Public Values and Private Justice: A Case for Mediator Accountability

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INTRODUCTION

Many lawyers are wary about mediation as an attempted alternative to adjudication. Some distrust arises from biases such as economic self-interest, unfamiliarity with the process, and a professional mind-set that considers legal problems only from an adversarial perspective—with one person’s gain necessarily implying another’s loss. Other critics raise concerns about the quality of justice in mediation. Private settlement can prevent needed legal developments on important matters requiring an authoritative public decision. Mediation may risk second-class private justice that further disadvantages the poor or powerless. When a mediated agreement avoids adjudication, traditional mediator neutrality undermines protection of the parties’ legal rights.

As public citizens and as officers of the legal system, lawyers have special responsibility for the quality of justice. Lawyers serve an important public

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2. See generally, Delgado, Dunn, Brown, Lee, Hubbert, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. REV. 1359 (1985) (noting that the general informality of alternative dispute resolution may allow prejudice to carry more weight than is the case in formal litigation, with its attendant procedural safeguards); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668 (1986) (noting that alternative dispute resolution is still a “highly speculative endeavor,” requiring further study before any final judgment is cast on its ability to “provide equal justice to all.”); Fiss, Against Settlement, 93 YALE L.J. 1073 (1984) (comparing settlement to plea bargaining, as a “capitulation to mass society, [which] should be neither encouraged nor praised”); Hazard & Scott, The Public Nature of Private Adjudication, 6 YALE L. & POL’Y REV. 42 (1988) (because justice is a fundamentally public notion, a system of private “justice” is only effective insofar as it replicates important characteristics of the public system of justice).
3. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) [hereinafter MODEL RULES]. See also, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1980) [hereinafter MODEL CODE] (“guardians of the law”); EC 8-1 (lawyers “especially qualified to recognize deficiencies in the legal system and to initiate corrective measures”; lawyers should support programs to improve the system).
function even in matters that will not become "grist for the mills of courts."  

Collectively, the profession must assess alternatives to litigation by the quality of justice afforded.  

When fulfilling its advisory role to courts and the legislature, the bar should help create an appropriate institutional structure for mediation. Individual lawyers can help establish or support mediation programs when confident that the specific program will both facilitate fair, acceptable results for participants, and give due regard to the public interest. Before advising clients to undertake mediation or assuming responsibility for mediation, the lawyer should evaluate whether or not the program has appropriate safeguards and determine whether or not the immediate dispute is a candidate for mediation.

This article addresses mediation of disputes that might otherwise be resolved through legal channels. The number and array of mediation programs to handle such disputes is mushrooming. Meanwhile, nagging questions of mediator accountability and ethics persist. The questions concern how to protect important values served in adjudication while facilitating private settlement. Various possible goals exist for mediation. In my view, two predominate: (1) preserving courts' essential role in providing a public forum for disputes and their authoritative resolution; (2) minimizing the effects of power imbalance on the quality of justice attained in mediation.

These goals raise many ethical questions when lawyers encounter mediation, whether in creating or supporting development of a mediation program, serving as a mediator or legal advisor, or in representing a client who participates in a mediation. In furtherance of these goals, I offer reforms in two areas. First, and most important, to clarify ethical restrictions for lawyers involved with mediation. Second, in response to theoretical criticisms I offer suggestions generally applicable to mediation programs that may displace adjudication.

I argue that when mediated settlement supplants public adjudication, the mediator is accountable for procedurally fair process and minimally fair substantive outcome. Procedural intervention to insure access to relevant information and independent advice is consistent with neutrality. The neutrality principle must be modified to protect public values jeopardized by the mediated settlement. As to substantive fairness, the probable litigated outcome should serve as a reference point; the parties are free to find a solution that better serves their personal values and concerns. The mediator, however, should refuse to finalize an agreement when one party takes undue advantage.
of the other, when the agreement is so unfair that it would be a miscarriage of justice, or when the mediator believes it would not receive court approval.\textsuperscript{7} Completed agreements failing this standard should be vulnerable to rescission for a limited period of time on request of a party or during public review. If rescission is not possible, the disadvantaged party should have recourse against the mediator for malpractice.

Many specific questions arise when lawyers create, serve, or support mediation. How can lawyers minimize risks when establishing new mediation programs? May a lawyer serve as "legal advisor" to mediation conducted by non-lawyers without aiding the violation of unauthorized practice restrictions? Does mediation constitute the practice of law? What ethical restrictions limit a lawyer serving as mediator? What is the proper role for a lawyer independently representing one party involved in mediation?

Part I of this article explains the traditional commitment to mediator neutrality, which I criticize for subverting public values that might otherwise be protected through formal adjudication. Part II addresses the current confusion around ethical issues. I agree with those who find ABA Model Rules Rule 2.2 ("Intermediary") fits poorly when applied to mediation as limited and analytically distinct representation of persons not already represented by the mediator. I propose adoption of a new provision to the ABA Model Rules to regulate the conduct of lawyers who mediate. Proposed Model Rules Rule 2.4 states general standards for mediation by lawyers, and suggests a higher standard of substantive accountability when the parties are not separately represented. I also argue for relaxing restrictions against aiding the unauthorized practice of law so that lawyers are free to assist mediation programs in providing parties with general legal information. Part III addresses systemic issues relating to mediation programs that may displace adjudication. I suggest three areas of possible reform: (1) develop criteria to screen and identify for special treatment disputes where mediation might be used in an effort to avoid adjudication; (2) expand upon the mediator's accountability for settlement outcome; and (3) create a workable system of public review.

I. MEDIATOR NEUTRALITY VS. ACCOUNTABILITY

The general criteria for testing the effectiveness of any dispute resolution process is whether or not it is prompt, inexpensive, and procedurally fair.\textsuperscript{8} Mediation is negotiation facilitated by a neutral third party to assist the par-

\textsuperscript{7} Id. at 25.
\textsuperscript{8} FED. R. CIV. P. Rule 1.
Participants in arriving at a mutually acceptable agreement. In evaluating mediation, commentators suggest additional criteria: Does it produce solutions that are final and satisfy the parties? Does it enable the parties to achieve their optimal preferences?

Questions exist as to whether the mediator is accountable at all for fairness, and, whether that accountability is limited to process, not outcome. According to traditional theory, mediator accountability is limited to procedural fairness. Questions of accountability versus neutrality address fairness in the abstract, while greater focus should relate to specific context. Accountability should vary with the nature of a dispute and the circumstances of mediation; for example, interpersonal and non-legal disputes handled through a community mediation program may still fit the traditional model. Conventional thinking maintains that mediator neutrality is "absolutely essential" to building the trust needed for the process to work. Classic neutrality maintains the mediator is both impartial and uncommitted to the outcome. The parties need assurance of the mediator's neutrality before disclosing their real concerns. Only then can the mediator help clarify the parties' objectives, identify potential zones of agreement, and orchestrate the negotiation to successful conclusion.

Under traditional mediation theory, mediator accountability is satisfied by a procedurally fair process that treats parties with dignity and respect, and that stops intimidating or abusive behavior. According to some, the mediator is also responsible for assuring access to relevant factual and legal information. Absent abuse of the mediation process, any settlement the parties agree to is deemed fair. Voluntary compliance is more likely when parties autonomously reach their own agreement. Although settlement might not be

9. S. Goldberg, E. Green & F. Sanders, Dispute Resolution 7 (1985) [hereinafter Goldberg, Green & Sanders].
10. Id. at 8.
14. Goldberg, Green & Sanders, supra note 9, at 91 (the goal of the mediator is not to impose an outcome, but rather to assist the parties to reach their own agreement).
the most desirable outcome, the settlement decision rests with the parties. The mediator is responsible to insure that parties “understand their choice and to explore with them their enlightened self-interest, but not to impose [the mediator’s] values on them.”16 Coercing the parties into an agreement the mediator deems fair is an unacceptable response to issues of power imbalance. Instead, the mediator’s ultimate recourse is refusal to file an agreement with the court.17

Opinions are split on the question and extent of mediator accountability. The issues are whether, when, and what intervention is proper to avoid a patently unfair agreement. The initial problem is definitional. Fairness is in the eyes of the beholder—fair compared to what? Should we look to the probable adjudicated outcome, or to what is the best result for the parties involved? After all, courts have limited ability to order relief and secure compliance. Concern for enforcement problems encourages judges to issue technical orders in absolute terms. To dictate fair mediated outcome as defined by the probable legal result ignores the cost, trauma and uncertainty of litigation. Where parties understand a predictable outcome they have likely bargained “in the shadow of the law,” with deviations reflecting individualized negotiation about unique concerns.18 The parties can reach an agreement that maximizes their individual preferences. Arguably the vague fairness standard is practically meaningless for the many mediable disputes with stakes too small or personal to litigate.

These arguments fall short of the mark. They cannot sustain the criticism that public values may be subverted by private settlement. A system of private justice is not necessarily subject to public assessment in the same way as public justice, which is intended to assist in the orderly maintenance of society.19 Settlement cuts short public airing of claims, including those implicating public values which may need authoritative resolution. A private truce, for example, can be bought to keep secret information the public needs to know. Formality in litigation exerts control over prejudicial bias and may equalize power disparities.20 Public justice aims for a fair trial and outcome,
and transcends the immediate parties; final decisions rest with an impartial decisionmaker applying societal standards, not private values. Private settlement prevents these safeguards from operating.

While these concerns exist regarding any private settlement, they have greater force in mediation. Without the aid of mediation, the parties could not reach agreement. The formal protections of adjudication and its furtherance of public values would otherwise come into play.

The extent of mediator accountability for fairness varies by whether or not the mediator is a lawyer, and by whether the parties are independently represented by counsel. Ethical restrictions on lawyer involvement in mediation are in a state of confusion. In the next section I propose adoption of a new rule specifically applying to lawyers who mediate, and encourage allowing lawyers to help lay mediation programs provide participants with accurate legal information about disputed matters.

II. PROPOSED ETHICAL STANDARDS

A. LAWYERS WHO MEDIATE

The legal profession is collectively accountable for systemic fairness because of its near-monopoly over legal procedures. As both officers of the legal system and public citizens, lawyers have a special responsibility for the quality of justice. The Preamble to the ABA Model Rules of Professional Conduct encourages lawyers to be "mindful of deficiencies in the administration of justice." Concerns over limited access to legal representation encourage law reform activities and devotion of "professional time and civic influence" to unrepresented persons.

A lawyer-mediator practices law in the sense of using legal knowledge to solve problems. Legal knowledge facilitates mediation. A dispute over re-

Concrete Co., 860 F.2d 1308 (5th Cir. 1988), modified, 895 F.2d 218 (1990) (even if preemptory challenge claimed to be made on racial grounds, the Equal Protection Clause does not require that the litigant challenging the juror be made to give a reason).

21. See Hazard & Scott, supra note 2, at 57.

22. MODEL RULES Preamble.

23. Id.

24. See MODEL CODE EC 3-5 (essence of lawyer's professional judgment is his ability to relate the general body and philosophy of law to a client's specific legal problem). See also Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 Ariz. L. Rev. 329, 335 n.20 (1984) (accepting the functional definition of a lawyer provided by the Model Code); Note, The Mediator Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations, 34 UCLA L. Rev. 507, 521 (1986) (a lawyer practices law when she aids others through the use of legal knowledge in problem solving).

Most ethics opinions discussing whether mediation constitutes the practice of law involve questions of a lawyer aiding unauthorized practice by a non-lawyer mediator. See infra text accompanying notes 69-76. See, e.g., R.I., Op. 87-3 (1988), reprinted in ABA/BNA LAW. MAN. ON PROF. CONDUCT 901:7801 (1988) (lawyer may limit practice to mediation and arbitration but may not
spective rights and obligations is legal in nature. In such cases, the lawyer-mediator cannot ignore the law's relevance or one's legal knowledge. The lawyer-mediator cannot avoid the higher accountability to approximate or improve upon the likely result of litigation simply by concealing one's status as a lawyer. Mediation skills are acquired and that career route pursued because deficiencies in the legal system create the professional opportunity.

Of course, if a dispute is essentially personal, this standard does not apply. When parties feud over intimate or other matters that are not usually decided in court, there is no settled law to use as a benchmark. Here, the mediator's status as a lawyer should have no bearing, as she is not engaged in the practice of law.

A neutral lawyer mediates disputes where separate lawyers for the parties are non-existent or play a limited role. When the parties are not independently represented, the lawyer-mediator represents them jointly in a limited capacity. When mediating a litigable dispute, the neutral lawyer is accountable to both the legal system and her clients. Discipline and malpractice liability should provide downside risks for failing to satisfy the obligation. Where the mediation substitutes for legal process, the neutral lawyer has a duty to protect the public value of fairness. The mediator should assure, therefore, that the parties have sufficient information to make informed decisions on whether to settle privately or proceed to court. The parties must understand their respective legal positions and what might happen in court. Lacking such information, they cannot test a proposed agreement against their own sense of fairness, which is the key to successful mediation.

Considerable debate surrounds ethical restrictions on mediation. Under the former ABA Code of Professional Conduct, which strictly regulated conflicts of interest, some state ethics committees prohibited lawyers from mediating or serving as legal advisors to divorce mediation. Other states

form association with non-lawyer to provide services); Tenn., Op. 83-F-39 (1983), reprinted in ABA/BNA LAW. MAN. ON PROF. CONDUCT 801:8107 (1985) (divorce mediation not involving legal advice or services nevertheless constitutes the practice of law; a lawyer may not offer divorce mediation services jointly conducted with non-lawyer). Cf. Md., Op. 80-55 (declined to address unauthorized practice questions in family mediation center; Attorney General or other appropriate authority could resolve). Where the only question involves when a lawyer can mediate a legal dispute, the ethics opinions assume that the lawyer is engaged in the practice of law. See also C. WOLFRAM, MODERN LEGAL ETHICS § 15.1.3, at 835 (1986) (states have defined unauthorized practice broadly and without precision).

25. For examples of neutral lawyering where the parties are fully represented by outside counsel, see id. at 330 n.3.


27. Id. at 357.

28. See, e.g., Md., Op. 80-55A (1981), reprinted in ABA/BNA LAW. MAN. ON PROF. CONDUCT 801:4303-04 (1984) (a lawyer may not serve as an "impartial advisory attorney" in a divorce mediation if there is a risk that her independent judgment will be impaired or of unauthorized practice by
allowed lawyers to participate, subject to restrictions.\textsuperscript{29} Rule 2.2 of the ABA Model Rules regulates lawyers serving as "intermediaries," but not necessarily those serving as mediators. Although the Rule text superficially appears to fit, the non-binding comments to Rule 2.2 states it "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer. . . ."\textsuperscript{30} Other ethics codes, such as those for arbitration in commercial disputes, may apply instead.\textsuperscript{31}

An intermediary differs from a mediator in that the intermediary tries to help existing clients solve their differences in a matter of joint concern. The undertaking is proper when the clients' common interests predominate so that "the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests."\textsuperscript{32} Rule 2.2 is intended to protect the clients in this situation.\textsuperscript{33} It is based on the idea of "counsel for the situation," which caused controversy in the confirmation hearings for Justice Brandeis.\textsuperscript{34} By contrast, a mediator is engaged for the limited purpose of trying to help parties resolve their dispute. Basic principles of mediator impartiality require that the mediator has no prior personal or professional relationship with a party.

Professional responsibility and mediation experts disagree about whether Rule 2.2 should apply to mediation. Some authorities are now apparently willing to use the rule, with additional guidance to fit the mediation context. Professor Charles Wolfram applies Rule 2.2 to mediation and proposes an analysis of its provisions.\textsuperscript{35} By contrast, a leading interpretive text on the


\textsuperscript{30} MODEL RULES Rule 2.2 comment 2.

\textsuperscript{31} Id.

\textsuperscript{32} MODEL RULES Rule 2.2(a)(2).


\textsuperscript{34} C. WOLFRAM, supra note 24, § 8.7.1, at 438 (1986); Frank, The Legal Ethics of Louis D. Brandeis, 17 STAN. L. REV. 683, 702 (1965).

\textsuperscript{35} See C. WOLFRAM, supra note 34, § 8.7.1, at 439-43 ("Rule 2.2 apparently uses the term
Model Rules now omits any reference to the mediation disclaimer. In mediation, the lawyer represents all parties, as contrasted with "the typical arbitration in which a lawyer serves as a neutral third party, but 'represents' nobody."36 Professors Geoffrey Hazard and Robert Hodes explain that an intermediary represents clients who, "though technically adverse, share a more compelling interest in reaching agreement as a group."37 The terms "intermediary" and "intermediation" are used interchangeably with "mediator" and "mediation." They cite recognized works on mediation as supplemental authorities.38

At least two state ethics opinions applied Rule 2.2 to mediation, either directly or by analogy.39 Compared to the many ethics opinions on mediation generated under the former Code, the lack of opinions interpreting Rule 2.2 might suggest that state ethics administrators assume that the rule itself provides adequate guidance.40 Washington and Oregon are notable exceptions: They have proposed or adopted a separate rule covering only mediation.41

[mediation] to cover any simultaneous representation of potentially conflicting interests if the object of the representation is to achieve an accommodation of the interests of the clients.


40. For example, when callers ask about mediation, the Wisconsin ethics hot line refers them to Rule 2.2. Telephone interview with Keith Kapp, Ethics Consultant, State Bar of Wisconsin (Oct. 16, 1990).

41. OR. DR 5-106 ("Mediation") provides:

(A) A lawyer may act as a mediator for multiple parties in any matter if:

1. The lawyer clearly informs the parties of the lawyer's role and they consent to this arrangement; and

2. The lawyer gives advice to a party only in the presence of all parties in the matter.

(B) A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it.

(C) A lawyer serving as a mediator may not act on behalf of any party in court nor represent one party against the other in any related legal proceeding.

(D) A lawyer shall withdraw as mediator if any of the parties so requests, or if any of the conditions stated and DR 5-106(A) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.

The Oregon rule avoids the "semantic debate over whether the lawyer-mediator represents neither or both parties by focusing on what a lawyer as mediator must do, rather than on how the
Mediation scholars express reservations. Professor Leonard Riskin opposes using Rule 2.2 for mediation because the concept of “representation” envisions a duty of undivided loyalty inconsistent with a neutral posture toward all parties.\textsuperscript{42} Professors Nancy Rogers and Craig McEwen interpret the disclaimer comment literally, and analyze mediation under \textit{Model Rules} Rule 1.7, the general conflicts provision.\textsuperscript{43} If strictly applied, Rule 2.2 imposes unrealistic constraints that would preclude many common and unobjectionable forms of mediation.

As written, Rule 2.2 contemplates a more expansive representation than that of the usual mediation. It assumes prior representation of both clients before undertaking intermediation, and thus properly imposes higher standards on the lawyer. Intermediation between clients is proper where a reasonable lawyer would find agreement is feasible, the clients are adequately

\begin{itemize}
\item role is characterized."
\item \textit{OREGON STATE BAR, ARBITRATION AND MEDIATION}, Chapter 18.14 (1987).
\item The proposed Washington Rules of Professional Conduct for Lawyers Acting as Mediators provide as follows:
\begin{enumerate}
\item \textit{Definition}
\begin{enumerate}
\item A. For the purpose of this code, mediation is defined as a process by which one or more persons help parties reach an informed and mutually acceptable settlement.
\item B. A lawyer shall be governed by the Rules of Professional Conduct.
\item C. Mediation does not constitute “intermediation” as defined in RPC 2.2.
\end{enumerate}
\item \textit{Disclosure}. Before commencing mediation the mediator shall ensure that:
\begin{enumerate}
\item A. The distinction between “legal representation,” “arbitration,” and “mediation” is explained, and the parties are informed the mediator does not represent any party during the mediation;
\item B. Each party is informed that they should obtain independent legal advice;
\item C. An agreement regarding the payment of fees is reached. In no event shall the mediator charge a contingent fee;
\item D. Any personal or professional relationship between the mediator and any party is disclosed;
\item E. The parties are informed that the mediation is confidential, and that the mediator will not reveal information conveyed during the mediation to non-parties unless agreed to by the parties or mandated by law;
\item F. Each party is informed that they may withdraw from mediation at any time.
\end{enumerate}
\item \textit{Advertising}. The mediator shall not make a false or misleading communication about mediation.
\item \textit{Professionalism}. The mediator shall be competent, diligent and impartial. The mediator shall not mediate a dispute where the mediator is not qualified by experience or training.
\item \textit{Ex Parte Contact}. The mediator shall not initiate or maintain \textit{ex parte} contact with any party regarding the substance or \textit{sic} the mediation without obtaining the consent of the other party or parties.
\item \textit{Withdrawal}. The mediator, after explaining the reasons therefore, may withdraw from the mediation if the mediator determines mediation is no longer appropriate.
\item \textit{Mediating with Non-Lawyers}. RPC 5.4 shall not preclude a lawyer and a non-lawyer from jointly mediating a dispute and sharing the fees therefrom.
\item \textit{Drafting Agreements}. The mediator may prepare documents which reflect the terms agreed upon by the parties.
\end{enumerate}
\end{itemize}

42. Riskin, \textit{supra} note 24, at 341-42.
informed of the potential risks and consent to the common representation. The lawyer must reasonably determine that the matter can be resolved "on terms compatible with the clients' best interests, . . . each client will be able to make adequately informed decisions . . . and . . . there is little risk of material prejudice" to either client's interests if the mediation fails.

An attorney must seriously assess the propriety of joint representation before seeking client consent. She must find that impartiality is correct for the situation and that it will not adversely affect any other responsibilities owed either client.

Only after advising each client on the implications of intermediation—risks, advantages and effect on privilege—may the lawyer obtain consent to the joint representation. During intermediation, she must consult with each client, providing information about factual, legal and equitable considerations to ensure adequately informed decisions. The lawyer must withdraw if either client requests, or upon failure of any condition for the joint representation. After withdrawing, the lawyer may not represent either party concerning the dispute.

These basic principles similarly apply when parties ask a mediator to help them resolve their dispute. Where the lawyer has no prior relationship with either party, however, Rule 2.2 may impose unreasonably high standards that prevent lawyers from mediating or acting as legal advisors to mediation. Given the very limited professional undertaking, the lawyer-mediator probably lacks sufficient information to determine whether the mediation is proper. Many lawyer-mediators avoid private caucuses out of ethical concerns, and a party is unlikely to disclose in open mediation sessions private information indicating whether resolution is in her best interests. Nor can the mediator

44. See also Model Rules Rule 1.2(c) (allowing a limited scope of representation).
45. Model Rules Rule 2.2(a)(2). Comment revisions are warranted. Besides clarifying the coverage issue, a second comment overly restricts when mediation is allowed. A lawyer cannot undertake mediation if contentious litigation is imminent or if contentious negotiations are contemplated. If applied literally, this comment would eliminate mediation by a trained lawyer in many situations where it is most valuable. The legitimate conflict of interest question concerns whether the limited joint representation can adequately protect both clients' interests. Successful mediation allows venting of hostility so the parties can generate options addressing the underlying concerns. Initial contentiousness should not preclude representation unless the lawyer reasonably doubts that mediation will succeed. Instead, this comment furthers the adversarial presupposition from the Code. See Note, supra note 24, at 516-17 (discussing whether mediation activities for non-clients are covered by Rule 2.2); Riskin, supra note 245, at 350-52 (suggesting the ABA Standards have an adversarial perspective and are too rigid an interpretation of Rule 2.2).
46. Model Rules Rule 2.2(a)(3).
47. Model Rules Rule 2.2(a)(1).
49. Model Rules Rule 2.2(c).
50. Continued representation of either client after mediation fails violates the lawyer's continuing duties to a former client. See Model Rules Rule 1.9.
be sure that the attempted mediation presents no material risks of prejudice.\textsuperscript{51} "Agreements not to disclose, subpoena, or offer in evidence information conveyed during a mediation . . . do not fully protect those data from disclosure."\textsuperscript{52}

Court-annexed and community mediation programs present unique problems in complying with Rule 2.2. In court-annexed programs, participation may not be completely voluntary. Thus, the mediator may feel pressured to continue the mediation after one party has requested that it stop, or after other indications the mediation should cease. Full conflicts screening may be practically impossible in programs where lawyers volunteer to serve and are assigned specific disputes with identified parties only at the appointed time for the mediation.

The ABA should adopt a new rule governing only mediation. Proposed Rule 2.4 would apply when a lawyer undertakes to mediate a dispute between parties not previously represented by the lawyer. It regulates the conduct of lawyers serving as mediators, whether on paid or volunteer assignments. It starts with the proposition that a lawyer who mediates is engaged in the practice of law on behalf of the mediation clients. The actual text does not use the word representation, however, because ethics committees are split on the issue, and some fear this label could trigger remote consequences.\textsuperscript{53}

\textbf{Proposed Model Rule 2.4}

\textit{Mediator}

(a) A lawyer may act as mediator to resolve a legal dispute between parties, separately represented or not, subject to the following conditions:

\begin{enumerate}
\item the lawyer reasonably believes that the mediation can be undertaken impartially.
\item the lawyer reasonably believes the dispute is suitable for mediation and the parties are able to participate effectively and to make adequately informed decisions.
\item the parties are reasonably informed about the mediation process, including the advantages and risks involved and the potential effect on the attorney-client privilege, and each party consents to participate.
\end{enumerate}

(b) When the parties are not separately represented, the mediator should provide them with sufficient information about the law and its possible application so that each party can make adequately informed decisions. Explanation of the applicable law shall occur in the presence of both parties to the mediation.
(c) When the parties are not separately represented, the mediator may prepare a written agreement resolving the dispute subject to the following conditions:

1. the terms approximate a likely adjudicated outcome, or the parties are adequately informed and voluntarily agree to different terms;

2. the parties are informed of their right to seek independent legal advice, and urged to do so when the agreement addresses important legal rights;

3. the lawyer may not knowingly finalize an agreement reasonably believed to be illegal, grossly inequitable, or based on false information.

(d) The lawyer shall not communicate privately with any party regarding the substance of the mediation without obtaining the consent of all parties to the mediation. The content of private meetings is confidential and may not be disclosed to the parties without express consent of the party making the confidential disclosure.

(e) The lawyer shall withdraw and terminate the mediation on the request of a party or if any of the conditions stated in paragraph (a) is no longer satisfied. The lawyer may terminate the mediation if it is determined that mediation is no longer appropriate. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.

Proposed Rule 2.4 is a specific application of other, more general provisions. It is premised on the concept of limited representation specifically authorized by Model Rules Rule 1.2(c). By contract entered into at the beginning of a representation, a lawyer may limit the scope of representation with client consent after adequate disclosure. One may not, of course, disclaim obligations to perform the services competently. Model Rules Rule 1.1 requires reasonably necessary legal knowledge, skill, thoroughness and preparation. At a minimum, the lawyer should have suitable training before agreeing to mediate.

The amount of legal knowledge and preparation required can vary with the context. If serving as a volunteer in court-annexed programs to facilitate settlement of small disputes, the mediator’s general knowledge of the substantive law will probably suffice. If, however, the lawyer is specially retained by parties to mediate their dispute, she is properly held to a higher standard of familiarity with the applicable law.

The limited scope of representation highlights the importance of the clients’ control over the objectives of representation. The mediator’s task is to
facilitate the parties’ effort to reach a their own, satisfactory resolution. The mediator uses technical skills and legal knowledge to aid the negotiations.57

The extent of obligations assumed will vary, depending on whether the parties engage independent counsel during the mediation or to review the proposed final agreement. If neither party is separately represented, the mediator represents them both in a limited capacity, and Proposed Rule 2.4 applies in full.

Before accepting the mediation, a lawyer must evaluate potential conflicts under Model Rules Rule 1.7(b).58 Might the representation of either party materially limit the lawyer’s responsibilities to the other? If so, the lawyer should decline unless she reasonably believes neither party’s interests will be adversely affected, and both clients consent after adequate consultation. Many community or court-annexed programs handle large volumes of cases with small stakes and no overriding public interest. One must consider realistically whether the parties’ divergent interests are sufficient to warrant independent counsel, and whether retaining separate lawyers is feasible. If not, the mediator’s role as neutral lawyer may be the parties’ only chance for legal assistance to find an acceptable solution.

Proposed Rule 2.4 articulates the neutral lawyer’s obligations. Part 2 of the Model Rules addresses the lawyer’s role as counselor as distinguished from advocate. The mediator must clarify her non-partisan role. A neutral lawyer should provide legal information jointly to the parties in a non-adversarial fashion. This will help them understand their legal positions and the associated uncertainties.59 Professor Riskin argues that the neutral lawyer should aim for an agreement which does not violate minimal standards of societal notions of fairness.60 While this suggestion provides a good start toward increasing mediator accountability, it does not state a meaningful standard for potential discipline, civil liability or court review. For theoretical purposes addressed more fully below, I propose instead a standard that the agreement approximate or improve upon the probable outcome of litigation. This incorporates the relevant substantive law and difficulties of proof, while acknowledging that personal preferences may result in an optimal pri-

57. Model Rules Rule 1.2(a). The mediator may not impose her own values by pressuring the parties for specific settlement terms. It is proper, however, for the mediator to consider public interest in adjudication during the screening stage. The mediator must inform the parties of relevant law so that any deviations from a probable litigated outcome are voluntary but within legal bounds. Proposed Rule 2.4(c)(3) prohibits the lawyer from finalizing an agreement reasonably believed to be illegal, grossly inequitable or based on false information. Issues of accountability to the legal system dictate some minimum floor of fairness; this is determined by a legal standard and does not lie purely with the lawyer’s subjective assessment.
58. Model Rules Rule 1.7(b).
59. Riskin, supra note 24, at 335-36.
60. Id. at 354.
Private settlement at odds with probable legal outcome. In undertaking to mediate a dispute capable of legal resolution when the parties are not independently represented, the lawyer mediator assumes a responsibility to tell the parties enough about the applicable law and its uncertainties to ensure that their settlement decision is adequately informed.

Imagine, for example, a divorce mediation in which one spouse is willing to give the other a generous settlement so that she or he can quickly re-marry and alleviate guilt feelings associated with the dissolution. The mediator should accurately explain the applicable law and its probable application to their situation. The agreement should state the parties are adequately informed about the relevant law, briefly allude to the personal preferences responsible for the variance from the probable legal outcome and that they voluntarily enter the agreement because of their personal preferences.

Proposed Rule 2.4(c) defines a lower standard for disciplinary purposes. A neutral lawyer serving as mediator may only prepare a written agreement when:

(1) the terms approximate a possible adjudicated outcome, or the parties are adequately informed and voluntarily agree to different terms.  

(3) the lawyer may not finalize an agreement reasonably believed to be illegal, grossly inequitable, or based on false information.

The theoretical standard of "probable" legal outcome is relaxed to "possible adjudicated outcome." Inherent difficulties in predicting final outcome require more latitude for the mediator.

Only subsection (d) and the screening obligations in Proposed Rule 2.4(a) would apply where parties are independently represented. Here the mediator is accountable for procedural, and not substantive, fairness. The mediator must assure a fair process, free of abusive behavior that coerces settlement favoring the stronger party. Less accountability is warranted because the parties retain a mediator only to facilitate negotiation, and expect no legal information. Here there is no representation; civil liability should ensue only for failing to ensure the process is fair. This standard should apply whether or not the mediator is a lawyer.

61. Emphasis added.

62. This standard is similar to that proposed in Note, The Sultans of Swap: Defining the Duties and Liabilities of American Mediators, 99 HARV. L. REV. 1876, 1886-94 (1986) (a lawyer's brief and limited role at the periphery of litigation does not rise to the level of "representation" which triggers future disqualification). The mediator has a general duty of procedural openness "to ensure that neither disputant was allowed to abuse the contractarian process." Id. at 1886. A material breach entitles the injured party to seek rescission and restitution from the other party, but not necessarily damages from the mediator.

Equitable and policy considerations of proximate cause should limit mediator liability to those cases where breach caused detrimental reliance or consequential harm apart from ill-formed con-
Other Model Rules also apply to mediation by lawyers, regardless of whether the parties are independently represented. *Model Rules* Rule 1.9 governs when a lawyer may assume a representation adverse to a former client.\(^63\) If a matter is substantially related to the former representation, so that confidences were likely shared, the lawyer may not assume the new representation without client consent. Before a lawyer can mediate a dispute involving a former client, informed consent is required from all parties to the mediation.\(^64\) Proposed Rule 2.4(d) makes explicit this principle for the neutral lawyer. Should the mediation fail, the lawyer must terminate all involvement with the dispute. Neither party should run the risk that the mediator will later serve as a partisan for the other.

*Model Rules* Rule 1.10 provides for imputed disqualification of the lawyer's firm.\(^65\) Imputed disqualification does not create an onerous burden, particularly where a firm's lawyers regularly engage in compensated mediation. Data that screens out conflicts in mediation can be added to the screening mechanisms customarily employed for other representations. Furthermore, when lawyers participate in court-annexed or community mediation programs, the mediation is often short-lived—resolved in an hour or less. Principles of limited representation and peripheral involvement should limit the risk of wholesale imputed disqualification.\(^66\) As a practical matter, the neutral lawyer has an extremely limited opportunity to obtain any confidential information. If the mediation succeeds, the dispute is ended by agreement. If it fails, it is not too much to ask the mediator's law firm to decline representing either party in the ensuing litigation.

Additional minor amendments are warranted. *Model Rules* Rule 1.5 generally regulates lawyers' fees; proposed subsection (d) prohibits contingent fees in criminal defense and divorce representations.\(^67\) Mediation should be included in Rule 1.5(d). Contingent fee agreements create an untenable conflict between the mediator's economic self-interest and the parties' interest in finding their own preferred resolution. To allow development of interdisci-
plenary mediation teams, some provision should be made regarding fee-splitting with non-lawyers and aiding in the unauthorized practice of law. Co-mediation can provide disputing parties with the best of both worlds: accurate legal information and the interpersonal skills and insights of a mental health professional. The fee-splitting question could be handled either by classifying both mediators as independent contractors, with separately charged fees, or as an exception to the general restriction embodied in Rule 5.4.

B. WHEN NON-LAWYERS MEDIATE

For non-lawyer mediators, accountability raises delicate unauthorized practice issues. They are hard to assess because genuine concern for the public counterbalances economic concerns.

Most mediators are non-lawyers; many serve as volunteers. Many mediation professionals come from other disciplines such as mental health and social work. They often are trained in interpersonal skills and are better equipped to mediate relational problems than most lawyers. Dispute resolution specialists have forged a distinct professional category, with a resulting pressure to expand and solidify their position. As lay mediators encroach upon areas traditionally handled by lawyers, the legal profession may perceive it as an economic threat. Antitrust questions should discourage the bar from taking positions unjustified by the public interest. Unauthorized practice inquiries must properly focus on whether consumers are harmed when a non-lawyer performs services that a lawyer might do.

Private mediation of legal disputes outside litigation can affect important legal rights. A party cannot evaluate the fairness of an option without minimally adequate information about the law. Mediation that does not assure each party has such information is likely to reinforce existing disparities in knowledge, resources and power. Unauthorized practice rules prohibit non-lawyers from giving legal advice and drafting legal documents. Therein lies the dilemma. The mediation process must accommodate the parties’ need for information with the mediator’s limited ability to give complete and accu-

68. See Or., Op. 488 (1988), discussed in ARBITRATION AND MEDIATION, supra note 41 (if lawyers and non-lawyers are to work together as family mediators, they must work as independent contractors who bill separately for those services).

69. See Proposed Washington RPC for Lawyers Acting as Mediators, supra note 41, Comments at 7 (narrow exception to reflect reality of co-mediation; poses no threat to standard of independent professionalism).

70. See generally Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L. Q. 107 (examining the four basic models of non-judicially referred divorce mediation and the ethical problems they pose).

rate information. Restrictions against lawyers assisting another's unauthorized practice should be narrowly construed. Better informed parties are more likely to reach optimal, reasonably fair agreements. Lawyers should be encouraged to prepare brochures or video-tapes and to act as legal advisors to mediation teams without risking discipline for aiding in the unauthorized practice of law.\textsuperscript{72} Such involvement outside the context of representation better responds to the parties' need for accurate legal information.\textsuperscript{73}

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

By contrast, divorce mediation requires that the parties have more precise legal information on such issues as the normal terms of separation, support, child visitation and taxes.\textsuperscript{74} Public concerns warrant greater lawyer involvement, whether as part of a mediation team\textsuperscript{75} or as independent counsel reviewing proposed agreements.\textsuperscript{76} Besides these informational safeguards, official supervision and review of agreements should confirm that they satisfy minimal standards of societal fairness.\textsuperscript{77}

Mediation is now firmly established as a mechanism for resolving disputes without complete adjudication on the merits. To avoid charges that the ethical rules operate as illegitimate protectors of economic interests, the rules should be revised to accommodate lay mediation. Clearer ethical rules will enhance development of mediation programs which strike the proper balance between the values favoring private settlement and those concerned with protecting legitimate legal claims. Further, lawyers who mediate need clear guidance on the applicable law so they can better serve their mediation clients. Parties are more capable of making informed settlement choices if lawyers are encouraged to provide legal information for use in mediation.

The following section suggests additional safeguards which might be insti-


\textsuperscript{73} \textit{See generally} Rogers & McEwen, \textit{Mediation and the Unauthorized Practice of Law}, 23 \textit{MEDIATION Q.} 23 (1989) (outlining the themes and reasoning of the court precedents dealing with the unauthorized practice of law by mediators).


\textsuperscript{75} Or., Op. 488 (1983).

\textsuperscript{76} Professor Riskin criticizes the ABA Family Mediation Guidelines for placing too much emphasis on independent, partisan representation. This can impede neutral lawyering. Riskin, \textit{supra} note 24, at 351.

\textsuperscript{77} Edwards, \textit{supra} note 2, at 671-72; Riskin, \textit{supra} note 24 at 360.
Mediator Accountability

Instituted to protect the public value of adjudicating important claims, and to protect against power imbalances. They are offered to further debate on mediator accountability for fairness.

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

Mediators intercede to facilitate an agreement the parties could not reach on their own. If it produces agreement, the mediation may substitute for public adjudication, often a desirable and appropriate end. When mediation intercedes to settle a legal dispute, additional safeguards are needed to protect for two important values at risk with private settlement: public values of fairness and authoritative public resolution of legal conflicts. The mediator is properly held to a higher standard of accountability. The process should enable both parties to obtain relevant information about the law and how it might apply to the instant facts. When disparities in power or knowledge disable a weaker party from effective bargaining, the mediator must intervene to avoid a patently unfair agreement at odds with the probable outcome of adjudication. Finally, these mediated agreements should receive meaningful public review to confirm they are within legal bounds and do not subvert important public values.

A. SCREENING FOR MEDIATION SUITABILITY

Although the mediation process is widely adaptable, not all disputes should be mediated. Disputes should be carefully screened to determine if they are suitable for mediation. Meaningful screening requires consideration of certain questions. First, what are favorable conditions for successful mediation? Which disputes are good candidates for mediation, taking into account public values of fairness and the need for authoritative determination? Which disputes are inappropriate for mediation because they involve matters of public importance or require the formal protections of adjudication?

A main object of mediation, Professor Lon Fuller observed, is to make parties aware of the social norms applicable to the relationship, and to persuade them to accommodate to the structure imposed by those norms. This assumes the applicable norms are both known and discoverable. In practice, often norms are created through the structured mediation process.

A heavily interdependent relationship between two persons exerts internal

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78. Fuller, supra note 37. A more limited objective of simply reaching an agreement that is good for, or acceptable to, the parties is problematic. Though consistent with mediation theory of party autonomy, it ignores knowledge and power differentials that, unaided, may distort outcome. By incorporating relevant social norms, the mediation must address how the legal system might regard the dispute.

79. Id.
pressure for agreement; mediation can therefore resolve bargaining impasses by reorienting the relationship, and direct the parties towards a new shared perception based on mutual respect, trust and understanding.

Where the law is settled, and can be adequately explained to the parties, mediation can guide their efforts towards agreement that approximates or improves upon articulated social norms. By contrast, if the dispute involves important unsettled questions of law, private mediation can subvert public values protected through formal adjudication.

Courts may not be the best avenue for obtaining the desired relief. Claims which previously received generous protection in the courts may now fail if pressed through adjudication. Pre-trial mechanisms to refer cases to dispute resolution processes should be sensitive to when such processes are likely to be helpful, and when they are not. Because some mistaken referrals are inevitable, a compulsory program should also include procedures for exempting cases unsuited for the program. A recent policy statement of the Society of Professionals in Dispute Resolution (SPIDR) recommends programs for mandatory referrals should provide for timely consideration of motions for exclusion. Thus, a party may ask to be excused if the interests of justice would not be served by mandatory referral. Relevant considerations include the public interest in outcome, novel issues of law, and the parties' ability to participate effectively in the process.

Consider, for example, a civil rights claim presenting a novel question of law. In the abstract, plaintiff's counsel might desire an authoritative ruling protecting the asserted right. Realistically, it is much more difficult to obtain a favorable ruling on the merits in the federal courts today than in prior

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

81. See Rogers & Salem, supra note 11, at 41-59 (providing working guidelines for a lawyer to use in determining whether a client's dispute should be referred to mediation). The long list of indications and contra-indications primarily relate to the client's concerns, and not to issues of fairness or the public interest in having an authoritative, public determination.

82. Fuller, supra note 37, at 325.

83. See Mandated Participation and Settlement Coercion: Dispute Resolution As it Relates to the Courts, (approved by the Board of Directors of the Society of Professionals in Dispute Resolution, Jan. 5, 1991) [hereinafter Mandated Participation] at 23 (mandatory referral system should avoid including cases in which dispute resolution process is unlikely to be helpful). See also, Note, Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Process, 103 Harv. L. Rev. 1086 (1990).

84. Mandated Participation, supra note 83.

85. Id. Recommendation 6.

86. Id. at 24.
years. Meanwhile, the client may simply want practical relief for the immediate situation. If the compulsory court referral system sent such a case to mediation, plaintiff's counsel should confer with the client about the objectives sought to be attained. If plaintiff primarily wants relief for the immediate problem, and cares little about creating precedent for the future, then the plaintiff should participate in the mediation. If, however, plaintiff agrees with counsel that the legal principles are of overriding importance, they should move for exclusion from mediation.

Sexual harassment claims provide a good example. Developing case law seeks to define limits of institutional liability. The personal nature of sexual harassment cases and adverse publicity generated by such conflicts could tempt efforts at private mediation. If the problem has progressed to the point where the victim has suffered a specific, legally cognizable harm such as an adverse employment decision and has retained counsel, together they can decide whether to participate in mediation or litigate the matter. In the abstract, the unsettled state of public law may render mediation inappropriate. On the other hand, counsel's participation in the mediation may effectively protect against power imbalances and private prejudice. 87

Contrast the use of private mediation in an institutional setting to prevent problems from becoming legal claims. Suppose the sexual harassment victim complains internally about the problem. Perhaps mediation can resolve the problem by separating the responsible person from the victim and putting the perpetrator on notice that the employer will not tolerate further incidents. On the other hand, traditional mediator neutrality might produce only a compromise of the immediate situation. If the employer is not put on notice, a question of institutional responsibility is submerged by the private agreement. Particularly where the victim is not represented by counsel, the private settlement likely reinforces existing power disparities.

The failure to put the employer on notice of the problem could seriously prejudice any future claim of liability if the problem persists. If the employer provides in-house programs to address internal problems, the mediator is in a delicate position. Where the mediator is also an employee, her neutrality might be compromised because of institutional concerns to avoid future liability. In this situation, involving a nascent legal claim, the mediator should caution the parties to consult with counsel before entering an agreement. Additionally, I suggest that any private agreement can only be confidential as

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87. See Edwards, supra note 2, at 675-82 (important public values such as equal justice under the law may be compromised in the name of increase access to dispute resolution and judicial efficiency); see generally Delgado, Dunn, Brown, Lee, Hubbert, supra note 2 (because of the informal setting of alternative dispute resolution and because of the lack of procedural safeguards that exist in the courtroom, minority disputants may be at an even higher risk of discrimination than in court).
long as it works to resolve the problem between the parties, and there are no subsequent allegations of harassment against the same person. If later incidents occur, the employer must receive notice sufficient to trigger its legal duty to take corrective action.\(^8\)

Mediation can help re-orient a relationship whose internal affairs are unsuited for a system of act-oriented rules.\(^6\) A conflict may be so personal or involve such small stakes that the legal system cannot resolve the problem. For example, nonviolent disputes in an ongoing marriage or between neighbors can badly disrupt relationships. Resort to the law probably will worsen the situation by solidifying positions and increasing hostility levels. Mediation can help the parties adjust their perspectives to find an acceptable common ground for peaceful coexistence.

Polycentric disputes involving complex and multi-faceted problems are also inappropriate for adjudication. Through mediation parties can create norms which address the issues better than a clumsy adjudicated result based on act-oriented rules.\(^9\) For example, environmental disputes involve competing claims of government regulators, environmental advocacy groups, industry, local community needs and affected property owners. Litigation could tie-up a project for years on procedural matters peripheral to the merits of the dispute or the impact of the problem on the environment. Mediation among all interested parties may enable a compromise addressing substantial issues eluded by protracted litigation.\(^9\)

Private disputes between parties of relatively equal power are good candi-

\(^8\) Mediation of sexual harassment may be appropriate in the employment context, but not in an educational setting. Contra Rifkin, Mediation From a Feminist Perspective: Promise and Problems, 2 J. LAW & INEQUALITY 21, 29-30 (1984) (approving use of mediation in a context where a student was offered, and declined resort to an \textit{ad hoc} hearing procedure on sexual harassment). Arguably the university's formal hearing procedure is important, both as a precursor to the articulation of public values through formal adjudication, and in its own right. It forces hearing panel members to identify institutional values relating to harassment, which in turn push for formal clarification of what conduct is unacceptable. In mediation a harassment problem may stay hidden, risking recurring incidents. The hearing procedure better serves institutional values. It grabs the attention of the person against whom the complaint is made more effectively than informal, relatively friendly mediation. It provides due process and fact-gathering to protect against professional taint arising from the allegations. If the allegations are substantiated, the outcome can provide meaningful remedies for the victim, and produce educational reform efforts extending beyond the immediate parties. Mediation may produce acceptable results for the parties themselves, but institutional interests in education and deterrence are lost.

\(^6\) Fuller, \textit{supra} note 37, at 330-31.


\(^9\) Edwards, \textit{supra} note 2, at 673; See Fuller, \textit{supra} note 37, at 334-37 (discussing the problem and solution of fairly allocating water to farmers). \textit{See generally} V. Huser, Presentation at University of Oklahoma Law Center (Jan. 30, 1986) (describing environmental mediation process and success stories) (unpublished manuscript; copy on file with author).
dates for mediation.92 If the dispute is truly private, no important public values will be compromised or subverted through settlement. Claims inappropriate for mediation concern constitutional questions needing an authoritative decision on the respective obligations of the government and its citizens. The mediation question may present a conflict of interest between the client and her counsel. When a lawyer's first commitment is to obtain institutional reform on public interest issues the lawyers' desired end may urge for adjudication to obtain favorable precedent. Where the client cares less about institutional reform than obtaining discrete relief for the immediate problem, the client's objective of representation must prevail.93 Public adjudication is needed "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."94

Some disputes appear private, but raise important public concerns that could be subverted by purely private settlement. For example, settlement of certain products liability claims could impede needed legal developments or suppress information of threats to public health.95 Economic incentives may compel generous private settlement in order to avoid risk of adverse precedent or negative publicity. A claimant may stand to receive excessive remuneration at the expense of the public interest and non-party third persons. These cases may be suitable for mediation only if an adequate checking mechanism were in place. Private settlements undoubtedly present the same risk of selling short the public interest in favor of a generous settlement to the plaintiff.96 Mediation compounds the problem. The parties could not reach private settlement; presumably they are ready to litigate. Mediation pushes them further to consider private settlement. Typical mediation of civil matters omits any protection for unidentified and absent third parties and the public interest.

A lawyer will have a conflict of interest when settling a matter for a private client if the claim involves issues of substantial public importance. But the issue arises in any private settlement, whether or not settlement results from mediation. Many settlement agreements routinely include confidentiality

92. See generally, Edwards, supra note 2, at 679; Delgado, Dunn, Brown, Lee, Hubbert, supra note 2, at 1402-03.
93. MODEL RULES Rule 1.2(a). See also, Maute, supra note 48; Bell, Serving Two Masters: Integration Ideals and Client Interest in School Desegregation, 85 YALE L. J. 470 (1976).
94. Fiss, supra note 2, at 1085.
95. Edwards, supra note 2, at 671-2.
96. The problem is compounded by provisions routinely included in civil settlement agreements to preserve secrecy of the settlement terms and seal the court records. Increasing criticism focuses on harm to the public interest from such provisions. See Kolbert, Chief Judge of New York Urges Less Secrecy in Civil Settlements, N.Y. Times, June 20, 1990, at A1, col. 3.
provisions, which seal the court records to prevent public disclosure. Traditionally, the litigator owes the client a duty of "zealous representation." Arguably this requires plaintiff's lawyer to obtain the highest possible settlement without regard for the public interest. But the plaintiff is not entitled to receive an unjustified gain at the public's expense when settlement includes a premium unrelated to plaintiff's harm, or to avoid adjudication and public disclosure. Overcrowded court dockets in practice mean the settlement terms receive little examination by the presiding judge. Current reform proposals would make it more difficult to seal civil court records of cases with important public implications.

The mediator must assess whether the disputing parties are suitable candidates for mediation. The question is whether they can deal fairly with each other: Do the parties participate voluntarily? Are they prepared to deal honestly and fairly in the mediation? Can they communicate effectively with each other, follow what is happening in the mediation process, and make good use of outside support as needed?

Relative parity in bargaining power largely avoids the public concern for fair resolution of essentially private disputes. Mediation between a person or institution of inferior status and one of superior status risks an agreement dictated by the stronger party. Compromise is only an equitable solution between equals; between unequal parties, it "inevitably produces inequality." Mediation is no haven for the poor or powerless. Stripped of adjudication's formal protections, the private context leaves the weaker party vulnerable to prejudices and coercion. The outcome may reflect more the stronger party's choice than mutual understanding and good faith comprom-

97. Id.
98. See Model Code EC 7-19, EC 7-1 (EC 7-19 not explicitly carried forward to the Model Rules).
99. See generally Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083 (1988) (lawyers should exercise judgment in deciding how to represent client, and should seek to "do justice." Where a decision is legally questionable but not subject to meaningful administrative or public review, the lawyer should refrain from taking the position).
100. Kolbert, supra note 95.
101. See generally Training Materials, supra note 3, at 21-2.
102. If the parties are business competitors in a highly concentrated market, private settlement incurs the risk of antitrust liability; therefore mediation is contra-indicated. Conversely, it is also inadvisable when the client cannot effectively represent her own interests and will not be represented by counsel during the mediation sessions. Rogers & Salem, supra note 11, at 51-52, 55.
103. Fiss, supra note 2, at 1076-1078; Hazard & Scott, supra note 2, at 54-5.
105. See Delgado, Dunn, Brown, Lee, Hubbert, supra note 2, at 1391. "Informal settings allow wider scope for the participants emotional and behavioral idiosyncrasies; in these settings majority group members are most likely to exhibit prejudicial behavior. Thus a formal adjudicative forum increases the minority group member's sense of control and, therefore, may be seen as the fairer forum." Id.
In mediation the lack of formal protections will likely reinforce the imbalance of power.

When screening out unsuitable disputes for mediation, court administrators and mediators should resolve doubts against those involving significant power disparities. Independent counsel for the weaker party might help equalize the situation. On the other hand, where the dispute is highly charged emotionally, counsel may not be able to adequately protect the client. If a client is unduly susceptible to settlement pressures and is incapable of speaking up for her own interests, the lawyer should perhaps advise against mediation.

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

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

Conversely, the following items are negative indicators for mediation:

1. When the dispute involves important unsettled questions of law affecting the public interest and authoritative public adjudication is needed.
2. Where there are substantial differences in respective power, bargaining ability or vulnerability of parties to private negotiation pressure which cannot be corrected through mediation process, supplemental information or independent legal advice.

Consider, for example, the litigation in *Brackenbury v. Hodgkin* as a prime candidate for mediation. Mrs. Hodgkin, an aging widow, asked her daughter and son-in-law to move from Missouri to Maine so they could care for her and the family farm. Her letter closed by way of postscript with "you to have the place when I have passed away." The family relationship determi-
orated shortly after Mr. and Mrs. Brackenbury arrived. Petty legal actions were instituted, and Mrs. Hodgkin deeded the property to a sympathetic son. The Brackenburys sued for breach of contract, contending their performance precluded revocation of the offer of the unilateral contract. The Supreme Judicial Court of Maine agreed and held that Mrs. Hodgkin's offer was a unilateral contract and was accepted when the offeree entered into performance of the specified acts. 109 The opinion purported to apply standard contract law; dicta suggests instead the decision was influenced by a misogynist assessment that Mrs. Hodgkin was exceedingly difficult to deal with. Accordingly, the court imposed a trust in favor of the Brackenburys. Mrs. Hodgkin could not use the property to strike another bargain providing for her care. After the litigation was complete, Mrs. Hodgkin was effectively held captive in her own home, to receive whatever care (or abuse) the Brackenburys saw fit to provide. 110

Instead, imagine this case arose today. The law of unilateral contracts has changed; § 45 of the Restatement of Contracts (Second) provides that part performance of an offer seeking acceptance only by performance results in a binding option contract (precluding revocation), with the duty to perform conditioned on full performance. One hopes most lawyers would respond to such an intra-familial dispute by considering settlement first, while considering litigation as a distant last choice. Effective counseling about the law and the emotional and economic costs of litigation should prime the parties to find a face-saving, peaceful end to the situation.

If private settlement efforts fail, mediation could provide the optimal structure for venting anger, generating options, and eventually reaching a fair solution. This is the type of dispute where mediation may best serve its primary functions. The parties are empowered to exercise autonomy, choice, and self-determination. Mediation evokes in each party recognition, acknowledgement, and some understanding or empathy for the other party's situation. 111 I have used the Brackenbury facts in contracts and dispute resolution classes for simulated exercises in counselling, negotiation and mediation. When students realize that they are free to settle on terms different from the likely adjudicated outcome they can generate many promising options. Mrs. Hodgkin might compensate the Brackenburys for their costs, losses and inconvenience resulting from reliance on her promise. The Brackenburys might realize the inequity of their claim to full ownership of the family farm. Sometimes the mediator has helped the parties identify specific

109. 399 Me. at 401, 102 A. at 107.
problem areas in the interpersonal relationship, thereby preserving both the contract and the family relationship.

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

The private nature of mediated solutions makes it more difficult to tell an actual story of a mediated dispute that should instead have been litigated. A simulated mediation presented at a dispute resolution workshop can, however, be considered. In this simulation, a male employee at a paint factory became sexually dysfunctional. His treating physician identified his work-related exposure to toxic chemicals as the probable cause. He filed a third-party products liability suit against the chemical manufacturer. Mediation was proposed to facilitate stalled settlement discussion.

Numerous factual questions arose during the mediation. It was uncertain whether the disorder was reversible or potentially life-threatening to the plaintiff and other employees working near the chemicals. Did the manufacturer or employer have notice of an unreasonably dangerous work condition, thereby triggering a duty to warn or take other precautions? Although the products liability claim did not involve novel questions of law, substantial doubt existed about application to these facts.

The extremely personal nature of the claim reinforced standard power differences based on the relative size and sophistication of the parties, and the availability of economic resources to litigate aggressively. Understandably, the worker was reluctant to discuss the disorder, especially in open court at trial.

112. Mini-workshop given by the American Association of Law Schools on ADR in the Curriculum (Jan. 6, 1986).
On the defense side, damage control gave strong incentives to settle. Settlement would result in the suppression of scientific evidence suggesting a causal relationship between the disorder and chemical exposure. Without causation, the chemical manufacturer would have no duty to warn or prevention duties. Defense counsel and corporate officers privately conceded their willingness to pay off this early claim, even at a premium, rather than expose through public adjudication what might be the tip of an iceberg.

There are many arguments against mediation in this case. If the chemical exposure produced the harm, the public deserved to know. While the scientific evidence could be challenged, it was substantial enough to require public review. Protection of the public interest and absent third persons called for formal authoritative determination. If the court found the scientific evidence persuasive, the decision could trigger other actions. Eventually, public scrutiny could result in the manufacturer taking the chemical off the market or placing warnings on proper usage, or in further administrative action to prevent widespread harm. A generous mediated settlement might include a premium reflecting the added value of private settlement at the expense of future claimants.

In this type of private suit, participation by union officials and government health and safety representatives could guard against the risk that plaintiff's silence will be bought at the probable expense of others. Also, the presiding judge could be assigned review authority to confirm that the private settlement and any secrecy provisions will not harm the public interest in workplace safety.113

The power imbalance, though apparent, is less troubling. As a practical matter, the superficial differences in power and litigable capacity exist in most products liability actions. These actions need not be disqualified from mediation. American corporations are strong supporters of developing alternatives to litigation, both because of reduced legal expenses and better use of corporate time on productive activities.114 Societal concerns for fair and efficient dispute resolution are furthered when legal principles are relatively settled and the plaintiff is represented by counsel.

B. MEDIATOR ACCOUNTABILITY FOR PUBLIC VALUE OF FAIRNESS

Mediation absolutely committed to neutrality may coerce settlement seriously at odds with societal norms.115 When access to court is short-circuited,
the mediator should be accountable for the quality of private justice and its effect on public interests.

Accountability is consistent with the neutrality that is properly required of the mediator. However, absolute neutrality may be more theoretical than real. Current literature departs from the traditional view and refines its definition.116 Earlier authorities often used "neutrality" to mean both that the mediator is unbiased and uncommitted regarding outcome.117 Some authorities now distinguish between impartiality and neutrality.118 A mediator must be impartial as to the parties, possessing no pre-existing loyalties that distort her ability to facilitate the process even-handedly. Many modern authorities consider strict neutrality as to outcome neither essential nor possible.119 The

116. See, e.g., Bush, supra note 110. This thoughtful work evaluates the unique qualities of mediation to better define the mediator's role and ethical obligations. Professor Bush identifies two current conceptions: efficiency (facilitate agreements in as many cases as possible) and protection of rights (ensure neither party's rights are compromised by settlement process). Both conceptions, he argues, are fundamentally flawed. A sounder conception of the mediator's role is based "on what mediation can do that other processes cannot" (emphasis in original). The empowerment function relates to the capacity of mediation to encourage parties to exercise autonomy, choice and self-determination. Drawing on Professor Fuller's earlier work, the recognition function can produce understanding and empathy of common humanity, even in the face of bitter conflict. Id. at 258-273.

Fulfilling the empowerment role requires the mediator to ensure that the parties act with full information and understanding in making their decisions. . . . Therefore, the mediator should push for the parties to disclose and otherwise marshall all information to resolving the dispute. . . . [T]he mediator should push for the parties to fully comprehend all the information before them, including the range of issues presented and each party's positions. Therefore, the mediator should summarize, clarify, question, and test for comprehension before allowing decision-making to proceed. Id. at 278.

The parties should understand fully the consequences of either reaching or failing to reach settlement. Empowerment also relates to the mediator's obligation to provide information on the law and legal advice. While the law need not control the parties' decision, information about the law "as an indication of what is obtainable from the legal marketplace, . . . as an indication of societal standards, . . . [or] as an expression of underlying principles . . . which the parties might want to consider in approaching their own resolution." Id. at 280 (quoting Training Materials, supra note 3).

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

117. See ROGERS & SALEM, supra note 11, at 139.


119. Honeyman, Bias and Mediators' Ethics, 1986 NEGOTIATION J. 175, 176 (obligation to disclose personal and situational biases). But see, Smith, Effectiveness of the Biased Mediator, 1985 NEGOTIATION J. 363 (suggesting that at least in the context of international mediation, certain nationalist mediator bias is common, and does not impair the process). See also Susskind and
mediator "should be concerned with fairness" and "has an obligation to avoid an unreasonable result."\(^{120}\)

Accountability relates to the ethical, moral, and legal obligations imposed on mediators who facilitate disputes that would otherwise be resolved in court. Accountability and impartiality are consistent; enhanced responsibility for procedural and substantive fairness is essential to protect public values at risk from private settlement, particularly when the parties are not independently represented by counsel. Ethical standards should guide the mediator when discharging this responsibility in the many contexts of law-related mediation.\(^{121}\) Public review of settlements plus risk of malpractice liability should act as safety nets protecting individual and public concerns for fairness.

Accepted mediation techniques reflect minimal accountability to use procedures adapted to prevent unfairness.\(^{122}\) Mediation ethics codes urge the mediator to stop intimidating or abusive behavior.\(^{123}\) Ethical rules for lawyer-mediators should do the same.\(^{124}\)

Mediation is a facilitative process, directed toward creating a context for pursuing the parties' mutual sense of fairness.\(^{125}\) The usual preliminary pro-

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Ozawa, Mediated Negotiation in the Public Sector, 27 AM. BEHAVIORAL SCIENTIST 255-79 (1983) (even though a mediator in the public sector may have biases, the mediator has a clear limit on what would be considered a reasonable settlement in keeping with community standards of justice).


121. See, e.g., ABA STANDARDS, supra note 120, § III.D. ("The mediator has an obligation to avoid an unreasonable result"). To that end, the Standards call for procedural intervention, ensuring participants have sufficient information and knowledge on which to make their decisions, advising them to obtain independent legal review before making agreement, and diffusing manipulative or intimidating negotiation techniques. Limited intervention on the substantive terms is authorized—a mediator shall not direct the negotiations based on one's interpretation of the law and predicted application to the facts. If the agreement being approached is unreasonable, the mediator must suspend or terminate the process. Id. at 459.

The ABA Standards carefully preserve the role of independent counsel; in so doing, an unrepresented mediation participant gets minimal protection against a patently unfair result. This is satisfactory only if interpreted to present risk of later accountability to a mediator who finalizes a dubious agreement without both parties obtaining independent legal advise. If the agreement is patently unfair when judged against prevailing legal norms, public review should rescind the agreement. Should such relief be unavailable, the harmed participant should have malpractice recourse against the mediator.

122. ROGERS & SALEM, supra note 11, at 146.

123. Id.

124. See infra text accompanying notes 22-68.

125. Training Materials, supra note 3, at 41. See generally Hobbs, Facilitative Ethics in Divorce Mediation: A Law and Process Approach, 22 U. RICH. L. REV. 325, 361-63 (1988) (proposes that neutral lawyers be guided by values of fairness and maximization. The standard of fairness includes "what society views as fair . . . the participants' own sense of fairness" and "the interests of unrep-
procedure of generating and evaluating options takes account of how the law might view a dispute. Selection among alternatives then eliminates unworkable options, including those at odds with one party's sense of fairness. A grossly unfair agreement risks non-compliance by the disadvantaged party who may refuse to perform and instead take her chances with the formal legal system. Thus, a successful mediation consistently focuses on questions of fairness as perceived by the participants, with reference to the applicable law.

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

The mediator should know enough about the law to assess whether an agreement is within the range of legally acceptable outcomes. If it is not, the parties should be told of this assessment and of the potential problems that might arise when the agreement is publicly reviewed. Later review thus gives participants an added incentive to find common ground within legal limits of fairness.

Whenever a mediation would affect important legal rights, the parties should be advised to obtain outside review by independent counsel to evaluated third parties.” Fairness and maximization values “only indirectly address the keystone principle—that the family lawyer is to facilitate the fulfillment of the client’s moral and legal family obligation.”


127. Riskin, supra note 24, at 335-36 (discussion of methods of providing legal services in mediation settings without introducing adversarial perspectives).

128. Id. at 337.

129. Id. at 336.

130. This standard is incorporated into proposed Model Rule 2.4(c), discussed in text accompanying notes 60-64 supra.

131. See Training Materials, supra note 3, at 25. A mediator will not generally offer opinion as to what is fair, unless: (1) One party takes advantage of the other; (2) the parties are moving toward an agreement the mediator believes is so unfair that it would be a “severe miscarriage of justice”; or (3) a court would not accept the agreement. Id.
ate and help process the final agreement.132 Outside review protects the parties’ interests, but also begins to bring private resolution back into the public domain. An independent counsel can safeguard public concern for the quality of individualized justice by advising her client against an unfair agreement, helping with further negotiations or pursuing litigation.133

A proposed agreement falling outside the range of acceptable outcomes warrants further intervention. A mediator should not finalize an agreement which she believes to be illegal, grossly inequitable or based on false information. The parties should be told of the problem and have remedies suggested to them. Mediator withdrawal remains the ultimate weapon to prevent an unfair agreement.134

C. PUBLIC REVIEW OF PRIVATE JUSTICE

When mediation supplants adjudication of private disputes,135 meaningful public review should confirm that the agreement is within legal bounds and does not subvert an important public value. A possible external benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome.136 The phrase “improves upon” contemplates that parties’ personal preferences may produce a permissible settlement that bears little resemblance to a possible adjudicated outcome. The reviewing body could set aside mediated agreements falling short of this goal. Where a dispute is litigable and the law reasonably settled, this standard can protect the quality of justice in mediation. Limited court review acts as a safety net of last instance, rejecting patently unfair agreements. Review should occur promptly, before the parties detrimentally rely on the

132. See ABA Standards, supra note 120. The ABA Standards are criticized for overly protecting independent counsel’s role in Riskin, supra note 24, at 351-52. See also Training Materials, supra note 3. Friedman includes lawyer review as part of the initial contract between the mediator and parties. He makes clear that the parties should view the lawyers reviewing the agreement (and other technical experts, e.g., accountants) as consultants, not as “‘professionals’ who take over what the parties should be doing, or who inject their views of how the parties should be looking at their lives.” Id. at 19, 25.

133. See, e.g., Rifkin, supra note 87, at 27-29. Rifkin recounts a divorce mediation where the mediator frequently advised the wife to consult her lawyer. That lawyer strongly objected to the mediated settlement. The wife terminated her lawyer’s representation and presented the agreement to court pro se. Nevertheless, her lawyer appeared to oppose court approval. The judge spoke with the wife at length before accepting the agreement. The lawyer’s outspoken objections clearly put the wife on notice that she was trading off more favorable financial settlement to avoid a damaged relationship with her children. The judge’s participation served as a check to ensure that the agreement subvert no important public values.

134. See, e.g., ABA Standards, supra note 120, at 120.

135. That is, the dispute is otherwise suited for public adjudication. See generally Edwards, supra note 2, at 671; Fuller, supra note 37; Hazard & Scott, supra note 2.

136. Hazard & Scott, supra note 2, at 120.
agreement. It may be summary, confirming the agreement is knowing, voluntary and not in gross derogation of law and equity.

Public review of mediated agreements is critical for disputes between unequal parties who might otherwise go to court. I am sympathetic to the values of autonomy, mutual understanding and respect. Nevertheless, without some public supervision and review, there is little confidence that mediation will protect public values of fairness and the need for authoritative resolution. Especially for court-referred mediation, participation is not wholly voluntary. The threat of public enforcement gives court-annexed mediation coercive power to achieve agreement despite lack of voluntary consent by the weaker party. Mediation involving juvenile offenders, crime victims and offenders, landlords and tenants, and divorcing spouses is often annexed to the formal legal system. Agreement may finally determine the parties' respective obligations, avoiding formal adjudication. Unless the agreement is closely reviewed, the risks of private settlement are too great to warrant public sanction. The extent of review may vary, depending on the amount of risk to public values. Summary review may suffice for some tort claims,\footnote{Assuming those cases do not present an unsettled question of public law or importance, and do present a question that is properly addressed in mediation.} while the more public aspects of prison complaints, consumer and employment disputes may warrant more exacting review.

III. Conclusion

The legal profession owes the public its diligence in improving the quality of private justice, while preserving courts' essential role in society. First, we must get our own house in order. Persistent confusion about the ethical issues has discouraged lawyers' thoughtful participation in and support of developing programs. Passage of time gave opportunity for issue identification and debate. Now the organized bar should take the lead, providing clear guidance on the many ethical questions specific to mediation. Lawyers could then participate more effectively both as mediators and as supporters of mediation programs. Enhanced involvement creates opportunities for lawyers' practical input on the systemic questions of screening, accountability, and review.