Notre Dame Journal of Law, Ethics & Public Policy

Volume 14
Issue 1 *Symposium on Ethics*

Article 14

February 2014

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Maureen E. Laflin

PRESERVING THE INTEGRITY OF MEDIATION THROUGH THE ADOPTION OF ETHICAL RULES FOR LAWYER-MEDIATORS

MAUREEN E. LAFLIN*

INTRODUCTION

As mediation has grown in popularity over the past few decades as an alternative to costly and protracted litigation,[1] a whole new field of professional ethics—mediation ethics—has emerged. The ethical issues that fall within this field are many and diverse, ranging from fact-specific questions of confidentiality, competence, and conflicts of interest to abstract inquiries into the very nature and scope of mediation as a practice.

While many of these ethical issues are germane to all mediators, a unique and problematic set of issues arises for those mediators who are concurrently licensed or certified practitioners within another profession. These "cross-profession" practitioners—psychologist-mediators, social worker-mediators, lawyer-mediators—must abide by the rules or standards of conduct for both professions. Oftentimes, these rules conflict or, by their silence, provide no guidance for practitioners attempting to navigate between them cleanly and without shipwreck.

Nowhere is cross-professionalism as problematic as it is for lawyer-mediators.[2] In part, this results from direct conflict

* Director of Clinical Programs; Associate Professor of Law; University of Idaho College of Law. I am grateful to the following friends and colleagues for their helpful comments on earlier drafts of this piece: Lela Love, Alan Kirtley, Kimberlee Kovach, Pat Costello, Nancy Luebbert, Mary Helen McNeal, Ken Gallant, and participants of the September 1999 Northwest Clinical Conference who commented on it. I thank Patrick Braden and Kevin Illingsworth for their research assistance. I want to especially thank Douglas Lind for his valuable insights especially into Wittgenstein and his sharp editorial eyes. I also appreciate Mary and Emmett McKillop providing me a quiet place to write.

1. *See* Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376 (1997) (noting that many lawyers use mediation under the belief that it reduces the cost of litigation by encouraging early settlement); *but see* JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 20 (1996) (arguing that empirical studies suggest that mediation programs do not reduce cost and delay).

2. Much has been written about cross-professional practice and the ethical dilemma lawyers confront when the rules governing lawyers' professional

between lawyer rules of professional conduct and the ethical obligations faced by mediators. Lawyers, for example, must report attorney misconduct,[3] yet a lawyer-mediator who discloses attorney wrongdoing that comes to his or her attention during a mediation potentially breaches the obligation of confidentiality that is central to the mediation process.[4] A second reason why cross-professionalism is particularly vexing for lawyer-mediators is the close relationship between the practice of law and mediation.[5] Most mediations concern disputes that could alternatively be handled through traditional legal processes. Many mediations are court-connected. Lawyer-mediators therefore often find themselves straddling their two professions. Sometimes, as when a party to a mediation seeks to secure legal representation from the lawyer-mediator subsequent to the close of a mediation, the lawyer-mediator may find that the closeness of the two practices becomes an ethical snare.[6]

Yet the greatest source of difficulty concerning the cross-practice of law and mediation is not the closeness of the two practices, but their fundamental differences. Law is an adversarial process that by design creates winners and losers; mediation is paradigmatically a facilitative process, whereby the parties strive to achieve a voluntary agreement that resolves the dispute

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conduct and the ethical rules for mediators conflict. *See, e.g.*, Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 3, *reprinted in* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS ch. 14 (1996); Judith Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991) (arguing that the Rules of Professional Conduct should be amended to add a new rule dealing with lawyer mediation).

3. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1997); Mori Irvine Sub, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155 (1994).

4. *See In re* Waller, 573 A.2d 780 (D.C. 1990) (per curiam).

5. Lawyers and successful mediators share many skills and attributes and thus are frequently called upon to serve as mediators especially in court-connected civil mediations. *See* Sub, *supra* note 3, at 155.

6. *See* NANCY H. ROGERS & CRAIG MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 10:02 (2d ed. 1994) (illustrating the range of ethical restrictions placed on mediators' subsequent representation of parties to mediation); Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Professional Practice*, 1 HARV. NEGOTIATION L. REV. 203(1996) (arguing that issues raised in *Poly Software Int'l Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995), underscore the need for the legal profession to adopt standards of conduct to address situations when lawyers practice law and serve as mediators).

to at least the partial satisfaction of all.[7] This fundamentally different practice-orientation gives rise to the principal ethical issue that emerges when lawyers, trained as advocates and problem-solvers, serve as mediators—that of preserving the integrity of the mediation process as a forum where an impartial third party assists the participants in resolving their own disputes.[8] This problem, often framed as the dilemma between facilitative and evaluative styles of mediation,[9] is an issue of power, domination, and control over the ultimate resolution of the dispute. The central ethical issue concerning lawyers as mediators, in other words, goes to whether the disputants arrive at the resolution of their dispute by their own self-determination or under the evaluative direction and control of the mediator.[10]

In this paper, I argue for ethical rules for lawyer-mediators that meaningfully address this issue of power and control.[11] In

7. *See* Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound By Ethical Codes For Lawyers When Acting As Mediators?*, 14 J. AM. ACAD. MATRIMONIAL LAW 267, 269 (1997) ("In contrast to the adversarial process for resolving disputes, the goal of mediation is that both parties should leave the mediation with a solution to which they have contributed and by which they can abide.").

8. Lawyers owe a duty of loyalty to their clients. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1997) ("Loyalty is an essential element in the lawyer's relationship to a client."); Moffitt, *supra* note 6, at 206. In contrast, lawyer-mediators owe a duty of loyalty to the process. *See* COMMISSION ON ETHICS MODEL RULE, *infra* note 12, at 2 ("Lawyer neutrals do not 'represent' parties, but have a duty to be fair to all participants in the process and to execute different obligations and responsibilities with respect to the parties and to the process."). *See also* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 826 (1999) ("Unlike physicians and attorneys, who owe a direct fiduciary duty to their patients and clients, respectively, the mediator is said to represent the integrity of the mediation process and it is in this sense then that the mediator has a special fiduciary relationship with both parties to a dispute.").

9. *See* Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 106-08 (comments of John Feerick).

10. *See* James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 503 (1996) ("Of all the ethical questions that arise in mediation, none is more central to the mediator's role, or more vigorously contested, than the 'neutrality vs. fairness' debate.").

11. Several others have written about the need for ethical rules for lawyer-mediators. *See, e.g.*, Maute, *supra* note 2 (arguing that the Rules of Professional Conduct should be amended to add a new rule dealing with lawyer mediation); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 418 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*] ("ADR now needs 'ethics' or standards in part because of its successes . . . ."); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996) [hereinafter Menkel-Meadow, *Is Mediation the Practice of Law?*] (questioning whether ADR ethics are subject to lawyer's ethical

general, three rule-making alternatives exist for regulating the cross-practice of lawyer-mediators. One alternative is to treat mediations conducted by lawyers as a form of legal service falling within the purview of traditional lawyer rules of professional conduct. A second alternative, which I call the "Umbrella Approach," involves regulating all mediators as a general class regardless of professional training or affiliation. Third, ethical rules can be crafted which specifically target the cross-practice of law and mediation.

I argue in favor of the third "Targeted Rule" alternative. Specific ethical rules for lawyer-mediators are needed to preserve the integrity of mediation as a process distinct from law. Rules of professional conduct crafted for lawyers-*qua*-lawyers reflect the adversarial nature of the law and encourage responsible advocacy and representation. These foci, while central to good lawyering, stand juxtaposed to the role of the mediator as an impartial neutral who represents no party but only, if anything, the mediation process itself. Standards designed for mediators as a general class, while obviously sympathetic to the facilitative nature of mediation, cannot adequately confront the cross-professional problems associated with any particular group of mediators. Only rules targeting lawyer-mediators directly—rules, that is, designed from a perspective of conscious awareness of the professional predisposition of many lawyer-mediators to exert power and control over the outcome of a mediation—offer any true prospect of combating this troublesome aspect of the cross-professional practice of mediation by lawyers.

As models for the type of targeted rules that are needed, I will discuss a pair of recent rule-making efforts aimed at clarifying the roles, responsibilities, and ethical obligations of those engaged in the cross-practice of law and mediation. In April

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standards); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217 (1995) (providing a cogent overview of models of mediation practice and the ethical issues raised); Moffitt, *supra* note 6 (arguing that *Poly Software* highlighted the cross-professional practice problems and the need for the bar to adopt standards of conduct for lawyer-mediators); Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213 (1993) (advocating adoption of a single ethical standard which would recognize the role of the neutral attorney mediator). The adoption of such rules has become necessary since the growth and success of mediation as a dispute resolution method has propelled it to that stage in the natural development of a profession where the adoption of rules of conduct becomes necessary. *See* MAGALI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 60-71, 166-77 (1977); Jack R. Frymier, *Professionalism in Context*, 26 OHIO ST. L.J. 53, 53-54, 56-58 (1965).

1999, the CPR-Georgetown Commission on Ethics and Standards in ADR released its draft *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral.*[12] Effective January 1, 2000, Virginia became the first state to adopt Rules of Professional Conduct for lawyers that unequivocally and specifically address the conduct of lawyers acting as third party neutrals and mediators.[13] While not perfect solutions, these codification efforts mark a significant breakthrough in the regulation of lawyer-mediators. Before examining them, however, we should consider in greater detail the problem of power and control that threatens to engulf mediation, as well as the shortcomings that attend using either of the first two regulatory alternatives.

I. THE EVALUATIVE THREAT TO MEDIATION PRACTICE

A. *The Evaluative/Facilitative Debate*

The problem of lawyer-mediators exerting too much control over the conduct and resolution of a mediation typically is presented as a debate over mediation styles—facilitative versus evaluative. Historically, this debate has no precedent. Prior to its recent growth and expansion in law-related cases, mediation was viewed as a wholly facilitative process separate and distinct from adjudication.[14] Even today, many scholars and theoreticians continue to characterize mediation in this classical sense as a process whereby the mediator, who has no stake or power over the outcome, helps the parties identify and evaluate their interests and options as they proceed, ever independent of the mediator's control, to design and craft their own agreement.[15] The hallmark of

12. PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT OF THE LAWYER AS THIRD PARTY NEUTRAL (CPR-Georgetown Comm'n on Ethics and Standards in ADR, Proposed Draft 1999) [hereinafter, COMMISSION ON ETHICS MODEL RULE].

13. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rules 2.10, 2.11 (1999). The new Rules of Professional Conduct replace the Virginia Code of Professional Responsibility.

14. *See, e.g.*, Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Douglas Lind, *On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence*, 10 MEDIATION Q. 119 (1992); *but cf.* ROGERS & MCEWEN, *supra* note 6, at § 5.01 (discussing the special character of labor mediation throughout much of the twentieth century).

15. *See, e.g.*, James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997) [hereinafter Alfini, *Evaluative Versus Facilitative Mediation*]; James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47 (1991) [hereinafter Alfini, *Trashing, Bashing, and Hashing It Out*]; Kimberlee K. Kovach, *What is Real Mediation, and Who Should Decide?*, 3 DISP. RESOL. MAG. 5 (1996); Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) [hereinafter Kovach & Love, *Evaluative Media-*

mediation in this sense is the self-determination of the parties[16] and the impartiality of the mediator.[17] On this classical model, the role of the mediator has been said, quite rightly, to resemble that of a Sherpa guide.[18]

Yet as mediation has grown in popularity, and especially as the practice has become increasingly intertwined with the legal system, this theoretical model has begun to unravel. In practice, many mediators deviate from the Sherpa guide ideal. Today, mediators often provide legal information or advice.[19] At times, they apply the law as they know it to the facts at issue and predict the likely outcome should the mediation dissolve and end up in court. As the giving of information, advice, and predictions has increased, mediation as a practice has moved further and further

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tion]; Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71 (1998) [hereinafter Kovach & Love, *Mapping Mediation*]; Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997). I discuss these writers *infra* notes 46-56, 88-89 and accompanying text.

16. *See* JOINT STANDARDS OF CONDUCT FOR MEDIATORS Standard I (1994) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely on the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.").

17. *See id.* Standard II ("The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.").

18. Sub writes:

> A mediator can be envisioned as the Sherpa guide of the negotiation process. A Sherpa guide does not tell explorers which mountain to climb, or whether to climb a mountain; rather, once the explorers decide to climb a mountain, the Sherpa guide helps the expedition find the best way up to the top. Similarly, a mediator does not tell the parties when or how to settle a case, but will help the parties maneuver towards resolution.

Sub, *supra* note 3, at 158 n.13.

19. Some make a distinction between giving legal advice and legal information. *See, e.g.*, Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996) (arguing that mediators should refrain from using legal knowledge to analyze issues and predict probable court outcomes). Sandra E. Purnell claims that mediators who provide legal information are not practicing law because the parties do not reasonably believe that the mediator is their representative. *See* Sandra E. Purnell, *The Attorney As Mediator—Inherent Conflict of Interest*, 32 UCLA L. REV. 986 (1985). Purnell argues for the development of guidelines which allow attorney-mediators to provide legal information but not legal advice. *See id.* Others argue that the distinctions are too nebulous. *See, e.g.*, Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 544 (1997) (noting that "the distinction between information and advice has been criticized as too vague to guide mediator behavior clearly").

from the facilitative ideal, looking at times no different from neutral case evaluation or settlement conferencing.

This transformation in the practice of mediation has become particularly acute with the dramatic increase in lawyers acting as mediators and in referring matters for mediation.[20] Several factors have contributed to these changes in mediation practice brought about or at least accelerated by its increasing connection with the legal system. These factors include the close relationship between law and mediation,[21] the growth of court-connected mediation,[22] the increase in mediations involving

20. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 92 ("Two factors have driven the mutation of mediation: rapid expansion of court-connected and lawyer-dominated programs and the failure of courts to distinguish among ADR process options."). "Many practicing mediators have an evaluative orientation. Yet most trainers, teachers, and professors don't teach evaluation as a permissible component of meditation. The courts and the legal community are largely responsible for this paradox." Kovach & Love, *Evaluative Mediation, supra* note 15, at 31.

21. The connection is best seen in the current certification requirements adopted by the federal courts and by many states. Most federal district courts and at least eight states require that mediators in civil cases be licensed attorneys. *See* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCE BOOK FOR JUDGES AND LAWYERS (1996) (surveying the rules, including some ethical requirements, of current ADR and settlement procedures in the 94 federal district courts). The states include: Delaware, *see* 6 DEL. CODE ANN. § 7708 (1998), Florida, *see* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.100(c) (1992) (only applies to circuit court mediators), Idaho, *see* IDAHO CT. R. 16 (k)(13)(A) (1998), Indiana, *see* IND. ADR R. 2.5(A)(2) (1996), Louisiana, *see* LA. REV. STAT. ANN. § 4106(A)(1) (1997), Michigan, MICH. CT. R. 2.404(B)(2)(a) (1993), Montana, MONT. R. APP. PROC. 54(d)(4) (1998) (only applies to appellate cases), South Carolina, S.C. CIR. CT. MEDIATION R. 10(a) (1999), and Washington D.C. Of these eight, Delaware, Florida, Idaho, Louisiana, Michigan and Montana require attorneys to have five years experience prior to certification or qualification.

22. This legalization of mediation through court annexation has come under attack by those who argue that court-referred mediation is not an alternative dispute resolution mechanism, but an administrative aid for the courts, an "add-on" process for the parties and a monopoly for lawyer-mediators. *See* Louis J. Weber, *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom?*, 46 SMU L. REV. 2113, 2114 (1993) (describing court-referred ADR as an "additional" dispute resolution mechanism, an "add-on" procedure and calling for the return to ADR as a public service, and away from its current direction as a vehicle of profit for greedy lawyers scrambling in a depressed market); *see also* Alfini, *Trashing, Bashing, and Hashing It Out, supra* note 15, at 47 (citing Albie Davis, director of the mediation project in the District Court Department of the Trial Court of Massachusetts, whose reaction to the Florida rule requiring mediators in non-family civil cases to either be experienced lawyers or retired judges—was to say that the requirement portends "the end of good mediation"); Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 336 (1984) (writing over fifteen years ago, that

complex legal questions,[23] the greater subject-matter expertise lawyers often bring to mediations,[24] and the expertise parties expect them to have,[25] especially compared to non-lawyer mediators.[26] Recent studies further reveal that lawyers referring cases to mediators prefer those who fit the more "evaluative" profile.[27]

"[m]ost lawyers are ill-suited, by training and inclination, to the mediator's role").

23. *See* Menkel-Meadow, *Is Mediation the Practice of Law?*, *supra* note 11, at 61. Menkel-Meadow writes, "Complex mediation these days often involves legal questions and mediator prediction or evaluation of the legal merits or 'likely outcomes' of cases. Wouldn't you want a mediator with legal expertise if you were involved in an important case?" *Id.* She goes on to say, however, "Just because a mediator has a law degree—or even an up-to-date license to practice—does not mean that he or she will give accurate legal advice, prediction, or evaluation." *Id.*

24. *See* John Forester, *Lawrence Susskind: Activist Mediation and Public Disputes, in* WHEN TALK WORKS: PROFILES OF MEDIATORS 331 (Deborah M. Kolb et al. eds., 1994).

25. Donald Weckstein attributes the move toward more evaluative methods to the parties and their lawyers. *See* Weckstein, *supra* note 19, at 526 ("One suspects . . . that the preference and expectations of the parties and their lawyers significantly contribute to the widespread use of the evaluative mediation model—a rationale that is consistent with disputant empowerment.").

26. *See* Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 729 (1997) (A mediator cannot engage in an evaluative-type mediation if the mediator does not have subject matter expertise. . . . In the legal setting, parties often look to mediators to have both process familiarity and subject matter expertise. Whether the mediator is facilitative or evaluative, some subject matter understanding usually is required simply to help the parties communicate effectively and reach resolution.").

27. In a 1997 survey, 160 of the 600 members of the Hillsborough County Trial Lawyers Section responded. *See* Martha J. Cook, *Survey*, (1997) (on file with author). The results showed that 90% preferred evaluative mediation. *See id.*; *see also* Barbara McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* (Dec. 1997) (on file with the Minnesota Supreme Court of Continuing Education and author):

> Data confirms that the most important qualification for a mediator is substantive experience in the field of law related to the case. Approximately two thirds of the Minnesota lawyers surveyed reported that having the mediator be a litigator and lawyer also are important qualifications. Over two thirds of the lawyers surveyed reported that mediators encourage clients to participate, use caucuses effectively, press for settlement, propose realistic settlement ranges, and help parties to communicate effectively.

McAdoo &Welsh found: (1) lawyers want lawyers to mediate; (2) lawyers want litigators as mediators; and (3) most importantly, lawyers want mediators to have substantive experience in the field of law related to the case. *See* McAdoo &Welsh, *supra* note 1, at 390.

Some scholars view this change in mediation matter-of-factly, as a perhaps inevitable development in a practice that is undergoing such significant growth. Leonard Riskin, for example, defines mediation wholly empirically. Mediation is, on his account, whatever mediators do.[28] Since mediators differ in their styles and approaches, ranging from those who are strictly facilitative in the classical sense to those who are highly, even aggressively, evaluative, Riskin claims that mediation must be understood as a continuum, a practice that spans the full spectrum.[29]

This is not to say that Riskin does not recognize or appreciate the important difference between facilitative and evaluative mediation. He acknowledges that the "largest cloud of confusion and contention surrounds the issue of whether a mediator may evaluate."[30] Yet when he created his popular mediator grid, he sought to reduce the ambiguity surrounding what counts as mediation by suggesting that the practice should be defined according to whatever transpires within its purported occurrence.[31] Citing Ludwig Wittgenstein for the proposition that "usage determines meaning,"[32] Riskin thus mapped out four mediation style quadrants—evaluative, facilitative, narrow, and broad,[33] claiming that all possible approaches to mediation resulting therefrom (evaluative-narrow, facilitative-narrow, evaluative-broad, and facilitative-broad) count as legitimate mediation styles.[34]

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28. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTATION L. REV. 7, 21-37 (1996) (describing the problem-definition continuum, mediator orientations, and mediator techniques, all of which he maintains fall under the definition of mediation).

29. *See id.* at 22-38.

30. *Id.* at 9. John Feerick, Dean of Fordham University School of Law and chair of the Joint Committee, maintains that "the lens [Riskin] has chosen will perpetuate confusion about what mediation is. Therefore, I would prefer drawing a bright line around mediation as a process in which the neutral facilitates the bargaining of the parties, rather than evaluating the merits of an issue or situation." Symposium, *supra* note 9, at 104 (comments of John Feerick).

31. *See* Riskin, *supra* note 28, at 13 ("I hope to facilitate discussions and to help clarify arguments by providing a system for categorizing and understanding approaches to mediation."). Riskin acknowledges that his own orientation is as a broad facilitative mediator, an approach which is not universal. He contends that the time for narrow definitions is gone.

32. *Id.* at 13 n.19.

33. *See id.* at 24 (defining mediation as "a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction").

34. *See id.* at 26-34.

To a great extent, Riskin's all-inclusive definition of mediation rests on the assumption that mediators conduct mediations (and, *a fortiori*, the nature of mediation evolves) according to how they perceive the wishes of the parties. He points out that a mediator's need for subject-matter expertise typically increases in direct proportion to the parties' need for mediator evaluation.[35] If it appears to the mediator that the parties want an active, evaluative mediation, Riskin maintains that "the mediator ought to evaluate and it is ethical."[36]

Riskin further premises his approach on the preferences and orientations of the mediators themselves. All mediators, he claims, come with a predominant orientation toward using certain strategies more frequently than others.[37] While many mediators will move along the facilitative/evaluative continuum throughout the course of a mediation as they see fit,[38] most lawyers will emphasize their dominant orientation.[39] Evaluative mediators simply are those who "assume[ ] that the participants want and need . . . guidance as to the appropriate grounds for the settlement."[40]

Others who agree with Riskin that mediation should be defined inclusively likewise turn for justification to the interests and desires of the parties.[41] Donald Weckstein surmises that the

35. *See id.* at 46. Riskin concludes his discussion on subject matter expertise with a cautionary statement: "[T]oo much subject-matter expertise could incline some mediators toward a more evaluative role, thereby interfering with the development of creative solutions." *Id.* at 47.

36. Symposium, *supra* note 9, at 105 (comments of Leonard Riskin). Riskin remarked, "[I]f the parties intelligently decide that they want the narrow evaluative mediation, . . . the mediator ought to evaluate and it is ethical . . . ." *Id.* He further stated, "[E]valuation can enhance self-determination." *Id.* at 101.

37. *See* Riskin, *supra* note 28, at 24-25 ("Most mediators operate from a predominate, presumptive or default orientation," but "many mediators move along continuums and among quadrants."). He notes that one's orientation is usually grounded in the mediator's personality, education, training, and experience. *See id.* at 35.

38. *See id.* at 35-38.

39. *See id.* at 24-25.

40. *Id.* at 24.

41. *See, e.g.*, Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996) (noting that while the primary risk of evaluation is the mediator's potential loss of perceived neutrality because the "loser" in the evaluation may view the mediator as an adversary, nonetheless, situations do exist in which the careful and thoughtful use of mediator evaluation can serve the parties); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996) (arguing that the parties should have the right to chose between evaluative and facilitative styles); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome*

move toward evaluative methods in mediation is directly attributable to the wishes and expectations of the parties as well as their lawyers.[42] This, he says, is good, for it is "consistent with disputant empowerment."[43] Lawrence Susskind argues even more forcefully that it is not merely a matter of preference, but a mediator's duty to evaluate and take active responsibility for reaching a sound agreement.[44] By his account, the mediator is obligated to enlighten the parties with ideas and potential solutions drawn from the mediator's knowledge, experience, and expertise.[45] To Susskind, good mediators are "activists" who do not simply facilitate but work as "advocate[s] of a good solution."[46]

Kimberlee Kovach and Lela Love, among others, have directly challenged the inclusive approach, arguing that evaluative mediators are not really mediating cases.[47] To both Kovach

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Questions and Tenative Proposals, from an Evaluative Lawyer Mediator, 38 S. TEX. L. REV. 769 (1997) (supporting evaluative mediation); Weckstein, *supra* note 19 (arguing that professional information can empower disputants).

42. *See* Weckstein, *supra* note 19, at 526; *cf.* JOHN W. COOLEY, MEDIATION ADVOCACY 86-88, app. A-2 (1996) (describing the facilitative and evaluative mediation styles, and recommending that attorneys and their clients select a mediator based on the nature of the dispute and the style of mediation they believe would best resolve it). *See also* James H. Stark, *supra* note 10, at 487:

> When settling their disputes, disputants must be permitted to invoke legal norms if they choose to, and the mediator must take steps to ensure that the parties' choices are knowing and informed. In my view, any threat to the appearance of neutrality and impartiality is a necessary price that mediators must pay for party empowerment and informed consent.

43. Weckstein, *supra* note 19, at 526.

44. *See* Forester, *supra* note 24, at 323-33.

45. *See id.* at 328-31. Susskind is critical of those who disdain substantive expertise and the use thereof:

> [Y]ou're less than a helpful advocate of a good outcome if you can't bring to [the parties] the experience of others that they don't know, with the range of solutions they might invent. . . . So the notion that the mediator or facilitator shouldn't have any expertise doesn't make any sense. It's only if you say, "My job is to help the parties reach an agreement amongst themselves. I don't care about the agreement; I have no responsibility for the agreement. I'm neutral! I'm neutral with regard to the quality to the outcome. I don't care about the outcome; I'm a process person. . . . I don't need any expertise except process expertise." That's nuts.

Id. at 331; *see also* James Alfini & Gerald S. Clay, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spr. 1994, at 8 (Clay, an attorney-mediator, argues that "[e]ffective mediation almost always requires some analysis of the strengths and weaknesses of each party's position should the dispute be arbitrated or litigated").

46. Forester, *supra* note 24, at 331.

47. *See* Kovach & Love, *Evaluative Mediation*, *supra* note 15, at 31 (arguing that evaluation tends to perpetuate or create an adversarial climate and discour-

and Love, mediation must be understood not as a grand ADR practice, encompassing the wide spectrum of divergent techniques outlined by Riskin in his grid, but as one among several forms of ADR.[48] Mediation, that is, should be understood in terms of its place on the ADR spectrum, not as forming a spectrum unto itself.

Kovach and Love each characterize the role of the mediator as strictly limited to facilitation.[49] Echoing the classical definition, Kovach and Love maintain that the province of mediation is to assist parties in evaluating their own situations and developing their own solutions.[50] Mediators may facilitate communication between the parties, help focus their understanding of their own and others' interests, assist in creative problem solving, and otherwise help the parties devise their own agreement.[51] Yet, they argue, if the assistance a mediator offers becomes directive, such as providing legal advice or offering an evaluative assessment of each party's position, then the mediator is no longer mediating.[52]

Neither Kovach nor Love seeks to prohibit what Riskin and others call "evaluative" mediation. They do not object to evaluation outright; indeed, they acknowledge that at times an activist,

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age understanding and problem-solving); Kovach & Love, *Mapping Mediation, supra* note 15, at 106-10 (arguing for a bright line between the various ADR processes and asking evaluative mediators to name and label the process they use as neutral evaluation or non-binding arbitration to avoid confusion and to clarify expectations); Love, *supra* note 15, at 939 (stating that "differences between evaluators and facilitators mean that each use different skills and techniques, and each requires different competencies, training norms, and ethical guidelines to perform their respective functions"); *see also* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 989 (1997) (maintaining that mediation and the evaluative processes used in adjudicatory processes are not the "same enterprises").

48. *See* Kovach & Love, *Evaluative Mediation, supra* note 15, at 31-32; Kovach & Love, *Mapping Mediation, supra* note 15, at 77 ("By mixing the functions traditionally associated with arbitrators, case evaluators, and judges with those of mediators, the Grid suggests that mediation significantly overlaps with those other processes. This blurring of distinctive processes is an unnecessary and unhealthy capitulation.").

49. *See, e.g.*, Kovach & Love, *Evaluative Mediation, supra* note 15, at 31; Kovach & Love, *Mapping Mediation, supra* note 15, at 106; *cf.* Love, *supra* note 15, at 939.

50. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 88-89, 92; Love, *supra* note 15, at 938.

51. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 79-81 (stating that some evaluative techniques are used by facilitative mediators); Love, *supra* note 15, at 939.

52. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 80-81.

evaluative dispute resolution approach is appropriate.[53] They simply say that to be responsible toward the profession and entirely candid with the parties, third-party neutrals must name and label the ADR processes they use.[54] Activist, evaluative ADR, where the third-party neutral advises the parties how to proceed or takes control of the outcome is, on their account, not mediation but something more akin to neutral evaluation.[55] Moreover, if a mediator engages in a "mixed" ADR process—part mediation in the classical facilitative sense and part neutral evaluation—then he or she should name each process.[56] According to Love, mediators who are asked to evaluate can do so, "as long as the process of evaluating [is] recognized as a whole set of different activities than mediation."[57]

B. *The Mistaken Notion that All Evaluation Forms a Part of Mediation*

The evaluative/facilitative debate has thus resulted in opposing camps each striving to influence the way mediation is conceived as a form of ADR. Riskin and others advocate an inclusive definition where mediation is regarded as whatever mediators do. For some like Riskin, directive, overtly evaluative dispute resolution techniques are not necessarily desirable, but they must be treated as part of mediation practice since they occur within

53. *See id.* at 79; Love, *supra* note 15, at 948.

54. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 79, 109; Love, *supra* note 15, at 948 ("Mediators who regularly give case assessments and expert opinions should continue those practices only if they are requested by the parties, properly advertised, and accurately labeled."). *See also* Alfini, *Evaluative Versus Facilitative Mediation, supra* note 15, at 929 (comments of Lela Love). Love contends that "the neutral mediator must be competent to give the opinion and should be liable for careless opinions which could cost the parties a great deal. The process should be labeled mediation and neutral evaluation." *Id.*

55. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 79, 89, 92.

56. *See* Alfini, *Evaluative Versus Facilitative Mediation, supra* note 15, at 929 (comments of Lela Love clarifying her position that mediators should never provide legal advice or outcome predictions); Kovach & Love, *Mapping Mediation, supra* note 15, at 92 ("Entities inevitably evolve and change, but they should assume a new name when their mutation alters their fundamental characteristics. For example, we do not call butterflies caterpillars."); Love, *supra* note 15, at 948 (maintaining that mixed processes can be useful, but mediators should properly label the separate processes).

57. Alfini, *Evaluative Versus Facilitative Mediation, supra* note 15, at 933 (comments of Lela Love).

the context of mediations.[58] Others, like Weckstein and Susskind find the activist, directive techniques to be not merely part of mediation as a matter of fact, but in many situations compelled by the ethical obligations mediators owe the parties.[59] To those in the other camp, such as Kovach and Love, such talk dissolves the distinction between mediation and the evaluative ADR processes. And turns it into an amorphous, catch-all.[60] Kovach and Love prefer a brighter line definition of mediation that sets it apart according to its historically singular function as a facilitative method only.[61]

While I sympathize with Kovach and Love in their desire to hold fast to the classical definition of mediation, the bright-line approach they recommend is unworkable. Few words or concepts lend themselves to such definitional precision. Most terms, and certainly those representing practice-bound concepts such as mediation, permit only hazy definitional boundaries.[62] Kovach and Love may well be correct in suggesting that mediation is better understood by identifying its place on the ADR spectrum than by viewing it as an isolated continuum or 'grid' of its own. The ADR spectrum, however, must not be conceived as a number line where each form of ADR occupies a clearly marked independent position. Rather, it forms a spectrum along the lines of a color spectrum, such that every ADR method can be understood only in relation to the others into which it blends and fades.

Mediation, in other words, is a form of ADR separate and distinct from other ADR methods, though at the outer bounda-

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58. *See* Riskin, *supra* note 28, at 13 (acknowledging that he favors the facilitative-broad approach but that it is too late to tell practitioners that what they do is not mediation).

59. *See* Weckstein, *supra* note 19; *see also* Forester, *supra* note 24, at 326-33.

60. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 106-10.

61. *See id.* at 108-10.

62. The use of the words "proposition," "language," etc. has the haziness of the normal use of concept-words in our language. To think this makes them unusable, or ill-adapted to their purpose, would be like wanting to say "the warmth this stove gives is no use, because you can't feel where it begins and where it ends."

If I wish to draw sharp boundaries to clear up or avoid misunderstandings in the area of a particular use of language, these will be related to the fluctuating boundaries of the natural use of language in the same way as sharp contours in a pen-and-ink sketch are related to the gradual transitions between patches of colour in the reality depicted.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 120 (Rush Rhees ed. & Anthony Kenny trans., 1974); *see also id.* at 77 ("If we look at the actual use of a word, what we see is something constantly fluctuating.").

ries of its practice it becomes difficult to differentiate from other methods such as neutral evaluation. At its core, "mediation" has been defined as "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps the participants reach their own agreement for resolving a dispute or planning a transaction."[63] By contrast, "neutral evaluation" amounts to "a process in which the parties present their dispute before a neutral expert and receive an unprejudiced assessment of their case."[64] Yet where mediation ends and neutral evaluation begins, there is no bright line. Advocates of an all-inclusive definition of mediation stress this point, noting that in the midst of the evaluative/facilitative debate there remains a lack of agreement about what truly constitutes evaluation. Mediators "evaluate" in various ways. Weckstein prefers a very directive "issue-by-issue evaluation, particularly if combined with a decision analysis which seeks to establish probabilities of success at each step of a potential judicial proceeding."[65] This sounds very much like neutral evaluation. Others, however, use far less intrusive techniques. Marjorie Corman Aaron recommends evaluative assessments of a range of fair outcomes, where the mediator suggests "a range within which an intelligent, neutral, fair-minded person would find it reasonable for the parties to settle."[66] Others prefer using the Socratic method to do reality testing.[67] For these mediators, "[q]uestions become suggestions in the guise of a query."[68] Susskind, favoring the Socratic approach, regards such questioning as

63. Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 24 (1985); *see also* NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 1 (1987) ("Mediation is a process through which two or more disputing parties negotiate a voluntary settlement of their differences with the help of a third party (the mediator) who typically has no stake in the outcome."); Weckstein, *supra* note 19, at 508 ("While differing somewhat in language and detail, most modern definitions of mediation contain two common elements: (1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute.").

64. U.S.D.C. D.C. app. B (1996) (Dispute Resolution Programs, at 847).

65. Weckstein, *supra* note 19, at 553.

66. Aaron, *supra* note 41, at 64. While Aaron favors evaluation, she regards it as a last resort and as a means of helping the parties assess their progress and potential solutions, not as the final word. *See also* IND. CODE § 4-21.5-3.5-19 (1996) (applying to mediations involving administrative agencies, allows a mediator, in joint or separate sessions, to "express an evalaution of the proceeding . . . [which] may be expressed in the form of settlement ranges rather than exact amounts").

67. *See* Weckstein, *supra* note 19, at 521.

68. Deborah M. Kolb & Kenneth Kressel, *The Reality of Making Talk Work*, *in* WHEN TALK WORKS, *supra* note 24, at 472.

a "way of teaching without lecturing"[69] and at the same time, acknowledges that questions are a form of activism.[70] To this, Professor Love replies, "Asking questions comports with the mediator's role, but giving or suggesting answers does not."[71] Yet if the method of questioning is Socratic, or the nature of the questions leading or rhetorical, then the mere fact that a third-party neutral may choose to proceed by asking questions instead of stating propositions hardly provides a bright-line by which to characterize the process as mediation or neutral evaluation.

It is likely not possible, that is, to define mediation with such a sharp boundary as to preserve the process as purely facilitative without some tincture of evaluation. This lack of a *sharp* boundary, however, does not mean that mediation is *boundless.* Riskin and others who allude to Wittgenstein's famous proposition that "meaning is use,"[72] and who from that advocate an all-inclusive definition of mediation, *misuse* Wittgenstein and fail to recognize that the nature of a practice or activity is to be understood according to the actions of those who perform it well, not by the mistakes of those who do not.[73] Wittgenstein well-recognized that people often use words mistakenly.[74] And he understood that while a practice, activity, or technique develops its sense through the actions of its participants, a great gulf may well separate the nature of any such practice or technique from the errors of those who may blunder through it.[75] That a dancer falls during a ballet does not make falling part of good dance. That umpires may call strikes and balls inconsistently does not make inconsistency or a shifting strike zone part of good baseball. That most drivers on urban freeways often exceed the speed limit does not make the typical speed the lawful limit. That certain investors may engage in insider trading, some judges accept bribes or act with bias, certain politicians sell the public interest for the sake of reelection, does not mean their actions should be taken into account in redefining the ethical contours of their

69. *Id.* at 473; *see also* Weckstein, *supra* note 19, at 550 ("The question format of the suggestion also makes it easier for the parties to reject it, but that does not make it any less a suggestion.").

70. *See* Forester, *supra* note 24, at 328 (quoting Susskind: "I'm not pretending that by asking it as a question, you're not being acitivist. Quite the contrary. I'm saying that's the form of activism that I would personally prescribe . . . .").

71. Symposium, *supra* note 9, at 108 (comments of Lela Love).

72. Riskin, *supra* note 28, at 13.

73. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, I §§ 9, 54 (1973).

74. *See, e.g., id.* at I §§ 54, 143.

75. *See, e.g., id.* at I §§ 197-203.

respective practices. And the fact that some parties and lawyers prefer active, evaluative mediators does not necessarily pull the conduct of those mediators within the realm of *good* mediation practice.

Riskin's empirical claim that activist, evaluative dispute resolution techniques are part of mediation and, thereby, *ethical* thus quite simply begs the question. The recent proliferation of evaluative techniques in mediation can equally well be seen as evidence of a practice in distress, overrun by legally-trained professionals unable to convert their directive, decision making orientations to fit the facilitative mode.[76] Under this interpretation, the nature of the practice takes priority over the preferences of the practitioners.

As Kovach and Love argue, ADR practitioners owe the parties and their profession candor and clarity in *labeling* the dispute resolution method(s) they use. There are definitely times when a mediator will find him or herself participating in a mixed process that lies indistinguishably along the hazy boundary between mediation and another ADR method. But if the mediator subsequently recognizes that the process has edged into say, neutral evaluation, then *ethics* demands that the mediator not simply continue the process under the guise that the parties *want* 'evaluative' mediation. He or she should inform them that the process they initially agreed to has changed, advise them of the nature *and name* of the new process, and ensure their understanding and consent to continue. As Love has stressed, the parties must fully be apprized of the process involved and advised that a predominately evaluative process differs markedly from one that is in the main facilitative.

Without such candor, evaluation threatens to undermine the two central principles underlying mediation—the self-determination of the parties and the impartiality of the mediator. To many, it is these principles that set mediation apart from other forms of dispute resolution.[77] John Feerick calls self-determina-

76. While most trainers teach facilitative methods, *see* Kovach & Love, *Evaluative Mediation, supra* note 15, at 31, this training does not change the lawyers' years of training and experience in the adversarial process. Thus most lawyers revert to their dominant orientation. *See* Riskin, *supra* note 37.

77. *See, e.g.*, Nolan-Haley, *supra* note 8, at 790-91 (pointing out that it is the parties' retention of decision-making responsibility that distinguishes mediation from litigation); Alison Taylor, *Concepts of Neutrality in Family Mediation: Concepts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215 (1997).

tion "the most fundamental principle of mediation."[78] Others stress that the very integrity of mediation demands that mediators ever "remain impartial and evenhanded."[79]

The importance of these two principles is not lost on most advocates of activist mediation. Riskin, for example, emphasizes that parties to a mediation should understand that once they allow the mediator to express an opinion on the merits of their dispute, that opinion "will almost always have a powerful impact on all further negotiations."[80] But if the parties consent as a practical matter to giving the mediator control over their "self-determination," Riskin considers the giving of the opinion unproblematic. To Robert Moberly, the requirement of self-determination itself calls for evaluation when the parties express that as their preference.[81]

Weckstein concurs, arguing that "unless a qualified mediator is permitted to ethically offer pertinent information that a party has not or cannot obtain from other sources, that party's ability to engage in self-determination will be impaired."[82]

It is dubious to think, however, that party *self*-determination can only be realized through dependence on the greater wisdom and even-handed distribution of information by the mediator. This is akin to suggesting that the true self-realization of womanhood requires submitting oneself to the paternalistic dominance of a protective husband. As John Stuart Mill wrote over a century ago: "The principle of freedom cannot require that [one] should be free not to be free. It is not freedom to be allowed to alienate [one's] freedom."[83] Similarly, it is not self-determination to alienate one's right to direct one's own destiny. The claim that such alienation in mediation is necessary, a claim implicit in the writings of Weckstein and Susskind, among others, is what leads the opponents of evaluation to characterize the very idea of 'evaluative mediation' as oxymoronic.[84]

The question thus remains whether it is possible to engage in evaluation without fundamentally compromising the principles of self-determination and impartiality. Kovach argues that impartiality is necessarily compromised, for evaluation "invaria-

78. John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 460 (1997).

79. JOINT STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (1994).

80. Riskin, *supra* note 28, at 24.

81. *See* Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 672 (1997).

82. Weckstein, *supra* note 19, at 539.

83. JOHN STUART MILL, ON LIBERTY (Mary Warnock ed., 1962) (1859).

84. *See* Kovach & Love, *Evaluative Mediation, supra* note 15.

bly favors one side over the other."[85] It has also been suggested that even if an evaluation is as a matter of fact even-handed, there is always the risk that it will be perceived as partial by one or more parties.[86] Should such an appearance take hold, the reality of the mediator's impartiality becomes irrelevant, for the perceived loss of neutrality undercuts the integrity of the process as the party disgruntled by the evaluation comes to view the mediator as an adversary.[87] Yet to Weckstein at least, this threat that evaluation poses to mediator impartiality is of little concern. For impartiality, he claims, is an "ideal, but it is neither realistic in all cases nor an essential ingredient of the process."[88]

Perhaps of greater concern than how activist, evaluative techniques impact particular mediators is the danger they present to the very continuation of mediation as an ADR process distinct from law.[89] As James Alfini has noted, evaluation threatens to transform mediation from a consensual to a coercive process.[90] This threat has grown substantially in recent years as lawyers have increasingly joined the ranks of mediation practitioners. Trained in the adversarial, legal mode as partisan representatives, many lawyer-mediators quite understandably find evaluative, directive techniques more comfortable and natural than the facilitative, consensual approach of classical mediation practice.[91] Now, some may wish to argue that mediation *ought*, as a practical matter, be reconceived and transformed into an evaluative process more attuned to the legal mind, where sound outcomes are achieved under the watchful direction and control of the mediator. The very notion of mediation as a facilitative process where the parties truly *create* their own agreement may be an unreasonable and unachievable ideal. But if it is, and if it is true that mediation as a practice *ought* to be transformed, then we must acknowledge the failure of the classical model and admit and justify the new mediation paradigm. The

85. *Id.* at 31.

86. *See* Aaron, *supra* note 41, at 62.

87. *See id.*

88. Weckstein, *supra* note 19, at 510.

89. *See* Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Medation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 864 (1998).

90. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out*, *supra* note 15, at 50.

91. *See* Kovach & Love, *Evaluative Mediation*, *supra* note 15, at 32 ("'Evaluative mediation' shifts mediation back into the comfortable framework of the adversarial norm."); Kovach & Love, *Mapping Mediation*, *supra* note 15, at 96 ("Lawyers like most people feel comfortable with what they know best . . . . Accordingly, they attempt to draw mediation back into their adversarial paradigm.").

justification required would have to include assurances that the basic principles of self-determination and impartiality will not be compromised or, if they are, that they were unnecessary in the first place. And it would demand that all concerned accept the expanded role of the mediator on which the evaluative mediation paradigm rests.

More than anything, the evaluative paradigm calls for mediators to assume far greater power and control over the mediation process than they ever exercised under the classical model. Whether the arguments for this expanded role are sound or not, one thing about them is patently true—that they rest on a paternalistic attitude toward the process and parties involved in mediation.[92] Riskin describes the facilitative mediator as one who "assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps better than the lawyers."[93] To the contrary, the evaluative mediator takes a paternalistic attitude toward the parties and an attitude of dominance and control toward the process.

This attitude of paternalism comes through most strongly in the activist evaluation approach discussed by Susskind. Commenting on the issue of impartiality, Susskind explains that the "activist" mediator is not neutral, but "*nonpartisan*" with regard to outcome.[94] This is to say that the activist mediator sees him or herself as an "advocate" of the "best possible outcome," though he or she maintains a posture of disinterest toward the parties individually.[95] In taking such a personal interest in the outcome, the activist mediator further presumes that the "best possible outcome" can only be achieved under his or her guidance and control, not through the creative energies of the parties. It becomes the duty of the activist mediator, then, to "train" the parties how to put their options on the table and advocate their own interests.[96] Yet mediators who see their role as one of training the parties, no matter how impartial they may be, are paternalistic. And mediators who approach the process as "advocate[s] of a good solution"[97] are necessarily adopting an attitude of power and control over the outcome, an attitude which cannot but compromise the principles of self-determination and impartiality.

92. *See* Nolan-Haley, *supra* note 8, at 815.
93. Riskin, *supra* note 28, at 24.
94. Forester, *supra* note 24, at 328-29.
95. *Id.* at 332.
96. *Id.*
97. *Id.* at 331.

Activist, evaluative approaches to mediation thus do pose a significant threat to the continued existence of mediation as a separate and distinct form of ADR. Yet despite the threat, the debate over evaluative and facilitative mediation styles, as is currently occurring within the academic community, is just beginning and will likely be with us for some time. Unfortunately, mediation practice cannot wait for this theoretical debate to run its course. It is necessary as a practical matter to create ethical rules *now* that protect mediation from being dissolved into a mere appendage to the legal system.[98] Toward the feasibility of that end we will now turn.

II. REGULATING LAWYER-MEDIATORS THROUGH LAWYER RULES OF PROFESSIONAL CONDUCT

All fifty states and the District of Columbia have adopted rules of professional responsibility for lawyers that follow or are modeled largely on the ABA's Model Code of Professional Responsibility or its Model Rules of Professional Conduct. The Model Code and the Model Rules both rest on the conceptual model of lawyers engaged in conventional, adversarial legal representation.[99] While no one questions whether these standards apply and govern lawyer conduct during traditional trial representation, the scope of their application becomes murky when lawyers mediate disputes. Do the rules of professional responsibility or professional conduct govern? Is the lawyer engaged in the practice of law?[100] Does the mediator's style affect the debate?

The Model Rules and the Model Code themselves provide little guidance as to their application to lawyers engaged in mediation.[101] The Model Rules contain only one express mention of mediation. Model Rule 2.2, titled "Intermediary," permits an attorney to act as an intermediary between clients under certain conditions. The rule's comment section expressly *excludes* attor-

98. *See, e.g.*, Gerencser, *supra* note 89, at 849 ("Mediation has been co-opted by legal advocates and become part of the adversary process."); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or The Law of ADR*, 19 FLA. ST. U. L. REV. 1 (1991) (arguing that ADR already has been co-opted by the adversary system).

99. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997) ("A lawyer is a representative of clients . . . .").

100. *See* Furlan, *supra* note 7, at 272-87 (discussing whether mediation is the practice of law); Menkel-Meadow, *Is Mediation the Practice of Law?*, *supra* note 11, at 61 (arguing that applying legal standards to concrete facts and making predictions constitutes the practice of law, regardless of whether there is a lawyer-client relationship).

101. *See* Furlan, *supra* note 7, at 278-302; Smiley, *supra* note 11.

ney-mediators. The comment explains that the rule "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties."[102] The effect of this exclusion is unclear. Some have argued that this comment suggests that the conflict of interest rules do not apply to a lawyer while he or she is acting as a mediator,[103] though this remains open to debate.[104]

The strongest argument for treating mediation by lawyers as covered by the Model Rules comes from Model Rule 5.7, regarding "law-related services" by lawyers.[105] Model Rule 5.7(a) stipulates that any professional activity by a lawyer falls under the Rules of Professional Conduct as a "law-related service" so long as it is a service provided:

> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) by a separate entity controlled by the lawyer . . . if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.[106]

A question exists as to whether a lawyer's "law-related services" as defined in Model Rule 5.7[107] include mediations.[108] To date, five states have adopted Model Rule 5.7, two of which stipulates

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102. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1997).

103. *See* Sub, *supra* note 3, at 163 n.40.

104. *See* Maute, *supra* note 2, at 510-11 (discussing the split of opinion on the applicability of Model Rule 2.2 to mediation).

105. *See, e.g.*, Jonathan A. Beyer, *Practicing Law at the Margins: Surveying Ethics Rules for Legal Assistants and Lawyers who Mediate*, 11 GEO. J. LEGAL ETHICS 411, 413-16 (1998) (discussing mediation as a law-related service and concluding that "mediation satisfies the general definition of a law-related service as offered in the amended Model Rule 5.7"); Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 FAM. L.Q. 679, 681-84 (1996) (providing an analysis of Model Rule 5.7 and mediation services).

106. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7(a) (1998).

107. Model Rule 5.7 defines "law-related services" as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." *Id.* Rule 5.7(b).

108. *See* COMMISSION ON ETHICS MODEL RULE, *supra* note 12, at 2. *See also* Furlan, *supra* note 7, at 290-99 ("[T]he legal nature of mediated disputes, coupled with the potential for confusion that may arise from the mediator's status as an attorney, makes it reasonable to suppose that mediation does fall within the scope of Model Rule 5.7 . . . ."); Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74, 75 (1996) (main-

that ADR services are "law-related services," while the other three take no position on the question.[109]

The principal drawback to applying the ABA Model Rules (or any existing state lawyer rules of professional responsibility) to lawyer-mediators is that the traditional role of the lawyer as advocate differs fundamentally from that of the lawyer-mediator. Although the Model Rules of Professional Conduct, in contrast to the earlier Model Code of Professional Responsibility, recognize more diversity and specialization in the legal profession,[110] neither deal with lawyers as third-party neutrals. The Model Rules discuss lawyers in a wide variety of roles including serving as advocates,[111] intermediataries,[112] prosecutors,[113] former judges, arbitrators,[114] government officials,[115] and representatives of entities.[116] All of these roles envision the lawyer practicing law in a representational capacity.

Ethical standards for mediators typically emphasize parties' self-determination, mediator impartiality, the facilitative nature of the process, and discourage mediators from engaging in activities that constitute the practice of law.[117] However, when lawyers adopt an evaluative orientation by dispensing legal advice, apply-

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taining that Rule 5.7 does appear to include mediation as an ancillary service but arguing against its application to attorney-mediators).

109. Five states have adopted Model Rule 5.7. *See* INDIANA RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1997); MAINE CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.2(h) (1998); MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1998); NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1997) (comment section offers examples of law-related services which includes providing ADR services); PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1999). *See also* Andrew M. Goldner, *Minding Someone Else's Business: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 GEO. J. LEGAL ETHICS 767 (1998).

110. *See* Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering As Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 635 (1997).

111. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1998).

112. *See id.* Rule 2.2.

113. *See id.* Rule 3.8.

114. *See id.* Rule 1.12.

115. *See id.* Rule 1.11.

116. *See id.* Rule 1.13.

117. For example, Florida prohibits the mediator from giving his or her personal opinion as to "how the court in which the case has been filed will resolve the dispute." FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.370 (effective Apr. 1, 2000). Indiana allows a mediator, in joint or separate sessions, to "express an evaluation of the proceeding . . . [which] may be expressed in the form of settlement ranges rather than exact amounts." IND. CODE § 4-21.5-3.5-19 (1996). In Montana, "[t]he role of the mediator is to encourage and assists the parties to reach their own mutually-acceptable settlement by facilitating communication; helping to clarify issues, interests, and the

ing the law to the facts, or making specific predictions, they may find that they fall under the rules of professional conduct.[118]

The question then becomes whether mediation is the practice of law[119] and, if so, whether lawyer-mediators can ethically practice law within the mediation setting. While providing an all-inclusive definition of the practice of law may well be impossible,[120] case law, commentators, and the Model Codes provide some guidance as to its essential nature. Most fundamentally, the practice of law is thought to rest on the existence of an attorney-client relationship.[121] Many commentators argue that mediation services should not be characterized as the practice of law.[122] Here emphasis is placed on the lack of a "client."[123] Yet other factors contribute to the understanding of what constitutes the practice of law. These include the performance of activities

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appellate perspective; fostering joint problem-solving; and exploring settlement alternatives." MONT. R. OF APP. PROC. Rule 54 (e)(1) (1998).

118. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 11, at 424 (1997) (arguing that when mediators evaluate the strengths and weaknesses of a particular dispute by applying legal principles to specific facts, mediators are engaging in the practice of law).

119. *See* Beyer, *supra* note 105, at 415-18; Furlan, *supra* note 7, at 272-87; Purnell, *supra* note 19.

120. *See* State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 8-9 (Ariz. 1961) (noting that it is "impossible to lay down an exhaustive definition of 'the practice of law'"); State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976) (stating that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure").

121. *See* New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 998 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967) (stating that the "relation of confidence and trust so necessary to the status of attorney and client is the essential of legal practice").

> Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1981).

122. *See, e.g.*, Moore, *supra* note 105, at 682.

123. *See* Meyerson, *supra* note 108, at 75 (1996) (arguing that to practice law one must have a client: "Assuming that mediators clarify with parties that no attorney-client relationship exists, engaging in a legal discussion would not be the practice of law. Specifically, in order for a mediator's conduct in advising parties about the legal aspects of a particular dispute to be considered the practice of law, the party to the mediation must view the mediator as her lawyer and assume that she is receiving legal advice for her personal benefit."); *but see* Menkel-Meadow, *Is Mediation the Practice of Law?*, *supra* note 11, at 61 (contending that applying legal principles to specific facts constitutes law practice regardless of whether a lawyer-client relationship exists).

that are "commonly understood to be the practice of law,"[124] that call for the application of law to specific factual situations,[125] or that involve the exercise of judgment or the drafting of documents that impact the legal rights of others.[126]

The lack of a consistent and uniform understanding of the practice of law and its relationship to mediation hampers the development of mediation. For example, the Rules of the D.C. Court of Appeals Rule 49 addresses the "Unauthorized Practice of Law." The Rule provides:

> (b)(2) "Practice of Law" means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> > (A) Preparing any legal document . . . intended to affect or secure legal rights . . . ."[127]

The comment section to the rule makes it clear that this rule does not apply to ADR services.[128] Similarly, the Washington State Board of Governors recently adopted the position that

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124. *See, e.g.*, Windover v. Sprague Tech., 834 F. Supp. 560, 566 (D. Conn. 1993); Monroe v. Horwitch, 820 F. Supp. 682, 686 (D. Conn. 1993); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958)).

125. *See* Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975). *Compare* New York County Lawyers' Ass'n v. Dacey, 234 N.E.2d 459 (N.Y. 1967) (holding that *How to Avoid Probate*, which encouraged people to use "living wills" and contained legal forms, was protected speech and did not involve the practice of law), *with* Grievance Comm. v. Dacey, 222 A.2d 339 (Conn. 1966) (ruling that Dacey, who in another book provided estate planning counseling to individual potential mutual fund investors, was engaged in the unauthorized practice of law), *and* Florida Bar v. Stupica, 300 So.2d 683, 686 (Fla. 1974) (holding that information provided in a divorce kit was so "comprehensive and specific" and so "parallel[ed]" the advice attorneys customarily provide clients seeking divorce as to constitute the providing of legal advice and hence the unauthorized practice of law).

126. *See, e.g.*, *In re* Ellingson, 230 B.R. 426, 434 (D. Mont. 1999); Palmer v. Unauthorized Practice Comm., 438 S.W.2d 374, 377 (Tex. Civ. App. 1969).

127. D.C. CT. APP. R. 49(b)(2) (1995).

128. *See id.* R. 49 cmt.:

> The Rule is not intended to cover the provision of mediation or alternative dispute resolution ("ADR") services. This intent is expressed in the first sentences of the definition of the 'practice of law' which requires the presence of two essential factors: The provision of legal advice or services and a client relationship of trust and reliance. ADR services are not given in circumstances where there is a client relationship of trust and reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel.

mediation services are not the practice of law.[129] In contrast, the New Jersey Supreme Court Advisory Committee on Professional Ethics found that providing mediation services is the practice of law.[130]

The debate about whether mediation is the practice of law becomes particularly thorny when the mediator uses an evaluative approach that includes predicting likely outcomes should the matter proceed to trial. This question does not arise in the context of strictly facilitative mediation.[131]

Verbal disclaimers that mediation is not the practice of law may not immunize the lawyer-mediator if her conduct during the mediation is inconsistent with the verbal assertions. Responsible mediators explain to the parties at the outset the nature of mediation as a neutral process, making clear the distinction between mediation services and legal services. They emphasize that mediation is not the practice of law, and that no attorney-client relationship exists. They advise the parties that they may need to consult independent legal counsel[132] and should not look to the mediator to protect their legal rights.[133] These verbal explanations will not shield the mediator, however, from responsibility

129. *See* Washington State Bar Ass'n Comm. to Define the Practice of Law (Final Report, July 30, 1999). The Report's definition of the Practice of Law expressly excludes those "[s]erving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator." *See id.* § (b)(4). The Board of Governors unanimously approved it on September 10, 1999 and forwarded it to the Washington Supreme Court for adoption as a court rule. *See* Notes from conversation with Robert Weldon, General Counsel for the Washington State Bar Association and Reporter for Committee to Define the Practice of Law (on file with author).

130. *See* New Jersey Sup. Ct. Advisory Comm'n on Professional Ethics Op. No. 676 (1994) (holding that when a lawyer serves as a third party neutral, "he or she is acting as a lawyer and is not engaging in a separate business"). *See also* Furlan, *supra* note 7, at 273 (discussing state statutes which have addressed the question of what constitutes the practice of law).

131. *See* Imperati, *supra* note 26, at 718 ("Under the facilitative model, an attorney who mediates is not practicing law during mediation, even if he or she regularly engaged in a traditional attorney capacity outside the mediation session.").

132. *See* Nolan-Haley, *supra* note 19, at 83, 99 (noting that while seeking outside professionals may be desirable, it is "particularly illusory," "woefully inadequate," and "practically unfeasible for the majority of Americans").

133. *See* Meyerson, *supra* note 108, at 74. Meyerson argues that to practice law one must have a client. Hence, he claims, mediators who offer the parties no indication of legal representation face no problems in doling out legal advice:

> Assuming that mediators clarify with parties that no attorney-client relationship exists, engaging in a legal discussion would not be the practice of law. Specifically, in order for a mediator's conduct in advising parties about the legal aspects of a particular dispute to be considered the practice of law, the party to the mediation must view the

for practicing law if her conduct truly exemplifies legal, rather than mediation practice. Veiled attempts to call it a facilitative process disappear once the lawyer-mediator engages in lawyering activities such as dispensing legal advice and making predictions. The lawyer is practicing law.

Thus, the more evaluative the techniques the mediator uses, the more closely mediation comes to the practice of law. The Model Rules as they stand do not expressly regulate this area of lawyer conduct. State lawyer rules, currently silent on the role of lawyer-mediators, provide an inadequate forum for resolving the questions whether mediation constitutes the practice of law and, if so, whether it is ethical for lawyers to practice law within the context of the mediation process.[134] While courts occasionally have tried to answer these questions using the traditional lawyer rules,[135] their answers have been inconclusive, suggesting the need for specific rules targeting the lawyer-mediator. These rules could come in the form of an amendment to the Model Rules of Professional Conduct,[136] or perhaps through generic rules of ethical conduct for mediators.

III. ETHICAL RULES FOR MEDIATORS—THE UMBRELLA APPROACH

In 1992, the ABA, together with the American Arbitration Association ("AAA") and the Society of Professionals in Dispute Resolution ("SPIDR"), formed a joint committee to develop a code of conduct for mediators.[137] After two years, this joint com-

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mediator as her lawyer and assume that she is receiving legal advice for her personal benefit.

Id.

134. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution, supra* note 11, at 425 ("To conclude, as I do, that the flexibility of the mediator's role includes the provision of legal information and legal advice and thus, 'the practice of law,' does not resolve by what standards of ethics or performance a third-party neutral should be judged.").

135. *See, e.g.*, Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487 (D. Utah 1995) (holding that while the rules of professional responsibility do not expressly regulate attorney-mediators, they do address the issue of subsequent representation); *In re* Waller, 573 A.2d 780 (D.C. App. 1990) (per curiam) (concerning a lawyer-mediator who reported the misconduct of another attorney under Rule 8.3, which he learned about during the course of a court-annexed medical negligence and product liability mediation). In the *In re Waller* case, the Board of Professional Responsibility supported the lawyer-mediator's decision, ruling that the confidentiality requirement was not intended to prevent disclosure of such attorney misconduct. On appeal, the court upheld the Board's decision.

136. *See infra* Pt. IV.

137. *See* Feerick, *supra* note 78, at 458.

mittee issued its Joint Standards of Conduct for Mediators ("Joint Standards"). The Joint Standards apply to all mediators, not drawing a distinction between lawyer-mediators and other professional mediators.[138] According to Dean John Feerick who served as chair of the joint committee, the Joint Standards were meant to provide a "starting point in the development of national ethical guidelines for the practice of mediation."[139] Conceived as a set of "general considerations" for mediators, they are by design "aspirational in nature and . . . intended to be guideposts toward the development of uniform standards of conduct for mediators."[140]

While the members of the joint committee wrestled with the issue of evaluative versus facilitative mediation, they did not resolve it.[141] Regarding mediation as resting fundamentally on the self-determination of the parties, the committee stressed that mediators should be effective *facilitators* foremost,[142] not 'evalu-

138. *See id.* at 459.

139. *Id.* at 477.

140. *Id.*

141. *See id.* at 472. *See also* Symposium, *supra* note 9, at 103 (Dean Feerick, chair of the committee, notes that the standards encourage a facilitative role but they do not prohibit an evaluative role: "Our committee did not view mediation as an evaluative kind of process, however, but rather as a process premised on the self-determination of the parties."); *id.* at 104-05 (comments of Kovach, the reporter-drafter of the joint standards, noting that the most controversial issue in drafting the Model Rules was the legitimacy of evaluative mediation).

142. In the Preface, the Joint Committee defined mediation:

> Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promoting understanding, focusing the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

JOINT STANDARDS OF CONDUCT FOR MEDIATORS Preface (1994). Further:

> The primary purpose of mediation is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that the parties seek outside professional advice, or consider resolving the dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

Id. Standard VI cmt.

ators.'[143] Yet while the Joint Standards encourage a facilitative approach to mediation,[144] they do not prohibit evaluation outright.[145] Rather, they caution mediators to "refrain from providing professional advice,"[146] emphasizing the importance of self-determination.

Dean Feerick cautioned that mediators who evaluate need to recognize that in doing so they take on increased obligations and responsibilities which may make them answerable to other standards of professional conduct.[147] This may well include responsibilities under the lawyer codes of ethics or state statutes or rules regarding the unauthorized practice of law.[148] Thus to Dean Feerick and the other drafters of the Joint Standards, lawyer-mediators who adopt evaluative approaches should take heed. Regardless of any disclaimers a lawyer-mediator may provide about not serving as either parties' lawyer, the mediator starts down the slippery slope of practicing law, accountability, and liability[149] once he or she starts to provide legal information and advice.[150] This warning echos the concerns Professors Kovach, Love, and Menkel-Meadow, among others, who likewise argue

143. *See supra* note 141.

144. *See supra* note 142.

145. *See* Symposium, *supra* note 9 (comments of John Feerick).

146. Feerick, *supra* note 78, at 482.

147. *See id.* at 472 n.74.

148. *See id.* at 473 n.75. Feerick gives examples of statutes which authorize non-lawyer judges, and also notes that Rule 2.2 of the ABA Model Rules does not necessarily regulate lawyer-mediators.

149. Many states provide for mediator immunity unless one can establish willful mediator misconduct. *See generally* ROGERS & MCEWEN, *supra* note 6, at § 11:03. The Draft Uniform Mediation Act, however, expressly denies mediators immunity from civil suit. *See* National Conference of Commissioners on Uniform State Laws, American Bar Association Section on Dispute Resolution, *Draft Uniform Mediation Act*, March 1999 at § 4(b) [hereinafter *Draft Uniform Mediation Act*] (visited Dec. 18, 1999) <http://www.stanford.edu/group/sccn/mediation/>. The Reporter's Working Notes explain that "[m]ediators are not licensed, so the only means to hold them accountable outside the program supervised by courts or public agencies is to preserve the possibility of civil liability." *Id.* The reporter notes that, to date, "there are no reported cases in which a mediator has been held liable despite tacit and sometimes explicit authority for such legal claims." *Id.*; *see also* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986); Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731(1984).

150. Providing legal information is generally allowed, and legal advice is not. *See* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 714 (1994).

that evaluative mediation necessarily constitutes the practice of law.[151]

At least two states have adopted the Joint Standards.[152] The state of Florida, while not one of the Joint Standards states, has enacted one of the most comprehensive sets of rules for certified and court-appointed mediators.[153] The Florida scheme begins with a statutory definition of mediation,[154] supplemented by court rules that further define the process,[155] sets forth ethical

151. *See* Kovach & Love, *Mapping Mediation, supra* note 15, at 104-05 ("evaluation of likely court outcomes is the practice of law"); Menkel-Meadow, *Ethics in Alternative Dispute Resolution, supra* note 11, at 425 (concluding that providing legal information and advice is the practice of law); Menkel-Meadow, *Is Mediation the Practice of Law?, supra* note 11. However, Meyerson writes:

> Assuming that mediators clarify with parties that no attorney-client relationship exists, engaging in a legal discussion would not be the practice of law. Specifically, in order for a mediator's conduct in advising parties about the legal aspects of a particular dispute to be considered the practice of law, the party to the mediation must view the mediator as her lawyer and assume that she is receiving legal advice for her personal benefit.

Meyerson, *supra* note 108, at 75.

152. *See* LA. REV. STAT. ANN. § 4107 (1998) (incorporating by reference the Joint Standards for all approved registered mediators in Louisiana); S.C. MEDIATION R. app. A (1998) (adopting almost verbatim the Joint Standards; only deleting one sentence under Standard I). Both Louisiana and South Carolina have lawyer-only mediation rules. *See* LA. REV. STAT. ANN. § 4106(A)(1) (1998); S.C. MEDIATION R. 10(a) (1998).

153. *See* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS Rules 10.100-10.900 (effective Apr. 1, 2000). Florida also has a lawyer-only rule for circuit court mediators. *See id.* 10.100(c). The Florida Supreme Court Standing Committee on Mediation and Arbitration Rules recently completed a two-year review of the ethical standards for mediators. The Florida Supreme Court amended the Florida Rules for Certified and Court-Appointed Mediators which become effective April 1, 2000. Much of the debate in Florida centered on the issue of the role of evaluation in mediation.

154. Florida law defines mediation as follows:

> "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.

FL. STAT. ANN. § 44.1011(2) (1997).

155. Mediation Defined. Mediation is a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

rules,[156] and establishes a grievance procedure.[157] Regarding the question of evaluation, Florida allows certified and court-appointed mediators to provide information which the mediator is "qualified by training or experience to provide."[158] In no event, however, may a mediator offer an opinion or prediction as to specific court outcomes.[159]

One of the most distinguishing features of the Florida regulatory scheme is its express recognition of the ethical issues created by cross-professional mediation practice. The State scheme includes a rule on "Concurrent Standards" which provides, "Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound."[160]

Like the drafters of the Joint Standards, the authors of the Florida mediation program thus understood the peculiar ethical dilemmas faced by cross-practice mediators. However, the Florida Concurrent Standards rule provides, in contrast to the Joint Standards, some solution and guidance, and does not simply

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FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS Rule 10.210 (effective Apr. 1, 2000).

> Mediator's Role. In mediation, decision-making authority rests with the parties. The role of the mediator includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

Id. Rule 10.220.

> General Principles. Mediation is based on principles of communication, negotiation, facilitation, and problem solving that emphasize:
>
> (a) self determination;
>
> (b) the needs and interests of the parties;
>
> (c) fairness;
>
> (d) procedural flexibility;
>
> (d) confidentiality; and
>
> (f) full disclosure.

Id. Rule 10.230.

156. *See id.* Pt. II (setting forth the Standards for Professional Conduct).

157. *See id.* Pt. III (providing method of enforcing rules).

158. *Id.* Rule 10.370(a).

159. *See id.* Rule 10.370(c) ("A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."). Professor Bob Moberly, who helped draft an earlier version of the rules, explains that the purpose of this rule is to prohibit tactics that will imply some special knowledge of how a particular judge will rule. *See* Moberly, *supra* note 81, at 674.

160. *Id.* Rule 10.650.

acknowledge and warn cross-professional practitioners that they are bound to abide by multiple sets of ethical rules.

The Joint Standards and comprehensive state programs like Florida's, while necessary and helpful for the conceptual regulatory frameworks they put around the practice of mediation, do not adequately address the specific ethical problems and issues encountered by lawyers or other mediators who concurrently are members of a regulated profession.[161] They do not answer the specific cross-disciplinary questions that arise when mediators are governed by two potentially conflicting standards simultaneously.[162] Indeed, they may at times add to the confusion.[163] Lawyer-mediators thus need a uniform and comprehensive set of standards that will protect the participants from specific mediations while promoting the process of mediation generally, as well as the practice of law.[164]

Since the cross-practice of law and mediation is unique to lawyer-mediators, logic and experience suggest that targeted ethi-

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161. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1912 (1997) ("While the Joint Standards provide a useful starting point for the basic principles of good mediation . . ., its vague standards do not provide adequate guidance in particular settings."); Moore, *supra* note 105, at 720:

> None of the standards reviewed provide a comprehensive set of guidelines to assist lawyer-mediators in dealing with ethical challenges they confront on a regular basis . . . . The attempt in the [Joint Standards] to provide guidance for lawyer-mediators has not fully resolved the ethical dilemmas they confront. The practicing lawyer-mediator is still governed by the Model Rules as well as jurisdictional mediation standards and court rules which may often be mutually inconsistent.

162. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 11, at 451-52 (criticizing the Joint Standards as too broad and ambiguous in precisely those areas where they need to be concrete and specific and arguing for discretionary, aspirational standards on "alternative justice issues"—"process-based ethics" such as real consent, self-determination, and democratic participation). Florida's recent rule on current standards tries to provide a simple answer to a complex set of questions by suggesting the state's ethical standards of conduct for certified and court-appointed mediators trumps all other professional rules. While this pre-emptive rule provides a neat, bright-line resolution to the cross-practice problem, I doubt it will work. The problems that arise in the cross-practice of law and mediation are too central to both practices to think that either one can so easily be pushed aside. It is hard to imagine that state bar counsel or state bar commissioners will defer to another body on the issue of lawyer misconduct even if it is in a mediation context.

163. *See id.*

164. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 11, at 409 (arguing that lawyers in ADR need their own rules because the "matrix of dilemmas" for lawyers who practice as neutral third parties "are simply not resolved by currently existing rules of ethics for lawyers and third-party neutrals").

cal rules for lawyer-mediators would best be located apart from umbrella rules applicable to all mediators. Those states that either have adopted the Joint Standards[165] or, like Florida, that have enacted their own umbrella standards of conduct for mediators,[166] do not adequately address the concerns that are peculiar to lawyer-mediators. Moreover, those lawyers who have assumed the role of a mediator without ever seeking certification as such are obviously not subject to any umbrella standards.[167] Hence, ethical rules specifically targeting the lawyer-mediator should either come as stand-alone provisions or be incorporated into lawyer rules of professional conduct.

IV. TARGETED ETHICAL RULES FOR LAWYER-MEDIATORS

To date, two entities have crafted ethical rules that directly target lawyer-mediators. One is the CPR-Georgetown Commission on Ethics and Standards in ADR, which in April 1999 released a draft Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral.[168] The other comes from the Commonwealth of Virginia in the form of specific provisions, contained in its new lawyer Rules of Professional Conduct, that address lawyers as third party neutrals and mediators. Both amount to laudable regulatory efforts, the best to date in terms of providing meaningful guidance to states and bar associations venturing through the cross-practice ethical maze. Each also, however, has its limitations.

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165. *See supra* note 152.

166. *See, e.g.*, FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS Rule 10.200-10.690 (2000); GA. ALT. DISP. RESOL. R. app. C, A (1997); IND. ALT. DISP. RESOL. R. 7 (1998); MASS. SUP. JUD. CT. R. 1:18, 9 (1997); MINN. GEN. R. PRACTICE 114 app. (1997) (*see* Adam Furlan Gislason, *Demystifying ADR Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System*, 83 MINN. L. REV. 1839, 1878 n.26 (1999) (noting that Minnesota's ADR Review Board modeled its Code of Ethics after the Joint Standards, and consulted several other states' and associations' codes of ethics)); OKLA. DISP. RESOL. R. 12, ch. 37, app. A (1995); OR. ADMIN. R. 718-040-0100 (1999) (*see* Imperati, *supra* note 26 (providing a comparison between the Model Standards (ABA, AAA, SPIDR), the Oregon Mediation Association's Standards of Mediation Practice, the Oregon State Bar's Code of Professional Responsibility, and the ABA's Model Rules)); TENN. R. SUP. CT. RULE 39, app. A (1994); UTAH R. COURT-ANNEXED ADR R. 104 (1997).

167. For example, Idaho requires mediators on their court-approved roster to be lawyers with five years of legal experience. *See* IDAHO R. CIV. P. 16(k)(13)(A)(i) (1995). The Idaho courts, however, have never adopted a Code of Professional Conduct for Mediators.

168. *See* COMMISSION ON ETHICS MODEL RULE, *supra* note 12 (draft released in April 1999 with comments welcome until July 15, 1999).

A. *CPR-Georgetown Commission on Ethics*

The CPR-Georgetown Commission designed its Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral ("Draft Model Rule") to *supplement* traditional lawyer rules of professional conduct.[169] The Commission recognized that lawyers who serve as third-party neutrals often find themselves in the dual professional capacities of partisan legal representatives and impartial neutrals.[170] Given the very different and sometimes conflicting demands of these two roles, the Commission determined that meaningful ethical rules which speak directly to the cross-practice legal professional are necessary.[171] Reasoning that "[w]hen a lawyer serves as a third party neutral in a capacity governed by multiple sets of ethical standards, the lawyer must note that the Model Rules of Professional Conduct govern his/her duties as a lawyer-neutral and that discipline *as a lawyer* will be governed by the Model Rules,"[172] the Commission deemed it most appropriate to offer its Draft Model Rule as a supplement to the already existing rules of professional conduct for lawyers.

With its model rule, the Commission on Ethics hoped to clarify the distinct role of the lawyer-mediator while remedying the inadequacies of the umbrella approach as well as the silence toward cross-practice issues found in the ABA Model Rules and the state ethics rules for lawyers.[173] The Commission's Draft Model Rule in the main follows the type of all-inclusive view of mediation advocated by Riskin and others. Dividing its definitional section into four main categories—"adjudicative," "evaluative," "facilitative," and "hybrid" dispute resolution processes—the Commission included mediation under both the "evaluative"[174] and "facilitative"[175] categories, each with a similar yet different definition. The Commission noted that mediation is often

169. *See id.* at 1 n.3 ("The proposed rule is designed to be incorporated in lawyer ethical codes.").

170. *See id.* at 2.

171. *See id.* While confusion may exist for any mediator operating under multiple ethical codes, the Commission on Ethics only addresses the ethical obligations of lawyers who serve as third party neutrals. *See id.* at 1.

172. *Id.* at 3.

173. *See id.* at 1 n.2. The Commission on Ethics pointed out that "[t]he current Model Rules are silent on lawyer roles as third party neutrals, which are different from the representational functions addressed by the Model Rules of Professional Conduct and judicial functions governed by the Judicial Code of Conduct." *Id.* at 2.

174. *Id.* at 2. The Commission on Ethics Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral defines "evaluative mediation" as:

characterized as a wholly facilitative process,[176] yet it observed that "in some forms, . . . the third party neutral may engage in evaluative tasks."[177] Among the types of evaluative activities it deemed appropriate, the Commission listed: "providing legal information, helping parties and their counsel assess likely outcomes and inquiring into the legal and factual strengths and weaknesses of the problems presented."[178]

In addition to listing examples of appropriate forms of evaluation, the CPR-Georgetown Commission further restricted the use of evaluative techniques by emphasizing self-determination,[179] impartiality,[180] competence,[181] and the integrity of the

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> A procedure in which a third party neutral facilitates communications and negotiations among the parties to effect resolution of the matter by agreement of the parties. Although often considered a facilitative process (see below) in which a third party neutral facilitates communication and party negotiation, in some forms of mediation, the third party neutral may engage in evaluative tasks, such as providing legal information, helping parties and their counsel assess likely outcomes and inquiring into the legal and factual strengths and weaknesses of the problems presented. By agreement of the parties or applicable law, mediators may sometimes be called on to act as evaluators or special discovery masters, or to perform other third party neutral roles.

Id. at 4.

175. *Id.* at 2. The Commission on Ethics Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral defines "facilitative mediation" as:

> A procedure in which a neutral third party facilitates communication and negotiations among the parties to seek resolution of issues between the parties. Mediation is non-binding and does not, unless otherwise agreed to by the parties, authorize the third party neutral to evaluate (see above), decide or otherwise offer a judgment on the issues between the parties. If the mediation concludes in an agreement, that agreement, if it meets otherwise applicable law concerning the enforceability of contracts, is enforceable as a contractual agreement. Where authorized by applicable law, mediation agreements achieved during pending litigation may be entered as court judgments.

Id. at 4. It is interesting to note, however, that Professor Carrie Menkel-Meadow, chair of the CPR-Georgetown Commission on Ethics and Standards in ADR, in an earlier article discussing the work of the Commission on Ethics, listed mediation only under facilitative processes. *See* Menkel-Meadow, *supra* note 110, at 660-62.

176. *See* COMMISSION ON ETHICS MODEL RULE, *supra* note 12, at 4.

177. *Id.*

178. *Id.* at 4-5.

179. *See id.* at 5-6 ("While settlement or resolution is the goal of most ADR processes, the primary responsibility for the resolution of the dispute and the shaping of a settlement in mediation and evaluation rests with the parties.").

mediation process.[182] Rule 4.5.1(b), for example, restricts a lawyer-neutral's conduct by stipulating that the neutral "should decline to serve in those matters in which the lawyer is not competent to serve."[183] Following this, the rule's comment section adopts a contextual view of competence. It provides:

> In determining whether a lawyer-neutral has the requisite knowledge and skill to serve as a neutral in a particular matter and process, relevant factors may include: the parties's reasonable expectations regarding the ADR process and the lawyer-neutral's role, the procedural and substantive complexity of the matter and process, the lawyer-neutral's general ADR experience and training, legal experience, subject matter expertise, the preparation the lawyer-neutral is able to give to the matter, and the feasibility of employing experts or co-neutrals with required substantive or process expertise. In many instances, a lawyer-

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180. *See id.* at 9 (defining impartiality as "freedom from favoritism or bias either by word of action, and a commitment to serve the process and all parties equally.").

181. *See id.* at 6:

> [T]he parties's *reasonable expectations* regarding the ADR process and the neutral's role, the procedural and substantive complexity of the matter and process, the lawyer-neutral's general ADR experience and training, legal experience, subject matter expertise, the preparation the lawyer-neutral is able to give to the matter, and the feasibility of employing experts or co-neutrals with required substantive or process expertise.

182. *See id.* at 14. In particular, Rule 4.5.6(d) provides in part, "[t]he third party neutral should also make reasonable efforts to determine that the parties have reached agreement of their own volition and knowingly consent to settlement." *Id.* Comment 1 provides:

> While ethical rules cannot guarantee the specific procedures or fairness of a process, this rule is intended to require third party neutrals to be attentive to the basic values and goals informing fair dispute resolution. These values include party autonomy; party choice of process (to the extent permitted by law or contract); party choice of and consent to the choice of the third party neutral (to the extent permitted by law or contract); and fairness of the conduct of the process itself. This rule is concerned not only with specific harms to particular participating parties but with the appearance of the integrity of the process to the public and other possible users of these processes.

Id. Comment 2 paraphrases and clarifies subsection (d):

> While some have suggested that third party neutrals should bear some moral accountability or legal responsibility for the agreements they help facilitate, *see* Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 9 VT. L. REV. 1 (1981), these Rules do not make the third party neutral the guarantor of a fair and just result.

Id. at 14-15.

183. *Id.* at 5.

> neutral may accept a neutral assignment where the requisite level of competence can be achieved by reasonable preparation.[184]

While thus placing some restrictions on the use of evaluation in mediation, the Commission on Ethics concludes its definition of evaluative mediation by stating: "By agreement of the parties, or applicable law, mediators may sometimes be called on to act as evaluators or special discovery masters, or to perform other third party neutral roles."[185] This leaves a huge valley in the mediation process as it allows the mediator to shift processes without considering the potential harms that could result. There is, for example, no assurance that the parties truly understand the differences in processes. There is also the potential for information gathered in caucus being used later for purposes that were unanticipated at the time. Confidences shared with a non-decisionmaking mediator may well be regretted should that mediator later become an evaluator or special master.[186] Thus, all the concerns that surround the use of hybrid ADR processes are left exposed by the Commission on Ethics Draft Model Rule.[187]

Thus it is apparent that the Commission on Ethics struggled with the issue of evaluation and reached a compromise—acknowledging the existence and role of both facilitative and evaluative mediation. The Commission on Ethics Model Rule, however, does not really address the risks associated with evaluation as it relates to impartiality and self-determination nor how switching roles or processes in mid-stream may impact the processes. The impartiality section deals primarily with the mediator's ongoing obligations to maintain neutrality,[188] to disclose

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184. *Id.* at 6.

185. *Id.*

186. *See* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997) (discussing the role of deception in mediation, exposing the types of deceptions mediators and mediation advocates use in mediation, and calling for the legal community to clarify the ethical rules regarding truthfulness standards in the context of mediation and negotiations).

187. *See, e.g.*, Julie Brienza, *ADR: Doing Two Things at Once Can Be Problematic*, 34 TRIAL 19 (1998); Robert B. Fitzpatrick, Shouldn't We Make Full Disclosure to Our Clients of ADR Options?, 59 ALI-ABA 755, 769-70 (1998); *but see* Sherry Landry, *Med-Arb: Mediation With A Bite and an Effective ADR Model*, 63 DEF. COUNS. J. 263, 264-69 (discussing the pros and cons of med-arb and concluding that it effectively combines the best of arbitration and mediation).

188. *See* COMMISSION ON ETHICS MODEL RULE, *supra* note 12, at 9:

> (a) A lawyer who serves as a third party neutral should be impartial with respect to the issues and the parties in the matter;
>
> (1) A lawyer who serves as a third party neutral should conduct all proceedings in an impartial, unbiased and evenhanded manner,

the potential for bias, and to avoid conflicts of interest.[189] The rules briefly address the right of the parties to formulate their own solutions,[190] though it provides little guidance as to how predictions by the mediator may interfere with the parties' self-determination. The rules also fail to adequately define or differentiate between legal information and legal advice. While some of these deficiencies may be clarified in later versions, it appears as if the Commission has adopted a very expansive view of mediation without providing sufficient guidance on the downsides of evaluation or how allowing third party neutrals to switch processes may impact the process. This view is based on the very questionable assumption that consumers are sophisticated and can understand and evaluate the distinctions.

B. *Virginia Rules of Professional Conduct*

Like the CPR-Georgetown Commission with its Draft Model Rule, the Commonwealth of Virginia has set out to devise rules of professional conduct that directly target those engaged in the cross-practice of law and mediation. In Spring 1999, the Virginia Supreme Court approved new Virginia Rules of Professional Conduct for the legal profession. These rules, which take effect on January 1, 2000, are part of an elaborate ADR regulatory scheme. Virginia addresses mediation in its statutes ("Code of Virginia"),[191] its Standards of Ethics for Court-Certified Mediators,[192] its Guidelines for the Training and Certification of Court-Referred Mediators,[193] and most recently in Guidelines on Mediation and the Unauthorized Practice of Law.[194]

> treating all parties with fairness and respect. If at any time the lawyer is unable to conduct the process in an impartial manner, the lawyer shall withdraw, unless prohibited from doing so by applicable law.

189. *See supra* note 180.

190. *See supra* notes 179, 182.

191. *See infra* notes 195-200 and accompanying text.

192. STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (adopted by the Judicial Council of Virginia, October 1997).

193. These were recently amended and became effective January 1, 2000.

194. GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999) [hereinafter GUIDELINES ON MED. & UNAUTHORIZED PRACTICE]. The Department of Dispute Resolution Services of the Supreme Court of Virginia created a committee which surveyed the various states on the problems of UPL and mediation. They determined the following:

> At a minimum, a mediator provides legal advice whenever, in the mediation context, he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.

By statute, Virginia defines mediation,[195] describes confidentiality in the mediation process,[196] and establishes civil immunity for mediators.[197] Section 8.01-576.9 of the State Code describes the ethical standards of neutrals, prohibiting a mediator or other neutral from compelling or coercing the parties into entering into an agreement, and requiring them to remain impartial and free from conflicts of interest.[198] Section 8.01-576.5 allows a court to refer any contested civil matter or selected issues in a civil case to a dispute resolution evaluation session.[199] Pursuant to sections 8.01-576.12, a court may vacate an agreement for various reasons, including misconduct on the part of the neutral.[200] Most significantly and novel, however, is the targeted regulation of lawyer-mediators found in the new Rules of Professional Conduct. These rules include provisions that expressly cover lawyers acting as third party neutrals[201] and as lawyer-mediators,[202] as well as a requirement that lawyers advise their clients about available dispute resolution processes.[203]

Id. at 13.

195. *See* VA. CODE § 8.01-576.4 (1999).

196. *See id.* § 8.01-576.9.

197. *See id.* § 8.01-581.23.

198. *See id.* § 8.01-576.9.

199. *See id.* § 8.01-576.5.

200. *See id* § 8.01-576.12:

> [Defining "misconduct" as including] the failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement will affect legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so.

201. *See* VIRGINIA RULES PROFESSIONAL CONDUCT Rule 2.10 cmt. 1 (1999) (defining dispute resolution proceedings conducted by a third party neutral as including mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences).

202. *See id.* Rule 2.11.

203. *See id.*; *id.* Rule 1.2 cmt. 1 ("a client has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives"); *id.* Rule 1.4 cmt. 1(a):

> This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such

The Virginia rules are significant not only because they mark the first attempt by a state to specifically address the practice of mediation by lawyers, but also because they confront head-on the divisive issue of evaluation.[204] The drafters of the Virginia rules thoroughly debated the issue of evaluation, striving to resolve it through what they termed a "delicate compromise."[205] The drafters wanted to provide guidelines or boundaries without tying the hands of mediation practitioners.[206] Viewing mediation as an evolving profession that requires flexibility,[207] they rejected any attempt at a hard and fast definition of the practice,[208] suggesting instead that while facilitation lies at the core of mediation,[209] the practice allows for a good measure of evaluative activity.

Like the CPR-Georgetown Commission, therefore, Virginia's "delicate compromise" amounts to a pragmatic approach to the issue of evaluation. Acknowledging that many parties do want evaluation and that many lawyer-mediators give them what they want, Virginia recognizes both the facilitative and evaluative

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as mediation, where the parties themselves could be more directly involved in resolving the dispute.

204. *See id.* Rule 2.11 (characterizing evaluation as looking at the strengths and weaknesses of positions, assessing the value and cost of alternatives to settlement or assessing the barriers to settlement).

205. Carl T. Hahn, *Using Evaluative Techniques: The Virginia Approach*, 16 ALTERNATIVES TO HIGH COST LITIG. 149 (1998).

206. *See* Notes from a conversation with Barbara Hulburt, Co-chair of the Joint Committee on ADR for Virginia (on file with author) [hereinafter Hulbert].

207. *See id.*

208. Similarly the Draft Uniform Mediation Act does not distinguish among styles or approaches to mediation but the drafters substituted the word "facilitated" for "conduct" in the definition of "mediator" to emphasize that the mediator has no authority to decide the dispute. *Draft Uniform Mediation Act, supra* note 149, at 10. The Reporter's Working Notes for Draft Uniform Mediation Act also discuss some of the considerations which went into finding a definition of mediation:

> A definition of mediation could be drafted to exclude related processes that are not the type of mediation contemplated by the Drafters. However, to narrow the definition to purely facilitative mediation could lead to attempts to thwart the privilege if the mediator gave an opinion concerning the likely outcome if the parties did not settle, and carries potential for abuse. The Draft definitions provide only two distinguishing factors (1) a mediator not aligned with a disputant and (2) assistance is through negotiation.

Id.

209. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(a) (1999) ("A lawyer-mediator is a third party neutral . . . who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.").

mediation styles.[210] Unlike the CPR-Georgetown Commission, however, Virginia does not simply recognize both styles, but gives a decided preference to the facilitative mode while identifying and addressing the pitfalls associated with evaluations.

Virginia thus places "restrictions on evaluative techniques designed to protect the essential, facilitative purpose of the mediation process."[211] These restrictions proscribe that any evaluative activity be "incidental to the facilitative role" and not "interfere with the lawyer-mediator's impartiality or the self-determination of the parties."[212] Yet while Virginia discusses the role and highlights the dangers of evaluation, it does not define the term. After much debate, the drafters of the State rules decided that "[d]efining mediation to exclude an evaluative approach is difficult not only because practice varies but because no consensus exists as to what constitutes an evaluation."[213] Nonetheless, they did attempt to place certain parameters around evaluation.[214] Virginia Rule of Professional Conduct 2.11(d) contains descriptive language of evaluation,[215] and the comment explains that lawyer-mediators are prohibited from offering any of the parties legal advice (noting that this is a function of the lawyer who is representing a client),[216] or from using coercive techniques.[217] The rule does authorize lawyer-mediators to give legal informa-

210. *See supra* notes 21-33 and accompanying text.

211. Hahn, *supra* note 205, at 149.

212. VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(d) (1999).

213. *Id.* Rule 2.11 cmt. 2.

214. When asked whether lawyer-mediators in Virginia could give outcome predictions, Barbara Hulburt believed that the new rules of Professional Conduct allowed a broad brush approach without giving a specific prediction. *See* Hulbert, *supra* note 206.

215. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(d) (1999).

216. *See id.* Rule 2.11 cmt. 7. All certified mediators in Virginia are further prohibited from dispensing legal advice by the State ethics standards for mediators. *See* VIRGINIA STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (adopted by the Judicial Council of Virginia, Oct. 1997). Virginia has taken a more aggressive stance than most states in regulating mediator competence and ensuring credentialing. Certified circuit court civil mediators must have a four year degree, forty hours of training, two observations, supervised co-mediation for at least ten hours, and evaluation and recommendation by a certified mentor. They must also agree to abide by the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators. Mediators must be recertified every two years. Recertification for circuit court civil mediators requires having performed a minimum of five complete cases or fifteen hours of mediation over the certification period, submittal of performance evaluations, and completion of at least eight hours of additional training or education, two hours of which must be in mediation ethics. *See id.*

217. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11 cmt. 8:

tion,[218] on the ground that doing so "is an educational function which aids the parties in making informed decisions."[219] The rule also premises the dispensing of legal information on the notion of "informed consent," resulting in an approach that ensures that the principle of self-determination is not compromised by the parties' decision to adopt a more evaluative mediation style.[220]

Prior to commencing a mediation, lawyer-mediators in Virginia must discuss with prospective parties the general nature of mediation.[221] They must divulge their personal style, approach, and subject-matter expertise,[222] while eliciting the parties' expec-

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> The lawyer-mediator shall not, however, make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute or to accept a particular solution to their dispute. . . . [The rule] restrict[s] the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.

See also Nolan-Haley, *supra* note 8, at 812-40 (describing her theory of true informed consent and integrating it into mediation practice).

218. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(c) (1999) ("A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent.").

219. *Id.* Rule 2.11 cmt. 7.

220. *See id.* Rule 2.11 cmts. 7, 8. *See also* Hahn, *supra* note 205; Nolan-Haley, *supra* note 8, at 812:

> A robust theory of informed consent requires that parties be educated about mediation before they consent to participate in it, that their continued participation and negotiations be voluntary, and that they understand the outcomes to which they agree. Informed consent serves the values of autonomy, human dignity, and efficiency. It guards against coercion, ignorance, and incapacity that can impede the consensual underpinnings of the mediation process. But to say this is just the beginning of the inquiry. A theory of informed consent for mediation must take into account not only the relationship between the principle of informed consent and the values it serves, but how this principle should operate in the parties' decisionmaking acts, the practices which foster it, and its limitations.

221. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(e)(1)(i) (1999).

222. *See id.* Rule 2.11(e)(1)(iii). The requirement of informing prospective parties of their subject-matter *expertise* creates a potential conflict with Model Rule 7.4, which prohibits a lawyer from claiming to be a "specialist" in any area of law except for patent law, admiralty, or upon special certification by an appropriate regulatory authority or organization.

tations about the mediation process.[223] Furthermore, they must explain the limitations that are inherent in the use of evaluation.[224] Under Rule 2.11(d), evaluation may play only a supportive, secondary role:

> A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.[225]

The parties' expectations and understandings must be memorialized in writing in the agreement to mediate.[226] The rule ends emphasizing party choice—"A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choice and expectations."[227]

The comment section to the Virginia rule further stresses disclosure and the importance of the parties' full understanding as to the risks associated with evaluation. Comment 3 stipulates that: "If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination."[228] Moreover, before actually giving an evaluation or engaging in evaluative techniques, comment 4 instructs the lawyer-mediator to consult with the parties and independently consider whether the evaluation is appropriate under the circumstances, especially as to whether it presents a threat to the mediator's impartiality or the ability of the parties to retain control over fashioning their own agreement.[229] The mediator must also assess whether the evaluation contemplated appears likely to detract from the par-

223. *See id.* Rule 2.11(e)(1)(iv). This is consistent with Sam Imperati's recommendation that a code encourages the parties to pick the mediation model that works for them. *See* Imperati, *supra* note 26, at 743.

224. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(e)(1)(ii) (1999).

225. *Id.* Rule 2.11(d).

226. *See id.* Rule 2.11(e)(2); Nolan-Haley, *supra* note 8, at 828 (arguing that "a contractual approach to informed consent gives parties a great deal of freedom in structuring their own decisionmaking process, and it may be helpful in resolving some of the difficult problems affecting mediation practice today").

227. VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11(f) (1999).

228. *Id.* Rule 2.11 cmt. 3.

229. *See id.* Rule 2.11 cmt. 4.

ties' willingness to participate openly and meaningfully in the mediation process.[230]

Thus, Virginia clearly does not prohibit outright the use of evaluative techniques in mediation. Nor does the State require, as has been urged by Professors Kovach and Love, that each general approach to mediation be labeled as a distinct process. Yet the Virginia program places unprecedented hurdles in the path of evaluation. Mediators in Virginia must inform all parties to a mediation that evaluative techniques have significant drawbacks and will only be used if requested by all sides.[231] The Virginia rules further ensure that evaluation will be employed sparingly and always as a supplement to the facilitative process, never as the primary orientation. In these respects, the Virginia rules mark a significant development in the ethical regulation of mediation practice. They are principled in their support of the classical conception of mediation as a facilitative process, yet pragmatic in structure. Virginia seeks to resolve the facilitative/evaluative dilemma, that is, by noting the pitfalls of evaluation and curtailing its proliferation while acknowledging the realities of practice—that numerous parties want and many lawyer-mediators give evaluations.[232] In the words of one of the rule's drafters: "[I]n the view of most of the committee, mediation encompasses a wide range of techniques. As a result, to impose in ethical rules a definition of mediation as a pure facilitative process would create the potential for unfair ethical traps for unwary parties and mediators."[233]

Yet despite the creative nature of the new Virginia rules, serious questions surround how they will be received by the mediation and legal communities. Questions of implementation and work ability also exist. Briefly, I want to highlight three concerns that suggest that the Virginia solution to the evaluative/facilitative debate may be less than fully satisfactory.

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230. *See id.* (requiring a mediator to consider "whether an evaluation could detract from the willingness of the parties to work at understanding their own and each other's situation and at considering a broader range of interests, issues and options").

231. *See* VIRGINIA STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS D.2.c (1997) (encouraging neutral third parties to properly label mixed processes "[i]f the mediation is conducted in conjunction with another dispute resolution process, such as arbitration, and the same neutral conducts both processes, the mediator must describe to the parties the procedures to be followed in both processes clearly, prior to entering into the agreement to mediate").

232. *See supra* note 27.

233. Hahn, *supra* note 205, at 149.

First, and most fundamentally, Virginia does not resolve the question, *What is mediation?* By not following the requests of Kovach and Love to clearly label all directive methods as forms of ADR distinct from mediation, Virginia does little to quell the debate over whether evaluation can appropriately be considered a type or technique of mediation practice. The decided preference Virginia gives to facilitation is clear; yet the accommodation it provides those mediators with evaluative orientations makes its overall contribution to the definitional debate far less so.

Second, while the Virginia rules make a laudable effort at listing allowable forms of evaluation, interpretation of these forms may prove to be controversial. For example, the Virginia rules do not define "legal advice," which is prohibited, or "legal information," which is not. While prohibiting one and allowing the other suggests that it is possible to distinguish clearly between them, a good deal of academic literature suggests that such a distinction is not readily forthcoming.[234] Virginia is likely to find, though, that it will need to hazard some clarification. The proposed Guidelines on Mediation and the Unauthorized Practice of Law make an effort in this regard[235]—"A mediator may not make specific predictions about the resolution of legal issues or direct the decision-making of any party"—though the Guidelines themselves will likely come under severe attack, particularly by mediators who operate from a strong evaluative orientation.

Finally, questions surround the workability of the State's "informed consent" requirement. The firm demand set forth in the Virginia rules that a mediator secure in writing the informed consent of all parties before commencing any evaluative activities is one of the program's hallmarks.[236] Mediators must discuss

234. *See, e.g.*, ROGERS & MCEWEN, *supra* note 6, at § 10.02 (detailing a number of opinions on the difference between legal advice and information); *supra* note 19.

235. *See* GUIDELINES ON MED. & UNAUTHORIZED PRACTICE, *supra* note 194 (providing examples of what constitutes legal advice and finding that a mediator may "provide legal resources and procedural information to disputants," "make statements declarative of the law," "ask reality-testing questions that raise legal issues," "inform the disputing parties about the mediator's experiences with a particular court or type of case," and "inform the disputing parties about the enforceability of a mediated agreement." "A mediator may not make specific predictions about the resolution of legal issues or direct the decision-making of any party.").

236. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 2.11 (e)(2) (1999) (requiring the lawyer-mediator, prior to the mediation session, to "enter into agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation"); *id.* cmt. 3 ("Following [the initial consultation] the lawyer-mediator and

mediation approaches with the parties and caution them about the potential problems associated with evaluative techniques.[237] This requirement adds a valuable dimension to the Virginia regulatory scheme, for it curtails the mediator's power by ensuring that the parties are not taken unawares by a shift in orientation in a mediation.[238] Yet how *informed* is informed consent? It belies experience to think that most parties to a mediation will understand readily the differences between mediation styles, especially when they learn of them in the charged atmosphere of an ongoing process. Academics and practicing mediators find it difficult to agree where evaluation begins or when party self-determination has been compromised. We can hardly expect the parties to gain a full understanding the first time of a process that so befuddles its own practitioners.

CONCLUSION

Ethical rules that target lawyer-mediators, such as those included in the new Virginia Rules of Professional Conduct, thus offer no panacea, though they do signify an important step in the regulation of mediation practice. Such regulatory developments are critical, for the proliferation of activist, evaluative techniques in mediation jeopardizes the very continued existence of mediation as a practice separate and distinct from law and other ADR processes.

I do not mean to suggest that evaluation should be prohibited; nor, in fact, do I regard all evaluative or directive techniques as "bad." In many situations, a third party neutral with an evaluative orientation will be more effective and more to the parties' liking than a strictly facilitative neutral. Only the "activist," directive evaluator is not a mediator, at least not in the traditional sense. And while tradition alone may not be a good reason to try curbing the evaluative movement in mediation practice, neither is the factual premise that evaluation is what many mediators do a sound reason for letting the movement grow unhindered. I am reminded of the introduction of kudzu

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the parties shall sign a written agreement to mediate which reflects the choice and expectations of the parties.").

237. *See supra* note 227.

238. *See* Nolan-Haley, *supra* note 8, at 778:

> [Arguing that informed consent] serves as a check on the mediator's power, a way of making sure that the mediator has not used her position to cajole or bamboozle parties into consent. In short, informed consent matters because the potential for coercion, incapacity, and ignorance can impede the consensual underpinnings of the mediation process.

in the Southern states during the first part of the twentieth century. Brought in from Asia to curtail erosion, the hairy kudzu vines have taken over much of the rural landscape. Likewise, importing evaluative techniques into the traditionally facilitative process of mediation may well lead to those techniques coming to dominate the process, contributing to the demise of mediation as a facilitative process. It would be tragic to lose one of the real alternatives to the adversarial process. While some argue that it is too late to rein in evaluative techniques, I disagree. That is precisely what we must do. Along with Professor Menkel-Meadow,[239] I believe that the continued success of mediation requires us to regulate the profession, especially those involved in the cross-practice of law and mediation.

The focus of the debate about whether evaluation properly constitutes a form of mediation should be directed, explicitly and narrowly, toward the two basic premises of mediation: participant self-determination and mediator impartiality. Some, but not all, evaluative mediation styles do interfere with one or both of these two basic tenets. Yet no sharp boundary or definition of mediation can be expected to delineate with certainty when a mediator's conduct exceeds the proper scope of mediation practice. The sole question that helps is whether the mediator's conduct gives him or her power and control over the outcome of the mediation. For once a third party neutral advocates that the parties see the dispute in a particular light, that light becomes the beacon that directs the pathway through the remainder of the mediation, compromising both the parties' self-determination and the mediator's impartiality.

If the mediator becomes the central character and the party who truly determines the outcome, then the dispute resolution process at issue is no longer mediation but something much more akin to settlement conferencing. Just because the neutral calls it mediation doesn't make it so. Imprecise usage of language cannot be allowed to define the process. We err, and we disserve the entire spectrum of ADR processes, if we come to view the whole spectrum as merely mediation in a variety of forms and orientations.

Labeling ADR processes enhances informed consent. A sound dispute resolution program must include assurances that the parties involved in each matter share a common understanding about the nature of the process they are purchasing. Label-

239. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 11, at 418 (arguing that the success of mediation now requires us to regulate it).

ing the process and clearly communicating its parameters to the parties helps ensure mutual understanding.

Finally, we must acknowledge that as mediation becomes more and more commonplace, and the parties to mediations and their lawyers increasingly sophisticated about the process, evaluative techniques may well come back to haunt the unwary mediator who finds him or herself prey to the skilled lawyer or astute party. An experienced litigator who regularly refers and represents his clients in mediations not long ago confided in me that he plays "spin the mediator" whenever a mediator begins to exhibit directive, evaluative tendencies. His game of spinning the mediator has as its goal convincing the evaluative mediator of the correctness of his client's position, and then sitting back as the mediator advocates on his client's behalf. So much for impartiality!

Without close scrutiny and the enactment of meaningful ethical rules for those engaged in the cross-practice of law and mediation, evaluation thus not only threatens the continued existence of mediation as a separate form of dispute resolution, but brings into question the very fairness of using mediation as an alternative to litigation. For if skilled litigators come to treat mediation as a tool they can manipulate, and evaluative mediators as neutrals easily duped into becoming unknowing advocates, any thought that mediation is a forum for the just resolution of disputes becomes mere illusion and pretense.