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Carrie Menkel-Meadow

Georgetown University Law Center, meadow@law.georgetown.edu

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Carrie Menkel-Meadow

Professor of Law

Georgetown University Law Center

meadow@law.georgetown.edu

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THE LAWYER AS CONSENSUS BUILDER: ETHICS FOR A NEW PRACTICE

CARRIE MENKEL-MEADOW*

What . . . promotes or impedes good work today? . . . [G]ood work—work of expert quality that benefits the broader society . . . ,

HOWARD GARDNER ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET*, at xi (2001).

Cooperation—the basis of our earliest hunting successes, the force behind our evolving capacity for language, the glue of our social cohesion. . . . Selfishness is also written on our hearts. This is our mammalian conflict: what to give to the others and what to keep for yourself. Treading that line, keeping the others in check and being kept in check by them, is what we call morality.

IAN MCEWAN, *ENDURING LOVE* 15 (1997).¹

I. INTRODUCTION: ETHICS AND CONVENTIONAL CONCEPTIONS OF THE LAWYER'S ROLE

The traditional role of a lawyer is to represent a client's partisan interest. The first few iterations of ethical rules for lawyers mainly recognized the lawyer's role as a representative in a litigation setting.² More recently,

* Professor of Law and Director, Georgetown-Hewlett Program on Conflict Resolution and Legal Problem Solving, Georgetown University Law Center. This article draws on several presentations made while visiting The University of Tennessee as Distinguished Visiting Professor in Advocacy and Dispute Resolution in March 2002. I would like to thank The University of Tennessee faculty for its hospitality, and I would like to give a special thanks to my old friend and colleague Dean Rivkin for stimulating conversations on this and other topics.

1. The first chapter of this novel recounts the attempted rescue by several individuals of two passengers in a falling hot air balloon. The rescuers' decisions to hold on or let go of the hot air balloon demonstrate the tensions of the "prisoner's dilemma," which involve deciding whether to cooperate or defect in the absence of any communication among the parties. See AVINASH DIXIT & SUSAN SKEATH, *GAMES OF STRATEGY* 225-87 (1999); WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* 216 (1992) (stating that in the prisoner's dilemma, "the common good is subverted by individual rationality," where "[e]ach player desires the other's cooperation, yet is tempted to defect himself").

2. In 1908, the American Bar Association ("ABA"), at the time an exclusive professional association, adopted the original Canons of Professional Ethics ("Canons"). MODEL RULES OF PROF'L CONDUCT preface, at vii (2002). The Canons were based on the pioneering work of Judge George Sharswood, whose work was published in 1854, and David Hoffman, whose work was published in 1836 as originally codified in the Code of Ethics "adopted by the Alabama Bar Association in 1887." *Id.* Between 1913 and 1964, a number of ABA committees were charged

ethical codes for lawyers have recognized alternative roles that lawyers

conduct issues, and dealing with grievances. *Id.* In 1964, ABA President Lewis F. Powell, Jr. created a special committee to assess the ethical standards of the profession. *Id.* The committee's work resulted in the Model Code of Professional Responsibility ("Model Code"), which was adopted by the ABA in 1969 and then adopted by a "majority of state and federal jurisdictions." *Id.* In 1977, the Commission on Evaluation of Professional Standards entirely revamped the Model Code into its current form—the Model Rules of Professional Conduct ("Model Rules"). *Id.* at vii-viii. The Model Rules omitted the three levels of canons, disciplinary rules, and ethical considerations and included only simplified blackletter rules and comments, which merely explained the Model Rules and advised readers of other substantive laws or principles that might affect the professional conduct of lawyers. Robert W. Meserve, *Introduction*, MODEL RULES OF PROF'L CONDUCT at xi (2002).

For many years, about half of the states operated under the Model Code and the other half operated under the Model Rules. California, however, has yet to adopt the Model Rules or the Model Code; instead, it has drafted its own regulations, which are found in the California Business and Professions Code and the California Rules of Professional Conduct. In 1997, the ABA established the Ethics 2000 Commission, to address a variety of important and new issues, such as modern communication technologies, class action law suits, and ADR. *Id.* preface, at viii. The Ethics 2000 Commission, however, only submitted proposals for relatively minor amendments to the Model Rules and, for the most part, avoided dealing with such questions concerning multi-disciplinary practice, class actions, ADR, and many modern technological issues. Where the Ethics 2000 Commission took a relatively bold stand (following the American Law Institute's similar treatment in section 67 of the *Restatement (Third) of the Law Governing Lawyers*), in proposing to permit lawyers to disclose confidential client information to "prevent, mitigate or rectify" serious economic injury, see MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Official Draft 2002), available at <http://www.abanet.org/cpr/e2k-rule16.html> (last visited Oct. 31, 2002), the ABA House of Delegates rejected the Ethics 2000 Commission's proposal when it approved the amendments to the Model Rules in February 2002. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002), available at <http://www.abanet.org/cpr/e2k-rule16.html> (last visited Oct. 31, 2002); ABA Center for Professional Responsibility, Ethics 2000 Comm'n, at http://www.abanet.org/cpr/e2k-report_home.html (last visited Nov. 4, 2002).

The Ethics 2000 Commission's treatment of disclosure of economic fraud is further complicated by the recent passage of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C.A., 18 U.S.C.A., 28 U.S.C.A., and 29 U.S.C.A.), which requires lawyers to report corporate fraud to corporate officials, board members, and others. *Id.* at 784. The states and the Securities and Exchange Commission will now regulate disclosure of economic fraud, and thus, federal and state law may differ from the ABA's official position in the Model Rules. It is important to remember that the Model Rules do not have the force of positive law unless enacted by a state's legislature or supreme court, which has regulatory power over that state's legal profession. However, the Model Rules and the advisory opinions issued by the ABA Standing Committee on Professional Responsibility, although not law, are widely influential because most states have formally adopted most of the Model Rules with a series of variations. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 reporter's note (2000) (reviewing state departures from the Model Rules). It remains to be seen whether the formulations and blackletter rules of the *Restatement (Third) of the Law Governing Lawyers* will displace the Model Rules as states now begin another round of review of ethics rules and regulations.

perform as counselors,³ lobbyists,⁴ and government lawyers.⁵ Such recognition of alternative roles, however, assumes that lawyers will continue to serve as zealous advocates for their clients. In general, a lawyer's duty is conceived of as a duty to maximize a client's individual, corporate, or entity interest *within the bounds of the law*.⁶ Thus, although there are some limits placed on the "zealous advocate,"⁷ the lawyer's goal is to seek gains that benefit his client—whether those gains are achieved by "winning" in litigation or by drafting advantageous clauses in contracts.

In the last few decades, the American Bar Association ("ABA") has revised the ethical rules for lawyers several times, beginning with the Model Code of Professional Responsibility ("Model Code") in 1969, continuing with the Model Rules of Professional Conduct ("Model Rules") in 1983,⁸ and, most recently, with the proposed revisions to the Model Rules by the Ethics 2000 Commission.⁹ With each revision, debates emerge regarding the introduction of new duties and responsibilities for lawyers who serve in alternative roles of legal practice.¹⁰ Despite the ABA's efforts, arguments continue regarding whether it is possible to draft an ethical code for a unitary legal profession and whether specialized codes are required to recognize the distinct duties that

3. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1, 2.3-2.4 (2002) (stating that a lawyer may advise a client on "moral, economic, social[,] and political" considerations, provide a third party with "an evaluation of a matter affecting a client" if "compatible with . . . the lawyer's relationship with the client[,] and serve as a third-party neutral for "two or more persons who are not" the lawyer's clients).

4. See, e.g., *id.* R. 3.9 (discussing the procedures a lawyer must follow when "representing a client before a legislative body or administrative agency in a nonjudicative proceeding").

5. See, e.g., *id.* R. 3.8 (discussing the particular ethical responsibilities of prosecutors in criminal cases).

6. See WILLIAM SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS 7-8 (1998).

7. Compare MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) (including zealous representation in the black letter rule), with MODEL RULES OF PROF'L CONDUCT pmb. ¶ 8 & R. 1.3 cmt. [1] (2002) (discussing zealous advocacy only in the preamble and in comment sections). Despite such textual revisions, most lawyers continue to claim that their duty is to zealously protect and advocate for their clients. Thus, the culture of ethics may not entirely coincide with the letter of the law or the rules.

8. MODEL RULES OF PROF'L CONDUCT preface, at vii-viii (2002).

9. To view the full text of the Model Rules, as approved by the House of Delegates in February 2002, and the Model Rules, as proposed by the Ethics 2000 Commission, see ABA Center for Professional Responsibility, Ethics 2000 Comm'n, at http://www.abanet.org/cpr/e2k-report_home.html (last visited Oct. 31, 2002).

10. Despite drafting rules that recognize lawyers as third-party neutrals, the Ethics 2000 Commission considered, yet declined, to draft ethical rules for lawyers representing clients in class action lawsuits. See Nancy Moore, *Who Should Regulate Class Action Lawyers?*, U. ILL. L. REV. (forthcoming 2003). Bankruptcy lawyers also unsuccessfully lobbied for special ethical rules for their specialized practice.

flow from alternative forms of legal practice.¹¹ Increasingly, private professional associations, federal agencies,¹² state agencies, and other bodies have begun to regulate lawyer conduct.

In this Article, I explore the roles of lawyers in alternative dispute resolution ("ADR"), including traditional roles in arbitration and "new" roles in mediation and facilitation. I also discuss how conventional ethics rules for lawyers fail to provide guidance and "best practices" for lawyers who serve in these new roles. State legislatures and professional associations, such as the American Arbitration Association ("AAA"), the Center for Public Resources Institute for Dispute Resolution ("CPR"), and the Association of Conflict Resolution, have adopted ethical codes for mediators and arbitrators. Select professional associations are also developing "best practice" guides for the provision of ADR services; however, the lack of clarity in the Model Rules is a serious problem. The failure of the Model Rules to recognize the role of lawyers in "peacemaking," dispute prevention or resolution, and legal problem solving marks an absence in what is publicly recognized as among the most important roles a lawyer performs—that of a "constructive lawyer."¹³ Furthermore, the Model Rules misrepresent the legal profession by assuming that representing clients in adversarial matters is the only role lawyers fulfill.¹⁴

11. See, e.g., Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1161 (1995) [hereinafter Menkel-Meadow, *Ethics and the Settlement of Mass Torts*] ("We probably need to recraft some of our ethics rules (conflicts of interests, attorney-client relations, and attorneys' fees) to take account of new forms of action and representation.").

12. Congress recently passed the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C.A., 18 U.S.C.A., 28 U.S.C.A., and 29 U.S.C.A.), which requires lawyers to "whistle blow" or disclose "evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the" corporation "to the chief legal counsel or chief executive officer" and to certain board committees if the counsel or officer does not appropriately respond. *Id.* 116 Stat. at 784; see also Stephanie Francis Cahill, *Corporate-Fraud Law Forces Lawyers to be Whistle-Blowers*, 1 A.B.A. J. EREP., Aug. 2, 2002, at ¶ 1, available at WL 29 ABAJEREP 1 [hereinafter Cahill, *Corporate Fraud Law*] ("The corporate responsibility law . . . requires in-house and outside lawyers to report evidence of corporate wrongdoing to their client companies' boards of directors."). Such a rule is contrary to the dictates of lawyer-client confidentiality in the Model Rules. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). The original Ethics 2000 Commission proposal to require lawyers to report economic fraud was defeated in the House of Delegates in February 2002. See Stephanie Francis Cahill, *Task Force Has Take On Lawyers' Responsibility*, 1 A.B.A. J. EREP., Aug. 2, 2002, at ¶¶ 4, 7, available at WL 29 ABAJEREP 2.

13. Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 786 (1999) (quoting Professor Vicki Jackson, Remarks at the Meeting of CPR Comm'n on Problem-Solving in Legal Educ., at Georgetown Univ. Law Ctr. (Oct. 22, 1999)) [hereinafter Menkel-Meadow, *The Lawyer as Problem Solver*].

14. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern*,

Such an assumption fails to give adequate guidance to a lawyer who fulfills a broader, and perhaps, more significant role than that of a "hired gun."¹⁵

As we debate the basic elements of human nature—whether humans are intrinsically competitive or cooperative¹⁶—similar debates also arise regarding the legal profession. Do lawyers engage in unnecessary adversarial conflicts or, in the alternative, do lawyers contribute to society by negotiating agreements,¹⁷ creating new entities and concepts,¹⁸ seeking justice, resolving disputes, and facilitating policy initiatives?¹⁹ If lawyers are capable of performing new roles, what incentives, rules, and regulations should govern their behavior?

II. NEW ROLES FOR LAWYERS: DISPUTE RESOLVERS, THIRD-PARTY NEUTRALS, AND FACILITATORS

In his novel *Enduring Love*, Ian McEwan eloquently expresses the dilemma of cooperation versus selfishness.²⁰ The protagonist, a science writer named Joe Rose, is picnicking in a field when he sees a hot air balloon with a passenger dangling from a rope.²¹ Sensing his "cooperative," life-preserving, and altruistic instincts, Rose rushes into the field to try to help the passenger.²² Four other men respond similarly and run from each corner of the field.²³ The men manage to grab the lines, but the wind catches the

Multicultural World, 38 WM. & MARY L. REV. 5, 24 (1996) [hereinafter Menkel-Meadow, *The Trouble with the Advocacy System*].

15. See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 108 (1999) (analyzing the profession of law and the adversarial role of lawyers as a core animating principle).

16. See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* preface, at ix-x (1984); RICHARD DAWKINS, *THE SELFISH GENE* 12 (1976); MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 6-7 (1996) ("Society . . . evolved as part of our nature. . . . [W]e must look inside our brains at the instinct for creating and exploiting social bonds We must also look at other animals to see how the essentially competitive business of evolution can sometimes give rise to cooperative instincts."). See generally ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1998) (exploring sources of altruism and the effects of altruism as a motivational force).

17. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES*, at ix (2000); Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 7-8 (1995).

18. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 124-25 (2001).

19. See CARRIE MENKEL-MEADOW, *THE LAWYERS' ROLE(S) IN DELIBERATIVE DEMOCRACY* 16-23 (2000) (unpublished manuscript, on file with the *Tennessee Law Review*).

20. See MCEWAN, *supra* introductory quote.

21. *Id.* at 9.

22. *Id.* at 10.

23. *Id.*

balloon and pushes it up.²⁴ As they coast upward, the roar of the wind prevents the men from communicating with each other about what to do next.²⁵ This is the “prisoner’s dilemma,” but the situation the characters face is not a game. Several lives hang in the balance, and each rescuer must decide whether to hold on or let go as the balloon veers toward an escarpment, which drops off a considerable distance, making a safe, controlled landing less possible.²⁶ With the force of nature and chance (the wind), combined with unorganized human behavior, itself derived from conflicting motives of altruistic rescue and self-interested survival, what can be done? It is not clear who “defects” first; however, all but one of the five rescuers drop the line so as to land safely before the balloon is carried over the cliff and tragedy ensues.²⁷ In the aftermath, the protagonist Rose considers a variety of important philosophical questions about the nature of man and his efforts to coordinate human activity. Rose concludes that

[t]here may have been a vague commonality of purpose, but we were never a team. . . . Any leader, any firm plan, would have been preferable to none. No human society, from the hunter-gatherer to the post-industrial, has come to the attention of anthropologists that did not have its leaders and the led; and no emergency was ever dealt with effectively by democratic process What is certain is that if we had not broken ranks, our collective weight would have brought the balloon to earth a quarter of the way down the slope as the gust subsided a few seconds later. . . . [T]here was no team, there was no plan, no agreement to be broken.²⁸

Rose contemplates the nature of man and finds it in need of coordination in order to be a good society—“one that makes sense of being good.”²⁹

Much like the participants in a prisoner’s dilemma situation, parties involved in real human conflicts cannot reach an outcome favorable to all without communication and coordination; though some outcome will result in the absence of communication (as in the *Enduring Love* example), that outcome may ignore, disregard, or contravene the interests of one or more of the parties.³⁰ A facilitator is required to coordinate activities and to facilitate

24. *Id.*

25. *Id.*

26. *Id.* at 14.

27. *Id.* at 14-17.

28. *Id.* at 11, 14-15.

29. *Id.* at 15.

30. Most game theory assumes that no coordination occurs and assumes that individuals seek “solutions” in strategies that make assumptions about how the others will also attempt to maximize their gains. John Nash’s Nobel Prize-winning work, based on his “Nash equilibrium” solution, explained how actors should behave in multi-party, simultaneous action, and in non-cooperative games. See DIXIT & SKEATH, *supra* note 1, at 82, 213-16 (stating that application in real life suggests that actors seek some “pay-offs” in reciprocity and reputation in repeated

problem solving and communication, especially in emergency settings.³¹

A modern philosopher has recently reached similar conclusions after a lifetime of studying the elements of a good society. In his recent book, *Justice is Conflict*,³² Stuart Hampshire suggests that humans are unlikely to agree on the elements of the "good life" and are more likely to hold conflicting values due to the increasingly diverse world; therefore, we may only reach a consensus regarding fair procedures for resolving disagreements.³³ *Audi alteram partem*, which means to "hear the other side,"³⁴ is the one principle that may unite us. We, as lawyers, must learn to hear ourselves as well as others and to reason in a balanced manner as the adversarial system requires. Procedures can create justice and fairness, and the procedures of conflict resolution are our only hope for survival in a world where we are unlikely to agree on our ultimate aims. Hampshire suggests that "the skillful management of conflict [is] among the highest of human skills."³⁵ Although Hampshire rests his procedural justice claim on a conventional view of adversarial justice, citing such familiar examples as trials, arbitration, and negotiation, he argues that developing institutions that promote procedural fairness should be the first priority of lawyers, especially where "the human race is unlikely to survive for very long unless reasonably fair procedures develop and become accepted for negotiations and arbitrations in the settling of international conflicts threatening war."³⁶

For at least two decades, creating institutions and procedures that are capable of providing fair processes, where all sides may be heard, has been the goal of political scientists, public-policy practitioners, and conflict-resolution theorists and practitioners at both the international and domestic levels.³⁷

games so that "fair and nice" behavior can be a Nash equilibrium in a repeated game); see also AXELROD, *supra* note 17, at 118-20 ("[I]t is good advice to . . . reciprocate defection as well as cooperation."). The movie, *A BEAUTIFUL MIND* (DreamWorks Pictures 2001), provides a simplified illustration of how individuals maximize joint and individual gain by declining to seek the same scarce resource, a single blonde, and choosing instead the next best resource, a group of brunettes. *Id.* For a historical description of John Nash and his work, see SYLVIA NASAR, *A BEAUTIFUL MIND* (1998).

31. See GARY KLEIN, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* 222-23 (1999) (describing the importance of communicating intent to team members to facilitate independence, problem solving, and coordination of activities).

32. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

33. *Id.* at 79.

34. *Id.* at 8-11.

35. *Id.* at 35.

36. *Id.* at 40.

37. See, e.g., JACOB BERCOVITCH & JEFFREY Z. RUBIN, *MEDIATION IN INTERNATIONAL RELATIONS* 13 (1992) (stating that "international, transnational, and other non-state actors . . . [are] very active participants in the search for institutions and proposals conducive to peace," and that it is expected that "such organizations [will] play their full part in the mediation of international disputes"); ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT*

Building on the work of social philosopher Jürgen Habermas, who argued for “ideal speech conditions”³⁸ where democratic discourse may be employed to resolve conflict, American theorists and practitioners have elaborated on the practice of “deliberative democracy”³⁹ and “democratic discourse.”⁴⁰ The goal of deliberative democracy and democratic discourse is to allow for greater participation by individuals most affected by policy issues or conflict resolution. In the words of Habermas, a “moral norm is valid only insofar as it wins assent of the people concerned.”⁴¹

WITHOUT GIVING IN 40 (2d ed. 1991) (“The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side’s needs, desires, concerns, and fears.”); JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES 24 (1997) (“To be at all germane to contemporary conflict, peacebuilding must be rooted in and responsive to the experimental and subjective realities shaping people’s perspectives and needs.”); DEAN G. PRUITT & JEFFREY Z. RUBIN, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 140 (1986) (“It is often possible to engage in problem solving and at the same time cope directly with these risks [such as one party benefitting more from problem solving] by . . . communicating covertly with the other party, combining problem solving with contentious behavior, equalizing the parties in verbal ability, or paying greater attention to the needs of the party with greater threat capacity . . .”). See generally MARC HOWARD ROSS, THE CULTURE OF CONFLICT: INTERPRETATIONS AND INTERESTS IN COMPARATIVE PERSPECTIVE (1993) (exploring conflict management in intergroup and cross-cultural relations); HAROLD SAUNDERS, A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS (1999) (describing a process by which disputants in significant international and domestic ethnic conflicts can move toward more peaceful relations through “sustained dialogues”).

38. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 22 (William Rehg trans., 1996); JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 3-15, 116-23 (Thomas McCarthy trans., 1979); 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 305-07 (Thomas McCarthy trans., 1984).

39. See JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 1-3 (1996); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 35-37 (1991). See generally AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996) (exploring compromise in a system of representative government); DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT (Stephen Macedo ed., 1999) (questioning in a series of essays the conventional wisdom of deliberative democracy).

40. See generally MARK KINGWELL, A CIVIL TONGUE: JUSTICE, DIALOGUE, AND THE POLITICS OF PLURALISM (1995) (discussing justice and communicative action); cf. FREDERICK SCHAUER, TALKING AS DECISION PROCEDURE, THE GOOD SOCIETY (1999) (criticizing deliberative democracy literature as focused on “process” cures, rather than on substantive value conflicts).

41. CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 110 (1996); see also JÜRGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 43-115 (Christian Lenhardt & Sherry Weber Nicholson trans., 1990).

Application of modern political and conflict resolution theories⁴² to legal and policy disputes encouraged the redevelopment and reorientation of conventional ADR procedures, such as mediation and arbitration,⁴³ and prompted the development of new forms of ADR, such as “consensus building”⁴⁴ and participatory public-policy fora.⁴⁵ Whether they are attempting to resolve traditional legal disputes through facilitated negotiation (mediation), private adjudication (arbitration), or as facilitators of public policy fora, lawyers use their legal knowledge and expertise and act as neutrals, not as partisan representatives, as contemplated by the Model Rules. When the purpose of the lawyer’s work is to facilitate an agreement that is acceptable to all parties rather than to attempt to maximize the individual client’s interest, conventional lawyer ethics rules have scant relevance.

Lawyers who serve in neutral roles share responsibilities with non-lawyers who are professionals and non-professionals.⁴⁶ While some worry that rigorous ethical rules, which only apply to lawyers who serve in neutral roles, will place lawyers at a disadvantage, I argue that higher standards will

42. See, e.g., MORTON DEUTSCH, THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch & Peter T. Coleman eds., 2000) (exploring developing theories in social and cognitive psychology and sociology for application to conflict resolution practice); MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 151 (1973) (stating that

[t]here are two basic modes of intrapsychic conflict resolution. First is the tendency to change the external reality so that the conflict between the behavioral tendencies no longer exists; the other is to change the cognitions and/or valences that determine the direction and potency of the conflicting behavioral tendencies).

43. For my argument that recent conflict-resolution theory and practice in law and legal studies originated with the work of the Legal Process school of the 1950s, most notably the work of Lon Fuller, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000). See also Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) (discussing the theory and methodology of mediation).

44. See generally THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) (discussing the process, application, and success of consensus building).

45. See, e.g., SUSAN CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES (2001).

46. Very few states regulate the provision of intermediation services. Thus, virtually anyone may claim to be a mediator or facilitator. Some states, like Florida, regulate the conditions under which someone may mediate in a court program. See, e.g., FLA. R. CIV. P. 10.100(b)(2) (West 2000) (stating that, among other requirements, a family mediator must have a master’s degree or doctorate in social work, mental health, or behavioral or social sciences; be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least 4 years practical experience in one of the aforementioned fields or have 8 years family mediation experience with a minimum of 10 mediations per year).

make lawyers more appealing.⁴⁷ Alexis de Tocqueville was among the first to note that, at least in the United States, lawyers might be particularly well-suited to participate in the intermediation of class, policy, and partisan interests because, in a democratic society that does not have an aristocracy or monarchy, “[lawyers] serve as arbiters between the citizens.”⁴⁸

Why might lawyers be particularly well-suited to serve as the citizens’ arbiters or dispute resolvers? What may lawyers do to resolve social, economic, and political problems beyond formal adversarial client representation? Elsewhere, I defined a lawyer as

a professional with formal legal training who employs law, as well as other relevant disciplines [and skills], to solve human problems and disputes, plan transactions, prepare legal instruments and regulations, and who facilitates and engages in processes designed to accomplish compliance with law and the pursuit of justice as members of society seek to accomplish legitimate aims of individual and social life.⁴⁹

Anthony Kronman suggests that lawyers have a special place in the intermediation of private interests, public values, and institutions because of their dual loyalty to clients and to the polity in which they serve as officers of justice, if not narrowly, the courts. Kronman says that

[l]awyers serve private interests of their clients but they also care about integrity and justice of the legal system that defines public order within which these interests are pursued. In this way, they provide a link between the realms of public and private life, helping to rejoin what the forces of privatization are constantly pulling apart.⁵⁰

Lawyers, then, may serve as mediators of the social order, helping to achieve the bargained for, principled,⁵¹ and creative⁵² arrangements that cultivate

47. Consider how fickle the public is about trusting professions. After many years of documented distrust of lawyers, see Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1372 (2001) (“Recent Harris Polls have found that public attitudes to lawyers and law firms, which were already low, continue to get worse. Lawyers have seen a dramatic decline in their ‘prestige’ which has fallen faster than that of any other occupation, over the last twenty years.” (quoting The Harris Poll # 37 (Aug. 11, 1997))), lawyers are now seen as possible saviors of the public in litigation against auditors and corporate executives in the wake of recent corporate audit scandals.

48. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

49. Menkel-Meadow, *The Lawyer as a Problem Solver*, *supra* note 13, at 793-94 (emphasis omitted).

50. Anthony Kronman, *The Law as a Profession*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 29, 36 (Deborah L. Rhode ed., 2000).

51. See Jon Elster, *Strategic Use of Argument*, in *BARRIERS TO CONFLICT RESOLUTION* 239 (Kenneth J. Arrow et al. eds., 1995) (giving an elegant description and contrast of

peaceful co-existence, social harmony, social justice, and Pareto-optimality.⁵³

Modern legal disputes, in both the public and private realm, often involve multiple parties and issues and take many different forms. Beyond the traditional civil or criminal trials, contemporary legal disputes include ADR procedures, such as private mediation, arbitration, hybrids of mediation and arbitration, such as mediation-arbitration ("med-arb") and mini-trials,⁵⁴ and court-recommended procedures, such as settlement conferences, arbitration, mediation, and summary jury and judge trials. In addition to these better known examples of "alternative" (we now say "appropriate") dispute resolution, newer forms of ADR, such as facilitated policy dialogue, consensus building, and multi-track negotiation and diplomacy are gaining popularity in the resolution of lawsuits, public policy issues, budget and resource allocation, and environmental, local community, and international disputes. In all of these processes, a "neutral," rather than a partisan, guides the process by serving as a mediator or conciliator in facilitating negotiation between the parties, as an arbitrator in deciding legal or factual issues for the parties, or as a facilitator in "help[ing] a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants."⁵⁵ Legal training provides special expertise and opportunities for these functions to be performed by a law-trained person; however, legal education does not necessarily train lawyers for alternative roles,⁵⁶ and conventional ethics rules do not provide guidance for good practices.

To the extent that third-party interveners derive their power and authority from "their status, legitimacy, process-management skills, and persuasiveness,"⁵⁷ lawyers may be especially suited to perform a wide range of third-party neutral roles, particularly when legal issues arise. In its simplest

bargaining and reasoning in the political processes that lead to political agreements, even in such important matters as constitution-making).

52. See Menkel-Meadow, *Aha? Is Creativity Possible?*, *supra* note 18.

53. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 139 (1982) (discussing Pareto-optimality—the condition where parties can no longer improve their individual positions without causing harm to the other parties).

54. See *The ABC's of ADR: A Dispute Resolution Glossary*, 13 *ALTERNATIVES TO HIGH COST LITIG.* 14 (1995).

55. *DICTIONARY OF CONFLICT RESOLUTION* 177 (Douglas H. Yarn ed., 1999) (defining "facilitator").

56. See, e.g., Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 *J. LEGAL EDUC.* 14 (1999) (discussing the process in which law schools may educate law students in problem-solving techniques); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 *J. LEGAL EDUC.* 5, 5-6 (1999) (urging law schools to incorporate "problem solving" into the core curriculum of legal education).

57. MICHAEL WATKINS, *BREAKTHROUGH BUSINESS NEGOTIATION: A TOOLBOX FOR MANAGERS*, ch. 7 (2002), *reprinted in* Michael Watkins, *Third Party Dilemmas: Are the Neutrals Working for Themselves?*, 20 *ALTERNATIVES TO HIGH COST LITIG.* 199 (2002).

form, a lawyer serving as a third-party neutral acts as a mediator between two or more disputing parties by facilitating negotiations without deciding anything for the parties.⁵⁸ Mediators do not represent the parties who appear before them. For that reason, among others, Rule 2.2 of the old version of the Model Rules, which permitted a lawyer to serve as an “intermediary” and engage in joint representation of clients, has been dropped from the revised version of the Model Rules.⁵⁹ Because lawyers who serve as mediators do not represent parties, the conventional ethical rules, which depend on the representational relationship, cannot provide ethical guidelines. Mediation presents complex challenges for conventional ethics rules in matters such as confidentiality, particularly when parties speak directly with one another. Parties do not always speak only in the presence of their lawyers; therefore, they may vitiate the lawyer-client privilege of confidentiality. Furthermore, the mediator often offers a form of confidentiality that applies as between the parties against the rest of the world and a form of confidentiality that applies separately to each party in private caucus sessions. What duty of candor should lawyers, parties, and mediators owe one another when Rule 3.3 does not apply?⁶⁰ As mediators work to effectuate their “magic”⁶¹ in facilitating agreements, they confront issues regarding confidentiality, competence, fees, conflicts of interests, whether they are practicing law in counseling, advising, or drafting agreements,⁶² and whether they owe any duties to third parties.⁶³

58. There is a spirited debate among mediators about the differences between facilitated mediation and mediation that is more “evaluative.” See, e.g., Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 13 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) (arguing that to remain “pure,” mediators should “facilitate” but never “evaluate” the merits of arguments, positions, or case quality (legality) of disputants in a mediation). Even in evaluative mediation the mediator may evaluate the parties’ arguments or claims and give them “reality testing” about their respective positions. The parties, however, must still formulate a negotiated agreement.

59. Compare MODEL RULES OF PROF’L CONDUCT (2002) (eliminating the intermediary rule found in the old Rule 2.2), with MODEL RULES OF PROF’L CONDUCT R. 2.2 (2001) (permitting a lawyer to serve as an intermediary in limited circumstances). The former Rule 2.2 was loosely based on the practice of Louis Brandeis, who served as an intermediary in a bankruptcy case and whose practice was described by others as “counsel for the situation.” See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1502-04 & 1502 n.194 (1996). This artful formulation of a lawyer’s potential role is difficult to manage in practice, especially given the strong conflict of interest standards that are still the hallmark of our adversarial system.

60. The Model Rules and the *Restatement (Third) of the Law Governing Lawyers* define many duties as applying only to lawyers who appear before tribunals, which include lawyers in binding arbitration but not in mediation. See MODEL RULES OF PROF’L CONDUCT R. 1.0, 3.3 (2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 cmt. a (1998).

61. See, e.g., John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 4-6 (1997) (discussing deception, its various forms, and whether it is an “acceptable or unacceptable [form] of persuasion in mediation”).

62. See Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES

The most familiar third-party neutral role is that of the arbitrator. An arbitrator decides matters involving fact, law, or a combination of both fact and law and whether to enforce contracts, such as in labor or commercial disputes. Although conducted in private with privately adopted rules of procedure, evidence, and decision, the role of arbitrator is much like that of judge with rules of conduct prescribed by the parties by their constitutive contract or by the appointing arbitral institution.⁶⁴ Even the Model Rules⁶⁵ and many state statutes⁶⁶ have formerly recognized and prescribed some guidance for the role of arbitrator.

Perhaps least familiar to most readers and central to my claims about the new roles of lawyers as consensus builders is the role of lawyers as neutral facilitators in consensus building or in the public-policy participatory fora. These processes, which involve multiple and complex issues with more than two parties, are hybrids of negotiation, case presentation, and often, legislation and rule-drafting. As a result, such processes require skilled facilitation and meeting management skills. Such innovative processes derive their power from their ability to attract multiple stakeholders to the table to debate policy issues, values, facts, and legal issues and disputes and when

TO HIGH COST LITIG. 57 (1996); Bruce Myerson, *Lawyers who Mediate are not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74 (1996).

63. The Model Rules do not tackle such complex issues of mediator ethics; however, mediator ethics are handled in a variety of special ethical codes. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n, Am. Bar Ass'n, & Soc'y of Prof'ls in Dispute Resolution 1994) (specifically discussing in Principle III conflicts of interest for mediators); CPR-Georgetown Comm'n on Ethics & Standards In ADR, Proposed Model Rule of Prof'l Conduct Rule 4.5 for The Lawyer as Third Party Neutral R. 4.5.3(a)(2) (Final Draft 2002), at <http://www.cpradr.org> (last visited Oct. 31, 2002) [hereinafter CPR-Georgetown Proposed Rule 4.5] ("A lawyer serving in a third party neutral capacity should not allow other matters to interfere with the lawyer's impartiality."). Increasingly, private professional associations and states are developing ethical rules for mediators. See, e.g., TENN. RULES OF PROF'L CONDUCT R. 2.4 (effective Mar. 1, 2003) (prescribing the duties of lawyers who serve as dispute-resolution neutrals).

64. See, e.g., Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 958-61 (2002) [hereinafter Menkel-Meadow, *Ethics Issues in Arbitration*].

65. Both the new and old versions of Rule 1.12 address conflicts of interest when one member of a law firm acts as an arbitrator and the lawyer's partners seek to subsequently represent one of the parties to the arbitration, usually in an unrelated matter. Compare MODEL RULES OF PROF'L CONDUCT R. 1.12 (2002), with MODEL RULES OF PROF'L CONDUCT R. 1.12 (2001). Rule 1.12 has incorporated the American (non-international) understanding of the "partisan" arbitrator in three person arbitration panels, allowing the arbitrator, who is chosen by the parties, to continue in a representational capacity for that party. *Id.*

66. Some states include arbitration in judicial codes of conduct because of the adjudicatory function of arbitrators. More recently, however, some states have begun to regulate the ethical obligations of arbitrators separately. See, e.g., CAL. ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (Cal. Judicial Council 2002).

successful, from their ability to reach a resolution that is often otherwise impossible in more formal legal settings where party politics or adversarialism often reduce the issues to binary and hotly contested alternatives. In the regulatory setting, such mixed processes are used to develop regulatory negotiations ("reg-neg" or negotiated rule-making)⁶⁷ to assist participants in arriving at agreements on environmental siting and clean-up plans, to accommodate preservationist and development interests, to resolve ethnic, community, and international disputes, and to develop budget allocations, as well as future financial and strategic plans. When multiple levels of government are involved in handling regulatory issues and other problems, new forms of coordination, experimentation, and administrative practices draw on the processes of stakeholder negotiation, facilitated and contingent agreements, and party-negotiated plans and solutions. In our domain of law, these practices have been labeled "democratic or constitutional experimentalism"⁶⁸ because they challenge conventional notions of separation of powers, federalism, and regulation by providing for more democratic participation of parties and stakeholders in community problem solving and administrative action and regulation.

At the process level, consensus building is a managed, deliberative, and decision-making process in which a third-party neutral is usually hired to perform conflict or issue assessment, to map potential interests and stakeholders, and to design and implement a process of "convening" representatives, groups, and constituencies to deliberate in a structured way about how to make decisions (developing both "deliberation" or process rules and decision rules) and what decisions to make. Structured discourse usually requires the development of ground rules, which are "enforced" by the third-party conveners or facilitators, usually after adoption, negotiation, and acceptance by the participants.⁶⁹ Participants are often trained in negotiation skills before they begin so that a basic skill level is present.⁷⁰ Different kinds of discourse are allowed and encouraged in such proceedings. While the basic justification is a Habermasian⁷¹ belief in the power of reasoned argument to

67. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLAL. REV. 1, 33-55 (1997) (discussing the negotiated rule-making process); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 28-31 (1982) (discussing the advantages of "developing rules through negotiation").

68. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing theories and examples of administrative democracy).

69. See, e.g., Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate By Consensus*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 3-5 (discussing Robert's Rules of Order as a traditional model and means of enforcing order and decorum in a group setting and describing and setting out alternatives thereto).

70. See *id.*

71. See HABERMAS, *supra* note 41.

persuade others of the validity of a particular claim or value choice, other forms of discourse often emerge as well, including bargaining and trading and appeals to beliefs, emotions, and so-called “a-rational” justifications⁷² for particular choices that are made. Then rules of decision must be agreed to, and, unlike more conventional legal processes of litigation (win/lose decision), negotiation (bi-lateral agreement), or legislative action (majority voting), these processes often use different decision rules (“consensus,” which is not necessarily unanimity but stronger than a majority), which require different deliberation and voting procedures.

Frequently, “approved” decisions or policies may still require further and formal legal approval by the appropriate legal agencies, such as zoning boards, administrative agencies, and legislatures; however, with a committed set of stakeholders who participated in the process, it is more likely that such policy outputs will be accepted.⁷³ Sometimes reaching a decision is not even a goal of a process that instead intends to broaden views, to educate conflicting parties, or simply to enhance mutual understanding across diverse and wide value divides.⁷⁴ Although such processes intend to encourage greater democratic participation by those affected by decisions and policy choices,⁷⁵ the irony is that they still often require some leadership in facilitation and action to be effective.⁷⁶ Regardless, these processes permit

72. See, e.g., JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 286, 315-17 (1999) [hereinafter ELSTER, *ALCHEMIES OF THE MIND*] (discussing the traditional view that emotions may be to blame for “irrationality” in decision-making); JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS ON RATIONALITY* 17-26 (1989) [hereinafter ELSTER, *SOLOMONIC JUDGMENTS*] (discussing several varieties of irrationality).

73. LAWRENCE SUSSKIND & LIORA ZION, *STRENGTHENING THE DEMOCRATIC PROCESS IN THE UNITED STATES: AN EXAMINATION OF RECENT EXPERIMENTS* 21-30 (Mar. 2001) (unpublished manuscript, on file with the *Tennessee Law Review*).

74. Examples of such wide and diverse value divides are found in the Public Conversations Project’s dialogues on abortion, gun control, and other highly controversial issues. See, e.g., PUBLIC CONVERSATIONS PROJECT, *CONSTRUCTIVE CONVERSATIONS ABOUT CHALLENGING TIMES: A GUIDE TO COMMUNITY DIALOGUE* (2002) (describing procedures for conducting a dialogue about a controversial subject with facilitation and ground rules but with no decision rules or “action” plans).

75. See, e.g., ARCHON FUNG, *ACCOUNTABLE AUTONOMY: PARTICIPATORY DELIBERATION IN URBAN GOVERNANCE* (Jan. 2002) (describing community participation and reform projects in the Chicago schools and police department) (unpublished manuscript, on file with the *Tennessee Law Review*); Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 *POL. & SOC’Y* 5, 7 (2001) (discussing reforms that “aspire to deepen the ways in which ordinary people can effectively participate in and influence policies that directly affect their lives”).

76. It is ironic that I am arguing for both more democratic group participation and community participation in governance issues while arguing that a professional class of lawyers may be appropriate or necessary to make that democracy work. Ian McEwan’s character made a similar observation after the would-be rescuers let go of the hot air balloon due to the lack of organized action. See MCEWAN, *supra* introductory quote, at 15-17. Lawrence Susskind calls

deliberation and action across governmental units and agencies and are especially useful for resolving interdisciplinary problems, such as environmental problems, which may require the involvement of scientists and other experts, as well as community members and professionals. Nevertheless, critics argue that these democratic processes subvert and pacify more active conflict and political action or that they may be manipulated by those with more economic, political, or social power and capital.⁷⁷ Critics also argue that these processes tend to localize and decentralize issues and problems that should stay within national policy ambits or in public fora, such as courts, legislatures, and administrative agencies. Some also claim that these new processes are not demonstratively effective;⁷⁸ however, most agree that it is too early to fully evaluate these innovative forms of action.⁷⁹

At the substantive level, these consensus-building or “empowered deliberative democracy”⁸⁰ practices have been employed in a variety of matters, and the catalogues and descriptions of success stories are beginning to make their way into print.⁸¹ In the legal arena, multi-party, multi-issue consensus-building fora have been used for administrative rule-making in occupational health and safety and environmental issues,⁸² environmental siting and clean-up disputes (both before and during litigation),⁸³ natural

this a “professionally facilitated dialogue”; however, he believes that the process would also succeed with the leadership of professionals other than lawyers. SUSSKIND & ZION, *supra* note 73, at 24-30.

77. See, e.g., Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670, 676-77 (2001) (arguing that the deliberative democratic process is not a good recommendation for the “real world” of politics where there are many “power disparities” among the parties).

78. See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1335 (1997) (“While negotiated rulemaking seeks to eliminate conflict, it also adds new sources of conflict and raises unrealistic expectations . . .”).

79. See Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 62 (2000); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 (2000).

80. Fung & Wright, *supra* note 75.

81. See generally CARMEN SIRIANNI & LEWIS FRIEDLAND, *CIVIC INNOVATION IN AMERICA: COMMUNITY EMPOWERMENT, PUBLIC POLICY AND THE MOVEMENT FOR CIVIC RENEWAL* (2001) (cataloguing a variety of examples of collaborative problem-solving processes at a variety of civic levels in issues such as the environment, economic development, and public health); THE CONSENSUS BUILDING HANDBOOK, *supra* note 44 (discussing the success of consensus building in public health, affordable housing, superfund cleanups, and abortion).

82. See Freeman, *supra* note 67, at 33 n.84 (discussing consensus building and self-governance in areas such as the workplace); Harter, *supra* note 67, at 28-29 (discussing the advantages of negotiation over the adversarial process in rule-making in the environmental arena).

83. See, e.g., Edward Scher, *Negotiating Superfund Cleanup at the Massachusetts Military Reservation*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 859-78.

resource disputes,⁸⁴ Indian reservation governance,⁸⁵ constitution and city charter drafting,⁸⁶ and lawsuit settlements, including major mass tort class actions.⁸⁷ Consensus-building strategies have also been used extensively in state and local government policy development for such areas as transportation,⁸⁸ AIDs and health care policy,⁸⁹ budget and block grant allocations, affordable housing,⁹⁰ and community revitalization and economic

84. See, e.g., Judith E. Innes & Sarah Connick, *San Francisco Estuary Project*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 801-27 (discussing the successful use of consensus building among “[e]nvironmentalists, agricultural and urban water users, business groups, and development interests” in the estuary context); Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—for a Time*, 67 U. COLO. L. REV. 259 (1996) (discussing mediation between Native Americans, farmers, and others in the context of water rights).

85. See, e.g., Jan Jung-Min Sunoo & Juliette A. Falkner, *Regulatory Negotiations: The Native American Experience*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 901-22 (discussing “the largest negotiated rulemaking” process among “Indian tribes and tribal organizations” and “federal agencies and offices”).

86. See, e.g., Kate Connolly, *From City Hall to the Streets: A Community Plan Meets the Real World*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 969-84 (describing a plan to revitalize the city, which involved a “strategy . . . built on the idea of partnership development, which meant that the . . . City Council and the community at large would share responsibility for the development and implementation of the plan”) (emphasis omitted); Susan L. Podziba, *The Chelsea Charter Consensus Process*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 743-72 (“The Chelsea Charter Consensus Process, which took place from October 1993 through June 1994, was a public consensus building process designed to engage a politically disillusioned community in the formation of its new local government.”).

87. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (involving the Dalkon Shield contraception device); *In re Dow Corning Corp.*, 187 B.R. 934 (Bankr. E.D. Mich. 1995) (involving breast implant litigation); *In re Joint E. & S. Dist. Asbestos Litig.*, 122 B.R. 6 (Bankr. E.D.N.Y. 1990) (involving asbestos litigation).

88. See, e.g., POLICY CONSENSUS INITIATIVE, NEGOTIATING TRANSPORTATION POLICY RULES IN OREGON (2000) (using consensus building processes to develop freeway access regulations).

89. See, e.g., SIRIANNI & FRIEDLAND, *supra* note 81, at 138-85 (discussing community health and “citizen organizing in the health arena”); Michael A. Hughes et al., *Facilitating Statewide HIV/AIDS Policies and Priorities in Colorado*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 1011-29 (describing “a consensus building process for HIV prevention strategies in” Colorado); Sarah McKearman & Patrick Field, *The Northern Oxford County Coalition: Four Maine Towns Tackle a Public Health Mystery*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 711-41 (“With leadership from the Maine Department of Environmental Protection (DEP) and the U.S. Environmental Protection Agency (EPA), town residents on different sides of the debate came together in 1994 to initiate a community-based consensus building process.”).

90. See, e.g., Lawrence Susskind & Susan L. Podziba, *Affordable Housing Mediation: Building Consensus for Regional Agreements in the Hartford Area*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 773-99 (“[A] 1988 Connecticut state program . . . initiated a consensus building process to address the housing crisis in the area.” Eventually, “a

development.⁹¹ At less concrete levels of action, such processes have also shown promise in “managing,” if not resolving, racial, ethnic, and cross-cultural disputes within particular communities.⁹² Moreover, at the international level, the same techniques have served as the foundations for “truth and reconciliation commissions” designed to provide opportunities for the expression of injustices so as to promote healing and to facilitate the co-existence of groups that have engaged in violence and other wrongs against one another.⁹³

Facilitating processes are now used to resolve past “wrongs” and to elaborate plans for the future, such as in strategic planning for corporations,⁹⁴ organizations, governments, entities, and institutions. Indeed, it is the ability to distinguish between punishment for past harms and planning for future relationships, as distinct from conventional forms of litigation and other forms of legal action, that is the hallmark of these newer forms of ADR. Dispute resolution and prevention services also distinguish “ad hoc” groups and “one-shot” issues from more permanent, ongoing organizations and relational “webs,” the latter of which may require different processes, including the provision of “system design”⁹⁵ services that help organizations develop

compromise bill passed, creating a pilot program to encourage municipalities, with the help of mediators, to negotiate regional affordable housing plans.”).

91. See, e.g., SIRIANNI & FRIEDLAND, *supra* note 81, at 35-84 (discussing community organizing and development); John Part, *The Chattanooga Process: A City's Vision is Realized*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 951-68 (“From recovering the river to revitalizing the downtown to creating affordable housing, Chattanooga’s list of collaboratively solved problems is impressive.”).

92. See, e.g., Norman Dale, *Cross-Cultural Community-Based Planning: Negotiating the Future of Haida Gwaii (British Columbia)*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 45, at 923-50 (“[E]xplicit negotiations have become the most favored means of resolving long-standing conflicts between Canada’s Native peoples (generally referred to as First Nations) and non-Native parties, including governments, other communities, interest groups, and industry.”).

93. See, e.g., SUSAN COLLIN MARKS, *WATCHING THE WIND: CONFLICT RESOLUTION DURING SOUTH AFRICA’S TRANSITION TO DEMOCRACY* 181-82 (2000) (discussing the Peace Accord and reconciliation in South Africa); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998) (describing South Africa’s truth and reconciliation process as one alternative to criminal trials).

94. See, e.g., Judy Mares-Dixon et al., *Building Consensus for Change within a Major Corporation: The Case of Levi Strauss & Co.*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 1065-86 (discussing Levi Strauss & Co.’s pride in “its consensus-based management approach”). The Association of American Law Schools has trained a cadre of law professors as facilitators to guide such strategic planning processes in law school planning.

95. See, e.g., CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 22-24 (1996) (discussing the recent recognition of the conflict management system’s effectiveness in organizations); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 42 (2d ed. 1993) (discussing the “basic

internal systems for orderly, participatory dispute processing.

At the most innovative levels, these processes have been used to facilitate “public conversations” about highly controversial matters such as abortion⁹⁶ and affirmative action⁹⁷ where no decisions are made but where political discourse is structured to encourage communication and prevent further polarization between the parties.⁹⁸ Although such an approach may not lead directly to conflict resolution, it allows for a variety of views to be expressed in a pluralistic and democratic society. At the institutional level, these processes have been used to develop new and more “permanent” forms of decision-making bodies in settings that use the “reg-neg”⁹⁹ approach in the administrative context and “problem-solving courts” in the judicial system. “Problem-solving courts” now attempt to “manage” certain legal issues, such as family, including such issues as neglect, domestic violence, divorce, and custody, with a multi-disciplinary “problem-solving” approach within a single court.¹⁰⁰

Because participation in new processes for legal problem solving places lawyers in alternative roles, new forms of training and skills development are crucial. As a neutral, the third-party facilitator must know how to maintain process neutrality, often in the face of heated debate and value-based commitments,¹⁰¹ know how to develop and then enforce process and ground

principles of dispute systems design”).

96. See, e.g., Michelle LeBaron & Nike Carstarphen, *Finding Common Ground on Abortion*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 44, at 1033 (discussing consensus processes that were designed to facilitate dialogue “among pro-life and pro-choice supporters” in “at least 20 cities”).

97. For a discussion of “deliberative conversation” on affirmative action, see Menkel-Meadow, *Trouble with the Advocacy System*, *supra* note 14, at 33-38.

98. See generally DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE (1998) (discussing how the adversarial system and agonistic arguments have dominated law, education, journalism, politics, and American culture and served to polarize and simplify subjects that require complex and multi-sided understanding).

99. See 5 U.S.C. §§ 569-84 (2000) (encouraging negotiated rule-making and addressing issues relevant to arbitration proceedings). See also Philip J. Harter & Charles Pou, Jr., *Using Negotiated Rulemaking Effectively*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 111-34 (Marshall Breger et al. eds., 2001) (“[T]he ‘regulatory negotiation’ . . . recognizes the political nature of the regulatory process and seeks to adopt the philosophy of the alternative dispute resolution movement to public policy making.”).

100. See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL’Y 125, 126-27 (2001); Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 852 (2000); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 28-34 (1999); Judith Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851, 862 (1997).

101. See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 179 (1987) (discussing how a

rules for discussion, know how to identify and invite the appropriate stakeholders to a particular problem, understand complex negotiation and coalition bargaining behaviors and dynamics,¹⁰² understand and prevent manipulation of voting strategies involved in the development of appropriate decision rules, guide and facilitate groups and constituents in their deliberations,¹⁰³ which often entails knowing when to engage in public and transparent processes and when to use confidential or “second-track” processes,¹⁰⁴ and ultimately, to assist in the development of “implementable,” “reality-tested” decisions or, at least, “contingent”¹⁰⁵ solutions for particular problems. Thus, lawyers who engage in such processes as neutrals will require training in meeting management and facilitation.¹⁰⁶ Also important is a degree of knowledge regarding the sociology and psychology of group behavior,¹⁰⁷ as well as economics, political science, the psychology of

neutral must “switch[] gears” in a zero-sum situation “to introduc[e] the possibility of trading things, especially things that the parties value differently”); LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES* 154-55 (1996) (contrasting “interests” and “values”; “[W]hile interests are about what we want, values are about what we care about and what we stand for”).

102. See LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 140-67 (2000); Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. ON DISP. RESOL. 243, 245-47 (1994); see, e.g., James K. Sebenius, *Sequencing to Building Coalitions: With Whom Should I Talk First?*, in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS (Richard J. Zeckhauser et al. eds., 1996) (stating that “[s]equencing choices can be a prominent feature of coalition building”); Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000) (discussing group polarization).

103. Contrast ROBERT’S RULES OF ORDER (Sarah Corbin Robert ed., 9th ed. 1990) (1876) (containing majority-based decision-making rules), with SUSSKIND & ZION, *supra* note 73, at 1, 21 (pointing out that “representative democracy in the United States falls short of our ideals in numerous ways” including “excessive reliance on majority rule, and a lack of emphasis on forging political consensus”).

104. “Second-track” or “dual track” negotiation (confidential and secret negotiations) was developed in the formal world of international diplomacy; however, second-track negotiation is used frequently in legal disputes and in confidential mediation sessions known as caucusing. See, e.g., *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* 2 (Jacob Bercovitch ed., 1996) (analyzing the effectiveness of mediation in the context of international dispute management and resolution); *WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT* (Melanie C. Greenberg et al. eds., 2000).

105. See, e.g., DAVID LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 97-98 (1986) (discussing the creation of contingent agreements).

106. See JENNIFER E. BEER & EILEEN STIEF, *PEACEMAKING IN YOUR NEIGHBORHOOD: MODERATOR’S HANDBOOK* (1982); TIM HINDLE, *MANAGING MEETINGS* (1998); ROGER M. SCHWARZ, *THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS* (1994).

107. See, e.g., JOSEPH LUFT, *GROUP PROCESSES: AN INTRODUCTION TO GROUP DYNAMICS* 16-35 (1963).

strategic voting,¹⁰⁸ negotiation,¹⁰⁹ mediation,¹¹⁰ bargaining behaviors, and decision science.¹¹¹

Lawyers who serve, not as neutrals, but as representatives of parties in such processes will also have to learn new skills and bodies of knowledge to serve as “representatives” who are not only adversarial advocates, but are also wise counselors and problem solvers¹¹² in processes that call for different kinds of participation in creative thinking, communication facilitation, coordination with clients and others, and joint problem solving with others.¹¹³ The role of the lawyer-as-neutral and the lawyer-as-representative in these new forms of dispute resolution and policy and transaction formation requires different ethical guidelines than those of the traditional adversarial lawyer.

108. See, e.g., JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 155-58 (1989); ELSTER, SOLOMONIC JUDGMENTS, *supra* note 72, at 85-92 (discussing the advantages of lottery voting, which include “reconcil[ing] honesty with self-interest; reducing the number of wasted votes; increasing representation of minority views in elections; and preventing the rise of professional politicians”); Thompson, *supra* note 102, at 154-56 (describing different voting strategies).

109. See, e.g., FISHER ET AL., *supra* note 37, at 40 (discussing the process and the multiple facets of negotiation); MNOOKIN ET AL., *supra* note 17, at 3 (discussing how “[n]egotiation is central to lawyering” and how lawyers can use negotiating skills to “help people construct fair and durable commitments, feel protected, recover from loss, and resolve disputes”); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764, 795 (1984) (comparing the “traditional” adversarial model of negotiation with a problem solving approach to negotiation and suggesting that the problem solving approach “presents opportunities for discovering greater numbers of and better quality solutions”).

110. See generally CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (2d ed. 1996) (describing the stages and functions of the mediation process).

111. See, e.g., MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING (5th ed. 2002) (describing both rational and “distorted” decision-making processes); JOHN S. HAMMOND ET AL., SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS (1999) (describing rational decision-making strategies using risk analysis and quantitative analysis).

112. See generally JESWALD W. SALACUSE, THE WISE ADVISOR: WHAT EVERY PROFESSIONAL SHOULD KNOW ABOUT CONSULTING AND COUNSELING (2000) (discussing how to give effective advice as a professional).

113. See e.g., James K.L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 425-26 (2000) (discussing the need for lawyers to acquire skills other than those traditionally used in the courtroom); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 271 (1999) (discussing the need for lawyers to “redefine their method of advocacy or role to fit the mediation forum”); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 56-66 (describing “six qualities” that are important for lawyers representing clients in negotiation); cf. Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 MEDIATION Q. 377, 378 (2000) (setting forth empirical data concerning “the impact of mediation on legal negotiation”).

A review of the ethics issues surrounding these new forms of ADR follows below.

III. ETHICS ISSUES FOR THE LAWYER AS CONSENSUS BUILDER AND DISPUTE RESOLVER

I have argued in a variety of fora for recognition of the ethical dilemmas that lawyers face while serving in third-party neutral roles and in representative capacities in dispute resolution or consensus-building fora, which are distinguishable from conventional legal and more adversarial roles.¹¹⁴ As chair of the CPR-Georgetown Commission on Ethics and

114. See, e.g., Carrie Menkel-Meadow, *Ethics, Morality and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS 119 (Phyllis Bernard & Bryant Garth eds., 2002); Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 123 (Deborah L. Rhode ed., 2000) (describing the differences in "ethics" of non-adversarial roles from the assumptions of lawyers' ethics of traditional roles); Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 981-87 (2001) (discussing four ethical issues confronting the practice of ADR: counseling, confidentiality, conflicts of interest, and conflicts of law); 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, 409 (1997) (explaining that the current ethical rules for lawyers are inadequate to address the role of lawyers who serve as third-party neutrals); Menkel-Meadow, *Ethics Issues in Arbitration*, *supra* note 64, at 958-61; Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 154 (1999) (noting that the current "rules of professionalism" for lawyers as advocates do not sufficiently address issues confronting lawyers serving in other roles); Menkel-Meadow, *Ethics and the Settlements of Mass Torts*, *supra* note 11, at 1160-61 (discussing ethical issues surrounding settlements of mass torts); Carrie Menkel-Meadow, *Ex Parte Talks With Neutrals: ADR Hazards*, 12 ALTERNATIVES TO HIGH COST LITIG. 109, 117 (1994) (discussing the possibility of ethics rules that address ex parte communications in ADR); Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57, 60 (1996) [hereinafter Menkel-Meadow, *Is Mediation the Practice of Law?*] (discussing the lack of guidance that legal ethics codes provide to lawyers who serve as mediators); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 785 (1999) (suggesting that the conception of the lawyer's role as advocate should be broadened); Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129, 131 (1993) (discussing the absence of a clear consensus on ethical rules for third-party neutrals); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 632 (1997) (recognizing that the *Restatement (Third) of the Law Governing Lawyers* fails to address issues confronting third-party neutrals, among others); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1911-22 (1997) (addressing ethical standards in ADR); Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3

Standards in ADR ("CPR-Georgetown Commission"), I testified before the ABA's Ethics 2000 Commission, which was charged with redrafting the Model Rules, and urged the Commission to consider the ethical dilemmas that challenge lawyers who serve as third-party neutrals. The CPR-Georgetown Commission has drafted a proposed Model Rule to govern lawyers who serve as third-party neutrals. The proposed Model Rule addresses such issues as competence, diligence, fees, impartiality, conflicts of interest, and the fairness and integrity of the process.¹¹⁵ Despite a great deal of lobbying activity by mediators, arbitrators, and third-party neutral organizations and the existence of ethical codes that offer guidance for mediators¹¹⁶ and arbitrators,¹¹⁷ the ABA Ethics 2000 Commission adopted a *de minimis* approach to deal with ethics issues in the practice of dispute resolution.

The Ethics 2000 Commission recommended three changes to the Model Rules. The ABA House of Delegates approved the changes in February 2002, perhaps reflecting at least some recognition of ethics issues involving lawyers engaged in dispute resolution. The Preamble to the Model Rules reflects the role of the lawyer as a third-party neutral by stating that: "[i]n addition to these representational functions, a lawyer may serve as a third-party neutral, a non-representational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to the lawyer who are or have served as third-party neutrals."¹¹⁸ In addition, revised Rule 2.4 formally recognizes the role of lawyers as third-party neutrals by stating:

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a

(considering whether a lawyer who serves as an ADR representative should follow different ethical standards than one who serves in the traditional role as advocate).

115. CPR-Georgetown Proposed Rule 4.5, *supra* note 63.

116. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n, Am. Bar Ass'n, & Soc'y of Prof'ls in Dispute Resolution 1994).

117. See, e.g., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Am. Arbitration Ass'n & Am. Bar Ass'n 1977) (being currently revised by committees of the American Arbitration Association, the American Bar Association Sections of Dispute Resolution, Business Law, and International Law, and the Center for Public Resources); see also RULES OF ETHICS FOR INT'L ARBITRATORS (Int'l Bar Ass'n 1986).

118. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 3 (2002) (citing *id.* R. 1.12, 2.4 (2002)).

client.¹¹⁹

Comment [3] to Rule 2.4 discusses the different responsibilities of lawyers and non-lawyers serving as third-party neutrals and requires lawyers serving as neutrals to disclose that they are not representing parties to a dispute resolution event.¹²⁰ Comment [5] to Rule 2.4 also states that the lawyer who is serving as a representative of clients in arbitration or mediation has different duties of candor.¹²¹ When appearing before a binding arbitration panel, the lawyer-representative has the full duty of candor before a "tribunal"¹²² under Rule 3.3;¹²³ however, when appearing in a mediation proceeding, the duty of candor is governed by Rule 4.1,¹²⁴ thus formalizing a different standard of candor in different dispute-resolution fora.¹²⁵

Rule 1.12 addresses conflicts of interest that occur when a former judge, arbitrator, mediator, or other third-party neutral works as a neutral (or law clerk) on a matter where parties to that matter seek subsequent representation in that matter or another from a law firm for which the mediator works.¹²⁶ The revised rule follows the old rule and allows a former judge, arbitrator, or mediator to serve as a representative only after receiving informed consent in writing from all parties.¹²⁷ In the event that a former judge, arbitrator, or mediator is disqualified from representation in a matter pursuant to Rule

119. *Id.* R. 2.4.

120. *See id.* R. 2.4 cmt. [3].

121. *See id.* R. 2.4 cmt. [5].

122. Tribunal is defined in Rule 1.0(m) as "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." *Id.* R. 1.0(m).

123. Rule 3.3 requires, among other things, that a lawyer disclose adverse controlling authority. *See id.* R. 3.3.

124. Rule 4.1 bars lawyers from knowingly making "a false statement of material fact or law to a third person" or "fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited . . ." *Id.* R. 4.1.

125. Like the *Restatement (Third) of the Law Governing Lawyers*, the Model Rules distinguishes between the varying "tribunals," which include binding arbitration and other fora of legal dispute settlement, such as mediation—treated like private negotiation—and dispute settlement with a "reduced" duty of candor to an "adversary" or non-decisional facilitator. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 7, introductory note (1998) (stating that

[t]he Chapter addresses situations . . . in which the lawyer is 'representing a client in a matter before a tribunal.' . . . Thus . . . the Chapter would be applicable in contested arbitration and similar trial-type proceedings, but it would not be applicable to a mediation (except mediation in the form of a mock trial or similar contested proceeding)), *with* MODEL RULES OF PROF'L CONDUCT R. 3.3, 4.1 (addressing situations in which a lawyer appears before a binding arbitration panel or appears in a mediation proceeding).

126. *See* MODEL RULES OF PROF'L CONDUCT R. 1.12(a), (d).

127. *See id.* R. 1.12(a).

1.12(a), partners in the former judge's, arbitrator's, or mediator's law firm may represent parties to that matter only with proper "screening."¹²⁸ Screening of otherwise disqualified third-party neutrals, a hotly contested ethical issue in deliberations concerning the ethics of conflict resolution, is intended to encourage law firms to allow lawyers in the same firm to serve as third-party neutrals and representatives.¹²⁹ Comment [2] to Rule 1.12 recognizes that "[o]ther law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification."¹³⁰ Rule 1.12(d) continues to recognize the role of a party-chosen "partisan" arbitrator on a multi-member arbitration panel who is allowed to subsequently represent the party in the same matter.¹³¹

The Ethics 2000 Commission at least recognized the existence of lawyers serving as third-party neutrals; however, it failed to take a specific stand about a wide variety of potential ethical issues facing third-party neutrals and representatives in dispute-resolution activities. In failing to take such a stand, the Ethics 2000 Commission's revision of the Model Rules left out what I call the "many 'Cs'" of dispute-resolution ethics.

128. *Id.* R. 1.12(c). The requirements for screening are provided for in the Model Rules. *Id.* R. 1.0(k).

129. See generally CPR-Georgetown Proposed Rule 4.5, *supra* note 63.

130. MODEL RULES OF PROF'L CONDUCT R. 1.12 cmt. [2] (citing *id.* R. 2.4).

131. *Id.* R. 1.12(d). The role of the "non-neutral" partisan arbitrator is a feature of American commercial and labor arbitration and is becoming increasingly controversial in both domestic and international commercial arbitration. See, e.g., Lawrence J. Fox, *The Last Thing Dispute Resolution Needs is Two Sets of Lawyers for Each Party*, in INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR 48 (CPR Inst. for Dispute Resolution 2001) ("Quite simply, it is impossible to reconcile an obligation as an advocate with the role of impartial decision-maker."); Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 750 (1995) (stating that "[i]n tripartite panel arbitrations, under the rules of the American Arbitration Association (AAA), party-appointed arbitrators are permitted and even encouraged to be predisposed toward the position of their nominating party"). Many private international bodies of commercial arbitration have begun to limit severely or ban altogether the function of the partisan arbitrator; once chosen by the parties, all arbitrators are to behave as "neutrals." See, e.g., CPR RULES FOR NON-ADMINISTERED ARBITRATION R. 7.3 (CPR Inst. for Dispute Resolution 2000) ("Each arbitrator shall disclose . . . any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality."); James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "NonNeutrals,"* 11 AM. REV. INT'L ARB. 295, 298-99 (2000) (questioning the wisdom of "overtly partisan" arbitrators and pointing out that "[p]rominent rules used in international arbitrations provide expressly that all arbitrators, including those appointed by the parties, must be impartial and independent."); see also Menkel-Meadow, *Ethics Issues in Arbitration*, *supra* note 64; cf. Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 822 (8th Cir. 2001) (stating that "[w]here the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the party arbitrator's partiality prejudicially affected the award").

A. Counseling, Communication, and Comparisons

Many dispute-resolution professionals have called for a formal ethical rule that would require lawyers to counsel clients about the availability of legal services beyond litigation and the more conventional forms of dispute-resolution. A few states have enacted mandatory counseling rules, and many more states have used precatory language to suggest that lawyers should inform their clients of the many ways to solve a legal problem.¹³² The duty to inform clients is included within the obligation to communicate with clients about the means chosen to effectuate their objectives.¹³³ While some think that it is unethical for a lawyer not to review other forms of dispute-resolution due to the lawyer's presumed conflict of interest in increased litigation fees,¹³⁴ others suggest that the increased cost of counseling sessions required to compare adequately all of the possible forms of ADR and litigation might be prohibitive.¹³⁵

B. Consent, Choice, or Coercion: Of Courts and Contracts

While the animating impulse behind most of the "ADR movement" has advocated for client choice in dispute resolution and "self-determination" in mediation,¹³⁶ parties are increasingly ordered into arbitration or mediation by pre-dispute contract clause assignments or court rules that require an ADR procedure before trial. The United States Supreme Court has sustained most contractual arbitration clauses¹³⁷ against a variety of challenges, and most

132. For a review of these provisions, see Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 433-36 (2000); Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 902-06 (2001).

133. See MODEL RULES OF PROF'L CONDUCT R. 1.2.

134. EDWARD J. BRUNET AND CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 250 (2001).

135. See, e.g., Frank E.A. Sander & Michael L. Prigoff, *Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 51 (debating the argument that the additional costs associated with a lawyer explaining all options concerning ADR to clients would be an unreasonable burden on lawyers).

136. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS Principle I (Am. Arbitration Ass'n, Am. Bar Ass'n, & Soc'y of Prof'ls in Dispute Resolution 1994) ("A Mediator shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.").

137. See, e.g., *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 82-83, 92 (2000) (upholding a mobile home financing agreement that required disputes to be resolved by binding arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that "a claim under the Age Discrimination in Employment Act of 1967 . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration

courts have rejected claims that court-annexed arbitration violates the Seventh Amendment right to a jury trial.¹³⁸ Nevertheless, many legal scholars and lawyer-activists have denounced these trends, which are perceived as more “coercive,” rather than freely-chosen, dispute-resolution processes.¹³⁹ Efforts continue in the courts, as well as in legislatures, to have such clauses declared unconscionable or unenforceable as adhesion contracts¹⁴⁰ and to prohibit mandatory arbitration or mediation in a wide variety of disputes ranging from consumer, employment, and health care issues.¹⁴¹ Some have asked whether

application”). *Contra* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 896 (9th Cir. 2002) (reversing “the order compelling arbitration” and finding the Circuit City Dispute Resolution Agreement “an unconscionable contract of adhesion”).

138. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 503-08 (1989). *Contra* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956-57 (2000) (contending that “constitutional values” in ADR are “achievable, necessary, and desirable”); Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 69-78 (1997) (stating that a preference for binding arbitration rather than litigation violates the Seventh Amendment in cases where the party is entitled to a jury trial).

139. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, in 1996 SUP. CT. REV. 331-32 (criticizing the Supreme Court’s decisions regarding commercial arbitration agreements); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Justice Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26 (1999) (discussing whether the “haves” hold an advantage in ADR); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638-39 (1996) (criticizing the preference the Supreme Court gives to arbitration agreements, even when consumers do not know what they are signing); Katherine Van Wetzel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 703 (1999) (discussing the expanding scope of arbitration under the Act and concluding that “the Supreme Court’s expansive doctrines, when applied to consumer transactions, contravene the statute’s intent and undermine many important due process and substantive rights”); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 788 (2001) (stating that “dispute resolution procedure increasingly resembles a traditional bilateral negotiation session between attorneys”).

140. See, e.g., *Circuit City Stores*, 279 F.3d. at 891, 896 (finding that the “Circuit City Dispute Resolution Agreement” was “an unconstitutional contract of adhesion” and reversing “the order compelling arbitration”); see also *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (reversing the order to enforce the arbitration agreement and finding the arbitration agreement “unconscionably unilateral”); *Engalla v. Permanente Med. Group*, 938 P.2d 903, 927 (Cal. 1997) (stating that

[p]rivate arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a ‘take it or leave it’ basis. The courts must . . . ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness).

141. See, e.g., Consumer Fairness Act of 2002, H.R. 5162, 107th Cong. § 1003(a) (2002)

it is unethical or unconscionable for a lawyer to draft such a "one-sided clause" in a contract when the drafter should know that the other party probably does not understand the ramifications of the agreement.¹⁴² These "ethical" concerns go to the very core of the legitimacy and acceptability of dispute-resolution processes and the role of the lawyer in participating in processes that are regarded by many as unfair or violative of due process protections in the public sphere.

C. Competence, Credentialing, and Qualifications

Although most ethics codes enforce only a minimal level of "competence" and usually proclaim that ethics standards are not to be used to establish professional civil liability standards for malpractice,¹⁴³ a question remains regarding what levels of minimal competence and diligence should be suggested in ethical codes regarding dispute-resolution services. In fields like mediation and arbitration that do not yet carry formal procedures for licensing and credentialing,¹⁴⁴ the question is whether ethics codes should be used to enforce a basic level of service, particularly in light of many courts holding that both arbitrators and mediators are "immune" from liability because of their performance of "quasi-judicial" functions.¹⁴⁵ Indeed, the question of what professional ethics codes should regulate these "mixed" or hybrid professions, where practitioners come from a variety of disciplines, is also considered in the debate concerning whether mediation is the practice of law¹⁴⁶ and thus subject to ethics rules for lawyers, and in the debate concerning whether mediation is performed at all when third-party neutrals legally evaluate a case rather than simply "facilitate" negotiations and communications between parties.¹⁴⁷

(declaring arbitration clauses unenforceable as an unfair trade practice in consumer transactions); Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. § 3 (2001) (declaring unenforceable claims based on federal law arbitration clauses in employment contracts).

142. See BRUNET & CRAVER, *supra* note 134, at 174-75.

143. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 20 (2002).

144. See COMM'N ON QUALIFICATIONS, SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, *QUALIFYING NEUTRALS: THE BASIC PRINCIPLES* (1989).

145. See, e.g., *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding "that absolute quasi-judicial immunity extends to mediators and case evaluators"); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 903 (Cal. Ct. App. 1990) (holding "that absolute quasi-judicial immunity is properly extended to . . . neutral third-parties").

146. See Menkel-Meadow, *Is Mediation the Practice of law?*, *supra* note 114; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74, 74 (1996); Joshua R. Schwartz, *Layman Cannot Lawyer, But Is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715, 1745-46 (1999).

147. See Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 13 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Joseph B. Stulberg, *Facilitative Versus*

D. Confidentiality

Traditional lawyer ethics rules protect lawyer-client confidentiality¹⁴⁸ and evidentiary privilege; however, in mediation and arbitration, the parties and their lawyers usually appear before a third-party neutral, thereby eliminating traditional confidentiality protections. Confidentiality is protected in mediation and arbitration most often by a contract among the parties and the third-party neutral. Increasingly, at least with mediation, confidentiality is protected by statute¹⁴⁹ or common-law privilege. Confidentiality in mediation is complex because mediators often promise parties confidentiality in separate caucus sessions. Mediators can use different versions of promises about what they will reveal to the parties outside the caucus session. Thus, many mediator and arbitrator ethics rules will simply guarantee whatever confidentiality the parties and the third-party neutral promise each other, subject to applicable law. Recently, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Mediation Act to provide uniformity under state law in confidentiality protections and exceptions. However, whether a mediator may be called to testify about the existence or validity of a contract or whether an arbitrator may be called upon when arbitration awards are challenged may be a matter of federal law when cases are brought to federal court.¹⁵⁰

Confidentiality protections, whether based on evidentiary privilege, contract, or statute, may be waived pursuant to certain exceptions. For example, confidentiality may be waived in order to warn that someone may cause serious bodily harm to another. Moreover, disclosure of confidential information may be required to report crimes, such as child abuse or domestic violence. The Ethics 2000 Commission revisited these issues in its redrafting of Rule 1.6; however, recent developments at the federal level demonstrate the

Evaluative Mediator Orientations: Piercing the "Grid" Lock, 24 FLA. ST. U. L. REV. 985, 988 (1997).

148. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). Rule 1.6 has always been subject to controversies about when disclosure of client misconduct to prevent a future serious crime of bodily harm or economic fraud may be permissible or even mandatory. See, e.g., N.J. RULES OF PROF'L CONDUCT R. 1.6 (1998), available at <http://www.njlawnet.com/nj-rpc/rpc1-6.html> (last visited Nov. 1, 2002).

149. See CAL. EVID. CODE ANN. § 1119 (West Supp. 2000); COLO. REV. STAT. § 13-22-307 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 2002).

150. See Federal Arbitration Act § 10, 9 U.S.C. § 10 (2000); see also *In Re Grand Jury Subpoena*, 148 F.3d 487, 492-93 (5th Cir. 1998) (rejecting the argument that discovery of confidential mediation records in a federal agency proceeding investigating fraud is barred); *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1121, 1124-25 (N.D. Cal. 1999) (concluding that a mediator could be called to testify under the Federal Rules of Evidence in a challenge to a mediation agreement in federal court where the enforcement of the contract and confidentiality issues were a question of state law).

volatility of this area.¹⁵¹ The Ethics 2000 Commission recommended, consistent with the treatment of these issues in the *Restatement (Third) of the Law Governing Lawyers*,¹⁵² that lawyers be permitted to disclose confidential client information to prevent, rectify, or mitigate substantial financial loss or fraud; however, the ABA's House of Delegates rejected the recommendation. Nonetheless, recent scandals revealing corporate earnings and audit fraud have resulted in the passage of the Sarbanes-Oxley Act of 2002,¹⁵³ which requires the SEC to adopt professional conduct rules for lawyers practicing before it and requires lawyers to reveal securities violations and other corporate misconduct to corporate officials and board members.¹⁵⁴ Thus, this new federal law will preempt state laws and state ethics rules on confidentiality in this context, and it will raise interesting questions about the role of mediators and arbitrators working on corporate matters. Revelation of a confidential fact from a mediation or arbitration proceeding is one of the few clear acts of malfeasance that can result in a successful malpractice action against a third-party neutral.¹⁵⁵ Therefore, with possible conflicting laws and duties to disclose, the area of confidentiality is fraught with difficulty.¹⁵⁶

E. Conflicts of Interest: Neutrality, Impartiality, and Lack of Bias

Perhaps the most significant issue in debates about ethics in dispute-resolution is the conflict of interest issue, which includes the types of disclosures that mediators and arbitrators should make about past, present, and future relationships with parties, lawyers, and witnesses to a dispute-resolution proceeding. Another issue is whether a "conflict" should foreclose a third-party neutral's partner from undertaking subsequent representation of a party. Rule 1.12 of the proposed Model Rules adopted a permissible screening rule that permits an arbitrator or mediator's partners to engage in representation of parties in a mediation or arbitration¹⁵⁷ as long as appropriate screening has taken place according to Rule 1.0(k). Rule 1.12 is likely to remain controversial as it permits the law partners of mediators and arbitrators

151. See *infra* notes 153-55 and accompanying text.

152. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (2000).

153. Pub. L. No. 107-204, § 307, 116 Stat. 784 (2002) (codified in scattered sections of 11 U.S.C.A., 18 U.S.C.A., 28 U.S.C.A., and 29 U.S.C.A.).

154. See Cahill, *Corporate Fraud Law*, *supra* note 12, at ¶ 1.

155. See SARAH COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* 11-20 (2001).

156. Mediators, in particular, often discuss the complexity of the civil "Miranda" warnings they must give parties in mediation. These warnings explain what is confidential and what might not be confidential. They must also explain that just because something is "confidential" in a mediation proceeding does not mean it is non-discoverable information in litigation or another legal proceeding. My mediation retainer agreement now runs about ten single-spaced pages in length and contains explanations and mutual covenants among the mediator, the parties, and the lawyers.

157. See MODEL RULES OF PROF'L CONDUCT R. 1.12(c)(1) (2002).

to represent parties to a mediation or arbitration,¹⁵⁸ which could cast doubt on the neutrality and impartiality of the third party neutral (due to interests in future business with “satisfied” customers), and which could even allow the mediator or arbitrator to represent the parties in the same matter upon receiving the consent of all parties, a step beyond that permitted by most mediators’ understanding of what is permissible (never to undertake representation in the same matter). Furthermore, as I have argued elsewhere,¹⁵⁹ the definitions of conflicts of interest in the proposed Model Rules do not elaborate on the particular conflicts that may occur in dispute-resolution, such as possible interests in future business as a mediator, arbitrator, or trainer of a client and whether past representation of a client resulted in the selection of a particular mediator or “neutral” arbitrator.

Beyond conflicts of interest, more stringent disclosure requirements now imposed by some states, such as California’s Ethics Standards for Arbitrators,¹⁶⁰ require arbitrators to disclose past, present, or future financial, legal, economic, and personal relationships with all parties, witnesses, and lawyers to an arbitration and to include such relationships with their law and personal (including domestic) partners as well. Such strong disclosure requirements are intended to expose the possibility that certain arbitrators are “repeat players” with particular clients and to expose the existence of regular business to more “one shot” litigants in the arbitration system. So far, no mediation rules require such extensive disclosure of possible conflicts of interest, and indeed, most mediator ethics codes define “conflicts” quite generically and provide minimal guidance. Tennessee’s proposed Rule 2.4 for the Lawyer as Dispute Resolution Neutral, for example, states that “a lawyer may serve as a dispute resolution neutral” when

the lawyer reasonably believes he or she can be impartial as between the parties; . . . [and] the lawyer’s service as a dispute resolution neutral in the matter will not be adversely affected by the representation of clients with interests directly adverse to any of the parties to the dispute, by the lawyer’s

158. See *id.* R. 1.12.

159. See sources cited *supra* note 114.

160. See CAL. CIV. PROC. CODE § 1281.85 (West Supp. 2002); see also Caroline E. Mayer, *Arbitration Standards Challenged*, WASH. POST, July 30, 2002, at E1 (stating that “[t]he securities industry is pushing the state of California to exempt arbitrators that handle disputes against stock brokerages from new arbitration ethics standards that require more disclosure of conflicts of interests”). The National Association of Securities Dealers filed a complaint challenging the application of such state standards to its arbitration program for securities disputes and arguing that it is a self-regulating organization that is governed by the Securities and Exchange Commission under federal regulatory authority. See *Complaint, NASD Dispute Resolution, Inc. v. Judicial Council of Cal.*, 232 F. Supp. 2d 1055 (N.D. Cal. 2002) (No. C-02-3486-SC), available at http://www.nasdadr.com/pdf-text/072202_ca_complaint.pdf (last visited Nov. 1, 2002).

responsibilities to a client or third person, or by the lawyer's own interests,¹⁶¹ . . . [and] the lawyer consults with each of the parties, or their lawyers, about any interests of the lawyer, the lawyer's clients, the clients of other lawyers with whom the lawyer is associated in a firm, or third persons that may materially affect the lawyer's impartiality in the matter¹⁶²

Tennessee's proposed Rule 2.4 imposes a "consultation" requirement but does not define what might constitute a disqualifying conflict of interest. Contrast this to the treatment in proposed Rule 4.5.4 of the CPR-Georgetown Commission on Ethics and Standards in ADR, which specifies conflicts that automatically disqualify lawyers, conflicts to which parties may consent, and conflicts where screening permits some but not all of the law partners of a lawyer with a conflict of interest to work for parties to particular dispute-resolution fora in different or substantially related matters.¹⁶³

To the extent that not only the parties to a dispute-resolution event, but the general public who may watch lawyers repeatedly working for the same client or switching roles from mediator (neutral) to representative, the old concerns of "appearance of impropriety"¹⁶⁴ may have implications for the legitimacy of dispute-resolution fora. While "disclose and party consent" has become one practical approach to conflicts of interest, the conflicts of interest standards are further complicated by post-award challenges to arbitration for "evident partiality"¹⁶⁵ or for failure to investigate possible conflicts.¹⁶⁶ In mediation, such challenges arise with analogies to the conflict rules of past, present, and future representation of parties in substantially related matters.¹⁶⁷ At stake are issues about access to confidential information, the loss of perceived or actual neutrality, the potential bias in the hope for future business from satisfied repeat players, and the perception of disloyalty or "role conflicts" when

161. Query whether this is a subjective or objective standard.

162. TENN. RULES OF PROF'L CONDUCT R. 2.4(b)(3), (5) & (7) (effective Mar. 1, 2003).

163. CPR-Georgetown Proposed Rule 4.5, *supra* note 63.

164. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1977).

165. See Federal Arbitration Act § 10, 9 U.S.C. § 10(a)(2) (2000). *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), is the leading United States Supreme Court case on what standards of conflicts of interest should be applied to arbitrators, such as a judicial standard or a separate standard for "men of affairs." *Id.* at 150 (White, J., concurring).

166. See, e.g., *Al-Harbi v. Citibank*, 85 F.3d 680, 682-83 (D.C. Cir. 1996) (concluding that arbitrator Kenneth Feinberg did not have a duty to investigate his former law firm's prior representation of one of the parties to the arbitration).

167. See, e.g., *PolySoftware Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1491-93 (D. Utah 1995) (stating that the client sought the disqualification of his adversaries' lawyer as a representative because the lawyer previously served as mediator in a substantially related matter and had access to confidential information about both parties to the litigation); *Cho v. Super. Ct.*, 45 Cal. Rptr. 2d 863, 869 (Cal. Ct. App. 1995) (concluding that disqualification of an "individual attorney and his or her firm is required where the attorney has been privy to confidences of a litigant while acting as a neutral arbitrator").

lawyers from the same firm serve as neutral dispute resolvers and advocates for the same parties, and worse still, in the same matter.¹⁶⁸ The conflicts of interest area makes law before, during, and after dispute-resolution hearings occur and the continuing vagueness in most ethical codes, including the newly proposed Model Rules, promises to foster litigation at all of these points in time.

F. Candor

The obligations of candor that lawyers who serve as representatives, mediators, and arbitrators owe one another in dispute-resolution proceedings is also problematic. Under the proposed treatment of the Model Rules and the treatment in the *Restatement (Third) of the Law Governing Lawyers*,¹⁶⁹ only binding arbitrations are treated as “tribunals” under the applicable rules requiring the full duty of candor to the tribunal to report adverse controlling authority to the third-party neutral or arbitration panel.¹⁷⁰ All non-binding arbitrations and mediations are treated as if they were negotiations without the presence of third-party neutrals. However, Rule 4.1 prohibits any misstatement of a “material fact or law”¹⁷¹ in this context. In mediations and non-binding arbitrations there are no obligations to volunteer information or to correct misinformation by other parties or lawyers in the proceedings unless the duty is imposed by other law, such as state fraud law or rules of civil procedure. Mediation, perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives. It seems particularly odd, therefore, that the comments to Rule 4.1, which permit certain forms of “deception”¹⁷² in negotiation, would be permitted in mediation. While some are concerned that lawyers are not forced to be more “candid” with mediators than they would be with other lawyers in dyadic negotiations, a failure to specify more rigorous standards of honesty, as well as requirements for disclosure of facts, interests, and laws can particularly harm dispute-resolution and consensus-building efforts. Consequently, many third-party neutrals feel the need to contract for greater obligations of disclosure and honesty than is currently required in law or ethics codes.

168. Because of the concern about actual and perceived conflicts and “role switching,” many third-party neutrals have left their law firms to form specialized dispute-resolution firms. For examples, see the practices of such leading mediators as Kenneth Feinberg and John Bickerman (both formerly of Kaye Scholer in Washington, D.C.), John Upchurch in Florida, and Bruce Meyerson in Arizona (formerly with Steptoe & Johnson in Phoenix).

169. See *supra* text accompanying note 61.

170. See MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2002).

171. *Id.* R. 4.1.

172. These forms include “puffing” about the value of a bargained-for item, parties’ settlement preferences, and whether or not the negotiator is working for a particular principal. See MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. [2].

G. Costs and Fees

While much of the debate about fees and costs in the deliberations of the Ethics 2000 Commission revolved around the desirability of written contracts for lawyer fees, this issue has not figured as heavily in the mediation and arbitration area, perhaps because so much ADR is contractually based with fees specified or because these activities occur in court settings where fees are specified or disallowed. A more critical issue in the dispute-resolution field is the controversy surrounding the use of particular forms of fees, such as fees contingent on settlement or "bonuses." Many professionals in the field believe that such contingent fees should never be used to give third-party neutrals a "stake" in the settlement or resolution of a matter; however, others suggest that making fees contingent on success of the proceeding allows reluctant parties to participate without incurring additional pre-litigation fees and costs. Ethical issues also arise when one party bears all the costs and fees because the third-party neutral may favor the paying party in hopes of receiving future business.¹⁷³ However, some courts believe that placing all of the costs on the wealthier party, such as an employer, enables poorer parties to participate.¹⁷⁴ Because so much of ADR is private, transparency and monitoring of particular cost and fee issues may be particularly difficult.

H. Contexts

The increased use of the various forms of dispute resolution in many areas has caused some to call for ethics regulation in particular contexts according to subject matter¹⁷⁵ and according to whether the dispute-resolution

173. See *Hass v. County of San Bernadino*, 45 P.3d 280, 291-93 (2002) (reversing an administrative hearing decision where the government paid the hearing officer who was likely to get future business from the government).

174. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (stating that the employer should pay all of the arbitrator's fees and expenses for claimants in mandatory employment arbitration).

175. These subject areas range from employment, environmental, family, consumer, and health disputes, to securities and mass tort class actions, and complex international commercial disputes and transactions, which involve both individuals and multiple corporate or institutional entities. There has already been a great deal of activity in the effort to draft ethical standards for specific subject-matter disputes. See, e.g., MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION (Am. Bar Ass'n 2001), available at <http://www.abanet.org/ftp/pub/family/fccrdraft.doc>; DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (Am. Arbitration Ass'n, Nat'l Consumer Disputes Advisory Comm. 1998), available at <http://www.adr.org>; A DUE PROCESS PROTOCOL FOR RESOLUTION OF HEALTH CARE DISPUTES (Am. Arbitration Ass'n, Am. Bar Ass'n, Am. Med. Ass'n Comm'n on Health Care Dispute Resolution 1998), available at <http://www.adr.org>; CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Am. Arbitration Ass'n & Am. Bar Ass'n 1977), available at <http://www.adr.org>; RULES OF ETHICS FOR INT'L ARBITRATORS (Int'l Bar Ass'n 1986); see also

proceeding is being conducted in private or within the courts¹⁷⁶ or governmental agencies.¹⁷⁷ Whether the different kinds of processes—arbitration, mediation, and consensus building—have their own “moralities”—a claim made famously and rigorously by the jurist Lon Fuller many years ago¹⁷⁸—requiring their own functional logic and ethics is also a lively and continuing debate among those who promulgate ethical rules.¹⁷⁹

I. Compliance, Enforcement, Liability, and Immunity

State disciplinary bodies enforce legal ethical codes. Formed as either independent state agencies or divisions of the state supreme court, state disciplinary bodies are responsible for regulating the state’s legal profession.¹⁸⁰ Professional associations that promulgate specialized ethical

Complaint, NASD Dispute Resolution, Inc. v. Judicial Council of Cal., 232 F. Supp. 2d 1055 (N.D. Cal. 2002) (No. C-02346-56), *available at* http://www.nasdr.com/pdf-text/072202_ca_complaint.pdf (last visited Nov. 1, 2002) (arguing that regulation of NASD’s arbitrators in security broker disputes should be left to “self-regulating organizations,” which are regulated by federal agencies); Menkel-Meadow, *Ethics and the Settlement of Mass Torts*, *supra* note 11, at 1188 (suggesting that different ethical rules should apply to the settlements of mass tort claims).

176. *See, e.g.*, N.D. CAL. R. 1-1 (2002) (stating that the rules apply to ADR proceedings “in the United States District Court for the Northern District of California”); ROBERT J. NIEMIC ET AL., FEDERAL JUDICIAL CENTER, GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR (2001) (offering methods that federal courts may follow in selecting, referring, and managing cases in ADR), *available at* www.fjc.gov; REPORT OF THE ADR TASK FORCE OF THE COURT ADMIN. & CASE MGMT. COMM., GUIDELINES FOR ENSURING FAIR AND EFFECTIVE COURT-ANNEXED ADR: ATTRIBUTES OF A WELL-FUNCTIONING ADR PROGRAM AND ETHICAL PRINCIPLES FOR ADR NEUTRALS (Fed. Judicial Ctr. 1997), *reprinted in* CIVIL LITIGATION MANAGEMENT MANUAL app. B, at 395 (U.S. Judicial Conference 2001), *available at* <http://www.uscourts.gov/civillitig/civillitig04.pdf>.

177. *See, e.g.*, 5 U.S.C. §§ 571-84 (2000) (providing governing rules for ADR in the context of governmental agencies).

178. *See* LON FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Winston ed., rev. ed. 2001).

179. *See generally* Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341 (2001) (observing that “[i]nternational arbitration dwells in an ethical no-man’s land” and seeking to “develop a methodology for prescribing the normative content of a code of ethics for international arbitration”). *See also* Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Developing an Enforcement Regime for International Arbitration*, STAN. J. OF INT’L L. (forthcoming 2002) (suggesting that ethics rules in dispute resolution must “fit” the particular functions performed and may vary with the context in which the dispute resolution process occurs).

180. *See* Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 3 (1991).

codes often have ethics committees to perform oversight or to issue advisory opinions; however, without licensing for ADR professionals, formal sanctions hardly exist for “unethical” conduct by third-party neutrals.¹⁸¹ Some professional organizations will strike the names of “censured” professionals from their rosters as a means of discipline;¹⁸² however, there is a question regarding whether a form of due process must be provided to a mediator, arbitrator, or neutral before his or her name is stricken from court-maintained rolls. A few states have developed formal bodies of disciplinary authority for mediators and arbitrators,¹⁸³ particularly for those professionals who are listed on court or government rosters. At the international level, organizations that sponsor and administer international commercial arbitration adjudicate “challenge” claims against arbitrators suspected of having conflicts of interest or who commit misconduct, and post-hoc challenges to arbitral awards may also involve some post-hoc judicial rulings on the appropriateness of arbitrator conduct.¹⁸⁴ Relatively few malpractice claims are filed against both mediators¹⁸⁵ and arbitrators¹⁸⁶ in large part because a judicial policy supporting alternative dispute resolution has granted either absolute or “quasi-judicial” immunity to mediators (at least in the court setting) and arbitrators (even in private settings who are seen to be performing adjudicative services)¹⁸⁷ through both case law and statutory grants of immunity.¹⁸⁸

181. See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 545 (1989) (suggesting that the most effective form of “discipline” for unethical behavior in negotiation is the lawyer’s reputation in the market); CPR-Georgetown Comm’n on Ethics & Standards of Practice in ADR, *Principles for ADR Provider Organizations* pmbl., at 5 (2002) [hereinafter CPR-Georgetown Principles] (stating that “[i]n addition to establishing a benchmark for responsible practice,” the CPR-Georgetown Commission aims to “enhance understanding of the ADR field’s special responsibilities, as justice providers, to provide fair, impartial and quality process”).

182. See Reuben, *supra* note 138, at 1013.

183. See FLA. STAT. § 44.201 (2001); FLA. STAT. ANN. § 10.900 (West Supp. 2002); see also Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 719 (1994) (stating that “[t]o the author’s knowledge, Florida is the first state to adopt a procedure to enforce mediator standards of conduct”); FLA. DISPUTE RESOLUTION CTR., MEDIATOR QUALIFICATIONS BOARD UPDATE (1996), available at <http://www.flcourts.org/osca/divisions/adr/brochure.html>.

184. See Menkel-Meadow, *Ethics Issues in Arbitration*, *supra* note 64, at 963-66, 970-74.

185. But see, e.g., *Lange v. Marshall*, 622 S.W.2d 237, 237-39 (Mo. Ct. App. 1981) (reversing a \$74,000 jury verdict against a lawyer who served as a mediator for the husband and wife who were divorcing).

186. But see, e.g., *Baar v. Tigerman*, 189 Cal. Rptr. 834, 835 (Cal. Ct. App. 1983) (declining “to grant quasi-judicial immunity to an arbitrator who breached his contract to render a timely award”).

187. *Id.* at 836-37 (stating that courts “have long recognized immunity to protect arbitrators from civil liability for actions taken in the arbitrator’s quasi-judicial capacity”).

188. See CAL. CIV. PROC. CODE § 1297.432 (West Supp. 2002); FLA. STAT. ANN. § 44.201(6) (West 2002); N.C. GEN. STAT. § 7A-38.1(j) (2001); see also SARAH COLE ET AL.,

J. Corporate, Organizational, and Provider Liability

Perhaps because there is so little “quality control” of individual practitioners of dispute-resolution, demand has grown for oversight or regulation of dispute-resolution service providers. In response to the ongoing objections to mandatory arbitration in employment, consumer, and health care disputes, a variety of organizations have engaged in voluntary self-regulation by adopting “due process protocols.” Such protocols provide basic standards to ensure fairness in the conduct of mediation and arbitration proceedings that usually originate from contractual dispute-resolution clauses.¹⁸⁹

Following suggestions in legal commentary that entities and organizations should be held responsible for their actions in providing legal services,¹⁹⁰ the CPR-Georgetown Commission on Ethics and Standards in ADR promulgated the Principles for ADR Provider Organizations (“Principles”), the first ever set of standards for ADR service provider organizations. These standards are designed to “offer a framework for responsible practice by entities that promise ADR service”¹⁹¹; they suggest “best practices” and “baseline” measures for provider organizations in the provision of arbitration, mediation and other forms of ADR services. Unless adopted by state legislatures or appropriate state governmental entities,¹⁹² these standards do not have the

MEDIATION: LAW, POLICY AND PRACTICE ch. 11 (2001) (reviewing state law (common and statutory) on immunity and malpractice standards in mediation). Compare Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 85 (1986) (arguing in favor of mediator immunity), with Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 134 (1999) (arguing against mediator immunity). The New Jersey Supreme Court has declined to permit mediator immunity due to the absence of quality control protections. See N.J. Sup. Ct., *Task Force Report on Complementary Dispute Resolution*, 124 N.J. L.J. 90 (1990).

189. See, e.g., DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (Am. Bar Ass’n 1995), available at <http://www.bna.com>; A DUE PROCESS PROTOCOL FOR RESOLUTION OF HEALTH CARE DISPUTES (Am. Arbitration Ass’n, Am. Bar Ass’n, Am. Med. Ass’n Comm’n on Health Care Dispute Resolution 1998), available at <http://www.adr.org>; DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (Am. Arbitration Ass’n, Nat’l Consumer Disputes Advisory Comm. 1998), available at <http://www.adr.org>; JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2002), available at http://www.jamsadr.com/employmentArb_min_stds.asp.

190. See, e.g., Schneyer, *supra* note 180, at 5-4 (arguing that “[a]s law firms grow, the potential harm they can inflict on clients, third parties, and the legal process grows as well”).

191. CPR-Georgetown Principles, *supra* note 181, pmb1., at 5.

192. See, e.g., CHARLES POU, JR., DISPUTE RESOLUTION SERVS., MEDIATOR QUALITY ASSURANCE: A REPORT TO THE MD. MEDIATOR QUALITY ASSURANCE OVERSIGHT COMM. (Feb. 2002), available at <http://www.acresolution.org>; see also UNITED STATES POSTAL SERV., MINIMUM CRITERIA FOR MEDIATORS OF POSTAL SERVICE DISPUTES, CERTIFICATION FOR REDRESS MEDIATORS, STANDARDS OF PRACTICE FOR POSTAL SERVICE MEDIATIONS, available at <http://www.usps.com/cpim/ftp/pubs/pub102.html>.

force of law. They have, however, become a discussion document for assessing quality in state dispute-resolution programs.¹⁹³ The Principles state that organizations that refer, suggest, train, or provide individual dispute resolution services have responsibilities to ensure the quality and competence¹⁹⁴ of individuals that appear on their lists or rosters,¹⁹⁵ “to provide clear, accurate and understandable information” about the services provided,¹⁹⁶ to take “reasonable steps” to make services available to “low-income parties[,]”¹⁹⁷ to disclose all appropriate conflicts of interest,¹⁹⁸ to make available a grievance or complaint mechanism for the services offered,¹⁹⁹ to require neutrals to adhere to “reputable internal or external” ethics codes,²⁰⁰ to avoid making “false or misleading” statements about services provided,²⁰¹ and to take appropriate steps to ensure that services that are provided are done so in a “fundamentally fair” and “impartial manner.”²⁰² Principle I also recognizes that the obligations under these standards may vary with the degree of knowledge and sophistication on the part of parties that actively and thoroughly screen and select particular neutrals.²⁰³ Although William Slate, the President of the American Arbitration Association (“AAA”), served on the CPR-Georgetown Commission, his organization did not “fully endorse” the Principles; instead, the AAA adopted its own set of principles²⁰⁴ due to a concern that the CPR-Georgetown Principles would become legally enforceable standards for potential organizational liability.

Given the efforts of ADR organizations such as the AAA, the National Association of Securities Dealers, Inc. (“NASD”), and the Judicial Arbitration and Mediation Services, Inc. (“JAMS”) to self-regulate by adopting their own internal organizational ethical and practice standards,²⁰⁵ it remains to be seen whether courts or other bodies will hold provider organizations²⁰⁶ or the

193. See Conference of Soc’y of Prof’ls in Dispute Resolution, Albuquerque, N.M. (Sept. 2000), available at <http://www.acresolution.org>.

194. CPR-Georgetown Principles, *supra* note 181, cmt., at 6.

195. *Id.* Principle I, at 7.

196. *Id.* Principle II, at 9.

197. *Id.* Principle IV, at 10.

198. *Id.* Principle V, at 10.

199. *Id.* Principle VI, at 12.

200. *Id.* Principle VII, at 12.

201. *Id.* Principle VIII, at 13.

202. *Id.* Principle III, at 10.

203. *Id.* Principle I(b), at 7.

204. See Arbitration, The Code of Ethics for Arbitrators in Commercial Disputes, available at <http://www.adr.org>.

205. See CPR-Georgetown Principles, *supra* note 181, pmbl., at 5.

206. Some organizations, such as the Academy of Civil Trial Mediators and the National Academy of Arbitrators have elected members based on experience and reputation in the field. It remains to be seen whether conferring “honorific” status will insure any more quality than less exclusive organizational providers. Government agencies are also providing rosters of

individuals on their rosters to their self-imposed standards of quality, competence, and liability.²⁰⁷

K. Complaints and Grievances

As ethicists, consumers, and professionals advocate for more official regulation of the provision of private and public dispute resolution services, many have suggested that users of dispute-resolution services should have formal opportunities to raise questions and grievances about the process, especially where provider organizations (as well as courts and government agencies) select, list, train, and refer the third-party neutrals assigned. Many formal ADR organizations have grievance committees or ethics committees, which range from the Arbitration Court of the International Chamber of Commerce to an ad hoc ethics committee at CPR, to rule on challenges regarding conflicts of interest, misconduct, or other alleged ethical "violations." There are as yet, however, no formal requirements that such organizations provide procedures for enforcing even their own rules. The CPR-Georgetown Principles suggest that provider organizations "should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties"²⁰⁸ Courts, to some extent, have begun scrutinizing the work of particular providers,²⁰⁹ especially when a single provider is used throughout a particular industry. The existence of a formal complaint and grievance procedure is likely to render that provider more acceptable to regulators.

L. Conflict of Laws

The above discussion should make clear that there are now many sources of rules, statutes, standards, and regulations for ethical and good practices in

neutrals, who are usually "certified" after acquiring specified amounts of experience, otherwise known as "flying time."

207. One test was the litigation between the NASD and the California Judicial Council, which attempted to regulate ethical standards for all arbitrators in California. *See* Complaint, NASD Dispute Resolution, Inc. v. Judicial Council of Cal. (N.D. Cal. 2002) (No. C-02-3486-SC), available at http://www.nasdr.com/pdf-text/072202_ca_complaint.pdf (last visited Nov. 1, 2002). Rather than deciding the merits of the case, however, the district court dismissed the case on Eleventh Amendment state immunity grounds. *See id.*

208. CPR-Georgetown Principles, *supra* note 181, Principle VI, at 12. Principle VI also suggests that the organization provide a "fair and impartial process for the affected neutral or other individual against whom a grievance has been made." *Id.*

209. *See, e.g.,* Engalla v. Permanente Med. Group, 938 P.2d 903, 908 (Cal. 1997) (concluding, in part, "that there is indeed evidence to support the trial court's initial findings that Kaiser engaged in fraudulent conduct justifying a denial of its petition to compel arbitration").

the provision of dispute-resolution and consensus-building services. Such sources include federal statutes, regulations, and case law, as well as state substantive and ethical regulation and private rules of associations. At the international level, private associations, such as the ICC, the London Court of International Arbitration, the AAA, and courts, which are asked to enforce or vacate arbitral awards, will rule on the ethics and conduct of third-party neutrals. In the United States, where there is currently a great deal of advocacy in both courts and legislatures about the unfairness of mandatory contractual dispute resolution (particularly arbitration), proposals for new layers of regulation are pending at every level of governmental action.

Finding the relevant ethical rule or statutory standard in a private or public dispute-resolution proceeding, negotiated rule-making, or consensus-building process is difficult, but once found, duties may conflict with confidentiality protections in mediation,²¹⁰ as in the case of governmental transparency and public information policies, and in the case of federal-state conflicts of laws, rules, and policies. For example, the new federal corporate fraud act, which requires lawyers to “whistleblow” on their clients’ economic fraud, may conflict with and may thus preempt state ethics rules that protect client confidentiality.

Mediators, arbitrators, and facilitators in courts and governmental administrative proceedings may be subject to governmental rules, state ethics codes, the ethical rules of professional associations or provider associations of which they are members, and the contractual or retainer provisions signed by the parties to a particular proceeding. Thus, dispute resolvers and facilitators operate in public and private settings with a variety of parties who are not “clients” in the representational sense but who are “clients” of the dispute-resolution process and may be owed different sets of ethical and practice protections. There have been efforts to promulgate more uniform rules, as in the case of confidentiality rules in the Uniform Mediation Act and joint action rules on the part of multiple organizations²¹¹ to create some

210. See *In re Grand Jury Subpoena*, 148 F.3d 487, 491-92 (5th Cir. 1998); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988); *Bank of Am. Nat’l Trust & Savs. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986); *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1121-23 (N.D. Cal. 1999); *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119, 123 (Cal. 1992); see also *News-Press Publ’g Co. v. Lee County*, 570 So.2d 1325, 1327 (Fla. Dist. Ct. App. 1990) (ruling on conflicts between state “sunshine laws” for state administrative agency deliberations and the conflicting policy of confidentiality in mediation); Kate Marquess, *South Carolina Moves Toward Squelching Secrecy: Sealed Settlements Could Become a Thing of the Past*, 1 A.B.A. J. EREPORT, Aug. 9, 2002, ¶ 1, available at WL 30 ABAJEREP 6 (stating that “South Carolina’s federal courts may become the first in the nation to ban sealed settlements”); Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 ALTERNATIVES TO HIGH COST OF LITIG. 85 (1993) (reviewing the conflicting policies in protecting the privacy of legal settlements and the “public interest”).

211. Examples include the AAA/ABA/SPIDR Joint Standards of Conduct for Mediators

consensually arrived at standards of conduct and best practices; however, courts and legislatures²¹² do not always defer to such efforts.²¹³

For those who argue that dispute-resolution and consensus-building processes are ultimately voluntary, consensual, and often private, the ultimate jurisprudential challenges of the moment involve the appropriate level of public regulation and the relation of private self-regulation to more public processes, such as court mediation and administrative reg-neg, and to the wide variety of hybrid processes, such as when a court-annexed mediation is conducted in a private law office. To the extent that we are becoming aware of the many ethical and practice issues implicated in "the more conventional" and legally based forms of dispute resolution, such as arbitration and mediation, we are just beginning to recognize and consider some of the more complex ethical issues implicated in the use of the more challenging, if not more democratic, forms of deliberation in consensus-building and public-policy fora to which I now turn.

M. Consensus Building

Our hopes for using democratic deliberative fora to deal with complex social, legal, and economic policy issues and disputes at all levels of human interaction, such as the local, state, national, and international levels, raise additional ethical concerns for the neutral facilitators of these processes as well as for the participating parties. At the outset, the assumption of these processes is that many stakeholders must be identified and invited in by someone, usually the "convener" of the process, who may serve as a "host," a "leader," or a consulting "facilitator." Ensuring that a consensus-building process is legitimate by inviting all appropriate stakeholders is widely regarded as the key to the success of such processes and distinguishes such a deliberative democratic process from more conventional lawsuits or transactional matters. Once many stakeholders are invited in, however, complicated issues of process management and decision rules will arise. Furthermore, the biggest challenge for neutral facilitators involves how to handle extremists, "hold-outs," or others who seek to prevent agreements from occurring for legitimate and illegitimate purposes.

and the Due Process Protocols mentioned in this Article. See sources cited *supra* notes 136 and 175.

212. See CAL. CIV. PROC. CODE § 1281.85 (West 2002).

213. Courts ruling on challenges to arbitral awards, in particular, have often refused to adhere to privately adopted ethical standards when deciding whether an arbitrator demonstrated "evident partiality" in order to vacate an arbitral award under the Federal Arbitration Act. See, e.g., *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983) (stating that the American Arbitration Association's "Commercial Arbitration Rules and Code of Ethics for Arbitrators . . . do not have the force of law"); see also *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 820 (8th Cir. 2001) (stating that "the district court erred in placing primary emphasis on whether [the] party arbitrator . . . violated . . . the Code of Ethics").

Consensus-seeking facilitators always face ethical issues regarding transparency, privacy, and secrecy in deliberations²¹⁴ where private caucuses allow side deals and trades without public posturing but which ultimately must be disclosed to all interested parties and to the public to assure acceptability. Facilitators or managers of these complex processes must also deal with power imbalances between parties, especially where many parties do not have legal or other types of representation or substantive expertise.²¹⁵ In a decisional process that is designed to maximize both participation and substantive results (meaning inducement of and satisfaction of the needs and interests of the greatest number of participants), one way to approach power imbalances is to provide preliminary process training to all participants. Thus, consensus-building professionals, like Lawrence Susskind of the Consensus Building Institute and Chris Carlson of the Policy Consensus Institute, provide negotiation training to participants before beginning a policy-setting consensus-building event. This training is called "capacity building," which may empower participants to learn process skills that will transcend participation in a particular event. In the environmental area,²¹⁶ for example, former Secretary of the Interior Bruce Babbitt encouraged the use of the Habitat Conservation Plan processes to encourage the development of large-area ecosystem conservation and development plans to avoid the "zero-sum" gridlock involved in enforcing the Endangered Species Act. Secretary Babbitt did this by encouraging negotiated plans for species preservation, resource management, scientific monitoring, and goal-setting among a diverse group of governmental, environmental, and developer actors across the nation.²¹⁷

214. See ELSTER, *ALCHEMIES OF THE MIND*, *supra* note 72, at 250-51 (discussing different constitutional substantive arrangements that he attributes to differences in public versus private constitutional deliberations in America and France in the eighteenth century).

215. For the debates about power imbalances in dyadic mediation, see generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing the application of mandatory mediation to family law and concluding that "mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises"). Power imbalances in deliberative democracy experiments have emerged as a key point of critique. See, e.g., Young, *supra* note 77; see also Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 15 (1981) ("Mediators may . . . have to build the basic negotiating capabilities of one or more of the parties to ensure more equal bargaining relationships.").

216. For one of the most cited examples of the use of consensus building for environmental problem-solving, see JOSH EAGLE, STANFORD LAW SCHOOL ENVIRONMENTAL AND NATURAL RESOURCES LAW AND POLICY PROGRAM, PUBLIC PARTICIPATION IN NATIONAL FOREST MANAGEMENT: THE SIERRA NEVADA FRAMEWORK FOR CONSERVATION AND COLLABORATION AND THE QUINCY LIBRARY GROUP (SLS Case No.98-026 1998) (developing models for public participation in forest management with local, regional, and national interests).

217. See Bruce Babbitt, *ADR Concepts: Reshaping the Way Natural Resources Decisions are Made*, in INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING

With repeated uses of these processes, the hope and theory is that capacity for participation will be enhanced by education and increased experience.²¹⁸

The use of public-policy fora and consensus-building processes is sufficiently new and complex in its attempt to provide real democratic participation opportunities and demonstrate its effectiveness that it may be too early to lay down definitive ethical standards and norms. Furthermore, because the kind of professionals capable of leading, facilitating, and managing such processes are sufficiently diverse,²¹⁹ it is probably unwise to establish ethical standards within a particular discipline, such as law. Nevertheless, articulating aspirational standards and “best practices,” which attempt to specify widely shared, if not universal, norms,²²⁰ is a useful way to begin a debate and discussion about the best and most effective and fairest ways to conduct these processes. The following values can be said to inform the work of many who serve as professional facilitators of public participation and deliberative processes and may serve as a basis for an ethics code for this portion of the field.²²¹

AND ADR 13 (CPR Inst. for Dispute Resolution 2001); Fung & Wright, *supra* note 75.

218. Of course, this can work both ways. Repeat player developers, like Wal-Mart, learn how to “play” communities against each other in what they offer or demand in terms of tax relief, jobs promised, and community services supported.

219. At least one multi-disciplinary professional association, the International Association for Public Participation, has already emerged in this field. See International Association for Public Participation, *About IAP2*, at <http://www.iap2.org/boardlink/aboutiap2.html> (last visited Nov. 4, 2002). “IAP2 is primarily concerned with process, rather than specific positions on issues. Indeed, we regard ourselves primarily as facilitators—people who work to make planning and decision processes more inclusive and transparent.” International Association for Public Participation, *IAP2 Home Page News!*, at <http://www.iap2.org/> (last visited Oct. 3, 2002).

220. For a history of the United Nations’ negotiation and drafting process of the Universal Declaration of Human Rights, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 71 (2001), where Eleanor Roosevelt advocated for a “morally binding . . . declaration, rather than a legally binding international agreement.”

221. These core values are from my own experience in the field and my efforts to specify a set of aspirations when I teach and train others for this type of work. For the last few years, I have been part of an informal group of “senior mediators and facilitators” who meet annually at the Western Justice Center in Pasadena to share ideas and experiences in the field. The group has informally worked on developing a “consensus” about the core values of our field. The issues and values expressed above have not been endorsed by this group or any other with which I work and are provided for illustrative and discussion purposes only. I would like to extend a special thanks to Lawrence Susskind who initiated this discussion and began this work. My statement of “core values” here suggests “principles of practice and ethics” for both participants and leaders or facilitators of these processes. A more complete statement may also specify another set of principles for those who, like lawyers, represent parties and participants in proceedings. Here, I have chosen to treat “participants” as parties and their representatives.

1. Broad Stakeholder Identification

To the extent possible, all parties and groups with a “stake” or interest, or those who might otherwise be affected by a decision in a matter, should be invited to participate or should be represented by those whose individual interests are reasonably comparable.

2. Opportunity to Participate and Have a Voice

All identified stakeholders, whether direct constituents or in represented capacities, should have adequate opportunities to be heard and to participate in proceedings that may result in decisions affecting them. Parties and stakeholders should be able to choose representatives to represent or express their interests.

3. Participant Agreement on Process and Ground Rules

Clear rules of procedure and process for participation should be “agreed” to by the participants. Recognizing that some participants in consensus-building events democratically select their own rules while others agree to use the procedures suggested by expert facilitators, there should be a prior agreement before deliberations begin regarding how participants will behave. Where possible, agendas should be set in advance, and procedures for recording, taking minutes, or information sharing should be developed. Protocols and rules about publicity, transparency, or confidentiality and secret or protected deliberations should be specified. Where possible, participants should agree on enforcement mechanisms for monitoring and adhering to such process guidelines and procedures. Expectations of participatory norms, such as attendance, speaking turns, degree of candor, use of experts and scientific or factual data, and processes for joint fact-finding, should be specified.

4. Participant Agreement to Decision Rules

Before commencing deliberations and taking actions, participants should agree on the “rules of decision” to employ in order to specify what constitutes “consensus.” Consensus need not involve unanimity or majority vote but should specify what participants will consider sufficient for a “decision” or “action” to be taken or a recommendation to be made to the appropriate governmental or other action authorities.

5. Participant Recognition of Individual, Mutual, and Joint Gains and Improvements

Participants should seek, where possible, to recognize individual, mutual, and joint gains and improvements. The purposes of consensus building processes are not to replicate other forms of binary “zero-sum” decision-

making, but to seek ways to satisfy the needs, interests, and objectives of all the participants. Such participation processes seek to achieve Pareto-optimal and creative outcomes; in other words, the process seeks to maximize joint gain without unnecessarily causing harm or unagreed-to losses to any other participants.

6. Justified Bases for Claims, Arguments, Needs, and Interests

Participants should be able to express justifications for their views, arguments, needs, and objectives by explaining why particular outcomes or principles are important. Justifications may include reasons, data, values, beliefs, and emotions.

7. Fair Hearing and Respect for All Participants

All participants should respectfully listen to and attempt to understand the perspectives of all other participants. Process and ground rules should specify the rules of discussion, deliberation, and decision and how participants should demonstrate respect for differences among participants.

8. Seeking Creative and Tailored Decisions and Solutions

Participants and leaders or facilitators should seek creative and tailored decisions and solutions to their policy or dispute resolution objectives. Public-policy deliberation and consensus-building fora are designed to increase the possibility of finding tailored solutions to particular problems, conflicts, and disputes, as well as to create new entities or relationships to handle specific issues. Decisions taken or solutions crafted for particular problems need not be based on precedent but should offer the opportunity to develop specific and “localized” solutions.²²²

9. Third-Party Neutrals Should be “Clean”

Facilitators, mediators, or other third-party neutrals or intermediaries who assist and guide such participatory processes should act without bias or partisanship and should be accountable and acceptable to the participants in

222. Note that in consensus building involving environmental and administrative regulatory issues, tensions arise between localized “solutions” and the need for more regional, national, or universal standards. See Dorf & Sabel, *supra* note 68. Proponents of consensus building suggest that information coordination should be available, whether through formal governmental processes or more informal information sharing. In administrative regulatory literature, information coordination has been variously described as benchmarking, standard monitoring, and innovation sharing. See CHARLES SABEL ET AL., *BEYOND BACKYARD ENVIRONMENTALISM* 4 (Joshua Cohen & Joel Rogers eds., 2000).

the process. Third-party neutrals should disclose past, present, or potential future relationships and conflicts of interest with the participants or issues, which may cause the process to be perceived as biased. Where professionals or process experts are used to facilitate consensus-building processes, they should be chosen by and be accountable to the participants. Such third-party neutrals should act without partisanship and bias and should conduct themselves fairly.²²³

10. Facilitation of Dialogue

Facilitators, mediators, intermediaries, or other third-party neutrals should act to effectively facilitate dialogue, discussion and deliberation, to promote creative and efficacious problem solving, and to otherwise productively and fairly manage a consensus-seeking process.

11. Enhanced Capacities

Facilitators, mediators, intermediaries, or other third-party neutrals should enhance the capacities of participants to participate in such processes in the present and in the future with other parties. Where possible, process experts should be sure that parties learn how to negotiate, deal with differences and conflicts, and deliberate and dialogue with each other effectively. Enhanced capacity should occur not only to maximize effective participation in a particular event but also to improve and facilitate future dealings with the same or different parties.

12. Considerations of Practicality

Facilitators, mediators, intermediaries, or other third-party neutrals should attempt to ensure that decisions and agreements are implementable and that contingencies and future processes have been considered. Third-party neutrals should engage in "reality testing" to ensure decisions taken or agreements reached are implementable or realizable or that recommendations for future action may be referred to the appropriate legal or other authorities.

223. Note that my formulation above does not demand neutrality because I believe that no human being is capable of being completely neutral. What is important is to act fairly and without bias toward the parties and participants. A mediator or facilitator may, in fact, have to take a non-neutral or punitive action if a party violates a procedure or engages in other misconduct; however, as long as the procedure is fair, such an action is completely proper and within the role of the third-party facilitator. See Howard Gadlin & Elizabeth Walsh Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEGL. J. 17 (1997). An important controversy among mediators and facilitators involves when and how mediators should "intervene" to ensure fair outcomes and to protect the "unrepresented" parties. See Susskind, *supra* note 215, at 4-6.

Effective process experts should also assist the parties in developing plans for contingencies or uncertainties in agreements or decisions and provide for future deliberative or dispute-resolution processes.

13. Following Decision Rules and the Law

Agreements, decisions, and solutions should be approved according to the decision rules of the participants and consistent with applicable legal or other contextually based authorities. Agreements should be based on informed consent, not on coercion. A decision to not reach agreement should be a legitimate outcome if the conditions for reaching an agreement are not met.

14. Respectful Awareness

Facilitators, mediators, intermediaries, or other third-party neutrals should be sensitive to the different substantive, institutional, social, and cultural contexts in which they perform their duties.

15. Avoiding Unjust or Unfair Results²²⁴

A facilitator, mediator, intermediary, or other third-party neutral should do everything within his or her control to ensure that any agreement reached or decision taken is not unconscionable,²²⁵ unfair, unjust, or causes unnecessary harm to the participants or to any third parties not present during the process. An effective consensus-building process should at least make the parties better off than they were before they began, perhaps emerging with little more than mutual understanding. However, a deliberative process should not be used to circumvent other legitimate laws or processes or to deflect harm onto unrepresented parties. Third-party neutrals should not preside over agreements that are obviously unfair, unjust, unconscionable, or that will harm the participants or others outside of the process.

* * *

224. This last statement, or "core value," is "optional" because it is very controversial in the field of third-party neutrals and would impose a vague, but very demanding, standard of ethics and behavior.

225. This statement tracks the efforts to prohibit lawyers from negotiating and agreeing to "unconscionable" agreements in legal negotiations, which was originally proposed as Rule 4.3 for the Kutak Commission; however, the proposed rule was soundly defeated. See BRUNET & CRAVER, *supra* note 134, at 174-75; Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 591 (1975) (positing the precept that "[t]he lawyer may not accept a result that is unconscionably unfair to the other party") (emphasis omitted); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (1980).

The purpose of the preceding list of "core values" is to express some key ideas of good practices for both participants and expert "leaders" of consensus-building procedures. Such processes may be used in many settings, including public governmental, private individual, organizational, and international settings. A skilled "neutral" must become aware of and be respectful of how different settings and environments may require adaptation and modifications of the general principles.

IV. CHALLENGES AND OPPORTUNITIES FOR LAWYERS AS CONSENSUS BUILDERS

As the old Chinese proverb suggests, "we live in interesting times." Lawyers, as if they didn't have enough to do, now have the opportunity to expand their functions from traditional roles of advocate to facilitator, problem-solver, dispute resolver, and "neutral." For those lawyers who choose such new functions, whether as part of a traditional practice or as a different practice, there are many rewards and many challenges. For lawyers who continue to serve as advocates, the challenge will be to incorporate different paradigms or frameworks of work into the same human being.²²⁶ For lawyers who commit to a full-time practice of facilitation, mediation, dispute resolution, or consensus building, there will be collaboration and competition with others in the field who come from different disciplinary backgrounds.

Whether it is possible to generate a core set of values, practices, and ethics from such a new interdisciplinary field that operates in so many different substantive environments remains to be seen. Already, some of us in the "founding generation" of this field lament the entrepreneurial turn that it appears to be taking. Many American professions, both old and new, face challenges to their core values and objectives, as demonstrated in the recent book, *Good Work: When Excellence and Ethics Meet*.²²⁷ Entrepreneurial and economic pressures, as well as increased demands for immediate success,²²⁸

226. After many years of being a trial lawyer and teaching trial advocacy, I abandoned those roles when I became a more seriously committed mediator and mediation teacher. I found the roles of trial lawyer and mediator incompatible. See Jonathan Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863, 863-64 (1987).

227. HOWARD GARDNER ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* (2001) (contrasting the declining professional ethics and commitment of journalism to the "aligned" professionalism of geneticists).

228. A recent effort to use a consensus-building process in the United States Congress resulted in a bipartisan statement about faith-based government initiatives. The effort was designed to demonstrate how a controversial issue, such as providing government subsidies for religious organizations that provide social services, could produce "recommendations" across party lines. See The Working Group on Human Needs and Faith-Based and Community Initiatives, *Finding Common Ground: 29 Recommendations of the Working Group on Human Needs and Faith-Based and Community Initiatives* (2002), available at www.working-

often mute the animating values and goals of those who seek to develop a truly “alternative” professional framework.

It is not clear whether the promulgation of ethics rules or codifications of the field facilitate professional identity in a positive way²²⁹ or, in the alternative, blunt the opportunities for experimentation and cross-disciplinary collaboration. Ethics rules are often justified in terms of protecting the public. In conflict resolution, standards are necessary to assure consumers of these processes that what is being offered is fair (especially when compared to better known and mere conventional legal processes) and conducted by experienced professionals. Mediators, arbitrators, and facilitators need guidance in resolving difficult ethical dilemmas that they face.²³⁰ Lawyers, who are subject to discipline under the Model Rules for all work performed, even if it is not “the practice of law,” may be harmed by the lack of clarity regarding their duties and responsibilities when they take on other roles. Despite the minimalist approach to ADR ethics in the revised Model Rules, state legislatures have passed full statutory schemes for the use of ADR²³¹ and have proposed²³² amending their ethical codes to better regulate the role of the lawyer as third-party neutral. Most of this activity focuses on the role of lawyers as arbitrators, mediators, or neutral evaluators. To the extent that lawyers now participate in new forms of conflict resolution and legal problem solving, such as policy formation and consensus building (where I think they should be especially useful as both “process architects” and as experts on substantive legal requirements), the ethical terrain is even more unmarked and unguided. Whether lawyers who do this work should be guided by what little there is in the interdisciplinary field already, or whether they should take the lead in suggesting analogues to conventional legal ethical norms and newer particularized standards of practice is a difficult question.

The authors of *Good Work* pose an interesting question that we should consider: if you had a choice, what sort of problem would you work on for

group.org (last visited Oct. 31, 2002) (noting that the effort was facilitated by Consensus Council, Inc. and coordinated by Search For Common Ground, an organization that facilitates conflict resolution processes internationally and domestically and that promotes establishment of the U.S. Policy Consensus Commission, which would promote consensus-building processes at various levels of government action).

229. A standard canon of organizational sociology requires that new professions use ethics codes to establish legitimacy and to prevent competition with other professions. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 54 (1977); Andrew Abbott, *Jurisdictional Conflicts: A New Approach to the Development of the Legal Professions*, 1986 AM. B. FOUND. RES. J. 187, 188 (1986).

230. For a good definition of what an ethical “dilemma” is in dispute resolution, see ROBERT BARUCH BUSH, *THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS* (1992).

231. See COLE ET AL., *supra* note 155; see also VA. RULES OF PROF’L CONDUCT R. 2.10 (2000) (listing the third-party neutral rule).

232. See TENN. RULES OF PROF’L CONDUCT R. 2.4 (effective Mar. 1, 2003).

the next ten years of your professional life?²³³ I have answered that question for myself by suggesting that lawyers can pursue “the central mission of the legal profession [in] the pursuit of justice, through the resolution of conflict or the orderly and civilized righting of wrongs”²³⁴ by striving for peace as “a prerequisite for justice,”²³⁵ and developing the skills and the ethical commitments to attempt to make social, legal, political, and economic problems more amenable to democratic, creative, and life-enhancing resolutions that include more active participation by more of the people affected by decisions made and actions taken.

I believe that lawyers may play an important, but not exclusive, role in organizing and facilitating such democratic deliberation and negotiation to produce both better processes and better outcomes in the world. Clearly, we need new solutions to significant problems such as economic health and just distribution, health care, family responsibilities, corporate accountability, market productivity, resource allocation and environmental health, respectful treatment of a diverse citizenship, unemployment, and, not least of all, domestic and world peace. New skills are necessary for professions, such as law, to negotiate effectively with multiple parties, to lead and facilitate productive deliberations rather than simply making arguments to win, to imagine new and unused resolutions, and to work with contingent solutions to indeterminate problems as our “solution-oriented” science attempts to keep up with our changing knowledge base.

Skillful management of the conflicts that human beings produce for themselves is indeed, as Stuart Hampshire says, one of the most important of human skills. It is also one of the most difficult skills to learn and teach because it is not a “single” skill, but a set of competencies, judgments, empathies, and other sensibilities that it may take a long time to teach and learn. I believe that these skills and sensibilities are central to our continued existence. I continue to believe, as both a teacher and an ethicist, that such skills may be learned and must be practiced responsibly and morally within that tension of what we can do for others and what we do for survival and self-preservation or representation of others. By clarifying our purposes and aspirational values, by applying these aspirational principles to actual dilemmas of practice, and by committing ourselves to develop standards for responsible exercise of our various skills, we may not only make “new professions” (when our old and conventional ones fail to adapt adequately to change within honored traditions) that link several professional domains, but we can make the practice of our work both more individually fulfilling and social welfare enhancing.

233. GARDNER ET AL., *supra* note 227, at ix.

234. *Id.* at 10.

235. See Carrie Menkel-Meadow, *Practicing “In the Interests of Justice” in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1765 (2002).

I hope that I have at least suggested some of the important issues and values that we should consider while we recognize the importance of this “new” work of the lawyer as dispute resolver, facilitator, and consensus builder. I have no doubt that lawyers who work as consensus builders, mediators, facilitators, and legal problem solvers will find that work fulfilling, as I have. Our legal ethical standards (as lawyers) do not provide useful beacons of light as we navigate in these new, but much needed, roles. We may only be at the discussion stage in our deliberations about new ethics for deliberators, so I hope I have at least spotted some issues and offered some useful ideas as we begin to try to develop some consensus about how lawyers might build more consensus in our conflict-ridden society.

APPENDIX

Tennessee Rules of Professional Conduct (effective Mar. 1, 2003)**Rule 2.4: Lawyer as Dispute Resolution Neutral**

(a) A lawyer serves as a dispute resolution neutral when the lawyer impartially assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a dispute resolution neutral may include service as a mediator; an arbitrator whose decision does not bind the parties; a case evaluator; a judge or juror in a mini-trial or summary jury trial as described in Supreme Court Rule 31; or in such other capacity as will enable the lawyer to impartially assist the parties resolve their dispute.

(b) A lawyer may serve as a dispute resolution neutral in a matter if:

(1) the lawyer is competent to handle the matter;

(2) the lawyer can handle the matter without undue delay;

(3) the lawyer reasonably believes he or she can be impartial as between the parties;

(4) none of the parties to the dispute is being represented by the lawyer in other matters;

(5) the lawyer's service as a dispute resolution neutral in the matter will not be adversely affected by the representation of clients with interests directly adverse to any of the parties to the dispute, by the lawyer's responsibilities to a client or a third person, or by the lawyer's own interests;

(6) the lawyer consults with each of the parties to the dispute, or their attorneys, about the lawyer's qualifications and experience as a dispute resolution neutral, the rules and procedures that will be followed in the proceeding, and the lawyer's responsibilities as a dispute resolution neutral; provided, however, that any party to the dispute who is represented by a lawyer may waive his or her right to all or part of the consultation required by this paragraph;

(7) the lawyer consults with each of the parties, or their lawyers, about any interests of the lawyer, the lawyer's clients, the clients of other lawyers with whom the lawyer is associated in a firm, or third persons that may materially affect the lawyer's impartiality in the matter;

(8) unless the service is pursuant to Supreme Court Rule 31, each of the parties, or their attorneys, consents in writing to the lawyer's service as a

dispute resolution neutral in the matter; and

(9) when the service is pursuant to Supreme Court Rule 31, the lawyer is qualified to serve in accordance with the requirements of that Rule.

(c) While serving as a dispute resolution neutral, a lawyer shall:

(1) act reasonably to assure that the parties understand the rules and procedures that will be followed in the proceeding and the lawyer's responsibilities as a dispute resolution neutral;

(2) act impartially, competently, and expeditiously to assist the parties in resolving the matters in dispute;

(3) promote mutual respect among the parties for the dispute resolution process;

(4) as between the parties to the dispute and third persons, treat all information related to the dispute as if it were information protected by Rules 1.6 and 1.8(b);

(5) as between the parties to the dispute, treat all information obtained in an individual caucus with a party or a party's lawyer as if it were information related to the representation of a client protected by Rules 1.6 and 1.8(b);

(6) render no legal advice to any party to the dispute, but, if the lawyer believes that an unrepresented party does not understand how a proposed agreement might affect his or her legal rights or obligations, the lawyer shall advise that party to seek the advice of independent counsel;

(7) accept nothing of value, other than fully disclosed reasonable compensation for services rendered as the dispute resolution neutral, from a party, a party's lawyer, or any other person involved or interested in the dispute resolution process;

(8) not seek to coerce or unfairly influence a party to accept a proposal for resolution of a matter in dispute and shall not make any substantive decisions on behalf of a party; and

(9) when the service is pursuant to Supreme Court Rule 31, comply with all other duties of a dispute resolution neutral as set forth in that Rule.

(d) A lawyer shall withdraw from service as a dispute resolution neutral or, if appointed by a court, shall seek the court's permission to withdraw from service as a dispute resolution neutral, if:

(1) any of the parties so request;

(2) the lawyer reasonably believes that further dispute resolution services will not lead to an agreement resolving the matter in dispute or that any of the parties are unwilling or unable to cooperate with the lawyer's dispute resolution initiatives; or

(3) any of the conditions stated in paragraph (b) are no longer satisfied.

(e) Upon termination of a lawyer's service as a dispute resolution neutral, the lawyer:

(1) may, with the consent of all the parties to the dispute and in compliance with the requirements of Rules 1.2(c) and 2.2, draft a settlement agreement that results from the dispute resolution process, but shall not otherwise represent any or all of the parties in connection with the matter, and

(2) shall afford each party to the dispute the protections afforded a client by Rules 1.6, 1.8(b), and 1.9.

Comments

[1] Mediation, arbitration, and other forms of alternative dispute resolution have been in use for many years, but increasing demands in recent years for more prompt and efficient means of resolving disputes of all kinds have led to an increase in the demand for the services of dispute resolution neutrals skilled in the analysis of disputes and in conflict resolution. Lawyers are often particularly well-suited to perform this role and should be encouraged to do so.

[2] Although service as a dispute resolution neutral is considered a law-related service governed generally by these Rules, *see* RPC 5.7, the unique nature of a lawyer's role when serving as a dispute resolution neutral demands separate, more specific, treatment in this Rule for the guidance of the profession and the public.

[3] This Rule provides that a lawyer may serve as a dispute resolution neutral, whether as a mediator, a non-binding arbitrator, a case evaluator, or a judge or juror in a mini-trial or summary jury trial. The scope of a lawyer's possible service as a neutral is intended to be generally the same as that adopted in Tennessee Supreme Court Rule 31 governing court-annexed alternative dispute resolution. However, although Rule 31 covers only court-annexed alternative dispute resolution, this Rule covers services as a dispute resolution neutral whether rendered in connection with court-annexed dispute resolution proceedings or in another, perhaps wholly private, context not covered by Rule 31.

[4] This Rule does not cover the rendering by a lawyer of services related to

alternative dispute resolution that are not neutral in nature, but are more judicial in nature, such as service as an arbitrator in a binding arbitration. Although Rule 5.7 may address a lawyer's obligations in such a context, this Rule does not purport to address them.

[5] Although a lawyer who serves as a dispute resolution neutral is subject to the Rules of Professional Conduct, *see* RPC 5.7, many of the Rules do not directly apply to such service because the participants in a dispute resolution proceeding are not the lawyer's clients. Other Rules do apply, however, and this Rule further provides specific applications of certain rules that must apply differently in this context (including, for example, the application of rules governing conflicts of interest).

[6] Although the requirements of this Rule are generally intended to be consistent with those imposed on dispute resolution neutrals under Rule 31, there are duties additional to those set out in Rule 31 that are imposed on lawyers who serve in this role. *See also* Supreme Court Rule 31, Appendix: Standards of Professional Conduct for Rule 31 Mediators. Even though nonlawyers certified by the Supreme Court under Rule 31 as dispute resolution neutrals may not be subject to these Rules and the parties to the dispute are not deemed to be the clients of the lawyer serving as their dispute resolution neutral, the parties are properly entitled to assume that lawyers serving in this capacity are largely subject to the same broad standards of conduct as are applicable to lawyers when they are providing legal services to clients.

[7] The Supreme Court has set forth in Rule 31 rules and standards of professional conduct applicable to all Rule 31 neutrals, including lawyers and nonlawyers. Thus, paragraph (b) contemplates that a lawyer may serve as a Rule 31 neutral if the lawyer complies with these requirements. Paragraph (b)(9) further requires that a lawyer serving as a dispute resolution neutral pursuant to Supreme Court Rule 31 must comply fully with the requirements of that Rule as well.

[8] Paragraph (b) specifies the circumstances in which a lawyer may serve parties to a dispute as a dispute resolution neutral. With respect to the parties to the dispute, Rule 1.7 is inapplicable because there is no client-lawyer relationship between the neutral and the parties to the dispute. Rule 1.7 remains applicable, however, to protect a client, as distinct from parties the lawyer is serving as a neutral, if the lawyer's service as a neutral will materially limit the lawyer's representation of that client. Similarly, if the lawyer's service as a neutral would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

[9] Conflicts of interest for lawyers serving as dispute resolution neutrals are

specifically addressed because the parties to a dispute resolution proceeding are not the clients of the dispute resolution neutral. The lawyer serving as neutral, however, must be impartial, must fully disclose any pertinent relationships to the parties to the proceeding, and must obtain their consent to the lawyer's service based on these disclosures. Paragraph (b)(4) does not provide for mandatory vicarious disqualification based on a lawyer's current or prospective service as a dispute resolution neutral. If, however, a lawyer asked to serve as a neutral has a partner who currently represents one of the parties to the dispute in other matters, the lawyer obviously would be required to disclose this fact to the parties under (b)(7) and obtain consent to service as a neutral. Of course, this lawyer must also possess a reasonable belief that impartiality was possible despite this and other such pertinent relationships. If a lawyer may not make the disclosures required by paragraph (b)(7) because of his confidentiality obligations to a client, then the lawyer may not serve as a dispute neutral.

[10] Paragraph (c) further provides various standards of conduct particular to service by a lawyer as a dispute resolution neutral. Again, these rules of conduct are intended to be consistent with Rule 31 and to address the particular situation of a neutral who occupies a significantly different relationship to participants in a dispute resolution proceeding than a lawyer does with clients. Paragraphs (c)(4) and (c)(5) treat the confidentiality of all information related to the dispute (including that obtained in individual caucuses with the parties) by analogy to the rules concerning the confidentiality of client information. Thus, for example, any question concerning the potential disclosure of fraud by a participant in a dispute resolution proceeding would be addressed under Rules 1.6, 3.3, or 4.1 as though the participant were, in fact, a client of the lawyer. Other portions of paragraph (c), such as the ban on undisclosed compensation by one of the participants in paragraph (c)(7), the prohibition on coercion or decision making on behalf of parties in paragraph (c)(8), and the ban on giving legal advice to the participants in paragraph (c)(6), impose restrictions needed to insure and reinforce the necessary impartiality of the lawyer serving as a dispute resolution neutral.

[11] Paragraph (d) requires that a lawyer serving as a dispute resolution neutral withdraw or seek an appointing court's permission to withdraw in certain specified circumstances, such as a request by a party to do so or the lawyer's reasonable belief that the lawyer's service will not be fruitful.

[12] Paragraph (e) establishes a lawyer's duties toward participants in a dispute resolution proceeding upon the termination of the lawyer's service as a neutral for any reason, whether because a settlement is achieved or because a party requests the lawyer's withdrawal. Given the impartial role of a dispute resolution neutral, it is inappropriate for a lawyer who had served as a dispute resolution neutral to later represent any of the parties to the dispute in

connection with the subject matter of that dispute resolution proceeding. This disqualification, however, does not extend to other lawyers associated in a law firm with the dispute resolution neutral. If, however, the parties have successfully resolved their dispute, paragraph (e)(1) permits the lawyer-neutral to draft the agreement settling their dispute, but this must be done in conformity with Rules 1.2(c) and 2.2.

[13] Further, paragraph (e)(2) provides that, even though the participants to a concluded dispute resolution proceeding were not the clients of the lawyer who served as a dispute resolution neutral in that proceeding, these participants are nevertheless entitled to the protections relating to confidentiality and conflicts of interest afforded by Rules 1.6, 1.8(b), and 1.9 as if they were former clients.

