they would be compared within the Norm-Generating category, but the purpose here is

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[167] *Id.* at 135–36.

[168] *See* Waldman, *The Challenge of Certification, supra* note 7, at 733.

> The norm-generating model assumes that party autonomy is enhanced when parties are provided unfettered discretion in the resolution of their dispute . . . . Attention to social or legal norms is thought to constrict the parties' consideration of issues and limit the scope of reviewable options . . . . [M]ediation practitioners adhering to the norm-generating model view consideration of social norms to be irrelevant or destructive of the process.

Id.

[169] *See* Mnookin & Hornhauser, *supra* note 111, at 950.

[170] *See* Waldman, *Identifying Social Norms, supra* note 7, at 756.

> Both the transformative and problem-solving styles envision a process in which party settlements derive solely from party norms. The transformative approach seeks to improve a disputant's moral sensibility through empowerment and cultivation of empathic response . . . . The problem-solving approach aims to "find solutions that meet the needs of all involved parties to the greatest possible degree, and thus maximize joint satisfaction." . . . Both the problem-solving and transformative methods fit within the norm-generating paradigm in limiting the scope of inquiry and discussion to the parties' own articulated norms.

Id. (quoting BUSH & FOLGER, *supra* note 16, at 28, 56).

merely to establish a framework for comparison. Use of this framework would prove valuable for future exploration.

While many mediators may in fact be providing information and encouraging parties to seek out and share information, few examples of Norm-Educating mediation have been cited as models. One exception is Black and Joffee's Interdisciplinary Approach, which uses a lawyer-therapist mediator team to work with parties.[171] Another is Weckstein's definition of an activist mediator.[172]

The Norm-Advocating category may correspond most readily to what lawyer-mediators are doing as evaluative mediation.[173] Mediators using social and legal norms to define the parameters of agreements may feel comfortable with identifying this as their model.[174] However, any mediator

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[171] *See* Schwebel et al., *supra* note 39, at 219.

[This] interdisciplinary approach . . . assumes that if necessary information is freely available to parties and exchanged during sessions, then mutually acceptable, equitable agreements will emerge. Mediators provide parties with information, guidance, legal assistance, strategies for communicating and for building their communication skills, and insight into what to expect in the months and years ahead.

Id.

[172] *See* Weckstein, *supra* note 41, at 546–47.

In an information-based mediation, the receipt of knowledgeable input from the mediator is a principal reason that the parties choose a subject-matter qualified mediator. On the other hand, it should be made clear that a suggestion is not a decision or direction and that the parties are free to reject it.

Id.

[173] *See* Menkel-Meadow, *supra* note 128, at 425.

[S]ome third party neutrals see it as their duty to "correct" misstatements of law or to expose "false" facts. The authors of the *Joint Standards*, however, take the opposite view and suggest that the "mediator should . . . refrain from providing professional advice," demonstrating the lack of clarity and consensus in the field.

Id.

[174] *See* Waldman, *Identifying Social Norms, supra* note 7, at 742.

In some contexts, however, the norm-educating model is insufficiently protective of party and societal interests. This is true when the power imbalance between the parties is so extreme that one party cannot provide a trustworthy waiver, when the institutions administering mediation have a mandate to enforce statutory law, and/or when the dispute involves public resources or implicates public values in such a profound way that their enforcement outweighs the disputants' interests in achieving settlement.

Id.

using a legal statute to calculate child support is practicing Norm-Advocating mediation.[175]

C. Potential for Comparison of Models

Using these five examples of models, they can be compared regarding theory of conflict, empowerment of parties, basis of authority, control of process, and definition of success.[176]

1. *Norm-Generating.*
    a. Bargaining/Problem-Solving: conflicts are due to differences in parties' interests.
    b. Therapy: conflicts are due to misunderstanding and failure to communicate.
    c. Transformative: conflict is a crisis in interactions of individuals.
2. *Norm-Educating*: conflict is due to lack of information about personal, social and legal norms.
3. *Norm-Advocating*: conflict is due to lack of adherence to social and legal norms.

This framework allows mediators to engage in the discourse in an inclusive way. By looking at the Norm-Generating models, there is a context to identify real differences between clearly-articulated models, while at the same time recognizing the similarity in the underlying strategies, which is to keep the parties focused on their own norms and relationships. In a Norm-Educating model, parties would also seek all relevant information and develop negotiation skills. In a Norm-Advocating model, parties must understand the legal and regulatory restrictions in place that supersede any agreement. While these categories also include considerable overlap, the emphasis in each is distinct and the strategies and tools the mediator chooses will reflect the particular structure.[177]

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[175] Waldman, *The Challenge of Certification, supra* note 7, at 735.

In [the norm-advocating] model disputant autonomy is merely one value to be weighed and balanced against competing goals . . . the mediator relays information to the parties about relevant social norms, not simply to augment the parties ability to make informed decisions, but to ensure that their agreement concords with these norms . . . . The search for mutually agreeable outcomes takes place within the framework established by governing social norms.

Id.

[176] *See* Appendix A.

[177] *See* Waldman, *Identifying Social Norms, supra* note 7, at 765–66.

[E]ach mediation model places a different weight and emphasis on the values of fairness, disputant autonomy, social justice and self-determination. Predictably, the

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VIII. CAN WE AGREE ON THIS?

A. *Elements, Strategies, and Categories*

Despite the fact that each of the elements and strategies, are inherently subjective and difficult to define, can we agree that these elements, strategies, and categories approximate a definition of mediation vis-à-vis other ADR processes? While we acknowledge that Waldman's categories overlap, we can identify the key point of divergence of models as reality testing. What norms does the mediator choose to reference? What tools and information are called upon as interventions? What theory of conflict is the mediator using to assess the status of the mediation? Differentiating between models becomes necessary, because, in incorporating these elements and strategies, each model interprets them differently.

B. *Practicing What We Preach: Reality Testing About Mediation*

Having acknowledged the complicated and amorphous underpinnings of ADR, we must therefore recognize the valid concerns of critics who believe that ADR may be reinforcing existing power imbalances, diverting significant cases from litigation, and suppressing political dissent.[178] While serving some individuals, this does not necessarily serve the public good.[179]

Alleviating stress on the courts has been given as one of the main selling points of ADR.[180] The result is to regard law and mediation as competing

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tensions, both within and among the ethical guidelines, occur at points where the ethical vectors in the three mediation models begin to diverge. The competing ethical imperatives of each model create unavoidable strains and inconsistencies. The most obvious inconsistency in the code lies in the simultaneous recommendation that mediators promote disputant autonomy while ensuring that mediated agreements are fair according to societal norms . . . . Few codes provide explicit guidance as to how the mediator should assess the fairness of the proposed mediated agreement.

Id.

[178] *See* Kolb & Rubin, *supra* note 104, at 244 ("Critics argue that when violence against women, neighborhood quarrels, and landlord tenant disputes are channeled into mediation these issues are reduced to individual problems that ignore and depoliticize their social and economic causes. By individualizing these matters, there is less possibility for collective action or systemic change.").

[179] *See* Maute, *supra* note 111, at 369 ("Absent minimal accountability for fairness, private mediation risks second class justice.").

[180] *See* Carter, *supra* note 95, at 395 ("[W]e err if we see docket clearing as a primary goal of any form of ADR. Mediation processes should be designed to improve

with one another.[181] Although much is said about our overly litigious society, there are indications that, in fact, the court reforms have resulted in less, not more, litigation.[182]

Critics also argue that while ADR processes are cast as "alternatives" to appearing in court, they are merely a less visible way for the state to maintain authority.[183] While appearing benevolent, these processes may in fact mask a hidden agenda to maintain order.[184] The emphasis on preserving relationships rather than transforming them can be seen as undermining the struggle for rights waged by social justice movements.[185] While touting one advantage of ADR to be the informal and participatory way of dealing with disputes, this PR campaign may obscure the interest of the state in keeping

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the quality of settlements . . . . Assembly line coercive mediation may be efficient, but it is not good."); *see also* Menkel-Meadow, *supra* note 6, at 1871.

[181] *See* James E. McGuire & Frank E.A. Sander, *Some Questions About "The Vanishing Trial"*, DISP. RESOL. MAG., Winter 2004, at 17, 17–18 ("[T]he ADR community's interest in diverting disputes to its processes must also be recognized, raising the question of whether it has helped swing the pendulum too far . . . . [S]hould the ADR community help identify ways to save for trial those disputes where trials serve valuable interests?").

[182] *Id.* at 17 ("A new study shows a sharp decline in the number of federal trials between 1962–2002—from eleven percent to 1.8 percent in civil cases, and from fifteen percent to less than five percent in criminal cases.").

[183] CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 35 (1985) ("State Authority is not withdrawing from dispute resolution in periods of informal reform, it is being transformed . . . . Forms of therapeutic intervention in conflict resolution often blur the state's role in organizing these forums for building consensus and in defining what conflicts they will hear."). *Id.*

[184] *Id.* at 78.

> The Director of the Legal Service Corporation, Thomas Ehrlich . . . warned that there "is a danger, which we have seen, that the new forums will become institutionalized screening mechanisms for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public . . . ." Consumer and public interest groups shared this concern: access to *equal* justice may conflict with the other two goals of promoting harmony and maintaining public order.

Id.

[185] *Id.* at 89 ("To introduce labor-management mediation in this area [racial conflict], Alfred Blumrosen argued, was to undermine the efforts of the civil rights movement to mobilize legal resources for their political battles and erode the legal protections against racial discrimination and the remedies for those discriminated against.").

important issues out of the courts.[186] ADR professionals would do well to recognize the valid concerns of those who question the assumption that it is always preferable to avoid litigation.

IX. CONCLUSION

As we engage in the ongoing dialogue about mediation models within the profession,[187] we continue to explain the process to consumers and gatekeepers.[188] The first decision the consumer must make is an informed choice about whether or not to participate. This is a key moment of self-determination and should reflect participants' consideration of all necessary information, as an act of conscious intent. Mediators need to explain in a clear and efficient way, the boundaries of the processes they offer, to support parties' self-determination and mediator credibility. We must say what we do, and do what we say.[189] In addition to undermining self-determination, blurring processes diminishes the efforts to be recognized as a profession.[190]

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[186] *Id.* at 170 ("Informalism expands the capacity of the justice system to manage minor complaints and legitimates the extension of state intervention on functionalist grounds . . . . The new basis for legitimacy, functionalism, places a special emphasis on the role of participation in conflict management.").

[187] *See* Menkel-Meadow, *supra* note 6, at 1896–97 ("[I]t makes little sense to talk about ADR as if it was a reified unitary form. ADR consists of a wide variety of processes—each with increasing diversity in its variations—that merits discussion, examination and evaluation.").

[188] *Id.* at 1918–19.

> [A] growing number of states have required, either by formal rule or by ethics opinion, that lawyers inform their clients about different forms of dispute resolution, either when they are suggested by the other party, or as an independent obligation. Thus, lawyers will increasingly have to understand and embrace ADR enough to inform clients concerning the advantages such processes offer over more conventional forms of litigated solutions to problems.

Id.

[189] *See* Della Noce, *supra* note 16, at 557.

> [T]he field will have the opportunity—if not the obligation—to do what has not been attempted in any concerted way since the inception of court-connected mediation: to create (or re-create) court-connected mediation programs in explicitly theory-driven ways . . . . The chosen theoretical framework will guide the selection and qualification of third parties, the practices that are deemed competent and incompetent, and the policies that will promote effective use of the program and effective evaluation.

Id.

[190] *See* Philip J. Harter, *Federal Dispute Resolution Coming of Age*, DISP. RESOL. MAG., Winter 2004, at 26. Harter reviews JEFFREY M. SENGER, FEDERAL DISPUTE

Clarity about models would make it possible to uphold a set of ethical standards and practices the consumer can identify. Such clarity would also provide a basis for assessing the training and evaluation of mediators.

Riskin has presented us with a new set of grids to bring home the point that the mediator has influence.[191] Even if we agree that this influence ultimately rests on the consent of the parties,[192] without acknowledging this influence, mediators carry a hidden agenda.[193] Mediators cannot avoid bringing their experience, education and personal perspectives into the process.[194] Impartiality[195] between the parties and neutrality regarding the

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RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT (2004). Harter raises the issue of professionalism regarding Senger's suggestion that the government, to keep down costs may want to ask the mediator to reduce her or his fee. In addition, mediators are now trained in every government agency and these "in-house neutrals" are seen as coming for free. However, Harter points out the taxpayer is paying them about $100 an hour which is the same approximate cost for an outside professional. Harter also raises the question of the relationship between the mediator and the agency hiring them. He maintains that if the mediator is seen as a contractor, the agency doing the hiring has control over them. Harter's answer to this problem is that mediators must be treated as professionals. But, this begs the question of whether we, as professionals, *can* be neutral in such circumstances?

[191] *See* Riskin, *supra* note 5, at 38–46.

[192] *See* MOORE, *supra* note 37, at 17.

> The mediator's authority, such as it is, resides in his or her ability to appeal to the parties to reach an agreement based on their own interests or the past performance or reputation as a useful resource. Authority, or recognition of a right to influence the outcome of the dispute, is granted by the parties themselves rather than by an external law, contract or agency.

Id.

[193] *See* Grillo, *supra* note 109, at 1584–85.

> Mediators . . . exert a great deal of power . . . . The mediator also can set the rules regarding who talks, when they may speak, and what may be said. The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. This can make the parties feel less, not more, in control of the process and its consequences for their lives. There is much room for, but little acknowledgment of, the possibility of the mediator's exhibiting partiality or imposing a hidden agenda on the parties.

Id.

[194] Peter Reason & Hilary Bradbury, *Introduction: Inquiry and Participation in Search of a World Worthy of Human Aspiration, in* HANDBOOK OF ACTION RESEARCH: PARTICIPATIVE INQUIRY AND PRACTICE 7 (Peter Reason & Hilary Bradbury eds, 2001).

> Many writers and commentators are suggesting that the modernist world view or paradigm of Western civilization is reaching the end of its useful life. It is suggested that there is a fundamental shift occurring in our understanding of the universe and our place in it, that new patterns of thought and belief are emerging that will

outcome are only two forms of bias. The sum total of the life experience of the mediator, the subjective self, enters into each mediation and impacts the process and the outcome.[196] To deny this is to obscure the role and value of the third party.

A clear explanation of the model being used based on the norms being referenced supports self-determination of the parties. Transparency[197] regarding the model, information, strategies, and tools used can allow the mediator to influence participants and, at the same time, continue to support self-determination. Comparison of mediation models using Waldman's categories, and analysis of strategies used within those models, would also contribute to the ability of mediators to understand and convey the processes

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> transform our experience, our thinking and our action . . . Research in the West has been integral with a positivist world view, a view that sees science as separate from everyday life and the researcher as subject within a world of separate objects. . . . This is part of a modern world view based on the metaphor of linear progress, absolute truth and rational planning (Harvey, 1990). Seeking objective truth, the modern world view makes no connection between knowledge and power.

Id.

[195] See Grillo, *supra* note 109, at 1587.

> [I]n a very fundamental way, impartiality is a myth. It cannot exist in anything approaching a pure form, although we would like it to, and often we pretend that it does. The concept of impartiality is based on the notion of an observer without a perspective. But any observer inevitably sees from a particular perspective, whether that perspective is acknowledged or not. Mediators, like all other human beings, have biases, values, and points of view . . . . The proper role of these attitudes in mediation is and should be a subject of debate: should a mediator try to keep her own attitudes out of the mediation entirely, or should those attitudes be disclosed? When does disclosure become intrusive; that is, when is it something done to protect the mediator rather than to benefit the parties?

Id.

[196] See Kolb & Rubin, *supra* note 104, at 240. The authors indicate that there are lessons to be learned from international relations scholars, who have argued that

> in international relations at least, it is neither possible or necessary for third parties to be unbiased . . . . In the interdependent community of nations there is simply no place to retreat. Each nation is dependent, in one way or another, on every other nation; hence, each has an interest in particular outcomes and can never claim to be truly unbiased.

Id.

[197] See Menkel-Meadow, *supra* note 6, at 1897 ("At this early stage of development, full disclosure may be all that we can achieve, leaving it to the concrete cases, market forces, and common law system to explore the full legal and economic ramifications of different kinds of processes.").

they use.[198] This would reduce the danger of process abuses[199] and further the discourse on defining training[200] and best practices.[201]

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[198] Common Ground Negotiation Services, Charlottesville, VA offers a Continuing Mediation Education workshop entitled "Mediation Models: A Professional Conundrum," which presents five models. Participants form five role play groups, one for each model. Role players are asked to write an introduction based on their model and to role play that model. The five role plays are compared during the feedback session. In the group discussion, we are asking, "Have the different models produced different outcomes?" This is, of course, anecdotal, and hardly conclusive evidence of what would occur in a real mediation. The exercise is valuable, however, for mediators to look at what we do under a microscope of sorts. The goal is to examine the outcomes based on what we said we were doing. *See* Common Ground Negotiation Service, *at* http://www.commongroundnegotiations.com/workshops.html (last visited Mar. 18, 2005).

[199] *See* Grillo, *supra* note 109, at 1550.

> Voluntary mediation should not be abandoned, but should be recognized as a powerful process which should be used carefully and thoughtfully. Entering into such a process with one who has known you intimately and who now seems to threaten your whole life and being has great creative, but also enormous destructive, power.

Id.

[200] *See* Love & Kovach, *supra* note 30, at 299 ("As tests for mediator competence are developed, objective criteria and clear lines between processes are necessary to conclude what a passing grade or correct answer entails. An eclectic and amorphous process does not lend itself to the targeted learning objectives that effective teaching, training and service delivery require.").

[201] Lela Porter Love, *Twenty-Five Years Later with Promises To Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 OHIO ST. J. ON DISP. RESOL. 597, 606 (2002).

> We need more research, though we have made a good start, to develop useful theory . . . to address concerns raised by the impact of gender, culture or disability on participation in mediation. We need to know more about the dynamics of power . . . and the environments necessary to spark and support creativity . . . . We need to tie theory to practice by developing vivid, targeted training material.

Id.

Appendix A

COMPARISON OF MEDIATION MODELS

CONFLICT THEORY/MODEL	EMPOWERMENT OF PARTIES	BASIS OF AUTHORITY	CONTROL OF PROCESS	SUCCESS DEFINED BY
NORM GENERATING: Bargaining — Conflict is due to a difference in interests.	Interdependent equals engage in give-and-take bargaining based on their own self-interests.	Professionals in maintaining neutrality	Defines the experience of parties in a language of negotiation and exchange	Agreement based on parties satisfying their self-interests and recognizing their mutual interdependence
Therapy — Conflict is due to misunderstanding and failure to communicate.	Parties express and address the emotions blocking the agreement.	Experts in managing relationships based on social science research	Encourages expression of emotion converting it into a language of mutual relationship	A new view by parties of their own experience and values, and/or a new view of the relationship
Transformative — Individuals are social and relational conflict is a crisis in interaction.	Parties, given unfettered autonomy, have what it takes to resolve issues.	Experts as keepers of the frame, and in managing relationships through empathy	Alters parties' appraisal of the dispute and/or each other, by finding shared meaning	Mutual recognition by parties of the other's perspective and/or a gain in personal empowerment
NORM EDUCATING: Conflict is due to lack of information about personal and social values, and legal norms.	Information about, and consideration of, social and legal norms enhances party autonomy.	Experts in guiding decision-making by providing information regarding social and legal norms	Introduces information and/or urges parties to become informed and share information	Increased clarity of each party regarding issues, values and next steps
NORM ADVOCATING — Conflict is due to lack of adherence to social and legal norms.	Recognition of rights and responsibilities maintains society's interests and protects disenfranchised parties.	Experts in legal and social protective norms	Directs process so that parties can comply with the law	Agreements reached by the parties include their mutual obligations under the law

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Appendix B

ELEMENTS, STRATEGIES, AND CATEGORIES of MEDIATION

ELEMENTS

1. Self-Determination — Participants have the capacity and autonomy to make decisions based on informed consent;
2. Good Faith — Parties have the intention and authority to negotiate and disclose all relevant information;
3. Impartiality & Neutrality — The mediator has no preference for any one party and no stake in the outcome;
4. Balance of Power & Fairness — The mediator approximates an even playing field; settlements may reference social norms;
5. Confidentiality — Privacy between the mediator and all parties and of mediation itself, can be protected;

STRATEGIES

1. Establishing the frame/process of dialogue and negotiation and explaining the roles of the mediator and the parties;
2. Clarification of the issues through storytelling; drawing out common values and goals, and identification of issues;
3. Intervention through use of empathy, information, re-framing, resources and tools;
4. Shifting awareness of self-interests, by focusing on the present and the future;
5. Reality testing/ referencing social and legal norms;

ELEMENTS, STRATEGIES, AND CATEGORIES of MEDIATION

NORM ADVOCATING

Mediator informs parties about relevant social norms and laws. The parties decide to what degree they wish to incorporate the information into an agreement.

NORM EDUCATING

Mediator informs parties about relevant social norms and laws. The parties decide to what degree they wish to incorporate the information into an agreement.

NORM GENERATING

Mediator assists parties in formulating an agreement based on their personal norms and value systems.