



1997

Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities


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38 S. Tex. L. Rev. 407-454

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ETHICS IN ALTERNATIVE DISPUTE RESOLUTION: NEW ISSUES, NO ANSWERS FROM THE ADVERSARY CONCEPTION OF LAWYERS' RESPONSIBILITIES

CARRIE MENKEL-MEADOW*

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I. INTRODUCTION: THE ETHICS OF (NON) ADVERSARY PROCESS— OF ROLES AND RULES

The romantic days of ADR appear to be over. To the extent that proponents of ADR, like myself, were attracted to it because of its promise of flexibility, adaptability, and creativity, we now see the need for ethics, standards of practice and rules as potentially limiting and containing the promise of alternatives to rigid adversarial modes of dispute resolution. It is almost as if we thought that anyone who would engage in ADR must of necessity be a moral, good, creative, and, of course, ethical person. That we are here today is deeply ironic and yet, also necessary, as "appropriate" dispute resolution struggles to define itself and insure its legitimacy against a variety of theoretical and practical challenges.

While one strand of ADR (the one with which I identify—"qualitative"—better processes and solutions) has always associated itself with pursuing "the good" and the "just," the other strand of ADR (quantitative, efficiency concerned, cost-reducing, docket clearing) has produced institutionalized forms of dispute resolution in the courts and in private contracts. To the extent that ADR has become institutionalized and more routine, it is now practiced by many different people, pursuing many different goals. Demonstrating another form of irony is a recent continuing education program that advertised itself as "How to Win in ADR!"¹ Thus, lawyers as "advocates," as well as "problem-solvers" and parties now come to the wide variety of dispute resolution processes with a whole host of different intentions and behaviors, many of which may be inconsistent with the original aims of some forms of ADR. As skillful advocates try to manipulate ADR processes in order to achieve their conventional party maximization goals,² the rules of behavior demanded in ADR become both less clear and in some respects even more important.

Even for those well intentioned "ethical" problem-solvers (whom I call "solution maximizers") utilizing new forms of ADR, including repetitive use of neutrals and multiple roles (people acting both as neutrals in some contexts and as counsel in others), have created a variety of new problems for considering whether there is something

1. See Defense Research, Inc., *Winning in ADR and Negotiation—ADR FOR THE DEFENSE* (Sept. 21–23, 1995) (on file with author). My personal favorite is a letter from one counsel to another stating, "I am filing an ADR *against* you."

2. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 5 (1991).

that just "bothers" us about how the process is conducted or outcomes achieved.³

In this Article I describe a matrix of dilemmas presented by new forms of practice in ADR that are simply not resolved by currently existing rules of ethics for lawyers and third-party neutrals, when roles played in ADR are sufficiently different and complex to require their own "rules."⁴ Dependence on lawyer ethical rules will not work first, because representatives (counsel) and third-party neutrals perform different roles in ADR from traditional adversary practice and second, because there is so much variation in the roles of practicing ADR, ethics rules in ADR will have to be more sensitive to the variations of task and functions within different ADR forms and settings. Underlying my argument is the claim that where ADR seeks to express different values with respect to both dispute resolution and justice, its standards or rules of ethics must be responsive to a different set of underlying values than informs traditional adversary ethics.

The first and most important dilemma is one that has plagued me throughout my career as a lawyer—scholar—practitioner: the powerful heuristic of the adversary model and its concrete expressions in legal dispute resolution as a paradigm which does not aid, indeed, makes more difficult, the resolution of "ethical" dilemmas when one seeks to use other processes.⁵ To put it at its most concrete, as I have asserted in debate with many legal ethicists,⁶ the Model Rules of Professional Conduct (still based on an adversarial conception of the ad-

3. In a study of ethical dilemmas of mediators, Baruch Bush defined ethical dilemmas as those which caused some discomfort or ambiguity for practicing mediators because choices of courses of action produced conflicting possibilities, given potentially conflicting values (such as promising confidentiality and using information to achieve good solutions). See Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1 J. DISP. RESOL. 1, 3 (1994), reprinted in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES*, ch. 14, *Ethical Dilemmas* (1996) (published originally as Report for National Institute for Dispute Resolution (1992)).

4. This article, which focuses on the problems of creating ethics rules in ADR, is the first in a series I have planned. In subsequent articles I will look at some solutions to some of these issues and dilemmas. See Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers*, GEO. J. LEG. ETHICS (forthcoming, 1997).

5. See Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Post Modern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996).

6. See Carrie Menkel-Meadow, *Ancillary Practice and Conflicts of Interests: When Lawyer Ethics Rules Are Not Enough*, 13 ALTERNATIVES TO THE HIGH COST OF LITIG. 15, 15 (1995) (disagreeing with Professor Geoffrey Hazard that ADR is an "ancillary service"); cf. Geoffrey C. Hazard, Jr., *When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 147, 147 (1994) (finding lawyers who practice mediation in law firm contexts must be cautious to adhere to both ADR and traditional legal norms).

vocate's, including "counselor's", role) is not responsive to the needs, duties, and responsibilities of one seeking to be a "non-adversarial" problem-solver and the Code of Judicial Conduct,⁷ while perhaps helpful for arbitrators, is not responsive to the particular needs, duties, and responsibilities of the now wide variation in third-party neutral practices. Rules premised on adversarial and advocacy systems, with legal decision-makers, simply do not respond to processes which are intended to be conducted differently (in forms of communication, in sharing of information, in problem analysis and resolution) and to produce different outcomes (not necessarily win-loss, but some more complex and variegated solutions to legal and social problems). Thus, despite the conclusions of other well-respected scholars, like Geoffrey Hazard and John Feerick,⁸ I do not believe any of the currently drafted rule systems (the *Model Rules of Professional Conduct*, the *Judicial Code of Conduct*, the *AAA-ABA-SPIDR Joint Standards of Conduct for Mediators*, the *Restatement of the Law Governing Lawyers*⁹) provide adequate guidance for modern "ethical" dilemmas facing lawyers, parties, clients and neutrals in the wide variety of ADR processes.

To be specific, and to introduce what I will discuss in greater detail below, when mediators now function both as facilitators and as evaluators,¹⁰ and lawyers work both as litigators and as neutrals, the variety of behavioral repertoires located in single individuals or role conceptions challenges the categorization required for rulemaking. When practitioners within ADR approach their work with entirely different philosophical conceptions of what they are doing, "solving problems" or "representing clients," there may either be a mismatch of understood ethical norms or at the very least, a potential lack of

7. ABA CODE OF JUDICIAL CONDUCT (1990).

8. See generally John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314, 315 (1996) (discussing developments of the various standards and specifically commenting on the Joint Committee Standards).

9. See Carrie Menkel Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering As Only an Adversary Practice*, GEO. J. LEG. ETHICS (forthcoming 1997).

10. See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 25 (1996); cf. Marjorie Corman Aaron, *Evaluation in Mediation*, in GOLANN, *supra* note 3, at ch. 10 (discussing the framework and consequences of the mediator assuming an evaluative role); Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTER-NATIVES TO THE HIGH COST OF LITIG. 31, 31-32 (1996) (finding the evaluative role too much like traditional adversarial proceedings and conflicting with the mediator's neutral stance).

clarity of purpose.¹¹ What is appropriate when the game is clear (adversary representation), although arguable¹² in many instances, becomes alarmingly uncertain when we are not even playing the same game.

This leads me to the second dilemma—at what level are we talking about ethics? Attempts to specify rules in our more common litigation contexts, despite the differences in criminal and civil law, advocacy and advice, government service and private law work, focus on what I think of as the micro (behavioral or positivist) aspects of lawyering—when must a lawyer tell an opposing counsel about a fact or new law, when must a lawyer disqualify himself, when must a lawyer discuss a question of strategy with her client? Whatever our debates about these difficult questions, they are intended to focus on what we should do in a particular instance. As I will illustrate below, ADR needs answers to these kinds of good practice questions—when must a neutral disqualify herself, what use may be made of information revealed in a mediation session, when may a mediator meet separately with a party or advocate? But, ADR (as well as traditional adversary practice) presents what I would call macro (or jurisprudential) ethics questions too—when is a process or outcome fair or just?¹³ To what extent can ethics rules address such issues as whether one process or another is more fair, just,¹⁴ or has greater integrity for the parties or their dispute? Lest you think these are easily severable problems consider one of the most troubling of our ethical dilemmas

11. These philosophical differences of purpose are also manifested in the “psychological” role strain that individuals may feel when they are asked to perform different roles within the same legal system. Where there are competing norms, orientations or, as I like to call them “mind-sets,” of how to behave, lawyers may suffer from both psychological and sociological “role strain.” See Robert G. Meadow & Carrie Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid to the Poor*, 9 LAW & HUM. BEHAV. 397, 411–12 (1985); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 759–60 (1984). Formal recognition of these role differences can be located in the three person arbitration panel (where at least two of the arbitrators are thought to be partisan and the third “neutral”) and the practice in some countries, such as Germany, of training judges separately from lawyers.

12. By talking about adversary ethics I do not mean to suggest that there is total agreement about what those ethics are. Although I refer here to the “positive” law of the *Model Rules* and *Restatement of the Law Governing Lawyers*, many controversies remain about how ethical dilemmas in adversary practice should be resolved.

13. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2619, 2687–91 (1995) (suggesting that settlements can be justified on moral grounds).

14. See generally Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 49–52 (1996) (arguing that mediation should look to law for just outcomes).

in ADR—when is a solution suggested or imposed by a third party neutral too coercive¹⁵ on the parties? Consideration of this question clearly implicates both macro justice questions and micro behavioral questions of how a third-party neutral should act, with particularity, in a mediation session.

A third dilemma is jurisdictional on two levels. First, what professional body will oversee ethical regulation—is ADR ethics regulation the sole province of lawyers, (implicating the controversial question of whether ADR is the practice of law)¹⁶ or should we hope to share transdisciplinary regulation with other professions, as the Joint Standards seeks to do? What do we do if different professions suggest different treatments of particular problems?¹⁷ Second, what do we do about the current development of plural approaches to ethical dilemmas at different levels of the legal system? Conflicts in “resolution” of such issues as unauthorized practice of law,¹⁸ conflicts of interest,¹⁹ and advice giving²⁰ in mediation have already emerged from different jurisdictions.

A fourth dilemma presents an issue deeply structured in our jurisprudence—the separation of private and public spheres of action.²¹

15. See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (discussing the risks of racial and ethnic prejudice during informal ADR processes in relation to more formal adjudication); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing the inherent danger informal processes such as mediation can have for women's rights).

16. See Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 1, 60 (1996) (questioning whether ADR ethics are subject to lawyer's ethical standards); cf. Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 74, 74 (1996) (arguing, in response to Menkel-Meadow, that mediators are not practicing law).

17. For example, psychologists, but not necessarily lawyers, are bound to reveal certain confidences under the *Tarasoff* doctrine. See *Tarasoff v. Regents of the Univ. of Cal.*, 529 P.2d 553, 561 (Cal. 1974) (en banc); cf. Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 957-66 (1988) (stating that there is a limit to Federal Rule of Evidence 408's promise of confidentiality: under some circumstances communications can be admitted into evidence).

18. See D.C. Ct. R. 49, Unauthorized Practice of Law (mediation is not the practice of law) contrasted to Florida's regulation of mediation as performable only by lawyers.

19. See N.D. CAL. LOC. R. 2-5(d) (1995) (setting forth the Northern District of California's criteria for conflicts of interests of ADR neutrals).

20. See Commission Report on Dispute Resolution, Tennessee Supreme Court (on file with author) (suggesting that the giving of legal advice to both parties jointly is “not a legal opinion”); see also Sandra Purnell, *The Attorney as Mediator—Inherent Conflict of Interest*, 32 UCLA L. REV. 986 (1985) (suggesting that communicating legal information is not giving legal advice).

21. See generally Lisa Bernstein, *Understanding The Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2170

To what extent can private parties contract for ADR (without public scrutiny) when what they are contracting for is legal dispute resolution, a function committed to the public sphere?²² Under what circumstances should courts review private action?²³ Given the analytic separation of private contractual ADR (pre-dispute) from post-dispute public court referral to ADR,²⁴ we must consider both the regulatory forms and enforcement mechanisms for different sites and practices of ADR. With both private organizations (like J.A.M.S./Endispute and the AAA) and court ADR programs promulgating their own rules of practice and ethics, the breadth, reach and enforcement mechanisms for an ethics of ADR become highly pluralistic, substantively conflictual and procedurally cumbersome.²⁵ For example, while those of a law and economics bent might suggest allowing private contracting around ethics choices with a few clear default rules when the parties choose not to contract or forget to, such solutions beg the question of how private contracts are entered into in the first place. Although attempts to void contractual arbitration in contracts of ad-

(1993) (concluding that "procedural reform that explicitly permits parties to combine private ADR and traditional adjudication might be desirable").

22. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) (setting forth the proposition that legal disputes are public goods and should be conducted in the public realm).

23. At the present, court deferral at least to private arbitration (if not mediation which has not been litigated yet) is strong. See Federal Arbitration Act, 9 U.S.C. § 10 (1996) (listing the limited standards for court review); *Doctor's Assoc. Inc. v. Casarotto*, 116 S. Ct. 1652, 1654 (1996) (sustaining pre-dispute arbitration contract clause against state statute requiring special notice); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995) (sustaining an award of punitive damages in arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (compelling arbitration in contract of employment dispute which involved age discrimination); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (upholding an arbitration agreement in an anti-trust dispute).

24. See generally Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1994) (distinguishing between ex ante ADR and ex post ADR). These categories can also be decomposed. Parties may engage in post-dispute private contractual forms of ADR (such as the mini-trial or voluntary, contractual mediation or arbitration after the dispute arises). Similarly, now that some courts require certain referrals to ADR, we may speak of "pre-dispute" public assignments to ADR when the parties are on notice of a court-required ADR proceeding before they file their lawsuits.

25. The state of Florida has addressed this by establishing statutory standards for qualifications, ethics, and discipline of court and legally recognized mediators and arbitrators. See FLA. STAT. ANN. § 44.106 (West 1996) (listing rules for certified and court-appointed mediators); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 20 FLA. ST. U. L. REV. 701, 706 (1994) (recognizing that such standards are organic and likely to change and evolve).

hesion have so far failed in most jurisdictions,²⁶ the question of whether ex ante contractual agreements to engage in ADR or to waive certain ethical objections will remain enforceable continues to be raised in the courts.²⁷ Further, appealing entirely to freedom of contract or private choices does not deal with the important issues of ethics in court-sponsored ADR programs or in situations where parties cannot (through unequal bargaining power or simple ignorance) or do not choose to contract in advance.

Thus, in considering ethics problems in ADR we must be mindful of these dilemmas—what philosophical paradigm informs what we are trying to do (and I suggest here that adversary frames will not do if we are really trying to develop alternative conceptions of legal problem-solving).²⁸ How can we approach simultaneously jurisprudential and behavioral standards? At what level of generality, particularity, and rule-system can we regulate, if at all?²⁹

In this Article, I will review some of the concrete ethical issues facing us at this cross-roads, to suggest that current adversarial conceptions of lawyer's ethics will not do and we will, in my view, have to develop a particular³⁰ set of ethical considerations, as well as rules, for what I have here denominated as non-adversarial ethics. Concern with the ethics of ADR will, of necessity, have to focus on both the

26. *But see* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1304-05 (9th Cir. 1994) (refusing to enforce a contractual provision to arbitrate a sexual harassment complaint on basis that employee did not "knowingly" agree to arbitrate such claims).

27. *See, e.g.,* Barry Meier, *In Fine Print, Customers Lose Ability To Sue*, N.Y. TIMES, Mar. 10, 1997, at A1. *See* Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) (rejecting a compulsory arbitration process in a collective bargaining agreement in an employment discrimination case).

28. For an excellent description of how analytic "frames" can affect legal and policy decision making, see DONALD SCHON & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994).

29. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 804 (1992) (constructing "a matrix of lawyer-client interactions that highlight certain key contextual differences"); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1991) (suggesting an approval "that tailors ethical rules designed to foster a public-spirited view of lawyering to relevant differences in legal practice").

30. I have argued in other contexts that transsubstantive ethics (and procedural) rules may no longer work in our legal system where case complexity and variety may require more particularized rule and standard setting. *See* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1162 (1995). For another argument that ethics rules should be particularized to reflect lawyers' different roles and substantive areas of practice, see Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997).

macro (justice) and micro (behavioral) aspects of practice, though it may be easier to regulate in some areas than others.³¹

I begin with a brief intellectual history of ADR and legal ethics to develop the context in which we are struggling and then turn to some specific instances of ethical dilemmas in ADR to illustrate some of our choices and alternatives. We cannot yet definitively solve all of these problems, but I hope to both elevate and clarify the conversations and considerations of issues we must address.³²

II. THE CONTEXT: A BRIEF INTELLECTUAL HISTORY OF ALTERNATIVE DISPUTE RESOLUTION AND LEGAL ETHICS

The development of the alternative dispute resolution movement³³ recapitulates many of the issues of American jurisprudence.

31. In an early attempt to deal with this issue, I suggested that we might begin by framing a core of ADR ethics issues about which most ethicists and practitioners could agree (such as no contingent fee for service, conflicts of interest and disclosures and party consent to process). See Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO THE HIGH COST OF LITIG. 129, 130 (1993). We could then focus on the more contested issues such as whether mediation was the practice of law (in prediction and advice giving). Within two weeks of publication of this approach, it became clear to me that there were few "core" areas of agreement; some mediators routinely accept bonuses dependent on outcomes (a form of "contingent fee") and conflicts of interest has become one of the major issues of controversy. Some have suggested that market forces will be adequate for regulation of ethics in the field—those who are unethical will simply not be chosen by private parties or the courts. For an argument that negotiation is "self-regulating", see Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989).

32. I currently chair the CPR-Georgetown Commission on Ethics and Standards in Alternative Dispute Resolution, a body consisting of academics, corporate and private practitioners, public interest lawyers, nonlawyer neutrals and judicial officers, which intends to develop some guidelines and policy directions in this area within the next few years. The Commission has developed a clearinghouse of materials on ethics in ADR, at national, state and local levels, including legislation, reported cases, ethics opinions by bar associations and other regulatory bodies and private organizations' ethics rules. We are currently compiling a collection of "ethics hypotheticals" from which to develop some "best practice" suggestions. Inquiries should be directed to the Commission's staff director, Vice President of CPR, Elizabeth Plapinger, 366 Madison Ave., New York, New York, 10017.

33. See generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (reviewing historical roots of non-court forms of dispute resolution in the United States including specialized commercial and immigrant-ethnic forms of dispute resolution); EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION* (1995) (providing the practitioner with a broad and accessible treatment of the law and the practice of dispute resolution); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION NEGOTIATION, MEDIATION AND OTHER PROCESSES* (2d ed. 1992) (reviewing and presenting the processes of negotiation, mediation, and adjudication as they have been combined in a number of ways to enrich the hybrid dispute resolution process); CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985) (discussing the neighborhood justice center as an area of alternative dispute resolution reflecting the

ADR serves a metonymic function for understanding the tensions in the development of our legal system from formalism to realism,³⁴ rule-based to standard-based laws, formal equality to substantive equality,³⁵ law to equity, substance to process, statute to common law, uniform to particular and most recently, justice to care.³⁶ These oppositional (some would say competing and "adversarial") characteristics of a legal system illuminate the difficulties of expressing single values or virtues in one system. Whenever we create one model or mode of problem-solving (certainty, rule-based conceptions, such as "no vehicles in the park"³⁷) we immediately see the need for interpretations and exceptions (When is a tricycle not a vehicle? When does an emergency justify violation?). Legal systems, like most idea systems, Hegel would tell us, are subject to correction through dialectical processes in which each thesis contains its antithesis. So, as formalism spawned realism, the rigidity of rules and the "limited remedial imagination of courts,"³⁸ gave (re)birth to the more flexible and hybrid forms of mediation, mini-trials and settlement conferences which were intended to provide not only more flexible processes but more party-sensitive and complex solutions than the traditional litigated outcome. And, as dissatisfaction with courts increased,³⁹ both because of in-

dominant ideology and institutionalization of information); *THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE* (Richard Abel ed., 1982) (reviewing the developments of informal dispute resolution in a variety of sociological contexts); Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 JUDICATURE 300 (1986) (reviewing STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION*).

34. See generally Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (reviewing the movements in American legal thought).

35. See generally Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (discussing the legal equality doctrine and a vision of substantive sexual equality).

36. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMAN'S DEVELOPMENT* (1982) (covering different modes of thinking about relationships and the association of these modes with male and female voices); JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (discussing "why the switch from 'women's morality' to a care ethic is necessary"); ROBIN WEST, *CARING ABOUT JUSTICE* (1997) (discussing the application of women's concerns about interpersonal care to jurisprudential considerations of the meaning of justice).

37. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662 (1958) (discussing what is "good law" and the task of interpretation within various legal philosophies).

38. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 791 (1984).

39. Whether there is in fact more or less litigation and more or less satisfaction with it than in some historical golden age, is of course, subject to great debate. See Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 15-16 (1983).

creased caseloads and the difficulty of using courts to effectuate solutions in both the creative formation and execution stages, at least some disputants looked to new forms and institutions, with greater flexibility, both to solve problems in more creative ways, and to allow more parties to participate in potential resolution.⁴⁰

ADR then, began to articulate, in practice, if not in high flying theory, its own "institutional competence" to provide different kinds of processes and different kinds of solutions than those offered by legislatures, courts or administrative agencies.⁴¹ At its best, ADR was intended to provide more creative, particularized, flexible and participative solutions to problems than the more traditional and adversary legal system could offer. Early (modern) proponents of ADR from Frank Sander,⁴² Roger Fisher and William Ury⁴³ to me⁴⁴ argued that the courts were not meeting the needs and underlying interests of parties and others (particularly those outside of the "case") so that other, non-dyadic and non-adversarial formats which better met the interests of parties were necessary.⁴⁵

40. For the argument that dispute resolution, especially public policy mediation, is more democratic than other forms of dispute resolution, see John Forester, *Lawrence Susskind: Activist Mediation and Public Disputes*, in WHEN TALK WORKS, PROFILES OF MEDIATORS (Kolb ed. 1994); and Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 223 (1995).

41. If this sounds like Legal Process theory, it is. In the 1950's Hart and Sacks, as well as their sometime jurisprudential adversary, Lon Fuller, articulated an institutional competence (or "institutional settlement") justification for some forms of informal dispute settlement—with its own logic and advantages, if not its own ethics. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing the process and impact of arbitration in Chapter 2); Lon L. Fuller, *Mediation—Its Forms and Its Functions*, 44 S. CAL. L. REV. 305 (1971) (discussing the particular qualities of mediation and its "appropriateness" for some forms ("multiplex") of disputes).

42. See Frank E. A. Sander, *Varieties of Dispute Processing*, Address given at the Pound Conference on Causes of Dissatisfaction with Justice (1976), reprinted in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (Leo Levin & Russell Wheeler eds., St. Paul, Minnesota, West 1979) (discussing alternative methods to resolve growing burden of cases on the federal justice system); see generally *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (Leo Levin & Russell Wheeler eds., West 1979) (discussing the proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice including dispute resolution).

43. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 1982) (explaining skills for artful negotiation).

44. See Menkel-Meadow, *supra* note 11, at 759–60.

45. See generally JOHN M. HAYNES, *DIVORCE MEDIATION* (1981) (discussing generally the emphasis of "win-lose" outcome in divorce court and the personal and economic hardships associated with that emphasis); SALLY E. MERRY & ANN M. ROCHELEAU, *MEDIATION IN FAMILIES: A STUDY OF THE CHILDREN'S HEARINGS PROJECT* (1985) (discuss-

As with all cyclical human history, the reforms of flexibility, informality, particularity and privacy have led to their own set of abuses and that is why we are here today. ADR now needs "ethics" or standards in part because of its successes—it is being challenged from within as well as without. As I have argued at length elsewhere, the institutionalization of ADR in courts has tended to lead to the co-optation of some of the original goals of ADR with strategic use by advocates seeking to maximize client gain,⁴⁶ adulteration of some of the original goals of ADR by seeking docket-clearing efficiency (such as in seeking to "narrow issues" for trial at settlement conferences or early neutral evaluation sessions, when creative settlements are more often fostered by having multiple or expanding issues to trade) and institutional competence abuses (when is a court no longer a court?⁴⁷). The use of ADR in the courts presents a whole host of ethics and other issues⁴⁸—patronage bestowed, confidentiality, ex parte communications⁴⁹—some of which can be responded to by traditional court processes or statutory means⁵⁰ and others of which cannot.

In the private sphere ADR is also threatened by co-optation or abusive practices. Repeat players in the third-party neutral role raise such micro level concerns as whether neutrals should disqualify themselves from past, present or potential future conflict situations, or to put it at its most extreme, but real, form, whether repeat players (providers, as well as individuals) should never be used in particular circumstances (such as in pre-contract appointment of specific neutrals in employment disputes)?⁵¹ As we move to private systems of informal and private decision-making some have questioned whether

ing use of mediation in family law cases); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1987) (discussing environmental and public policy disputes).

46. See Menkel-Meadow, *supra* note 2, at 3.

47. See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (discussing the comparative institutional competencies of various forms of dispute processing formats); THE COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* (Jethro Lieberman ed., 1984) (discussing trends and changes in adjudication activities); Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984) (criticizing settlement over adjudication); Luban, *supra* note 22, at 2619 (discussing adjudication as preferable to settlements).

48. See Carrie Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, 7 *F.J.C. DIRECTIONS* 8, 8–11 (Dec. 1994).

49. See generally Carrie Menkel-Meadow, *Ex Parte Talks with Neutrals: ADR Hazards*, 12 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 109 (1994) (discussing ethical practices in ex parte communications in the ADR context).

50. See, e.g., 28 U.S.C. § 455 (1993) (judicial conflicts of interest statute).

51. See J.A.M.S./ENDISPUTE, *POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS* § VI (1996).

settlements are entered into coercively and secretly⁵² without the protections of the rule of law, public accountability for decision-making and equalization of economic and psychological or social power imbalances. As some third-party neutrals are granted immunity because they are either servicing the judicial system or acting in "quasi-judicial" capacities,⁵³ some worry that there will be no way to monitor competence or quality and our legal system will not only fail to produce publicly declared precedents, but will produce "bad" private justice. In other situations, parties (or the neutral) have been accused of violating contract terms or good faith by breaching confidentiality, engaging in self-dealing and promotion and rapacious competitive behavior.

In short, our flexible, adaptive and creative processes, "alternatives" to litigation and court have produced their own abuses and we are here today because some urge a return to the formalism and "rigidity" of clearly established rules, norms and standards of conduct. Our "informal" system is in need of "policing" and ethical sanctions (as well as other internal regulation) may be necessary in order to maintain public confidence and legitimacy.⁵⁴

Other historical and sociological forces have affected the environment we face. Scholars of the sociology of the professions have told us that the creation of "new" professions attempts legitimacy through the promulgation of ethical codes and rules, thus signaling a nascent's profession's right to control itself.⁵⁵ Thus, as the "turf" wars of lawyers, psychologists, economists, social workers and accountants are now heating up over social control of the human capital of ADR credentials,⁵⁶ development of an ethics code provides another tool (and

52. See Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 ALTERNATIVES TO THE HIGH COST OF LITIG. 85, 86 (1993).

53. See *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994); *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 901-02 (Ct. App. 1990).

54. See *Preface to AAA-ABA-SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS* (1994) (stating the purpose of promulgating standards for mediators).

55. See MAGALI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); RONALD M. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 25-26 (2d ed. 1988).

56. See generally YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996) (discussing how human capital is developed in international arbitration); Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285 (1996) (discussing how the field of professional competition in dispute processing has changed the field of business disputes).

some would say "weapon") in the ongoing competition between constitutive professions.

Intellectual history is embedded in our enterprise as well and that is the story of the promulgation of legal ethics rules and standards. That history has been well-rehearsed elsewhere⁵⁷ and does not need repeating here except to note that in our efforts to deal with ethical issues or dilemmas in ADR we are faced with similar legislative and political problems. At what level of generality or particularity should we address our standards? Should we aim for enforceable "rules" or aspirational "ethical considerations?"⁵⁸ What underlying economic, status, class or other competitions underlie the contestations about particular ethical treatments (such as conflicts of interests—are we maximizing repeat player "quality" or "monopoly"; defining mediation as the practice of law to include or exclude non-lawyers?). Are we academics and "framers" and developers of rules rationalizers and legitimators for the practitioners?⁵⁹ In short, while concern about ethics and "doing good" in ADR, whether as advocate or third-party neutral, seems motivated by a praiseworthy concern for quality and good practices, debates about ethical codes and standards are almost always characterized by contesting interests of their own—economic, status, philosophical and professional.

In my view, one of the most important functions of the inquiry we are embarked on here is the self-conscious reflection that debate about ethical codes can bring to the surface about our purposes and functions and expose the real differences among us. Where there is debate, disagreement, contest or modification, we can hope to seek

57. See generally JERALD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (discussing the social and political history of the legal profession and its regulation); Judith Lichtenberg, *What's A Code of Ethics For?*, in DEBORAH RHODE & DAVID LUBAN, *LEGAL ETHICS* (2d ed. 1995) (discussing the role of the Code of Ethics in the legal profession); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981) (providing a discussion and criticism of the role ethical rules play in the profession); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (discussing the historical development of the *Model Code of Professional Responsibility*); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677 (1989) (discussing the history and development of the *Model Rules of Professional Conduct*).

58. See Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 954 (1980).

59. This particular group likely has conflicts of roles and interests of its own. How many of us (including myself) are practitioners as well as ethicists, with what interests? See generally DEZALAY & GARTH, *supra* note 56 (discussing the role of academics in framing and constituting the changes in areas of international commercial arbitration and business disputes).

clarification and consider the multiple values we seek to express in our endeavors to use ADR for "good" ends.

And now, on to some specifics . . .

III. THE ETHICS OF ADR: WHERE THE (CURRENT, ADVERSARY-BASED) RULES DON'T HELP

A. *Of Roles and Rules: Third-Party Neutrals and Party Representatives: Is ADR the Practice of Law?*

At the threshold level we must decide what form of ethics regulation is desirable and possible. Rule drafters and commentators have already framed a variety of approaches, some contradictory, to this problem. Is "the practice of ADR" part of law practice, as some have argued,⁶⁰ so that at least initially, ethics problems can be directed to the *Model Rules of Professional Conduct*, or is "ADR" and all its forms its own form of practice, requiring transdisciplinary but role-specific rules, such as those the Joint Standards for the Conduct of Mediators attempts to create? Thus, the issue is "joined," as we say in legal parlance, because how one defines the role(s) of participants in ADR may suggest different ethical treatments.

My own, somewhat controversial, views are as follows: Role matters and it matters in complicated ways, related to the specific tasks performed in ADR, which themselves may cut across, but implicate, professional disciplinary lines. ADR contemplates the creation of new and different roles—tasks and practices are derived from legal, therapeutic, economic and problem-solving disciplines.⁶¹ Fashioning standards of practice from and for different disciplines for different roles and tasks thus presents a formidable challenge. Thus, for me, many forms of ADR practice do involve law and are, in my view, the practice of law,⁶² but they also involve other ways of thinking about and practicing problem-solving.

60. See generally Hazard, *supra* note 6 (discussing ADR as a part of practicing law).

61. See generally DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983) (providing ethnographic descriptions of different kinds of professional problem solving and decision making); Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995) (identifying ways law professors can transmit "learning, knowledge, and creativity" to students).

62. See Menkel-Meadow, *supra* note 6, at 15; Menkel-Meadow, *supra* note 16, at 59. But cf. Bruce Meyerson, *supra* note 16, at 74–75 (arguing that mediation is not the practice of law).

1. *The Varieties of Third-Party Neutraling*

First, one must separate the function of a lawyer-advocate or representative in an ADR proceeding, whose duties and responsibilities may vary depending on whether the proceeding is an arbitration with relatively well-controlled rules of evidence and traditional adversarial proceedings, or mediation, with more flexible procedures and routines, from those of the third party neutral. A third party neutral is not a "representative" of a party and thus is seemingly taken out of the lawyer rules, including Model Rule 2.2's intermediary role, which contemplates a representative capacity for two or more clients.⁶³ Yet, third-party neutrals now perform a wide variety of functions—including arbitration (covered alternatively by AAA's *Ethics Rules*, specific contract rules, or as argued by some, the *Judicial Code of Conduct*), facilitative mediation (governed by such rule systems as the AAA-ABA-SPIDR *Joint Standards of Conduct for Mediators*, the *American Academy of Family Mediators Ethics Codes*, the *ABA Standards of Practice for Lawyer Mediators in Family Disputes*), evaluative mediation⁶⁴ and hybrid forms such as med-arb,⁶⁵ mini-trials, settlement conferences, early neutral evaluations and summary trials, some of which are voluntary and consensual and others of which may not be.⁶⁶

While arbitration and some forms of early neutral evaluation and evaluative mediation may assimilate themselves to ethics rules like the *Judicial Code of Conduct* that assume some "judgmental" distance be-

63. But cf. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 511 (2d ed. Supp. 1997) (suggesting that a mediator "represents" all parties); see also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 835 (1986) (noting the broad scope and imprecise definitions in many state statutes regulating unauthorized practice of law, and explaining that unauthorized practice restrictions do not prevent a lawyer from providing advice to nonlawyers not under her supervision). I cannot resist suggesting that many of the ethics writers who think of mediation as "representation" in this traditional sense have never themselves actually mediated. See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 509-14 (1991) (discussing the author's proposed ethical standards for mediators); see also Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 525-34 (1986) (proposing a scheme to aid a lawyer raised on adversarial conduct to be a mediator, based on ethical standards).

64. See Aaron, *supra* note 10, at 267-305.

65. See Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 NEGOT. J. 9, 10-13 (1989); see also Stephen B. Goldberg, *The Case of the Squabbling Authors: A Med-Arb Response*, 6 NEGOT. J. 391, 392-96 (1990).

66. See generally CPR Inst. for Disp. Resol., *The ABCs of ADR: A Dispute Resolution Glossary*, 13 ALTERNATIVES TO THE HIGH COST OF LITIG. 147 (1995) (outlining a list of various types of ADR procedures).

tween decision-maker and litigants, other hybrid forms will not lend themselves to such easy role separation. The evaluative mediator, for example, will hear confidential information, what I have called "settlement facts,"⁶⁷ from both parties if there has been any attempt to settle before advising or prediction, as will a judge who conducts his or her own settlement conference.⁶⁸ Thus, the flexibility and variety of ADR neutrals' roles make reliance on currently existing ethical standards problematic. Some have tried to define away the problem by suggesting that "pure" mediation is always facilitative,⁶⁹ that mediators can give neutral, non-representational information, that is not adversarial "advice" or "prediction"⁷⁰ and others have chosen to simply state that mediation is not the practice of law (because it does not involve representation of parties⁷¹). Judith Maute has argued that mediation can be likened to "limited representation," a role contemplated by Rule 1.2(c) of the *Model Rules of Professional Conduct*, which allows parties to contract for "less than" full representation.⁷²

In my view, the great variety of roles and tasks taken on by third-party neutrals demonstrates the failure of the adversary model to provide standards of acceptable behavior in these areas. In a recent functional analysis of mediator roles, Margaret Shaw, an experienced mediator, has developed a spectrum of tasks performed by mediators ranging from simply giving information or answering parties' questions about their case and elements of proof, to asking parties to respond to each other's arguments, performing risk analysis, giving

67. These are "facts" which may not be legally relevant but which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation. Settlement facts are to be distinguished from "legal facts" (those which would be either discoverable or admissible in litigation).

68. See *Cho v. Superior Court*, 45 Cal. Rptr. 2d 863, 869 (Ct. App. 1995).

69. See Kovach & Love, *supra* note 10, at 32; cf. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70, 70 (1996) (suggesting that pure facilitative mediation may work in certain contexts, but parties usually want opinions as to strengths and weaknesses of each side).

70. See Sandra E. Purcell, *The Attorney as Mediator—Inherent Conflict of Interest?* 32 UCLA L. REV. 986, 1009–10 (1985) (arguing that legal information can be objectively given with both parties present and thus, is not practicing law).

71. See, e.g., Examination of Rule 49 Committee of the District of Columbia Bar, Proposed Clarification and Revision of District of Columbia Court of Appeals Rule 49 Concerning the Unauthorized Practice of Law § C, at 10 (on file with author) (definitionally excluding mediation from the practice of law); Report to Tennessee Supreme Court Commission on Dispute Resolution (on file with author) (suggesting that legal opinions given in mediation, with all parties present, are not to be considered legal opinions).

72. See Maute, *supra* note 63, at 515.

opinions about elements or the strengths and weaknesses of parties' cases (either in separate or joint meetings), giving opinions about the ranges of case settlements, predictions about court rulings and finally, proposing particular settlements.⁷³ This continuum of mediator activities ranging from information giving, to advice, prediction and eventually, evaluation, suggestion (of solutions) or decisions (usually non-binding in evaluative mediation), in my view, clearly implicates the practice of law. As courts have held, in other contexts, usually interpreting unauthorized practice of law provisions in ethics codes or criminal laws, when an individual uses "an ability to evaluate the strengths and weaknesses of the client's case vis a vis that of the adversary,"⁷⁴ she is practicing law, by applying legal principles to concrete facts and exercising legal judgment. Although, in mediation, the third party neutral is not "representing" the party (and indeed, in many cases the parties will be represented and can obtain a professional's advice about the law), parties may still rely on what is said to them by a more activist mediator.

As the law continues to expand liability of lawyers to third parties not in privity with the professional,⁷⁵ this reliance interest may prove troubling in the mediation context.⁷⁶ Thus, when mediators give legal information, whether or not "neutrally and objectively" stated or presented with more partisan or predictive casts, they may, in effect, be "practicing law" without a representational relationship⁷⁷—an entirely new role for ethics purposes.

And, some third-party neutrals see it as their duty to "correct" misstatements of law or to expose "false" facts.⁷⁸ The authors of the

73. See Margaret Shaw, *Evaluation Continuum*, Prepared for Meeting of CPR Ethics Commission (May 6-7, 1996) (unpublished manuscript, on file with author).

74. *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 234 (Pa. 1976) (enjoining insurance adjustors who were not lawyers from giving advice to insurance claimants).

75. See Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 968-75 (1996).

76. In actuality we already know of cases in which unrepresented parties rely on what mediators tell them about the law, the likelihood of their success in court and whether a settlement is a good idea or not. See GOLANN, *supra* note 3, at 420 (discussing when mediation may induce "detrimental reliance" by the parties on what is told to them in the process).

77. Traditional ethics codes treat this as not practicing law so as to separate judicial functions from representational ones, but my point here is that mediators may be somewhere in between, demonstrating a hybrid form of "practicing law without a representational relationship." Reliance on what a third-party neutral like a mediator says is different than "rulings" on the law by either judges or arbitrators.

78. For a useful discussion of some of these difficult dilemmas see Curtis Emery von Konn, *Is Your Mediation Ethical?*, Session at ABA Annual Meeting, ABA Sect. on Disp. Resol. (Orlando, Fla. Aug. 1996) (on file with author).

Joint Standards, however, take the opposite view and suggest that the "mediator should . . . refrain from providing professional advice,"⁷⁹ demonstrating the lack of clarity and consensus in the field.

To further complicate matters, several courts have already held that third-party neutrals (of all types) who serve the courts in a wide variety of capacities (probation officers, mediators, evaluators, even court-appointed psychologists) will be granted quasi-judicial immunity for their services,⁸⁰ thus rendering whatever legal advice or information which is given (whether bad or not) immune from scrutiny. Thus, the dilemma is that if third-party neutrals are not practicing law and are immune (at least while serving in courts) there will be no mechanism for accountability and quality control.

To conclude, as I do, that the flexibility of the mediator's role includes the provision of legal information and advice and thus, "the practice of law," does not resolve by what standards of ethics or performance⁸¹ a third-party neutral should be judged. Indeed, as the *Judicial Code of Conduct* and other definitions of judicial roles clearly exclude judges from "practicing law" (in an assumed representational capacity), the mixed role of mediator or evaluator (or "settlement oriented" arbitrator) is not dealt with adequately by any existing code.

Current legal ethics codes assume a clear distinction (based on our adversary system) between the advocates and the neutral, impartial and passive decision-maker who operates at arms-length from the parties.⁸² When the mediator-evaluator or settlement-oriented arbi-

79. See Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 127. "Mixing the role of mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice." Comment to STANDARD VI. *Quality of the Process*, ABA, AAA-SPIDR JOINT STANDARDS FOR CONDUCT OF MEDIATORS (1994). In my view, this language flies in the face of actual practice in the field where mediators quite commonly provide legal information, advice, and evaluation in a variety of contexts.

80. See, e.g., *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994); *Meyers v. Contra Costa County Dep't. of Social Servs.*, 812 F.2d 1154, 1159 (9th Cir. 1987); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 902 (Ct. App. 1990).

81. Is competence and quality an ethical concern? See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995) (requiring a lawyer to provide competent representation, including legal knowledge, skill, thoroughness, and reasonably necessary preparation).

82. See generally STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984) (detailing the history and prevalence of adversarialism in the judicial process); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-83 (1978) (describing the adversarial roles of judge, arbiter, and representative of parties); Menkel-Meadow, *supra* note 5, at 40 (discussing that adversarialism is so powerful that it infects non-adversarial possibilities of dispute resolution).

trator or judge⁸³ blurs those lines of distance and non-involvement in certain aspects of the case (like sharing of confidential information and actively engaging in promoting "consensual" settlements)⁸⁴ none of our existing regulatory schemes will help us judge what has happened. Thus, I come to the problematic view that even the "practice of third-party neutraling" (below I will examine the issues for advocates) implicates the practice of law (as well as a host of non-legal competencies)⁸⁵ but the current practice of law (or judging) rules do not guide the ethical issues which are raised in modern ADR practice which are particular to the new and hybrid forms of processes and behavior. The issue of what responsibility the third-party neutral bears within ADR remains unresolved and controversial. Some argue that mediators should be fully accountable for the outcomes over which they preside⁸⁶ and for "counter balancing" unequal power, even if it means losing some neutrality in the mediation.⁸⁷ Others argue that neutrality and non-involvement with the parties' consensual agreements must be the cornerstone of the third party's role.⁸⁸

2. *The Changing Roles of Parties, Representatives, and "Advocates"*

While we continue to debate whether ADR is a good or bad idea (supplanting or supplementing⁸⁹ more formal judicial systems⁹⁰) it is

83. On the settlement practices of judges, see D. M. PROVIN, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* (Federal Judicial Center 1986); Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. DISP. RESOL. 1 (1987); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 497-98 (1985).

84. See *supra* note 13-15 and accompanying text (raising the issues of macro ethics as to when we know a settlement is not "coerced").

85. As my colleague Howard Gadlin (an ombudsperson and psychologist) has opined, should psychologists only regulate the communication and facilitation activities of mediation and other dispute resolution processes since those are within their disciplinary purview?

86. See, e.g., Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 40-41 (1981).

87. See generally Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (mediating domestic abuse cases requires mediators to protect victims of violence); Maute, *supra* note 63, at 504.

88. See Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 330 (1984); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981).

89. See Judith Resnik, *Many Doors, Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 241-62 (1995).

90. This debate is international. As the new market economies of formerly Communist countries develop, entities like the World Bank seek to promote both predictable and legitimated judicial systems, as well as the "fair and effective dispute resolution mechanisms" of commercial ADR. See Memorandum from Steven G. Raikin, Esq. on the Public

important to note that the behaviors, skills and tasks of parties and their representatives may be called on in different ways in these alternative processes. The zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximize gain for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials.

However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides' interests, and a broadening, not narrowing of issues, may be more valued skills. Indeed, in the second generation of ADR training⁹¹ which now focuses on training the representatives how to "be" in a mediation or other ADR setting, there is recognition that certain aspects of the conventional adversarial role may, in fact, be disadvantageous for effective behavior and the achievement of Pareto optimal solutions in settlement contexts.⁹² Such principles as "reactive devaluation" in which one side simply discounts proposals from the other side because the proposals come from the other side,⁹³ teach us that we will have to relearn how to process and prepare information in a settlement-oriented setting.

Some have suggested the settlement function is sufficiently different from the adversarial function requiring different individuals, with different personalities and orientations as well as ethics.⁹⁴ Thus, as

Education Campaign on Commercial Alternative Dispute Resolution (ADR) in Russia (Oct. 4, 1996) (on file with author).

91. The first generation of ADR training included both training third-party neutrals (either in mediation or arbitration skills) and educating counsel about the range and "landscape" of disputing for choices about what forms of ADR to elect. See CPR INSTITUTE FOR DISPUTE RESOLUTION, WORKSHOP: MEDIATION ADVOCACY 1-23 (1996) (training modules developed for law firms and corporate ADR programs led by Carrie Menkel-Meadow).

92. See Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238 (1993); see generally KENNETH J. ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al. eds. 1995) (providing a superb discussion of some of these behavioral and cognitive distortions caused by a focus on adversarial thinking processes).

93. See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 26, 28 (Kenneth J. Arrow et al. eds., 1995).

94. See Roger Fisher, *What About Negotiation as a Specialty?* 69 A.B.A. J. 1221, Sept. 1983 (discussing the inherent differences between litigators and negotiators); Marguerite S. Millhauser, *Gladiators and Conciliators: ADR—A Law Firm Staple*, 14 B. LEADER 20, 20 (Sept.-Oct. 1988). This raises issues of psychological aptitude and affinity for different processes, as well as whether training can, in fact, recast adversarialists into problem-solvers and whether law is the best domain for situating mediational strategies. See Margaret L. Shaw, *Selection, Training and Qualification of Neutrals* (Oct. 15-16, 1993) (unpublished manuscript presented for the State Justice Institute's National Symposium on Court Con-

courts struggle with such legal issues as what it means to attend a settlement proceeding "in good faith,"⁹⁵ representatives of parties (which is the term I prefer to the term "advocates") have to consider how to become effective in a different forum.⁹⁶ A different orientation to the client and to the "adversary" may be essential in the kind of creative option generation and problem-solving that is essential in a mediation setting.

In addition to behavioral orientations or mind-sets, specific acts may be subject to different ethical criteria. If parties are present in an early neutral evaluation proceeding in a law office, for example (as is the practice in the U.S. District Court for the Northern District of California), are lawyers duty-bound to reveal adverse legal authority as they are required to before a tribunal (see MRPC 3.3) or are they engaged in private negotiations governed by MRPC 4.1?⁹⁷

Suggesting alternative behaviors, like cooperative and creative problem-solving,⁹⁸ is not the same as mandating it, yet ethical guidelines or "considerations" might do more to change the culture than simply ignoring these issues and letting traditional adversarial behaviors continue to control new processes. At the very least, some traditional ethical codes have been amended to require lawyers to, at least, advise their clients of the existence of alternative forms of dispute res-

nected Dispute Resolution Research, on file with author). Some may simply find too much psychological, sociological, and professional role strain in the different roles. See generally Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?* 34 UCLA L. REV. 863 (1987) (discussing the different roles of the litigator and the negotiator, and the barriers faced).

95. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?* 46 SMU L. REV. 2079, 2089 (1993).

96. For a more extended discussion of my views of how lawyers and law students need to be trained to think differently in order to solve problems, rather than advocate for them, see Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); see generally Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993) (discussing the integration of ADR into law school curriculum as a way to expand the concept of the lawyer as an altruist); Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn from Mediation*, 56 MOD. L. REV. 361 (1993) (discussing the teaching of negotiation with the aim of improving lawyering); Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOT. J. 321 (1993) (discussing training in empathy as indispensable to the success of any mediation program).

97. For a sampling of these real ethical dilemmas in ADR in the court setting, see Carrie Menkel-Meadow, Federal Judicial Center ADR Implementation Workshop, *Ethical and Other Issues in Using ADR Neutrals: Session 10 Hypotheticals for Group Discussion* (Kansas City, Mo., Sept. 18–21, 1994) (on file with author).

98. See, e.g., JAMES ADAMS, *CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS* xi (1986); MARTIN GARDNER, *AHA! INSIGHT* vi (1978).

olution.⁹⁹ A variety of new continuing legal education courses and materials now attempt to teach lawyers how to “advocate” for and in ADR proceedings.¹⁰⁰

Related to the lawyers’ role in advising and counseling clients is the role of the client in different kinds of proceedings. Once again, our traditional legal ethics rules address themselves to lawyers, but what of party responsibilities—to simply attend¹⁰¹ or to actively engage in solution-seeking behavior, or to consider the needs and interests of other parties?¹⁰² Rules prohibiting advocates from contacting represented parties and preventing clients from doing the same, in some cases, may be dysfunctional when we want to encourage the parties to talk to each other to resolve their problems. The appropriate rules of contact for third-party neutrals, representatives, and parties in joint sessions and caucuses are complex, dependent on different caucus philosophies, and left completely unanswered by conventional ethics rules.¹⁰³ Thus, the conceptual frameworks that inform alternative dispute resolution processes change the rules of the game being played. Participants of all kinds—lawyers, parties and third-party neutrals—are asked to do different things, to approach each other with different mind-sets,¹⁰⁴ and to seek different outcomes for their disputes and transactions, from what they might seek in the formal arena of litigation. These different goals and behaviors, in my view, thus require their own role and task sensitive standards.

99. COLO. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1996); see Donald A. Burkhardt & Frederic K. Conover, II, *The Ethical Duty to Consider Alternatives to Litigation*, 19 COLO. LAW. 249, 249 (1990).

100. See generally ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994) (discussing the strategies and techniques for litigators to use in the mediation process); Michael Lewis, *Advocacy in Mediation: One Mediator’s View*, 2 DISP. RES. MAG. 7, 7 (1995) (discussing the differences between typical lawyer-to-lawyer negotiation and mediation, and the techniques for advocates).

101. See, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1988) (en banc) (discussing duty of parties to attend settlement conferences).

102. See generally JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 47 (1995) (suggesting that victims of mass torts might have some moral and ethical responsibilities to consider all the victims of a mass disaster); Menkel-Meadow, *supra* note 30, at 1171.

103. For example, many mediators ask to meet with parties, sometimes even without counsel, when it appears that either the parties are being recalcitrant, or have particularly good business ideas or personal needs for settling the case. Although there is some ethical “folklore” about the propriety of meeting with parties without their counsel (it is probably unwise to do so without the parties’ permission), there is nothing which officially prohibits this sometimes very effective way to solve problems.

104. See Menkel-Meadow, *supra* note 11, at 794–842 (noting the importance of mind-set or orientation to problem-solving in setting the behavioral context).

3. *Why It Matters: How Non-Adversarial Practice Requires Its Own Rules*

In considering what principles should inform ethical standards and rules, it is important to understand the underlying values that lay the foundation for ethical rules. With the adversary practice as the model current rules are based upon, values of zeal (I prefer to highlight the "zealotry" implicated in zeal), client loyalty, partisanship and non-accountability¹⁰⁵ reign. If ADR draws from different foundational principles—problem-solving, joint rather than individual gain, and future rather than past orientation, its underlying principles will be different. Trust, confidentiality, creativity and openness may suggest different ethical precepts and standards. Questions of accountability and legitimacy still loom large and controversial at the macro level, but it might be possible to craft rules and standards on such issues in ADR where goals can be distinguished and articulated (such as a third-party neutral must disclose whether he will leave the solution to the parties or will pass judgment on the legality or fairness of proposals for settlements over which he will preside).

In addition, the use of ADR in the public sphere, through court-annexed programs, implicates important constitutional and statutory issues of ethics and standards. When is a jury trial waived in court-annexed programs?¹⁰⁶ What is the role of court-appointed mediators, special masters, early neutral evaluators as agents of the state, as judicial officers? Are there due process questions when court-appointed neutrals are struck from the lists maintained by the courts?¹⁰⁷ When do private actors become public servants—when judges officially assign cases to private providers? How do court-approved local rules intersect with state and bar association drafted regulations?¹⁰⁸ Most courts have acted as if ADR is the practice of law, certainly when

105. See Murray Schwartz, *The Zeal of the Civil Advocate*, in DAVID LUBAN, *THE GOOD LAWYER* (1984) 153–54; Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671–73 (1978).

106. See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 502–03 (1989).

107. Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, CAL. L. REV. (forthcoming 1997).

108. Many courts, such as the Northern District of California and Nebraska's federal courts, to name two examples, have promulgated local rules, which include ethical standards for third-party neutrals, such as incorporating the conflicts provisions, for third-party neutrals, of 28 U.S.C. § 455 (1988) that judges must follow. How will these rule systems interact with state ethics rules? For an illuminating discussion of the *Erie* problems in federal ethics, see Linda S. Mullenix, *Multiforum Federal Practice: Ethics and Erie*, 9 GEO. J. LEGAL ETHICS 89, 97–109 (1995).

conducted with the imprimatur of the court and indeed, some have gone so far as to require that mediators must be lawyers.¹⁰⁹

Official judicial and court treatment of ethics and standards issues does not, of course, exhaust the field. Private providers of ADR services, which may include both lawyers and nonlawyers, have begun to promulgate and adopt their own rules and standards, both within such organizations as AAA and JAMS-Endispute, and between organizations.¹¹⁰ It remains unclear what role these private ethical rules and standards will play in litigated disputes about the quality or ethics of ADR proceedings.¹¹¹ Throughout the country, many courts are now facing questions about the ethical and legal limits of private contracting for ADR services where egregious ethics violations have occurred.¹¹² Thus, courts will inevitably have to scrutinize private efforts to regulate (or, as it were, deregulate, by seeking pre-dispute contract waivers) ethics and standards by which ADR services will be measured.

The current ethics rules and codes are thus both over-inclusive and over-determined (by requiring zealous conduct where it may be dysfunctional) and under-inclusive and under-determined (by failing to deal with new issues or modifications of the "adversary" ideal for other forms of problem solving). At least one state has sought to deal with these issues by seeking to connect "exit" rules for attorney-ADR participants from the *Model Rules* to coordinate "entrance" rules to specific ADR ethics concerns that will apply to lawyers and nonlawyers alike.¹¹³ Such efforts seek to craft specific ethical standards that

109. See FLA. STAT. ANN. § 44.106 (West Supp. 1996) (Florida rule for certified and court appointed mediators); Mattox Hair et al., *Ethics Within the Mediation Process*, ADR CURRENTS, Summer 1996, at 9; Moberly, *supra* note 25, at 719-23.

110. See, e.g., J.A.M.S./ENDISPUTE, POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS § VI (1996) (stating that a mediator should refrain from providing legal advice); see also DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF EMPLOYMENT RELATIONSHIP (1995) (signed by the American Bar Association, Section on Labor and Employment, Nat'l Academy of Arbitrators, American Arbitration Assoc., Society of Professionals in Dispute Resolution, Federal Mediation and Conciliation Service, ACLU Workplace Rights Project and National Employment Lawyers Assoc. at 47 LAB. L. J. 122 (1996).

111. See generally Myron Levin, *Caveat: Know Your Arbitrator Law: Two Tales Illustrate the Risks in an Increasingly Common Feature of Contracts*, L.A. TIMES, Jan. 19, 1997, at D1 (discussing arbitration ethics abuses, and how private arbitrators rely on pre-dispute contract waivers of conflicts and interested participation of arbitrators).

112. See, e.g., *Engalla v. Permanente Med. Group*, 43 Cal. Rptr. 2d 621, 624 (Ct. App. (1995)) (holding that the evidence did not support trial court's finding of fraud in the arbitration clause of a health plan).

113. See Report to the Minnesota Supreme Court, ADR Review Board, and Minnesota Lawyers Professional Responsibility Board of the Ethics and Standards Committee of

are responsive both to the law practice issues and the specific issues that are implicated in the use of ADR.

Thus, different underlying values and goals of different processes suggest that it may matter, for the practice itself, whether ADR activities are assimilated to more conventional forms of adversary practice¹¹⁴ or whether task and role specific guidelines can be developed.

Let's examine some concrete examples.

B. The Integrity of ADR: Of Conflicts, Confidentiality, and Neutrality

1. Conflicts of Interest

One of the arenas that has sparked the greatest controversy and need for regulation has been that of conflicts of interest. While the lawyer rules of conflicts of interest are intended to protect the interests of loyalty and confidentiality, conflicts rules may have to serve different purposes in ADR practices. Although the value of "client loyalty" is absent when there is no representation, another concern, that of integrity and trust of the process, may provide new dilemmas. In the first few cases to test the scope of conflicts of interest, we can see the tensions of different paradigms of legal practice stretching and confounding the rules. Courts have had to decide such issues without clear guidance and have chosen instead to use the *Model Rules* or the *Judicial Code* by analogy. These cases illuminate the multiple layers of complexity in the conflicts area when it is imported to ADR.

Some analytic clarity may ease our reading of the cases. Unlike traditional lawyer conflicts (governed by Model Rules 1.7–1.12) that usually affect representational problems (Rule 1.12 deals with the transition from judge or arbitrator (but not mediator!)), of time (concurrent or successive representations), and place (moves from one legal locale to another like law firm to law firm or government to law firm), conflicts in ADR involve conflicts of role (representation and neutraling) as well as time and place. Thus, in efforts to mechanically import the "screen" or "cone of silence" device of Rule 1.11 (screening former government lawyers from private representation in law firms) and Rule 1.12 (screening former judges or arbitrators from the representational work of their subsequent law firms) to ADR, many

the Conflict Management and Dispute Resolution Section of the Minnesota Bar Association (Oct. 27, 1995) (on file with author) [hereinafter Report to Minnesota Supreme Court].

114. Does it matter that the "zealous representation" of Canon 7 has been moved to the comments of Model Rule 1.3 (now requiring diligence rather than zeal)?

commentators, lawyers and judges have not fully explored the different contexts in which such conflicts can arise.

Consider: In ADR there are the following possible classifications of conflicts (categorized by time, relatedness of matter, changed role of third party, and location of professional activity):

Prior (Before ADR):

- Can a third-party neutral mediate or arbitrate in a matter in which s/he previously arbitrated or mediated one of the same parties in a different matter or substantially-related matter?
- Can a third-party neutral mediate or arbitrate in a matter in which s/he previously represented a party in the same or a substantially related matter?
- Can a third-party neutral mediate or arbitrate in a matter in which his/her law firm (but not s/he) represented a party?
- Can a law firm take on a representation of a party if that party previously was party to a mediation or arbitration of someone who practices in the law firm?

Concurrent:

- Can a mediator/arbitrator perform neutral services when one of the parties is currently represented (in a related or different matter) by the mediator's law firm?
- Can a law firm take on representation (in a related or different matter) of a client who is currently a party to a mediation/arbitration conducted by a member of the law firm?
- When, if at all, can/should screens be employed to allow individuals to provide third-party neutral services where other members of the law firm provide representation?
- Who is responsible for monitoring conflicts? In a court-sponsored program, must the court or the third-party neutral conduct a conflicts check with the law firm's representational clients and potential parties to a court-assigned ADR proceeding?

Successive:

- Can a law firm represent (after a mediation or arbitration is concluded) a party in the same matter, a substantially-related, or a different matter in which a firm partner mediated the dispute?
- Can a law firm represent a party adverse to a party in a concluded mediation or arbitration conducted by a member of

the law firm? (Can you see what the potential conflict issue is here?)

Vicarious:

— Under what circumstances can a law firm screen itself off from the prior, current, or potential future work of a firm member who conducts mediation or arbitration services?¹¹⁵

Disclosure/Waiver/Consent:

— Which of the above conflicts should be "waivable" if the client consents to either representation or third-party neutraling, after full disclosure of potential or actual conflicts?

— When should "waivers" and consent be disallowed completely?

— When can waivers and consents be withdrawn if new relationships, creating potential or actual conflicts are created, either during a representation or during an ADR proceeding?

Thus, conflicts issues implicated in the ADR area involve prior and current representational and third-party neutral work of the individual and the firm, as well as a consideration of potential future work.¹¹⁶ Thus, questions of role, time, place and vicarious conflicts must all be analyzed to consider whether a particular conflict should be prohibited or can be waived.

As with all potential conflicts of interest, the legal question is what should be absolutely prohibited to protect some important interest (like loyalty, confidentiality or integrity of the process) and what conflicts can comfortably and permissibly be waived by full disclosure and consent? Some commentators have suggested simple solutions to these problems by providing for strong and broad disclosure require-

115. For the most part, screens are currently not authorized by law in these situations. The *Model Rules* allow screens only in cases of government to private law firm moves under Rule 1.11; however the current draft of the *Restatement* § 204 (Proposed Final Draft No. 1, Mar. 29, 1996) and case law throughout the country, at both federal and state levels, have allowed the screen device to be used in other conflict situations (such as lateral private law firm moves).

116. The most controversial and practical aspects of the issues about conflicts have to do with the fear of some court managers of ADR that distinguished third-party neutrals (particularly volunteers from major law firms or those with great expertise) will have to decline ADR practice when such work might disqualify their law firm from on-going or future work for particular clients. This has already occurred in the areas of intellectual property specialties, insurance defense, and repeat play, and when court ordered ADR is applied to major corporations who transact diverse business in large metropolitan areas (and thus, may be employing a variety of law firms for different kinds of legal work).

ments with specific waiver and consent provisions. Others simply suggest an arbitrary time period for ADR conflicts to "lapse."¹¹⁷

In the ADR context, these possible solutions may have other complications—what is to be disclosed? The judicial conflict rules¹¹⁸ focus on personal relationships and financial interests. But, might an ADR provider have to disclose other factors as well, such as the quality and amount of prior work for the parties (as advocated by opponents of pre-dispute contract allocation of arbitration or mediation services to particular providers), or potential or "perceived" biases or prejudices such as personal, demographic and social affiliations.¹¹⁹

Several of the few recent cases which have had to address these issues illustrate some of the difficulties. In *Poly Software International, Inc. v. Su*,¹²⁰ a federal court disqualified an attorney from representing a party against another party who had been a co-participant in a previous mediation involving a similar issue. In the first case, the two parties (together) were accused of appropriating software from another company and the attorney involved in the second case was the mediator. During the mediation the mediator clearly had access to information from all parties, including in all likelihood, some information about who had actually been responsible for the "theft" of the software codes. In the second case, the former partners in the prior mediation were engaged in a similar dispute, this time one of them accusing the other of appropriating the software documentation. The court based its disqualification ruling by reasoning, by analogy, from Rule 1.9,¹²¹ that like an attorney "*who has formerly represented a client in a matter [and who should therefore] not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former*

117. See generally CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR PRACTICE GUIDE: MEDIATION (1995) (suggesting a six month time bar for work on a substantially related matter).

118. 28 U.S.C. § 455 (1993).

119. See Baruch Bush, *supra* note 3, at 38–40 (discussing personal reactions to parties or their issues, and when "group" or class relationships exist); cf. Homer C. La Rue, *The Ethics of Disclosures by Arbitrators of Color: Have the Rules Changed?*, 42 LAB. L.J. 619, 629–34 (1991) (arguing that third-party neutrals of "minority" status are expected to disclose and disqualify themselves more often than whites on grounds of demographic or social affiliations). For a similar issue in the formal justice system see Motion to Recuse Judge Leon Higginbotham in *Pennsylvania v. Local 542, Int'l Union of Oper. Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974); see also *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (denying recusal of Judge Constance Baker Motley in employment discrimination claim because of former civil rights litigation).

120. 880 F. Supp. 1487 (D. Utah. 1995).

121. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1995).

client,”¹²² a mediator should not represent someone who had previously been a party in a mediation.¹²³ Note that the court treated the prior mediation as being analogous to a prior representation, when what occurred functionally, was the learning of confidential information during the mediation which could have been used adversely against one of the parties (who had, at least during the mediation, trusted that the mediator would not only keep the information confidential but not use it against him).

This case is instructive for many reasons. First, it is not clear from the confidentiality “oaths” and contracts that mediators make, that they are offering the same protections as representative lawyers. The mediator in this case could have represented the party in the second matter without disclosing any information—all he had to do was “use”¹²⁴ what he had learned against the prior party in some way, such as a tough cross-examination question during a deposition, a subtle “threat” through a settlement offer or any number of devices which would have communicated to the adverse party that he would be held liable “when the real facts came out.” There is no need for disclosure to a third party here. Thus, the court, in a sense, imposed a requirement of integrity for the “long-term” trust of the mediation process by suggesting that the mediator was no freer to use information than a prior representative who owes a “continuing loyalty” to the previous client.¹²⁵

I agree with this result but it is important to note that the underlying values supporting the holding are different for mediation and representational work. It is not “loyalty” to the party that needs to be protected in mediation (indeed, impartiality and neutrality values¹²⁶ dictate a certain distance from the parties) but the integrity of the process. If a party thought that a mediator could use shared information against him he would likely never participate in the mediation. This value, which looks both easy to apply and similar to client loyalty concerns, in focusing retrospectively, becomes more difficult when applied prospectively. Consider what the mediator or representational lawyer has to consider when deciding if “future” representational or neutralizing work might be precluded by a current assignment. Cur-

122. *Poly Software Int'l, Inc.*, 880 F. Supp. at 1494.

123. *Id.*

124. Note that Rule 1.9, dealing with conflicts of interest in representation of former clients, prohibits both the disclosure and the “use” of information obtained in a prior representation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (c)(1)–(2) (1995).

125. *Id.*

126. See Maute, *supra* note 63, at 508–19; Riskin, *supra* note 88, at 343.

rently, some firms consider whether or not to take some third party neutraling work that might prevent future, more lucrative, representational work.

Also consider the interesting fact in *Poly Software*, that the reason the mediator was in demand as a representational advocate was that he was one of the most knowledgeable and experienced intellectual property lawyers available in the geographic area.¹²⁷ Thus, if mediators look forward to consider all of the possible representational work they will lose if they accept a particular mediation in their field of expertise, it is likely they will want to decline at least one or the other (and so far, most specialized lawyers find their representational work more lucrative than third-party neutraling). Thus, if the integrity of the process or a similar value like "avoiding the appearance of impropriety," is taken too seriously, it will prevent a mediator from subsequent representation either for or "against" a party who appeared in a mediation (whether in a related or unrelated matter, though some might argue to limit such a rule to a "substantially related matter.") This will likely (it already has in some districts) have a chilling effect on the willingness of some, especially specialized and expert attorneys, to perform mediational roles.

Add to these issues the disqualification of the entire firm (under Rule 1.10), which the *Poly Software* court ordered,¹²⁸ and mediation work will soon be considered anathema in some quarters. In an effort to suggest that a "screen" might work appropriately here, some commentators have suggested that the courts recognize, that unlike representational lawyers, those serving as mediators cannot be presumed to share information with their partners. A mediator promises the parties confidentiality, and that is presumed to apply to anyone outside of the mediation.¹²⁹ Thus, if the screen is to be used in any situation, it would appear that a mediator, promising not to reveal any information, would be a perfect candidate for screening, allowing others in the firm to take on what otherwise would be prohibited representation.¹³⁰

Note that this conflates the two underlying values of conflicts protections—the protection of confidentiality, which can be realized

127. See *Poly Software Int'l, Inc.*, 880 F. Supp. at 1495.

128. *Id.*

129. Indeed, the Florida Advisory Committee on Ethics in ADR has ruled explicitly on the terms under which parties may seek expert guidance outside of the mediation (of spouses, accountants and others) while still preserving confidence. See Hair et al., *supra* note 109, at 10.

130. See James E. McGuire, *Conflicts in Subsequent Representation*, DISP. RESOL. MAG., Spring 1996, at 4.

with a “screen,”¹³¹ and the “integrity” or “propriety” of the process which cannot. If we decide that it looks bad, or impairs the overall trust of mediation if a mediator may subsequently represent someone against a party in mediation (as many have advocated, at least with respect to an unrelated matter), then the screen may not work in this context. Consider how it appears, both to the former party (and now adversary), and the general public that a “neutral” or his law firm is now litigating against a party he “helped” to reach a negotiated settlement as a neutral. Does the “unseemliness” of this change of roles require regulation in the form of prohibition (for the general public and legitimacy of the process) or possible consent (for the “waivable” protection of the parties)? I do not aim to resolve these questions today. My point is simply that the lawyer’s conflicts rules do not consider all the same concerns and issues that are involved in mediation with respect to representation conflicts (or its converse, prior representation to mediation¹³²).

131. Query: Can such confidentiality be assumed? I am skeptical that mediators do not in fact seek guidance from, and share information with, law firm members (not to mention associates, paralegals, and legal assistants who may work on the mediated case in the firm).

132. I do think this situation is more easily dealt with by mutual party consent. In a recent case the D.C. Circuit Court of Appeals held (under the more stringent review standards of the Federal Arbitration Act for overturning an arbitration award) that prior representation of a mediator-arbitrators’ law firm (apparently unknown and therefore undisclosed by him) of a party in an unrelated matter did not disqualify the arbitrator or void the arbitration award on ground of “evident partiality” under the FAA. *See Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C. Cir. 1996). This case still raises questions about whether standards should be different for arbitration than mediation, given the statutory standards of the FAA for overturning awards and by what standards parties and third party neutrals should be held for investigating possible conflicts. The court held that it could find no source for a generalized duty of investigation of conflicts like those in this situation. *Id.* at 682. The court distinguished a Ninth Circuit ruling that did reverse an arbitration award where, under the special rules of NASD arbitration, there was a duty to investigate conflicts of prior unrelated representation, at least so they could be disclosed and considered by the parties. *Id.* at 682–83. The D.C. Circuit, in looking at actual impartiality seemed to conclude that if the mediator-arbitrator did not know of the representation himself, he could not have been biased by it. *Id.* at 683. Query how we are to consider the underlying factual conclusion that the mediator-arbitrator did not know—how is his credibility to be assessed? In a concurring opinion, Judge Silberman opined that since the parties chose the arbitrator it was their obligation to do the conflicts checks. (Query, how could they have searched a law firm’s confidential client data base?) Note that in this case, we have the added fact of the arbitrator’s terminated relationship with the prior law firm (a reversal, in a sense of the “screen” solution). Note as well, that whether for strategic reasons or not, one party (here after the fact) considered it inappropriate that their decision-maker should come from a firm that had previously represented its opponent.

In another case, *Cho v. Superior Court*,¹³³ the court disqualified an entire law firm under the imputed disqualification rules¹³⁴ when a judge, upon retirement, joined the law firm which represented a party in a matter in which he attempted settlement, using mediational like techniques. In this case, the firm's efforts to use the screen permitted by Rule 1.12 for former judges and arbitrators was rejected (correctly in my view) because the judge had learned confidential facts concerning both sides during settlement negotiations and was not acting with arms-length distance from the parties usually associated with judging or arbitrating.¹³⁵ Thus, although some commentators suggest that screening would work here because the judge promised confidentiality to all, could easily be screened, and shouldn't be discussing this case with his partners anyway,¹³⁶ I share the court's view that this is precisely a case where a conflict is clear, and inappropriate representation would occur for several reasons.

First, the court recognized that settlement functions and mediation functions are different from adjudicative functions and the judge did, in all likelihood, hear "private" or "settlement" facts that could be used adversely by his firm against its adversary if any of the information were to become known. But, in addition, even if the judge could be trusted to keep his confidentiality pledge, there is a concern for the integrity of settlement and mediational processes if the parties see that their settlement officer (judicial or otherwise) has now joined their litigation "enemy."¹³⁷ There is then, a concern for the integrity of ADR processes (settlement conferences, mediation, even early neutral evaluation) that has more to do with "the appearance of propriety" and fairness (in a real sense) than with the functional analysis of confidentiality and relatedness commonly employed in the representational context.

To summarize, these early cases beginning to deal with the complexities of conflicts in the practice of ADR, reveal that while analogies to the lawyer rules may aid decision-making, eventually courts will likely have to grapple with the fact that the underlying principles of lawyer representational conflicts rules do not necessarily match

133. 45 Cal. Rptr. 2d 863, 863-64 (Ct. App. 1995), *review denied*, 1996 Cal. LEXIS 770 (Cal. Jan. 31, 1996).

134. CALIFORNIA RULES PROFESSIONAL CONDUCT, ch. 3, § 3-310 (West 1997).

135. *Cho*, 45 Cal. Rptr. 2d at 867-68, 871.

136. Note here that third-party neutrals working in law firm contexts will often have assistance on their cases from associates who may "cross the line" to the litigation side. This is why screens (of layers of lawyers) may be difficult to administer in the ADR context.

137. *Cho*, 45 Cal. Rptr. 2d at 870.

those of third-party neutrals, especially where, as in *Cho* and *Al-Harbi* particular individuals switch roles¹³⁸ (as well as allegiances to parties). It is possible that solutions can be found based on broad duties of investigation and disclosure of possible conflicts which the parties can waive,¹³⁹ at least at the beginning of an ADR or representation. Or, we might have to recognize (as some have suggested in the lawyer conflicts area), that with our increasingly mobile legal profession, the conflicts rules themselves will have to change,¹⁴⁰ permitting either greater "free agency"¹⁴¹ or at least specific time cut-offs for conflicts.

138. From settlement judge to law firm member and from law firm member to mediator and arbitrator in these instances. *Id.*; *Al-Harbi*, 85 F.3d at 681.

139. Of course, as the *Al-Harbi* case illustrates, it is easier to talk about waiver at the beginning of the case, then when a losing party "subsequently" discovers that something has not been disclosed and uses it to seek reversal of an award or agreement. *Al-Harbi*, 85 F.3d at 681-82. One of the key difficulties in the conflicts area is its dynamic quality. Law firms take on new clients continuously and the duty to investigate and disclose, if on-going, can lead to disqualification in the middle of a case, after great expense to the parties. Managers of law firm conflicts committees informally report that they spend many hours (of billable time) on conflicts checks. Personal communication with Leonard Gilbert, Esq., Florida (Oct. 11, 1996).

140. One could contrast the stringent conflicts rules of our American system with those of English barristers and lawyers sharing offices in a wide variety of other legal cultures. In many other legal cultures lawyers are considered representatives of "the case" not the client and side-switching or subsequent representation or service of adverse interests is far more common. These issues have significance for the increasing globalization of the practice of both law and ADR. See generally DEZALAY & GARTH, *supra* note 56 (discussing international arbitration and transnational legal issues); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) (discussing the patterns and growth of international law practice); David Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994) (discussing the role of lawyers in global economic and political systems). Why are American "conflicts" rules and loyalty principles so significant, especially in a culture generally known for its lack of "loyalty" in economic enterprises more generally. See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF POSTERITY* (1995) (discussing the irony of different approaches to "trust" and role in cultures).

141. At least one practicing lawyer has suggested to me that conflicts rules, with appropriate consent and waiver should be calibrated to "the sophistication of the client." Major corporations with inside counsel know what they are "waiving" when they choose a law firm that has previously represented or mediated with an adversary. They just want to hire that law firm because of its "quality" or expertise in a particular area. Such a broad client-determined consent rule adopts a "market control" approach to legal ethics. Query whether the conflicts rules should permit consent when the purposes are not only client protection (the consent model of dispute resolution I argued for in Menkel-Meadow, *supra* note 13, at 2690, 2692, 2693-94), but system integrity and "appearance of impropriety" concerns for how the "process" looks to those outside of the dispute (the "public" or the "externalities" problem of dispute resolution raised by Luban, *supra* note 22, at 2622-23). To the extent that there are interest groups in the conflicts discussion, one can see the replication of divisions of "academic-moralists" and "practitioner-pragmatists" which have characterized many of the debates around ethical standards for the legal profession. See

As a strict conflicts enforcer in some areas¹⁴² I am skeptical that “simple” rules can be found, but I am certain that if we are more explicit about the underlying concerns (integrity of the process, as well as confidentiality for the parties) we can develop some guidelines and suggestions for good practices.

2. Confidentiality

Like our concerns about conflicts of interest, confidentiality in ADR has become increasingly complex and controversial over the years. In seeking to draft ethics rules or guidelines of appropriate protection in this area, one must be mindful once again, of where ADR practice may diverge from representation practice. As the *Model Rules* (Rule 1.6) seek to protect both client and attorney interests,¹⁴³ in ADR there are party interests, as well as third-party neutral and process interests. Thus, as with representational confidentiality, there are multiple sources of law in the confidentiality area, including party contracts and agreements, specific statutory codes and sections,¹⁴⁴ court rules, case law and ethics rules. What is particularly tricky in the ADR area is ascertaining exactly what is protected. Under representational confidentiality rules, by definition, anything said in a mediation would not be confidential because (at least in joint sessions), adverse parties are revealing information to each other and in the presence of a third party (the neutral) and are thus, outside the protected zone of lawyer-client confidentiality. Thus, ADR has had to forge its own confidentiality protections so that parties may share “settlement” and other potentially compromising facts with each other without fear that such information will be used outside of the mediation. Interestingly, issues have already developed about the

generally Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons* (1996) (unpublished manuscript, on file with author).

142. See Menkel-Meadow, *supra* note 30, at 1189–98.

143. And thus, ethics protections for confidentiality must always be distinguished from the evidentiary privilege which rests on some different grounds, with different exceptions in different jurisdictions. See generally Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, The Will Be or the Ought To Be*, 29 LOY. L.A. L. REV. 1631 (1996) (discussing the current effort to draft the *Restatement of the Law Governing Lawyers* and its changes in confidentiality and disclosure requirements); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (discussing the basis, effect, and future of confidentiality rules).

144. See generally FED. R. EVID. 408; NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* ch. 9 (2d ed. 1994) (discussing the different barriers protecting confidential disclosure in the mediation process); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (identifying the various situations in which claims of mediation confidentiality may arise and describing the current state of the law of mediation confidentiality).

subsequent use of information disclosed in an unsuccessful mediation, where at least one party seeks admission of such information in formal court proceedings.¹⁴⁵ Though some have argued that all information disclosed in ADR proceedings should be covered by evidentiary rules that protect against admission of disclosures in furtherance of settlement,¹⁴⁶ this is considered by others a risky business as many other disclosure statutes "trump" confidentiality provisions and require disclosure of facts of child or domestic abuse or other intentions to commit crimes.¹⁴⁷

Ethics rules and guidelines, as well as private contracts and agreements for confidentiality, are still subject to "other law," raising significant issues about what *Miranda* warnings parties may need in a mediation in determining whether to be totally candid, as requested by the "norms" of good mediation practice.

Third-party neutrals have their own (and sometimes different from the parties') concerns about confidentiality, once again appealing to the integrity of the process and their own role-based ethics. Mediators and arbitrators promise confidentiality (in their contracts, retainer agreements and through private ethics codes) and may go so far as to risk contempt proceedings in refusing to disclose information revealed in a mediation or arbitration, even when under subpoena.¹⁴⁸ This is because, whatever the conflicting interests in particular cases (including allegations of fraud of either the parties or the third party neutral), third-party neutrals have their personal integrity and reputation for confidentiality at stake. Thus, while ethics standards attempt to deal broadly with confidentiality issues,¹⁴⁹ the reality is that case law and common law development will be required to deal with the myriad of factually specific conflicts that exist between competing policies.¹⁵⁰

145. See, e.g., *GTE Directories Serv. Corp. v. Pacific Bell Directory*, 135 F.R.D. 187, 190-91 (N.D. Cal. 1991) (requiring parties in future cases to submit documents with objections during ENE proceedings, otherwise privileges assumed waived).

146. See Green, *supra* note 144, at 35 (arguing for minor modifications to present rules rather than blanket protection).

147. See, e.g., CAL. PENAL CODE § 11164 (West 1992) (known as the Child Abuse and Neglect Reporting Act requiring child abuse to be reported and affecting the confidentiality of such reports).

148. Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L. J. 93 (1989).

149. See John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314, 316 (1996) ("Confidentiality: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.").

150. See, e.g., *Cincinnati Gas & Elec. Co. v. General Elec.*, 854 F.2d 900 (6th Cir. 1988) (discussing conflicts about confidentiality at the macro level). In *Cincinnati Gas* a newspaper sought entrance to a "confidential" summary jury trial proceeding claiming an impor-

Confidentiality is one of several of such basic issues to the integrity of the ADR process that it is not easily assimilated to confidentiality in adversary practice. As confidentiality attaches to lawyer-client interactions which meet certain basic requirements, confidentiality, at least in the mediation context, is far more complex. With a wide range of practices concerning when to hold private caucuses and separate sessions with the parties,¹⁵¹ attempts to clarify party expectations of confidentiality will be difficult at best, especially with such variations in third-party neutral practice. Some mediators reserve the right to share information between caucuses where it is "their" judgment that such disclosure will serve the settlement well; others promise never to disclose unless authorized to do so by the parties.¹⁵² Most problematic in practice, is the unwitting revelation of some underlying factual detail or party preference that can be discerned by a wise party when a neutral "proposes" a possible settlement option that implicitly contains messages about the preferences or facts of the other party. (Is this a violation of confidentiality? How should it be enforced or policed?) Such issues cannot be resolved easily either by broad protections of confidentiality or by reference to the lawyers' (and even other professionals'¹⁵³) duties of confidentiality.

3. *Neutrality*

Like conflicts and confidentiality, neutrality or impartiality of the third-party neutral showcases the different philosophies of practice (differences among third-party neutrals and differences from adversary practice). While some have argued that mediators and arbitrators should always be distanced, unbiased, impartial and neutral, at least three separate arguments have been made for some departures from that seemingly clear ADR norm. First, as parties seek substantive expertise (such as in intellectual property and environmental disputes) or knowledge of the parties or their history together (labor

tant public interest was at stake. *Id.* at 902. The court ruled that summary jury trials, as settlement proceedings, were private and confidential and denied admission to the press. *Id.* at 904-05.

151. Compare GARY FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION* (1993) (admonishing separate meetings with the parties) with JAMES C. FREUND, *THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES* (1994) (suggesting mediation be conducted almost exclusively in separate sessions).

152. This is similar to the divergence in mediator-evaluator practice as to whether "evaluations" should be given in joint or separate sessions. See Aaron, *supra* note 10, at 285-87.

153. Are psychologist-mediators bound by the requirements of *Tarasoff* where others are not?

arbitrators' knowledge of the shop-floor), the expertise of "repeat players" or contract arbitrators (as in collective bargaining agreements) may lead to the phenomenon of the "wise elder" who may be enmeshed with, or at least known to the parties. Second, as some have advocated that third-party neutrals may need to utilize particular "power balancing" techniques (such as giving legal advice to an unrepresented party) to reduce inequalities in the mediation process, momentary "neutrality" may be exchanged for "fairness" concerns about the overall process. Third, where some mediators insist on withholding approval of an unfair or "unlawful" settlement, the neutral's role may be transformed from simple facilitator to "judge" of the parties' agreement.

Such variations in the description of the neutral's function, thus, makes inapplicable much of the *Judicial Code of Conduct's* rules for third parties and makes fashioning a clear set of standards for neutrals extremely problematic, that is, unless one adopts a particular version of the appropriate role for the third-party neutral.¹⁵⁴ Many mediators (and some arbitrators) would disclaim rigid adherence to one role definition or another. Good third-party neutrals vary their practices flexibly to deal with the contexts of the disputes¹⁵⁵ and know "when to hold them and when to fold them."¹⁵⁶

Thus, conflicts, confidentiality and neutrality, as three of the most significant ethical dilemmas faced by practitioners of ADR, demonstrate how we must consider the underlying values which inform the practice differences before we can easily assimilate ADR to lawyers' ethics. If it is not only the parties' interests, but the integrity or interests of the processes themselves which are at issue, practitioners of ADR will have to craft their own rules and standards to meet the variable needs and requirements of the parties and those of process integrity. Perhaps honest disclosure of practice differences will be enough, but it may be possible to develop practice-differentiated "best practices" models that do not necessarily require adherence to a particular mediation philosophy. At this point in the development of the field, simple descriptions and disclosures of practice variations in a "best practices" format may better serve the needs of the parties in making informed choices about process than a rigid set of "ethical rules" or standards.

154. See Susan Silbey & Sally Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y Q. 7, 8-11 (1986) (specifying the empirical variations in mediator approaches).

155. See generally DEBORAH KOLB, *WHEN TALK WORKS* (1994) (discussing mediator profiles and the contextual variation and flexibility of effective mediators).

156. My apologies to Kenny Rogers and "The Gambler."

C. *Practice Issues: Ethics and Standards for the Regulation of Practice: Of Fees, Solicitation, and Joint Practices*

While I will not canvass the full range of possible "practice" issues that are usually dealt with in professional codes, it may be useful to consider at least some of the issues which demonstrate once again that ADR practice diverges in important respects from traditional legal practice. At least one state has already begun consideration, through a rule by rule analysis, of how the lawyers' *Model Rules of Professional Conduct* do not deal with all of the issues of ADR and has recommended that a "coordinate" code, using the same rule numbers should be developed to deal with such ADR practice issues as Competence,¹⁵⁷ Scope of Representation,¹⁵⁸ Diligence,¹⁵⁹ Fees,¹⁶⁰ Confidentiality of Information,¹⁶¹ Conflicts of Interest,¹⁶² Organizational Client Duties,¹⁶³ Parties with Disabilities,¹⁶⁴ Safekeeping Property,¹⁶⁵ Declining Representation,¹⁶⁶ Truthfulness,¹⁶⁷ Dealing with Unrepresented Parties,¹⁶⁸ Communicating About Services,¹⁶⁹ Advertising,¹⁷⁰ Contacts with Prospective Clients,¹⁷¹ Communications About Fields of Practice,¹⁷² Firm Names,¹⁷³ Judicial and Legal Officials,¹⁷⁴ Reporting Professional Misconduct,¹⁷⁵ Misconduct,¹⁷⁶ and Ju-

157. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

158. See *id.* Rule 1.2.

159. See *id.* Rule 1.3.

160. See *id.* Rule 1.5.

161. See *id.* Rule 1.6.

162. See *id.* Rules 1.7-1.12.

163. See *id.* Rule 1.13.

164. See *id.* Rule 1.14.

165. See *id.* Rule 1.15.

166. See *id.* Rule 1.16.

167. See *id.* Rule 4.1. Note that this listing eliminates all of the "adversary representation" rules of Rule 3. I would include consideration of analogies to these rules, such as Rule 3.3 Candor toward the Tribunal. Many of the Rule 3 requirements will have particular applicability to court-annexed forms of ADR in which ADR proceedings may well take place in the courthouse, before a "tribunal" and represent the difficult hybrid situations of public and private disputing institutions. We will have to consider the claims of Lon Fuller that each dispute institution has its own philosophical justification, purpose, and defense. See LON L. FULLER, *THE MORALITY OF LAW* 180 (1964). Does it? What if the institutions are hybrids of public and private, adversarial and non-adversarial, coerced and consented to?

168. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1995).

169. See *id.* Rule 7.1.

170. See *id.* Rule 7.2.

171. See *id.* Rule 7.3.

172. See *id.* Rule 7.4.

173. See *id.* Rule 7.5.

174. See *id.* Rule 8.2.

175. See *id.* Rule 8.3.

risdiction.¹⁷⁷ Note that this extensive list leaves out a number of other rules that clearly could have relevance to ADR practice. Rule 2 deals with the lawyer as counselor (and clearly has relevance for the lawyer who serves as an evaluator, predictor or advice-giver in a mediation, with special difficulties if one party is unrepresented¹⁷⁸). Article 3, dealing with the rules of advocacy, clearly has relevance (even if it needs to be modified) for the representative within a mediation or arbitration. Article 5, with its rules about internal organizational supervisory responsibilities and Rule 5.5's admonitions about unauthorized practice of law (or ADR!) would clearly be appropriate in any comprehensive effort to develop a coordinate code. Finally, Articles 6 (Public Service) and 8 (Maintaining the Integrity of the Profession) would clearly also have applicability to the entire ADR "profession" (third-party neutrals, as well as advocates). Thus, the effort to develop a coordinate code, though it might provide more ease of drafting and administration, will still have to confront, in all of its particulars, the concrete ways in which ADR may differ from adversary practice and conventional attorney practice rules.

Let me illustrate with a few examples. Although contingent fees are permissible in some forms of adversarial practice (generally prohibited in criminal cases and divorce), some have suggested that contingent fees should be absolutely prohibited in ADR practice. To the extent that mediators have an "interest" in settling a dispute, settlement, rather than what is fair or just, may become the mediator's goal and parties may not be fully apprised of the consequences of their conclusions, and "consent" to settlement may not be real. Such prohibitions on contingent fees have been proposed in ADR, though it is well known that some mediators take a percentage of the settlement, either as a straight fee or as a "bonus" if settlement is achieved.¹⁷⁹

In the area of solicitation, it is now clear that many ADR providers, both individuals and organizations, seek to have themselves appointed as the contractual third-party neutral for clients who contract in advance for a wide range of goods and services. What kind of solic-

176. See *id.* Rule 8.4.

177. See *id.* Rule 8.5; Report to Minnesota Supreme Court, *supra* note 113, at 10.

178. The issue of the appropriateness of ADR with unrepresented parties is itself a major "ethical" issue about which many courts and individual practitioners have differed. Some courts prohibit the use of ADR in cases with pro se litigants. Other courts are experimenting with the use of ADR in prisoners' civil cases, civil rights cases, and in some bankruptcy proceedings.

179. Kenneth Feinberg is one such third-party neutral who acknowledges he is sometimes paid this way.

itation should be prohibited? Should pre-contractual assignments of particular neutrals itself be prohibited, as has been suggested by some consumer groups and representatives of employee-litigants? As the specter of First Amendment jurisprudence questioning the regulation of professional solicitation efforts looms over lawyers and ADR, what limits on client solicitation (including courts as "clients" of ADR providers) will be permitted?¹⁸⁰

Of great importance to ADR practitioners is consideration of the unauthorized practice of law. While I have already discussed the difficult question of whether ADR practice is itself the practice of law, here I am concerned with the common and useful practice of engaging a variety of ADR professionals (including psychologists, economists, accountants and social workers) in joint practice of dispute settlement (or the sole practice of nonlawyers in matters containing legal issues such as divorce and domestic relations cases or corporate valuations). Clearly, a non-adversarial, multi-disciplinary approach to problem-solving should encourage such use of diverse expertise in dispute resolution; but here, both the current set of lawyer ethics codes and whatever rules or standards we develop for ADR must explicitly deal with such practices.¹⁸¹ If problem solving is to be broadly conceived, borrowing from and utilizing the knowledge of many disciplines, than a limiting no "unauthorized practice of law" rule or fee splitting prohibitions will inhibit the development of multi-disciplinary problem solving.

Finally, regulating practice routines by ethics standards begs the question of the appropriate unit of analysis. While some have attempted to develop standards for particular organizational and institutional uses of ADR¹⁸² and others for individuals, any regulation of ethics and standards in ADR will have to confront the issues implicated in provider accountability, internal ethics and responsibility.¹⁸³

180. See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2381 (1995) (holding that a 30-day ban on direct mail solicitation for personal injury attorneys is a constitutionally permissible regulation of commercial speech).

181. This raises the important issue of whether transdisciplinary multi-professional codes can be developed. Does this suggest that ADR is its own profession or that it is too early to describe the content of an ADR-specific professional code? How can multiple professional disciplinary codes interface with each other?

182. See CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1994) (on file with author).

183. See generally Theodore Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1 (1991) (describing one example of how to apply group or organizational responsibility in the lawyer context). The CPR Commission on Ethics and Standards has separate working groups which will be exploring ethics for Provider groups, such as dislo-

To what extent should institutions be "accountable" for the consequences of ADR that occur within their aegis—either by referral (as in the case of courts) or because an institutional provider actually provides the services, and thus in some way, should take responsibility for the selection and quality of the services it provides.¹⁸⁴ These "institutional" ethics issues will likely be dealt with, if not through ethics and standards regulation, then by liability and malpractice disputes.¹⁸⁵

IV. JUSTICE AND ADR: WHERE ETHICS RULES AND STANDARDS CAN'T GUIDE US—OR CAN THEY?

Perhaps the most vexing and difficult "ethical" issues to resolve in ADR practice have to do with the tension between dispute resolution goals (some consider it peace or harmony¹⁸⁶) and justice goals. Vast literature¹⁸⁷ now explores whether the goals of settlement and justice are compatible. While I do not want to repeat my general views on this subject here—in my view, since settlement processes and ADR are here to stay in both public and private settings, I am interested in exploring the question of what ethical standards or requirements might be useful in promoting the most fair or just system possible. The issues involved here include ADR neutral accountability for outcomes achieved (which in the eyes of some at least, implicates some loss of "neutrality" for the third party¹⁸⁸), the role of the neutral in

sure issues (of organizational, as well as individual conflicts), quality control assurances, liability, etc.

184. See also SPIDR COMMISSION ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989) (on file with author); SPIDR COMMISSION ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995) (on file with author); see generally Donald Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757 (1996) (arguing for the role of "certifying entities" to ensure quality control in mediator certification).

185. Thus far, most organizations have been successful at resisting organizational liability. See, e.g., *Olson v. American Arbitrator Ass'n, Inc.*, 876 F. Supp. 850, 852 (N.D. Tex. 1995) (dismissing suit against AAA in Texas for biased arbitrators); *Engalla v. Kaiser Permanente Med. Group*, 43 Cal. Rptr. 2d 621, 624 (Ct. App. 1995). However, I predict this will not last as more providers get into the field or as the providers become so large they cannot adequately "regulate" or vouch for their members.

186. See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 4 (1993).

187. See, e.g., Menkel-Meadow, *supra* note 13, at 2663–65; Menkel-Meadow, *supra* note 2, at 1 n.7.

188. See Maute, *supra* note 63, at 514–15 (suggesting that neutrality standards are relaxed in order to meet public accountability and justice standards, and proposes a new Rule 2.4 of the *Model Rules of Professional Conduct* to specify duties of lawyer mediators, including a duty of advice-giving to unrepresented parties and a duty to consider the likely "litigated outcome" as a measure of the mediation outcome's "fairness"). There are also

correcting "power imbalances" (or in other words, neutral accountability for the process), the degree to which, for the parties, both processes and outcomes are in fact freely chosen (invoking in various formulations, informed consent to both process and outcome, and "self-determination" or lack of coercion and abuse in the process), which implicate the behavior of all participants to an ADR proceeding—the parties, their representatives and the neutral. These concerns are "internal" to the process, essentially reducible to the question of whether a particular ADR proceeding is fair and just for the parties within it.

The larger jurisprudential debates about ADR implicate institutional ethics and standards—when should one institution (litigation or ADR) be used over another, for considerations that go beyond the needs, or wishes of the parties¹⁸⁹—a question framed by Lon Fuller,¹⁹⁰ among others,¹⁹¹ about the particular issue of whether the public has an interest in private dispute settlement. In other words, the ethics of ADR have externalities (those outside of a particular ADR proceeding are affected by what goes on inside).

The larger macro justice issues do not lend themselves easily to rule or standard drafting and are more likely to be debated in the halls of Congress (considering the renewal of the Civil Justice Reform Act and its appropriations), in the pages of law reviews like this one, and eventually, in the case law which will have to consider the larger justice issues implicated in particular settlements.¹⁹²

others who have argued that "internal" fairness should be measured by reference to legal results. See Robert Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 41 n.118 (1992); Luban, *supra* note 22, at 2621; Nolan-Haley, *supra* note 14, at 84–85. I have argued that there may be "justice," but that it is different from "legal justice" where a general rule may be inadequate for the particular situation of the parties. Other concerns, like social, psychological, economic, moral, religious, or political factors may "trump" legal considerations in a particular case, a concern recognized by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983). For some of us, ADR presents an opportunity to craft individualized solutions in particular cases and to avoid, occasionally, the injustice of particular legal rules. Those who favor "law based" or adjudicatory solutions should examine more closely the actual embodiments of adjudication—who is deciding and interpreting the law for whose interests? Are law-based solutions always more just? See generally Luban, *supra* note 22 (arguing for principled settlement and public scrutiny of the settlement result).

189. For one version of this recent debate about the public accountability and lawmaking function of private disputes see Luban, *supra* note 22, at 2620; Menkel-Meadow, *supra* note 13, at 2666–67.

190. See Fuller, *supra* note 37, at 662.

191. See, e.g., Fiss, *supra* note 47, at 1081–82.

192. See, e.g., *Georgine v. AmChem*, 83 F.3d 610, 617, 630–31 (3d Cir. 1996) (rejecting a major class action settlement, borrowing some forms of ADR for settlement of a national

I do think that ethics considerations, as "aspirations" can be framed to address both "internal" and "external" justice issues, but they will be controversial and virtually every formulation presents problems. I do not think we are ready, however, for clear rules and standards on some of these issues and will have to await a greater sample of data (in actual cases) to explore some of the parameters of regulation. Thus far, most of the proposed standards or rules in this broad area contain too many ambiguities to be useful. Thus, while I am prepared to consider concrete formulations for some specific ADR "ethics" issues, like conflicts and fees, I am less ready to codify rules and standards of an alternative "justice" system that is just beginning to explore both its strengths and its weaknesses.

Judith Maute, for example, suggests that agreements should only be "approved" when they either reflect a "possible" legal outcome¹⁹³ or it is clear the parties knowingly and voluntarily departed from such a possible outcome. In my view, this simply assimilates ADR to the same goals as adjudication. Larry Susskind argues that the mediator is responsible, not only to the parties, but to third parties who may be affected by a mediated resolution of a public policy or community oriented dispute or resource allocation.¹⁹⁴ I have suggested,¹⁹⁵ that issues affecting "public" interests should be treated differently than purely private disputes. Others have argued that unrepresented parties are owed special duties with concomitant increased responsibilities for neutrals in such cases.¹⁹⁶ Some have suggested standards or

class of asbestos claims against 20 producers and their insurers), *cert. granted*, 117 S. Ct. 379 (1996).

193. Some courts will overturn an arbitration award "in manifest disregard of the law," but this minority standard for overturning arbitral awards is not favored. *See First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1563-64 (S.D. Fla. 1996).

194. Susskind, *supra* note 86, at 44-47.

195. *See, e.g., Menkel-Meadow, supra* note 13, at 2693-96.

196. Judith Maute's proposed Rule 2.4, for example, specifies particular rules for unrepresented parties in mediation and the role of the "limited representative" mediator in such contexts, pursuant to her reading of Rule 1.2(c). Maute, *supra* note 63, at 514-15. However, her rule does not seem to deal with the thorny situation of one represented and one unrepresented party in a mediation, where "power imbalances" are not just the parties' but their counsel. I have experienced enormous ethical difficulties when both parties were represented and I could see the wide disparities of quality of counsel (even when economic resources were relatively equal, such as when all counsel came from quality law firms but still performed with gross disparities of skill). If a mediator is committed to "fair" outcomes as suggested by Susskind, it does not help to defer to the argument that the parties were represented and therefore the mediator is absolved from all responsibility for the agreement. Here, mediators have far less "power" and ability to do anything than judges or arbitrators who still have both decision-making power and the ability to provide reasoned opinions for their choices.

practices that focus on particular techniques for realigning or rebalancing power in any case where power imbalances occur, whether parties are represented or not.¹⁹⁷ All of these are efforts to ensure “fairness” of process or “justice” of outcome in ADR proceedings, but the enormous difficulty of defining such ambiguous terms as “public interest” or “disempowered party” makes regulation nigh impossible and demonstrates why rule drafters often revert either to generalized precatory language like “the neutrals shall not preside over an unjust outcome” or to “objective factors” like “unrepresented party” that may not respond to all the harms and ills intended to be corrected. This is why lawmakers, as well as ethics rules drafters, often prefer to “punt” and leave standards of ethics or “conscientiousness” to the parties. If the parties consent in an informed way, we defer to their agreement.¹⁹⁸ I am prepared to make real consent, a necessary, if not sufficient, condition for “just” ADR and thus, I believe that at least some of the legal challenges to pre-dispute contractual commitments to ADR¹⁹⁹ will eventually be overturned as being not freely consented to.

What then do I suggest? Despite my concerns that the *Joint Standards for the Conduct of Mediators*, for example, is too broad and ambiguous in the particular areas which need texture and detail, by virtue of the complexity of the tasks involved in ADR (i.e., conflicts, advice giving, and evaluation), I do think we can specify some “discretionary”²⁰⁰ aspirational standards which commit us to providing alternative justice, as well as alternative dispute resolution, based on adherence to ethical, moral and “good” non-adversary principles. Outcomes should not be coerced (there must be real consent); parties should feel as if they have been given a fair opportunity to choose

197. See MARK D. BENNETT & MICHELE S. G. HERMANN, *THE ART OF MEDIATION* 118 (1996) (discussing the issues and techniques implicated in “power balancing”); see also PHYLLIS BECK KRITIK, *NEGOTIATING AT AN UNEVEN TABLE: DEVELOPING MORAL COURAGE IN RESOLVING OUR CONFLICTS* 161–324 (1994); see generally Grillo, *supra* note 15 (discussing the diverse and opposing contexts of mediation in family court cases from a gender-conscious analysis).

198. Whether consent is enough to satisfy justice criteria remains a contested question among jurists. See ROBIN WEST, *THE OTHER UTILITARIANS* (1996). In ADR ethics we must be concerned about whether consent is real and thus, will have to carefully scrutinize and perhaps go beyond simple contract enforcement standards or important process issues will be merged (and lost) in contract doctrine (as I believe has already happened with Supreme Court arbitration jurisprudence). See Paul Carrington and Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

199. Such as in many banking, consumer, health, and employment contracts.

200. I use the term in the sense offered by William Simon. See William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988).

(self-determination) and participate in their proceedings (democratic participation); and the process should be conducted by parties and neutrals who behave fairly (and without partisanship as third parties, even if they can not be totally neutral and detached). This may seem like a process-based ethics,²⁰¹ and I have, in other contexts, urged some substantive evaluation of negotiated results,²⁰² but we must begin there. I think we can hope to command that solutions reached through ADR be fair and just, but we will inevitably have to rest on the common law development of the particularities of the ethics of the processes (which are different and varied) that make up ADR and which, at least in the case of some negotiation and mediation, have different goals or objectives informing their ethics.

In short, adversarial ethics will not inform what is good "ethical" practice at either the micro-behavioral²⁰³ level or at the macro-justice level.²⁰⁴ Like good common law lawyers and ethicists, we will deduce our "pragmatic" ethics from the specifics of the new world of problem-solving we hope(d) to create with distinctively different processes.

As I have argued for the substantive justification of ADR (and settlement) on the basis of democratic, party-empowering participation, consent and quality of solutions, and outcomes,²⁰⁵ then so must the ethics (and justice) of ADR be judged by these goals and purposes and not the goals or purposes of adversary representation. There are different processes because these processes have different purposes and therefore, they must be judged in relation to what they promise and deliver. To judge the practice and ethics of ADR by the same standards as adversary litigation is by definition to find it wanting because it is often designed precisely to avoid *legalistic* and *adversarial* results. If we are to have better quality outcomes for dispute resolu-

201. Years ago Peter Strauss at Columbia Law School accused me of being the ultimate "process person"—do you teach any "substance" at all, he asked? (I teach Procedure, Negotiation, Legal Ethics, Mediation and ADR, and have taught Trial Advocacy, Administrative Process, and Civil Rights and Labor Law. The last two must at least meet the criteria of "substance.") Peter Strauss, it should be noted, is well known for teaching and writing about administrative and regulatory process.

202. See generally Menkel-Meadow, *supra* note 30, at 1162, 1213–19 (suggesting more substantive review of mass tort class action settlements).

203. There is growing empirical evidence that adversarialism does produce bad and "uncivil" behavior. See American Bar Found., *Uncivil Litigation: Problematic Behavior in Large Law Firms*, RES. L., Fall 1996, at 1 (reporting on research of Robert Nelson).

204. Internationalists report that American legalization and adversarialism may be "distorting" international trade law under GATT and WTO procedures. See Interview with Richard Diamond (transcript on file with author); see generally DEZALAY & GARTH, *supra* note 56, at 115–318 (discussing the various international arbitration approaches).

205. Menkel-Meadow, *supra* note 13, at 2692–93.

tion, for both the parties within them and for the legitimacy and acceptability of the process, then our ethics rules will have to reflect these different underlying goals:

1. Party consent;
2. Democratic participation (of clients vis-a-vis lawyers and multiple parties when disputes involve more than two dyadic players);
3. Responsive and particularized solutions to legal disputes and transactions, which do no worse harm to the parties (or other third parties) than non-resolution of the dispute;
4. An orientation to joint, not individualized, problem-solving,²⁰⁶ with a concomitant; and
5. "Problem-solving," rather than "adversarial" orientation to legal disputes and transactions.

Parties should seek to solve the underlying issues between them, which does not preclude obtaining legal rulings and judgments, where necessary, but it should preclude an orientation to "beating the other side" just for the sport of it. Whether it is possible to draft ethics rules and standards that reflect these goals, different from adversary representation, remains to be seen, but we must keep in mind that we are seeking different goals and perhaps different ethics.

V. CONCLUSION: OF ROLES AND RULES—ADR'S NEED FOR ITS OWN ETHICS

I know I have here raised more questions than I have answered, but my hope has been to make us all realize that ADR, in its various forms, requires more textured ethics and standards that meet its own demands and requirements. If we are really to attempt to achieve better, more creative, quality forms of dispute resolution that depart from traditional adversarial practices of lawyers, we will have to develop (and confront and discuss) the different issues that less adversarial forms of practice present to us. Since the underlying goals and values to be served by ADR are often different from the goals of adversary practice, it should come as no surprise that adversarial lawyer ethics will not provide the answers to non-adversarial (or at least less

206. In negotiation parlance, this is a utilitarian, Pareto-optimal approach to problem-solving; in other contexts I have urged it as a humanistic "ethic of care" that takes account of the opponent in legal problem solving. See Menkel-Meadow, *What's Gender Got to Do With It? The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 289-93 (1996).

adversarial) dispute resolution efforts. I look forward to the challenges ahead.