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Identifying the Role of Social Norms in Mediation: A Multiple Model Approach

by
ELLEN A. WALDMAN*

Reports from the field suggest that the “quiet revolution” in dispute settlement continues.¹ The steady growth of mediation² supplies persuasive evidence. Once primarily limited to labor-management negotiations³ and neighborhood disputes,⁴ mediation has spread to a wide variety of settings. Rather than suffer the delays and expense of adversary proceedings, couples pursuing divorce,⁵ environmental

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1. See LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 1 (1990).

2. Mediation has been described as “the facilitation of an agreement between two or more disputing parties by an agreed-upon third party.” CATHIE J. WITTY, *MEDIATION AND SOCIETY: CONFLICT MANAGEMENT IN LEBANON* 4 (1980). Vague and capacious, this definition encompasses a potpourri of procedures. This descriptive vagueness is a virtue if the definition’s purpose is to allow for and encourage a heterogeneous mediation practice. This vagueness becomes a definitional vice, however, when attempting to distinguish between models and to clarify how traditional mediation differs from sibling processes. This Article offers additional terminology in an effort to facilitate a more precise understanding of what mediation entails.

3. See generally JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 4 (1984); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2d ed. 1986); Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION Q.* 3, 5 (1983).

4. See JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 297 (2d ed. 1996) (discussing development of Neighborhood Justice Centers and the community mediation movement).

5. In 1991, mediators conducted an estimated 65,500 court-connected child custody mediations in California alone. See CALIFORNIA STATEWIDE OFFICE OF FAMILY COURT SERVICES, *A SURVEY OF CALIFORNIA FAMILY COURTS: ALTERNATIVE DISPUTE RESOLUTION (ADR) AND AUXILIARY SERVICES* 1 (1994).

agencies seeking compliance with governmental regulations,⁶ communities embroiled in public policy debates,⁷ employers facing discrimination charges,⁸ law enforcement agencies handling certain misdemeanors,⁹ and other civil disputants,¹⁰ have turned increasingly in recent years toward a "mediated solution." But, at the risk of belaboring the seemingly obvious, what exactly is a "mediated solution?"

Mediation's expansion into various fields has worked a subtle, yet pervasive change in some mediators' methodology.¹¹ Interventions that challenge the central premises and goals of traditional mediation have become part of mainstream practice. This evolution has generated some discomfort.¹² For the most part, however, observers have

6. See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 165-72 (1987); Lawrence E. Susskind, *NIDR's State Office of Mediation Experiment*, 2 *NEGOTIATION J.* 323, 324 (1986) (describing Massachusetts Mediation Service's mediation of hazardous waste disposal disputes).

7. See Lawrence Susskind, *Mediating Public Disputes*, 1 *NEGOTIATION J.* 19, 21 (1985) (describing state sponsored mediation to settle disputes surrounding the siting of hazardous waste facilities).

8. *EEOC: Alternative Dispute Resolution Policy*, 8 *FAIR EEMPL. PRAC. MAN. (BNA)* § 405:7301 (Feb. 1997) (discussing EEOC policy supporting use of ADR in civil rights cases).

9. For example, the office of the City Attorney in San Diego, California, employs a Dispute Resolution Officer to mediate between defendants and victims of minor criminal offenses such as vandalism, harassment, petty theft, and battery. Interview with Jerry Parker, Dispute Resolution Officer of the San Diego City Attorney's Office, in San Diego, Cal. (June 11, 1996).

10. In Los Angeles County, California, the numbers of disputes handled by private mediators or other alternative dispute resolution providers increased at an average rate of 15% per year between 1988 and 1993. This increase occurred at a time when the number of cases filed in the Los Angeles County courts decreased by .5%. ELIZABETH ROLPH ET AL., *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* 18-19 (Rand 1994). In Dallas, estimates suggest that one quarter of the non-family cases on the state district court dockets will be resolved through mediation. See Charles B. Camp, *Legal Remedy: More Dallas Cases Are Being Resolved With Mediation*, *THE DALLAS MORNING NEWS*, Oct. 26, 1993, at 1A, 10A. Between 1985 and 1988, the percentage of claimants willing to use alternative dispute resolution to handle claims against Traveler's Insurance Company increased from 50% to 76%. See OFFICE OF RESEARCH, STATE BAR OF CALIFORNIA, *GUIDE TO EARLY DISPUTE RESOLUTION: MAKING ADR WORK FOR YOU* 1-3 (1993) [hereinafter *MAKING ADR WORK FOR YOU*]; Peter S. Chantilis, *Mediation U.S.A.*, 26 *U. MEM. L. REV.* 1031, 1033 (1996) (noting that approximately half of all states have implemented some form of court-ordered mediation).

11. See *infra* notes 82-221 and accompanying text.

12. See Leonard L. Riskin, 12 *ALTERNATIVES TO HIGH COST LITIG.* 111, 111 (1994) ("Almost every conversation about 'mediation' suffers from ambiguity. People have disparate visions of what mediation is or should be."); Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) From ADR Services*, 26 *U. MEM. L. REV.* 975, 976-83 (1996) (noting that mediation, like several other ADR techniques, has acquired a confusing, and in some in-

viewed the internal tensions within the field as signs of salutary ferment, and as the necessary growing pains of an inexhaustibly flexible and protean dispute resolution process.¹³

Some mediation scholars have endeavored to order and classify these new approaches. They contrast the therapeutic approaches of some mediators with the bargain and exchange tactics of others.¹⁴ They compare problem-solving mediators who labor to "expand the pie," with adversarial mediators concerned only with distributing the pieces.¹⁵ They distinguish those mediators who narrowly define the issues under discussion from those who expand the circumference of negotiations.¹⁶

These analyses, while enormously helpful, leave unclear whether the differences in mediator orientation reflect distinct practice models, or simply stylistic variations on a unified theme.¹⁷ More importantly,

stances misleading, set of labels); Jacqueline M. Nolan-Haley, Book Review, 45 J. LEGAL ED. 149, 153 (1995) (reviewing KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994)) ("The proliferation of mediation programs and empirical studies of mediators' behavior belies any monolithic vision of mediation practice and raises important definitional and policy questions.")

13. Kimberlee Kovach observes that mediator practice often departs from the "traditional" or "purist" model, but concludes that "the ability to adapt and modify the mediation process is a primary benefit of its use." KOVACH, *supra* note 12, at 27.

14. See Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y REV. 7, 19-22 (1986) (identifying two types of settlement strategies among mediators: bargaining and therapeutic. The bargaining mediator looks for bottom lines, narrows issues, and sidesteps intractable conflicts of interest. The therapeutic mediator emphasizes emotions, expands the discussion, and explores past issues not raised by the immediate situation, complaint, or charge.)

15. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-801 (1984) (discussing competitive versus problem-solving negotiation styles).

16. See Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 44-54 (1993) [hereinafter Riskin, *Two Concepts*] (delineating the "broad" and "narrow" mediative approaches employed by different mediators in federally sponsored farmer-lender mediation). In a more recent work, Professor Riskin adds a second axis to his mediation taxonomy. Building on the earlier observation that mediators differ in the breadth or narrowness with which they define the problems to be addressed, Riskin notes that mediator strategies range along a facilitative/evaluative continuum as well. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) [hereinafter Riskin, *A Grid for the Perplexed*].

17. Indeed, these analyses tend to attribute divergence in mediation method and technique to differences in mediator temperament and profession of origin. See Emily M. Brown, *Divorce Mediation in a Mental Health Setting*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 127, 139 (Jay Folberg & Ann Milne eds., 1988) (noting that the methods of therapist-mediators differ from those of attorney-mediators, a difference that "derives from a basic difference in approach and orientation to the resolution of personal problems"). See also FOLBERG & TAYLOR, *supra* note 3, at 134 (discussing various ap-

they classify mediator behavior according to criteria which ignore, or treat obliquely, the role social norms play in the process.¹⁸

proaches to mediation, including labor mediation, therapeutic mediation, and lawyer mediation, and observing that "[t]he approach used to mediate a dispute depends on the nature of the conflict . . . [the] resources of the disputants and the background and training of the mediator"). *But see* Silbey & Merry, *supra* note 14, at 19 (noting that many mediators utilized both bargaining and therapeutic modalities, often in the same case).

Some mediation theorists suggest that the proliferation of varied mediation approaches indicates the growing number of practitioners who are simply "doing it wrong." *See, e.g.,* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 28-53 (1994) (describing settlement-oriented mediators who derail the transformative potential of mediation by focusing on settlement rather than the moral growth of the participants). *See also* Linda Stamato, *Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice*, 1994 J. DISP. RESOL. 81, 86 (suggesting that mediators functioning properly "do not . . . 'value' cases" and that enhanced mediator training might eliminate such errant practices). Very few existing analyses, however, suggest that the observed variety in mediation practice reveals the existence of separate, yet equally valid, mediation models. *But see* Riskin, *A Grid for the Perplexed*, *supra* note 16 (identifying four mediation "orientations," describing the distinct techniques and strategies employed in each, and embracing all four as credible forms of mediation). *See* Andrew I. Schwebel et al., *Divorce Mediation: Four Models and Their Assumptions About Change in Parties' Positions*, 11 MEDIATION Q. 211, 213-214 (1994) (identifying four different divorce mediation models that rely on different strategies to help parties reach agreement. Schwebel labels the models legal, labor management, therapeutic, and communication and information.).

18. Certain classifications implicitly look to the mediator's treatment of social norms as a way of distinguishing mediator modalities. *See, e.g.,* McCoy, *supra* note 12, at 981 (distinguishing "aggressive mediation," where the mediator helps parties evaluate their respective claims according to prevailing legal norms, from interest-based mediation where no such evaluation occurs); Riskin, *A Grid for the Perplexed*, *supra* note 16, at 23-24 (contrasting facilitative mediation, in which the mediator eschews reference to norms extrinsic to those the parties identify and consider important, and evaluative mediation, in which the mediator "assumes that the participants want and need her [the mediator] to provide some guidance as to the appropriate grounds for settlement based on law, industry practice or technology"). However, those classification systems that differentiate mediator styles based, in part, on the mediator's use (or disuse) of social norms, treat mediator reference to social norms as an instrumental strategy used to effect settlement. Under this view, mediators discuss judicial reasoning and make predictions to eliminate unreasonable and extreme demands, narrow the scope of the contested terrain, and lessen the parties' negotiating burdens. *See* Riskin, *A Grid for the Perplexed*, *supra* note 16, at 44 ("The evaluative mediator, by providing assessments, predictions, or direction, removes some of the decision-making burden from the parties and their lawyers. In some cases, this makes it easier for the parties to reach an agreement."). *See, e.g.,* Lenard Marlow, *The Rule of Law in Divorce Mediation*, 9 MEDIATION Q. 5, 11 (1985). This vision of evaluative or norm-based mediation devalues the content of social norms. It emphasizes the utilitarian, rather than deontological purposes served when a mediator references social norms in a dispute. The typology set forth in this Article reverses the focus. While recognizing that discussion of social norms may help a case settle, it assumes that inclusion of social norms in mediation agreements may in fact yield "better" agreements. It further assumes that many mediators who discuss social norms in their mediations are motivated by the same assumption.

Although the mediation literature is rich with “thick descriptions”¹⁹ of various mediator styles, it lacks a theoretical framework that takes adequate account of the disparate role social norms play in different mediation models. This conceptual gap hinders our efforts to construct meaningful professional standards, and impedes both practitioner and client understanding of what mediation entails. Heightened attention to the role of social norms in mediation is necessary to allow mediators to adequately explain their methodologies and to allow clients to supply informed consent to mediator interventions.

This Article proposes a refinement of mediation theory in an effort to clarify discussion and comprehension of the field. It seeks to separate out the variety of processes grouped together as mediation and distinguish them based on their divergent treatment of social norms. It suggests that what passes as mediation today constitutes not one, but three separate models.²⁰ It terms these models “norm-generating,” “norm-educating,” and “norm-advocating” respectively. These interventions are similar in that they all employ mediative techniques.

19. “Thick description” was originally defined as ethnography that observes and interprets human culture as a system of signs and symbols. See generally Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3-30 (1973). More generally, it has come to denote description which transcends the mechanical rendering of events and situates human action in a rich temporal, spatial, and cultural context. See also Bette-Jane Crigger, *Negotiating the Moral Order: Paradoxes of Ethics Consultation*, 5 KENNEDY INST. ETHICS J. 89 (1995) (offering a “thick” description of ethics consultation and its larger effects on public moral discourse). For a particularly “thick” and illuminating description of mediation practice, see *WHEN TALK WORKS: PROFILES OF MEDIATORS* (Deborah M. Kolb & Assocs. eds., 1994).

20. Although the models are distinct, reflecting separate approaches to social and legal norms and pursuing slightly different goals, they are not mutually exclusive. A mediator may use each of these models in different cases, or, indeed, when handling different issues in the same case.

Professors Silbey and Merry described mediators as inclining toward either a “bargaining” or “therapeutic” approach, but clarified that these modalities should be understood as conceptual constructs, not quantitative descriptions of what mediators do. See Silbey & Merry, *supra* note 14, at 7-8, 19. In contradistinction, Professor Riskin intends his system, which distinguishes between narrow and broad problem identification and facilitative or evaluative strategies, to describe the practices of actual mediators (while acknowledging some mediators cross over and draw from different models). See Riskin, *A Grid for the Perplexed*, *supra* note 16, at 26 n.60. I believe that the models herein described do in fact accurately depict the practice of some mediators and mediation programs. However, for many other mediators, these models represent idealized forms from which they draw selectively in particular cases. A divorce mediator, for example, may select one model at one phase, and a second model at a different phase in the same case. See *infra* notes 100, 212 and accompanying text.

However, they differ in their relationship to existing social and legal norms.²¹

The model characterized as “norm-generating” corresponds to traditional notions of mediation,²² in which disputants are encouraged to generate the norms that will guide the resolution to their dispute. In this model, disputants negotiate without recourse to existing social norms. The models characterized as “norm-educating” and “norm-advocating” constitute more recently evolved paradigms, in which societal norms occupy a significant role in the disputants’ negotiations.

This Article contends that drawing a conceptual distinction between these related but separate processes is necessary if mediation theory is to keep pace with actual practice. Although existing classifications fruitfully illuminate certain issues, answers to other increasingly pressing questions remain obscure. As the mediation field moves to assume the insignias of an established profession, it faces a number of challenges. How is mediator education and training to be organized and evaluated? Is licensure or certification necessary to

21. At various points in this Article I refer to legal and social norms interchangeably. By this usage, I do not mean to suggest that they are equivalent. When I speak of social norms, I mean to include those principles and standards that have attained consensus status in society. Legal norms consist of principles and standards encoded in the law. Of course, many social norms are instantiated in legal codes. See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW* 11 (1983). These social norms may also be termed legal norms. However, some social norms are not enshrined in the rule of law. This may be because they are implicated in few disputes, are sufficiently politically sensitive to ensure legislative avoidance, or have only recently begun to command widespread support. In another paper, I have suggested that received wisdom about child development as well as universally respected bioethical principles may be characterized as social norms, but not as legal norms, because they have not yet been adopted in binding legal texts. Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 726 n.23 (1996).

Although mediators may make mention of both legal and social norms in their sessions with parties, the role of legal norms in mediation has received much more attention. See James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 486 (1996) (“the question of whether a mediator should provide such [legal] information and evaluation is vigorously contested”). But see Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified?*, 30 U.S.F. L. REV. 665, 675 (1996) (implicitly suggesting that social norms have a place in divorce mediation and that divorce mediators be trained in child development as it relates to the construction of parenting plans). The point, for purposes of this Article, is that whether the mediator discusses social or legal norms, the same controversies obtain.

22. This model is the archetype that many mediators, especially those trained to work in Neighborhood Justice or community mediation centers, assume occupies (or should occupy) the entire mediation field. See BUSH & FOLGER, *supra* note 17; see also Trina Grillo, *Respecting the Struggle: Following the Parties’ Lead*, 13 MEDIATION Q. 279, 279 (1996) (noting that transformative mediation, which is norm-generating in its inattention to social norms, is “the very essence of good mediation”).

protect the consumer? If so, how are such programs to be established? What core set of ethical principles should guide mediator behavior?

The existing theoretical framework cannot do the work required to adequately confront these questions. Adherence to an all-encompassing definition of mediation creates confusion within the mediation literature, performance standards, and ethical codes. The tripartite model this Article proposes will help dispel this confusion and will allow for the creation of more useful professional guidelines.

Part One describes the traditional "norm-generating" model, drawing on a dispute scenario ("the neighborhood spat") well-known to mediation trainers and students alike. Additionally, this Part offers a brief outline of the types of disputes in which the norm-generating model is most commonly and advantageously used. In describing the stages and techniques associated with this model, I will be treading ground familiar to anyone with passing knowledge of conflict resolution theory. I review this information, however, for an idiosyncratic purpose: to pinpoint those process stages and mediative techniques common to each of the three models, and to set the stage for a discussion of each model's differences.

Part Two traces the development of the "norm-educating" and "norm-advocating" models. It then provides an example of the norm-educating model drawn from one mediator's account of a typical divorce mediation, and sketches the dispute qualities which render application of the norm-educating model appropriate.

Part Three sets out the norm-advocating model, using a case study from a mediation project located in one of New York's busiest hospitals. It demonstrates that mediators employing the norm-educating and norm-advocating models utilize mediative techniques, but modify those techniques to include legal and social norms in the process. Part Three further suggests that norm-advocating mediation may be valuable in disputes which require the application of social norms, but are susceptible to a variety of satisfactory resolutions within the limits set by those norms.

Part Four addresses why recognition of the tripartite scheme is important. The blurred contours of our current mediation theory obstruct efforts both to define mediator competence, and to devise a consistent set of ethical standards. A survey of scholarly works and statutory schemes seeking to quantify and regulate mediator competence reveals an utter lack of consensus regarding what it is mediators

should be expected to know and do.²³ Similarly, the ethical guidelines formulated by professional organizations inconsistently adjure mediators both to respect disputant autonomy and to override disputant agreements that contravene societal norms of fairness and equity.²⁴

Conceptualizing mediation as a process comprising three separate models allows for a resolution of these tensions. It reveals that substantive knowledge of the social norms related to the disputed issues is irrelevant in a mediation process that follows the norm-generating model, but very important in both the norm-educating and norm-advocating models. It highlights the primacy of disputant autonomy in the norm-generating model and exposes the values that may trump a disputant's autonomous choice in the norm-advocating model. In sum, recognition of the tripartite scheme clarifies that a mediator's required knowledge base and ethical compass may vary depending upon the mediation model used. It allows for much needed revision and clarification of existing qualification standards and ethical codes, and paves the way for further consideration of the types of disputes in which each of the three mediation models may be most profitably employed.

I. Traditional Mediation: A Norm-Generating Process Using Mediative Techniques

A. Description of the Norm-Generating Model

What follows is a classic example of norm-generating mediation. While the details of implementation may vary,²⁵ the process described below displays the model's general features.

Ed and Fran are neighbors. Ed is twenty years old and works the five-to-ten shift as a chef at the local diner.²⁶ Ed purchased his home seven months ago and is enjoying living away from his family

23. See *infra* notes 213-265 and accompanying text.

24. See *infra* notes 268-283 and accompanying text.

25. For example, some mediators conduct most of the mediation in separate meetings with each party. The ground rules may differ from mediator to mediator. In states that have enacted statutes protecting the confidentiality of mediation proceedings, the mediator informs the parties of these protections, rather than securing an additional contractual agreement. See Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 2 n.6 (listing profusion of state statutes establishing a mediation privilege).

26. This scenario derives from a mock mediation exercise in NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW: TEACHER'S GUIDE* 33-38 (1987).

for the first time. Celebrating his freedom, he routinely has boisterous weekend parties that extend until midnight or one in the morning.

Fran has lived in her house fifty of the seventy-one years of her life. She has always enjoyed the neighborhood, until recently, when Ed moved next door. Now, she is kept awake by the sound of Ed's motorcycle cruising in at ten-thirty on week nights, and by the loud music coming from his parties on weekends.

Fran telephoned Ed during one weekend party to complain about the noise, and the music dimmed temporarily. After a brief interlude, however, the volume began to climb to its former level, and Fran called the police. After that, when the noise became intolerable during parties, Fran did not contact Ed. She simply called the police directly. Fran also suspects that Ed revs his motorcycle when he comes home simply to irritate her.

After one particularly raucous weekend, Fran saw Ed walking down the street with some companions. Fearing another party in the making, Fran called out, "Change your disgraceful ways." The companions turned out to be Ed's parents. In retaliation, Ed bought some red paint and painted "I love sex" in big letters on Fran's door. When Fran opened the door, she saw the message and saw Ed running with a paint can. She immediately called the police and said she wanted Ed prosecuted for defacing her property. The prosecutor said that her office could not prosecute the case immediately and suggested that Fran attempt mediation first. Doubtfully, Fran agreed.

The mediator, Mr. M., conducted the entire mediation with both Fran and Ed present together. He began by explaining the mediation process and his role as a third party neutral. He then secured their agreement to follow certain ground rules. Specifically, Ed and Fran agreed to eschew abusive language, to keep interruptions to a minimum, and to direct their comments throughout the mediation either to their fellow disputants or to the mediator, according to Mr. M.'s instructions. Mr. M. also secured Fran and Ed's agreement to be bound by certain confidentiality rules. Specifically, each agreed to forbear from using statements or documents generated during mediation in any future civil proceeding.²⁷

Next, Mr. M. asked Fran to explain to him, from her perspective, what had led to the mediation and what she would like to see ac-

27. Some mediators may broadly request that the parties promise to treat as confidential all statements made in mediation. Others may explain the relevant statutory provisions, and the situations in which information pertaining to the mediation must be disclosed by law. Others will require the parties to privately agree to more stringent privacy provisions than is required by statute. The exact treatment of confidentiality varies depending upon the applicable jurisdiction's statutory and common law, and the mediator's personal view of what the parties should be told about the issue. See Erin L. Kuester, Comment, *Confidentiality in Mediation: A Trail of Broken Promises*, 16 *HAMLIN J. PUB. L. & POL'Y* 573, 573 (1995) (arguing that mediation clients are often given the misleading impression that everything said in mediation is confidential, when, in fact, the protections conferred by law are much more limited).

complished during the session. Fran told Mr. M. about the problems with the motorcycle noise, the parties, and the graffiti on her door. She also told him of her affection for the neighborhood, her prior sense of safety and repose, her current discomfort, and her desire that Ed move out. Mr. M. reflected back²⁸ to Fran his sense that Fran was deeply frustrated and felt that her peace and quiet had been disturbed.

Mr. M. then asked Ed to relate his view of the issues and describe what, for Ed, would constitute a good outcome. Ed told Mr. M. that he felt entitled to enjoy his hard-purchased freedom and privacy. Ed also expressed to Mr. M. concern that Fran complained directly to the police without confronting Ed first; he vented his distress over Fran's ill-timed remark in front of his parents; and he expressed no remorse over the door, calling it "deserved payback." He concluded that, in his view, Fran's departure from the neighborhood would constitute a "good outcome." Mr. M. reflected back Ed's irritation over Fran's frequent calls to the police and Ed's embarrassment about being insulted in front of his parents.

After both parties had had an opportunity to tell their stories to him, Mr. M. presented a short summary of what he believed the issues to be and asked the parties to verify that the issues he had identified were indeed those the parties wished to address. Mr. M.'s list of issues was as follows: 1) motorcycle noise; 2) late night party noise; 3) lack of communication about noise; 4) lack of communication generally; and 5) concerns about respect and public humiliation.

Mr. M. then asked Fran and Ed to express to one another how they felt about being humiliated in public (Fran by the red lettered message and Ed by the remark to his parents), and to discuss the importance they place on feeling respected and comfortable in and around their homes. After Fran and Ed had done so and were feeling a little more empathetic and conciliatory toward one another, Mr. M. then asked them to brainstorm possible options for remedying the noise and communication problems. He asked them to discuss their schedules and to consider how they both might better pursue their favored activities without disrupting each other's lifestyle. He encouraged them to consider how better communication might provide avenues toward resolution.

In response, Fran and Ed began to articulate possible solutions, including altering the timing of the parties, the logistics of Ed's motorcycle use, and the structure of their future interactions. After listing a number of the proposed solutions on a large posterboard, Mr. M. asked Fran and Ed to identify those options which appeared to them most feasible and agreeable.

Fran and Ed, with Mr. M.'s help, winnowed down the satisfactory options until they were left with a series of mutual agreements. Ed

28. Mediators repeat or "reflect back" the emotions contained in the parties' statements to assure them that they have been heard and understood. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 165 (2d ed. 1996).

agreed to schedule his parties on the frequent weekends when Fran visited her sister. Ed also agreed to cut his motorcycle's engine one block away from Fran's house and walk his bike the final distance. Fran, in turn, promised to contact Ed directly if she had any problem with noise or any other behavior. In addition, Ed agreed to repaint Fran's door, provided Fran supply the paint and write an apology to his parents, which Fran agreed to do. Mr. M. then prepared a written agreement which contained these terms. He then made copies of the agreement for Fran and Ed and congratulated them on a job well done.

As noted, Mr. M.'s treatment of Fran and Ed's dispute conforms to the traditional "norm-generating" model of mediation. This process typically consists of several stages: *introduction, storytelling, exchange of views, option-generating, option-selection, and agreement writing*.²⁹

The first stage is the *introductory* or *contracting* phase, in which the mediator explains how the mediation will proceed and attempts to establish rapport and put a sense of trust in the process.³⁰ The next

29. Commentators differ in their enumeration and description of mediation's stages. See, e.g., FOLBERG & TAYLOR, *supra* note 3, at 38-72 (describing mediation as a seven stage process); KOVACH, *supra* note 12, at 24 (identifying nine necessary stages and four optional stages); CHRISTOPHER N. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 32-33 (1986) (describing mediation as a 12-stage process); John Haynes, *The Process of Negotiations*, 2 *MEDIATION Q.* 75, 86-87 (1983) (describing mediation as a set of structured negotiations in which the parties pass through three stages).

30. During this introductory stage, the mediator generally provides a brief explanation of the process, explains that as a third party neutral she has no authority to impose a settlement, discusses the confidential nature of the proceedings, sets several ground rules to facilitate open and balanced exchange, obtains the parties' agreement to abide by the ground rules, and explores the parties' commitment to resolving the dispute. See, e.g., FOLBERG & TAYLOR, *supra* note 3, at 38-47; ROGERS & SALEM, *supra* note 26, at 20-22; Mary B. West & Joan M. Gibson, *Facilitating Medical Ethics Case Review: What Ethics Committees Can Learn from Mediation and Facilitation Techniques*, 1 *CAMBRIDGE Q. HEALTHCARE ETHICS* 63-74 (1992). Generally, the ground rules require that disputants follow the mediator's directions regarding the process, agree to abide by whatever confidentiality provisions are established, and avoid abusive behavior. The San Diego Mediation Center, for example, requires that disputants agree to: 1) follow the mediator's instructions on when to address the mediator and when to speak directly to the other disputant; 2) work seriously towards a resolution; and 3) treat each other with respect throughout the mediation session. See *SAN DIEGO MEDIATION CENTER, INTRODUCTORY MEDIATION SKILLS TRAINING MANUAL* 27-28 (1996) [hereinafter *TRAINING MANUAL*] (on file with author); *ADR GROUP INTERNATIONAL, INC., MEDIATION STUDENT MANUAL* IV-14 (1995) [hereinafter *STUDENT MANUAL*] (on file with author) ("There are certain ground rules necessary to successful mediation. The primary rules are: 1) you do not interrupt each other, 2) we will all treat each other with respect; 3) there will be no name calling or insulting remarks.").

stage is the *storytelling* or *information gathering* stage.³¹ At this point, the mediator directs one of the parties to describe the conflict from her perspective. In some versions, the mediator also asks the party to identify what she would consider a "good outcome" and explain why.³² The mediator seeks to elicit all relevant facts by asking open-ended questions and seeks clarification where a disputant's telling of the story is disjointed or confused.³³ After both disputants have had an opportunity to describe the conflict from their perspective, the mediator then summarizes the key issues that have emerged from both parties' stories.³⁴

In the next stage, the *ordering* or *structuring* stage, the mediator sets the agenda for the rest of the mediation.³⁵ Often, the mediator pinpoints not only content issues, but also emotional concerns which are inflaming the dispute and impeding the parties' ability to find common ground.³⁶ The mediator assists the parties in identifying which issues are the most important and prioritizing the concerns underlying each issue or demand. The goal of the mediator in this stage is to provide some structure for the ensuing conversation, to break the parties' dispute into manageable components, and to direct the parties toward an organized and reasoned consideration of the elements of their conflict.³⁷

Once an agenda is set, the mediator initiates the fourth stage—the *exchange of views*.³⁸ The mediator asks the parties to speak di-

31. See, e.g., FOLBERG & TAYLOR, *supra* note 3, at 47-49; NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 22-27 (1987); West & Gibson, *supra* note 30, at 64.

32. See CENTER FOR DISPUTE SETTLEMENT, *MEDIATION FOR THE PROFESSIONAL* 17 (1996) [hereinafter CENTER FOR DISPUTE SETTLEMENT].

33. See, e.g., Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 *MEDIATION Q.* 151, 161 (1991) (arguing that a successful mediator facilitates "the production of a coherent narrative").

34. See, e.g., West & Gibson, *supra* note 30, at 64; TRAINING MANUAL, *supra* note 30, at 31-40; KOVACH, *supra* note 12, at 107.

35. See, e.g., FOLBERG & TAYLOR, *supra* note 3, at 49; West & Gibson, *supra* note 30, at 64; KOVACH, *supra* note 12, at 111; Margaret L. Shaw, *Divorce Mediation: Some Keys to the Process*, 9 *MEDIATION Q.* 27 (1985) (discussing importance of agenda setting).

36. At the San Diego Mediation Center, mediators are trained to organize an agenda that includes the parties' substantive concerns as well as the "blocking" issues—the emotional components blocking each party's ability to hear and empathize with the other's point of view. See TRAINING MANUAL, *supra* note 30, at 37.

37. See, e.g., KOVACH, *supra* note 12, at 111-14; MOORE, *supra* note 29, at 33; ROGERS & SALEM, *supra* note 31, at 28-30.

38. In some models, the parties' exchange of viewpoints comprises a separate stage. See TRAINING MANUAL, *supra* note 30, at 39-44; see also Judy H. Rothschild, *Dispute Transformation, the Influence of a Communication Paradigm of Disputing, and the San*

rectly to each other, often on a topic unrelated to the issue in dispute. This brief dialogue serves as an "ice-breaker," and encourages the parties to view each other more empathetically. Individuals caught in intractable conflict often demonize their adversary. The mediator's goal in this stage is to reverse this negative imagery. He³⁹ seeks to structure a dialogue that will remind each party of the other's essential humanity and of their common bonds. He helps create an environment where each party views the other as reasonable, with needs and concerns that must be attended to.⁴⁰

After the exchange, the mediator draws the parties toward the *option-generating* stage. In this stage, the mediator encourages the parties to brainstorm a range of possible solutions.⁴¹ The mediator urges the parties to be creative and even fanciful in imagining possible accords.⁴² The goal of the mediator during this stage is to help the parties relinquish the positions that they have advanced throughout the dispute and begin seeing the underlying issues in new and more constructive ways.

The *option-selection* stage commences when the parties have concluded their brainstorming and have begun evaluating the array of op-

Francisco Community Boards Program, in *THE POSSIBILITY OF POPULAR JUSTICE* 265, 291-92 (Sally E. Merry & Neal Milner eds., 1993) (discussing the second stage of the San Francisco Community Board mediation model in which the parties are encouraged to talk to each other about their feelings and develop an understanding of each other's perspective). In others, the promotion of understanding and empathy between the parties is presented as a generalized function which occurs throughout the mediation or in response to impasse. See John M. Haynes, *John and Mary: Sharing Parenting After Divorce*, 21 *MEDIATION Q.* 23, 25-26 (1988) (describing mediation in which mediator encourages parties to "walk a mile in the other's moccasins" to promote greater understanding and empathy); see also Christopher W. Moore, *Techniques to Break Impasse*, in *DIVORCE MEDIATION: THEORY AND PRACTICE*, *supra* note 17, at 251, 260-61 (explaining that mediators request parties talk about their perceptions of the dispute and each other in an effort to dissolve negative images and misperceptions); Alison Taylor, *A General Theory of Divorce Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE*, *supra* note 17, at 61, 73 ("Each participant must have the opportunity to understand the other's perspective in evaluating the importance of a certain option. Each must feel that his or her perspective is understood by the other.").

39. To avoid awkward instruction, I will use the pronoun "he," to signify he or she. I use the male pronoun only to counteract the common stereotype that women gravitate more frequently to low status helping professions than do men.

40. MOORE, *supra* note 28, at 169-72. Depending upon the level of animosity between the parties and the behavior of one or more parties, this is not always possible.

41. See, e.g., KOVACH, *supra* note 12, at 129-31; FOLBERG & TAYLOR, *supra* note 3, at 49; ROGERS & SALEM, *supra* note 31, at 30-33; West & Gibson, *supra* note 30, at 65.

42. Unconstrained and wide-ranging consideration of options is thought to increase the chances of arriving at a truly viable resolution. See, e.g., KOVACH, *supra* note 12, at 130.

tions that have emerged. In this stage, the mediator aids the parties in identifying principles or criteria with which to distinguish attractive options from unattractive options.⁴³ To this end, the mediator helps manage the parties' exchange of concessions and compromises and locate priorities and interests that can be traded for mutual gain. The mediator's goal in this stage is to narrow the range of options being considered and to move toward a solution that can be implemented and that will satisfy each party's critical needs.⁴⁴

In the final stage, *agreement writing*, the mediator reduces agreements to writing. The mediator checks with each party to confirm that the writing accords with each party's understanding of the agreements assented to during the mediation.⁴⁵ At this stage, the mediator may probe the parties' ability to implement the agreement and its durability over time.⁴⁶ The mediator may also urge the parties to develop contingency plans and strategies for coping with future conflict.⁴⁷ The mediator's goal in this concluding stage is to ensure that the written agreement represents a meeting of the disputants' minds, to probe the parties' commitment and ability to carry out the agreement, and to craft a mechanism for communication should further discord arise.⁴⁸

In sum, the mediator introduces the parties to the process, secures agreement to particular ground rules, facilitates an exchange of viewpoints, structures an agenda, encourages brainstorming of possible options, assists in the selection of viable options, and records the understandings reached, if any, in a written agreement.⁴⁹

Throughout the mediation, the mediator uses several techniques. He encourages face to face communication between the parties and engages in active listening, both to assure the disputants that he has heard their concerns and to confirm that he has understood the issues correctly.⁵⁰ He probes and uncovers the underlying needs and interests animating the parties' stated positions.⁵¹ He terminates personal

43. See Folberg & Taylor, *supra* note 3, at 53-57; Kovach, *supra* note 12, at 135.

44. TRAINING MANUAL, *supra* note 30, at 45-48.

45. *Id.* at 50-52; Folberg & Taylor, *supra* note 3, at 60-62; Rogers & Salem, *supra* note 26, at 28; West & Gibson, *supra* note 30, at 65.

46. Kovach, *supra* note 12, at 167-69.

47. *Id.* at 168; West & Gibson, *supra* note 30, at 65.

48. Kovach, *supra* note 12, at 163-70.

49. See MAKING ADR WORK FOR YOU, *supra* note 10, at 2-5.

50. See TRAINING MANUAL, *supra* note 30, at 79-80; West & Gibson, *supra* note 30, at 65.

51. See Roger Fisher et al., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 41-43 (2d ed. 1991).

attacks or other counterproductive conduct.⁵² He assists the more inarticulate party in identifying and explaining his position.⁵³ He constrains the more voluble party if that party's loquacity threatens to silence the other disputant.⁵⁴ He reframes and reorients disputant comments so that they are more palatable to the other disputant.⁵⁵ He shifts party focus from identifying past fault to determining future remedies.⁵⁶ He reframes conflict to permit more than one solution.⁵⁷ He focuses the parties on their best and worst alternatives to settlement⁵⁸ and plays the "agent of reality" when one party's expectations appear distorted.⁵⁹ He uses humor, shock tactics, metaphors, and stories to create dissonance in the party's thinking and facilitate review of

52. See Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 *MEDIATION Q.* 17, 20-21 (1984) (urging mediators to interrupt intimidating negotiating patterns).

53. *Id.* at 20 (stating that the mediator should compensate for a party's low-level negotiating skills).

54. See FOLBERG & TAYLOR, *supra* note 3, at 57 ("Maintaining some sort of equality in communication is important so that a verbose participant does not stifle the opinion of a quiet or passive one."); Rifkin et al., *supra* note 33, at 161-62 (arguing that a mediator should intervene to promote each disputant's ability to construct a coherent narrative).

55. KOVACH, *supra* note 12, at 108-09.

56. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1563 (1991) ("It is typical for mediators to insist that parties waste no time complaining about past conduct . . . and focus only on the future.").

57. See FISHER ET AL., *supra* note 51, at 57 (identifying negotiators' search for "the single answer" as one of four primary obstacles to creative problem solving).

58. *Id.* at 97-106.

59. See generally *id.* at 105; see also CENTER FOR DISPUTE SETTLEMENT, *supra* note 32, at 5 ("As agreement or its possibility nears, your (the mediator's) job is to increase each party's awareness of the other's needs and to build a realistic framework within which they can assess the costs and benefits of continuing or resolving the conflict."); Leonard Marcus, *Mediation, Arbitration, and Dispute Resolution*, in *RENEGOTIATING HEALTH CARE* 317, 345 (Leonard J. Marcus et al. eds., 1995) (noting that the mediator assists each party in realistically assessing options "in light of the recognized interests of the other"); Taylor, *supra* note 38, at 72-74 (explaining that the mediator serves as agent of reality by making "the participants doubt the assumptions and firmness of their original positions or perceptions"). Some mediators reality test by pointing out that the parties' expectations of how proposed options would work or how a third party decisionmaker would resolve their dispute are at odds with existing social or legal norms. See *id.* at 74 ("While mediators cannot make decisions for participants, they can remind participants of the sociological and statistical data about the options. Mediators in this situation have often reminded disputants of community norms or values . . ."); JAMES C. FREUND, *THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES* 15-16 (1994) (arguing that the mediator acts as agent of reality by persuading a party that he is overestimating the strength of his legal position or putting an absurd value on what is at issue). A mediator who reality tests by examining a party's proposals in light of the other party's goals is hewing to the norm-generating model. The mediator who reality tests by pointing out the disparity between a party's expectations and existing legal or social norms is adhering to a norm-educating approach.

additional options.⁶⁰ He uses flip charts or scratch paper to concretize the elements in dispute and to provide visual evidence of the parties' progress toward agreement.⁶¹

In using these techniques, the mediator exercises considerable control over the parties' interaction. Like a symphony conductor, he directs the order, pace, tone, and pitch of dialogue. At no time, however, does the mediator serve as a constraint on the parties' power of decision-making. He may question whether one party's demands are realistic, given the needs articulated by the other. However, he does not restrain deliberations by referencing concerns extrinsic to the parties.⁶² That is to say, in the mediation model I have characterized as "norm-generating," the mediator does not remove identified options from consideration simply because those options conflict with existing social norms.⁶³ As one influential mediation text explains:

The ultimate authority in mediation belongs to the participants themselves, and they may fashion a unique solution that will work for them without being strictly governed by precedent or being unduly concerned with the precedent they may set for others. They may, with the help of their mediator, consider a comprehensive mix of their needs, interests, and whatever else they deem relevant regardless of rules of evidence or strict adherence to substantive law.⁶⁴

The leitmotif of the norm-generating model, then, is its inattention to social norms. In an effort to spur innovative problem-solving, the model situates party discussion in a normative tabula rasa. The only relevant norms are those the parties identify and agree upon. As Lon Fuller has explained, traditional or norm-generating mediation

60. See Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 *MEDIATION Q.* 3, 15-16 (1995) (describing the mediator's use of rhetorical sleights-of-hand to dislodge parties from their entrenched positions).

61. *STUDENT MANUAL*, *supra* note 30, at VI-11.

62. See Sally E. Merry, *Mediation in Nonindustrial Societies*, in *MEDIATION RESEARCH* 68, 85 (Kenneth Kressel & Dean G. Pruitt eds., 1989) (demonstrating that American mediators are less direct than nonindustrial mediators and "are more concerned about achieving a lasting settlement than about enforcing societal norms"). As stated *supra* in note 59, those mediators who reality test by referencing legal or social norms depart from the traditional norm-generating model in favor of the norm-educating approach.

63. See *MAKING ADR WORK FOR YOU*, *supra* note 10, at 2-7 (stating that mediation is appropriate where resolution of the dispute is more important than the legal or moral principles involved).

64. *FOLBERG & TAYLOR*, *supra* note 3, at 10. See, e.g., Grillo, *supra* note 56, at 1559-61 (noting that mediation deemphasizes legal rules and principles, and accentuates a dispute's context and constitutive relationships. In such a forum, "each person's interests are important, but which person violated societal values and why he did so, is not.").

“is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.”⁶⁵

The norm-generating model has obvious appeal. It appears ideally constructed to promote disputant autonomy and satisfaction.⁶⁶ It promises more creative problem-solving⁶⁷ and avoids the rigidity and legalism⁶⁸ that attends more rule-based approaches. Although some scholars contend that this model is appropriate for virtually every variety of dispute,⁶⁹ the model appears to offer greater benefits and pose fewer harms in particular types of conflicts.⁷⁰

65. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971).

66. A dispute resolution process furthers individual satisfaction when the process “leave[s] the disputing parties feeling that their individual desires, as defined by themselves, have been satisfied, in terms of their experience and the outcome of the process.” Robert A. Bush, *Defining Quality in Dispute Resolution*, 66 DENV. U. L. REV., 335, 347 (1989). A dispute resolution process enhances disputant autonomy when it “strengthens the disputants’ capacity “to resolve their own problems without being dependent on external institutions, public or private.” *Id.* at 347-48. Many commentators and researchers have concluded that mediation more effectively enhances individual satisfaction and autonomy than norm-based processes like litigation and arbitration. See, e.g., Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH*, *supra* note 62, at 9, 27-29 (noting high level of user satisfaction with custody or visitation mediation services); Joshua D. Rosenberg, *In Defense of Mediation*, 30 FAM. & CONCILIATION CTS. REV. 422, 422 (1992) (Mediation “empowers the parties by enabling them to be the ultimate decisionmakers, and it allows the parties to reach agreements that take into account important facts that are often ignored in judicial decisionmaking. Mediated agreements are much more likely to satisfy the parties to a dispute than are court orders.”).

67. See Menkel-Meadow, *supra* note 15, at 754, 768-75. But see Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1376-77 (1994).

68. Judith Shklar uses “legalism” as a heuristic to stand for the subordination of moral reasoning to legal reasoning. Legalism reduces moral relationships to the recognition of “duties and rights determined by rules.” JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1 (1964). Legalism is problematic because it conflates morality with obeisance to rules and focuses on rights to the exclusion of relationships and responsibilities. See Bethany Spielman, *Invoking the Law in Ethics Consultation*, 2 CAMBRIDGE Q. HEALTHCARE ETHICS 457, 463 (1993).

69. See Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 278 (1996) (noting that a transformative, norm-generating approach is found “in the work of intervenors using diverse processes in diverse conflict contexts, including environmental and public policy interventions, team-building efforts in organizational and corporate settings, and international and interethnic conflict-handling processes.”). See generally BUSH & FOLGER, *supra* note 17, at 280-82 (arguing that the advantages inherent in the use of a transformative, norm-generating mediation model apply equally in all kinds of cases).

70. The confidence that dispute types can be effectively matched with dispute resolution systems is not universally shared. Compare STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES*, 435-37 (2d ed. 1992)

B. Identifying Paradigm Case(s) for Use of the Norm-Generating Model

The norm-generating mediation model is well-suited to conflicts in which the goals of enhancing disputant autonomy and preserving relationships are paramount.⁷¹ In these conflicts, the particular outcome reached is less important than the parties' active participation in its construction. Often, empowerment and relational concerns are primary because the competing goal of "doing justice" through the application of legal or social norms may not be possible, sensible or conclusive.⁷²

and Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 50 (1994) (examining the suitability of various dispute resolution processes from the parties' and the public's perspective) with 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, 12 n.52 (1991) (stating that attempts to allocate different disputes to different dispute resolution forms can only succeed at the margins, where the cases are "totally 'fact'" or "totally 'law'") and Bush, *supra* note 66, at 346 (arguing that the context of a dispute does not significantly affect definitions of what constitutes a quality process, and, consequently, does not affect the choice of process itself).

71. See ROGERS & SALEM, *supra* note 31, at 44-51. Rogers & Salem identify additional factors which, if present, would favor the use of mediation. These include: 1) the courts do not provide the relief the parties are seeking; 2) the parties want to settle the matter promptly and with minimal expense; 3) voluntary compliance with the disposition is particularly desirable; 4) one or both of the parties want to avoid the establishment of judicial precedent or a judgment that may have a preclusive effect; 5) the parties and their lawyers have difficulty initiating negotiations and/or lack negotiating skills; 6) the parties have differing appraisals of the relevant facts and law; 7) the dispute is polycentric, requiring complex trade-offs; and 8) confidentiality is desirable.

72. The proposition that "justice" (a slippery concept itself) is defined and implemented through the rule of law is a rather dubious one in many circles. See Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986). Certainly, the application of legal norms in many situations yields results that offend instinctive notions of fairness. See *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937) (holding insane defendant liable for battery, even though the impulse to strike is a by-product of the mental illness over which defendant has no control). Still, generally speaking, giving effect to legal norms in dispute resolution is thought preferable to ad hoc decisionmaking for several reasons: 1) it imparts consistency in decisionmaking and ensures that like cases are treated alike; 2) it serves a guidance function, creating markers which allow decisionmakers to order their future conduct according to known standards; and 3) it reflects and buttresses the public values embodied in authoritative legal texts. See generally Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 23-24 (1987); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984); Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 842-56 (1984).

Often, the inquiry as to whether alternative dispute resolution methods generate "just" or "fair" outcomes has been answered by comparing mediated settlements with adjudicated settlements in similar cases. See Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179 (1991); see also David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 387 (1989). However, many scholars note that the proper basis of comparison is not the "shadow verdict"—the likely outcome if the dispute went to court,

Application of legal or social norms may be impossible for two reasons. First, the parties may be disputing terrain where opposing factions have articulated contradictory norms, but neither norm has achieved consensus status in society. Thus, a conflict involving the provision of arguably futile medical care would be suitable for norm-generating mediation because no ethical or legal consensus exists regarding how futility is to be defined.⁷³ No legal norm directs how claims for futile care be treated.⁷⁴

Second, the parties may be disputing in the interstices of public regulation—in an area so private or of so little public concern that it has not been the subject of regulation.⁷⁵ Heated neighborhood disputes often revolve around domestic practices that have not given rise to legal restriction or guideline. Zoning ordinances do not ordinarily specify when individuals shall work in their gardens, cook their meals, or wash their clothes. Yet, all of these activities provoke discord. In these types of conflicts, even if the goal of preserving relationships were less vital, resolving the dispute by recourse to a legal standard would prove futile because such a standard rarely exists.

but the “shadow bargain”—the likely result if the dispute were resolved in lawyer-dominated negotiations absent the intervention of a mediator. Luban, *supra*, at 388. However, to the degree that lawyer-dominated negotiations are heavily influenced by the likely adjudicated verdict, it is not clear how dramatically the shadow bargain diverges from the shadow verdict in most cases. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 5 (1992). *But see* Luban *supra*, at 400-01.

In a recent article on court mediation, Jacqueline M. Nolan-Haley suggests that just decisionmaking involves “making knowledgeable choices based on an understanding of relevant law.” Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 75, 91 (1996). Although I would agree that just decisionmaking is enhanced when parties understand the norms relevant to their dispute, it is not clear to me that every instance of informed decisionmaking is just. Parties may, under duress or dire straits, agree to vastly unequal distributions, knowing that they are foregoing benefits to which they are legally entitled. Their knowing sacrifice does not make the distribution just.

73. See Steven Miles, *Futility and Medical Professionalism*, 25 SETON HALL L. REV. 873, 875-76 (1995) (describing the futility debate as “a cacophony of proposals”).

74. Compare *In re Baby “K,”* 16 F.3d 590, 592 (4th Cir. 1994) (requiring hospital to maintain infant on respirator despite the fact that treatment was arguably futile in light of infant’s anencephalic condition) with Virginia Health Care Decisions Act (“Nothing in this article shall be construed to require a physician to prescribe or render medical treatment to a patient that the physician determines to be medically or ethically inappropriate.”). VA. CODE ANN. § 54.1-2990 (Michie 1994).

75. See Diane E. Hoffmann, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821, 825 (1994) (arguing that, in mediation, disputed issues are presumed to be private and best decided by the personal norms that the parties calibrate to their own relationship).

In some disputes, application of legal or social norms may be possible but not sensible. This may be true where the norm is sufficiently inconsequential when compared to competing objectives⁷⁶ such that it may be overridden without fear of substantial harm to either the parties or the public interest.⁷⁷

To illustrate, imagine a dispute between neighbors. Neighbor A has filed a claim against Neighbor B for tying a clothesline on a branch of a tree rooted on Neighbor A's property. Neighbor B defends that he has an easement because he has openly and continuously used the tree to support the clothesline each year for the past ten years. Legal norms do exist setting forth the conditions under which the law will recognize an easement. However, those norms are designed primarily to facilitate orderly relations between land-users, not to safeguard essential societal values. It is more important that these neighbors work out a compromise which allows them to happily enjoy their property than to give voice to the values underlying the law of adverse possession.⁷⁸

In a third type of dispute, application of legal or social norms does not conclude the problem. Even where decisionmakers agree to be guided by certain norms, disagreements may persist as to what specific outcome the norms require.⁷⁹ For example, consider a custody dispute between divorced parents. Both parents seek sole custody of their five year-old son. The son has a close relationship with each parent. The mother is a sophisticated urbanite. She resides in the middle of a cosmopolitan city and possesses sufficient funds and leisure to introduce her child to, in her words, "the finer things in life." The father is a farmer raising crops and livestock in a rural area sev-

76. These objectives may be any goals the parties wish to achieve by pursuing an informal, nonlegal dispute resolution process. These objectives may include: 1) preserving relationships; 2) maintaining confidentiality; 3) encouraging self-determination; and 4) disposing of the dispute cheaply and swiftly. See KOVACH, *supra* note 12, at 40-41 (listing party objectives and case characteristics which render mediation appropriate).

77. See, e.g., Hoffmann, *supra* note 75, at 862 (explaining that mediation is appropriate where "[t]here is little or no state, societal or institutional interest in the outcome of the dispute—the ramifications of the agreement will be felt only by the disputing parties, there will be no significant externalities to the agreement").

78. For an empirical study demonstrating one cattle-ranching community's allegiance to informal community constructed norms, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (demonstrating that cattle-ranchers disregard legal doctrine and instead apply self-generated norms that maximize the objective welfare of the group).

79. Hoffmann makes this point when she notes that disputes well-suited to mediation "may be framed as having more than two mutually exclusive outcomes." Hoffmann, *supra* note 75, at 861. Where guiding legal norms are indeterminate, multiple outcomes may be consistent with these norms.

eral hours from the city. The father, while busy on the farm, can offer the boy a wholesome, bucolic setting, complete with farm animals, house pets, and an abundance of land to play on and explore. The relevant legal standard dictates that the custody decision be made "in the best interests of the child."⁸⁰ Here, both parents can offer the child different, but arguably equally valuable experiences.

Application of the legal norm in this instance does not tilt the decision in either direction. Good arguments exist that the child's best interest would be advanced by awarding the mother sole custody because she can offer the child a stimulating cultural education. Equally good arguments suggest that the father should be awarded sole custody because of the healthy, safe, and robust environment that he can provide his son. The "best interest" standard is, in this case, indeterminate.⁸¹ It allows for several different, but equally satisfactory outcomes.

In many disputes, the value to the disputants of forging a swift, economical and self-determined resolution dictates the use of a norm-generating mediation model. In these instances, often no social norm exists. If one exists, it is too indeterminate to settle the dispute or too inconsequential to warrant strong consideration. However, not every dispute is so configured.

II. The Norm-Educating Process Using Mediative Techniques

A. The Development of Norm-Educating and Norm-Advocating Mediation

As noted earlier, mediation first attained widespread use in this country in labor negotiations and community disputes.⁸² The norm-generating model which evolved in these contexts fits comfortably

80. See *In re Donna W.*, 472 A.2d 635, 644 (Pa. Super. Ct. 1984) (reviewing trial court's custody determination to ascertain whether best interest standard was correctly applied).

81. Numerous commentators have argued that the best interest standard is indeterminate under any set of facts. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 957 (1979).

82. See *supra* notes 3-4 and accompanying text. Some scholars locate the antecedents of American mediation in colonial practices and the local, autonomous, and insular conciliation boards of immigrant groups. See generally AUERBACH, *supra* note 21, at 25; FOLBERG & TAYLOR, *supra* note 3, at 3-4. Although scholars chart the growth of various mediation "movements" differently, compare MURRAY ET AL., *supra* note 4, at 290 (characterizing family disputes as "an early arena for application of mediation") with Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 CONCILIATION CTS. REV. 1, 11-20 (1982) (dating inception of the family mediation movement in the

with the subject matter of those disputes. The collective bargaining topics most frequently and successfully handled in mediation involve salary, sick leave, working hours, and other conditions of employment.⁸³ In these types of conflicts, the bargaining frequently occurs between relative equals.⁸⁴ Furthermore, discussions of salary and vacation time, absent extreme and outrageous party demands, do not ordinarily call into play defined social norms or principles. The same can be said where two neighbors are arguing over the volume at which one plays music late at night.

However, once mediation began to play a role in the resolution of divorce, environmental, criminal, and civil rights disputes, critics began to express concern about the process' inability to assimilate and apply social norms to the problems at hand.⁸⁵ The opportunity mediation created for parties to dictate the norms that would guide the solution to their dispute began to appear, to some, as a threat to the

mid to late 1970s), most agree that mediation attained its first and most visible niche in labor/management and neighborhood disputes. See KOVACH, *supra* note 12, at 19-20.

83. One study of 104 cases mediated by the British Advisory, Conciliation, and Arbitration Service (ACAS), revealed that 73% of all disputes surrounding issues of pay and other conditions of employment were resolved, while only 46% of the disputes concerning union recognition and other nonsalary matters reached a settlement. According to the authors, this finding is unsurprising because "issues involving pay and related matters more readily lend themselves to compromise solutions than issues that do not involve a continuous scale, such as recognition. Also, in disputes concerning recognition or matters of hiring and firing, positional commitments and dedication to principles often do interfere with the exchange of concessions." Jean M. Hiltrop, *Factors Associated with Successful Labor Mediation*, in *MEDIATION RESEARCH*, *supra* note 62, at 241, 246-47.

84. Management and worker representatives are usually equally well-informed and wield relatively equal power in the mediation. Consequently, labor mediators can confidently assume that a fair and balanced agreement will emerge through the parties' robust assertion of self-interest. See Schwebel et al., *supra* note 17, at 216; Pamela S. Ingram & James R. Markowitz, *Ethical Issues in Mediation: Divorce and Labor Compared*, 8 *MEDIATION Q.* 19, 21-22 (1985).

85. See, e.g., AUERBACH, *supra* note 21, at 145 ("[A]lternatives prevent use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them."); *NO ACCESS TO LAW* (Laura Nader ed., 1980); Brunet, *supra* note 72, at 17 ("Proponents of compromise solutions that ignore positive law give too little weight to the substantive policies that the positive law promotes."); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 *GEO. WASH. L. REV.* 482, 590 (1987) (expressing concern that mediation of employment discrimination claims may compromise complainant rights because "[m]ediation owes no allegiance to established norms, and one party's sophistication may prejudice the other party in achieving a just or fair result"); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* 1, 14-18 (1981) (arguing that mediators of environmental disputes should ensure that the substantive decisions reached in mediation create good precedent and take into account the interests of unrepresented third parties).

continued articulation and enforcement of principles that society holds dear.⁸⁶

Feminists, for example, argued that channeling support and custody issues into a process which often excluded lawyers and eschewed "rights-talk"⁸⁷ deprived women of the fruits of divorce law reform.⁸⁸

86. See generally Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 267, 267-320 (Abel ed., 1982). Owen Fiss and Richard Delgado are two important spokespersons for this view. Owen Fiss, in his declamation against ADR, argues that informal settlement buys peace between the parties at the expense of public values. Fiss, *supra* note 72, at 1085. Fiss views litigation as a mechanism for "using state power to bring a recalcitrant reality closer to our chosen ideals." *Id.* at 1089. Dispute resolution systems, Fiss writes, should seek

not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

Id. at 1085.

Richard Delgado and colleagues make a similar point in concluding that informal dispute resolution is likely to disadvantage racial and ethnic minorities. According to Delgado's syllogism, a liberal democracy such as our own prizes equality and other values important to disadvantaged classes. Because ADR fosters compromise and concession, it cannot advance these equality norms as well as does formal litigation. For this reason, "ADR may work against the best interests of the disadvantaged." Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359, 1399 (1985).

87. See Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 *DENV. U. L. REV.* 437, 472-96 (1989) (noting that the adversary system is occupied with identification, elaboration, and defense of rights, while the alternative dispute resolution system shifts attention to individual interests and needs).

88. The feminist critique of mediation is voluminous. Trina Grillo's diatribe against mandatory child custody mediation, for example, portrays mediation as dangerous for women generally, and black women in particular. Grillo, *supra* note 56, at 1565, 1572-81. In her article, Grillo argues that mandatory mediation precludes women from "naming" (perceiving injurious experiences), "blaming" (transforming these experiences into grievances), and "claiming" (asserting rights). This short-circuiting of the rights-claiming process, Grillo contends, stymies women's healthful post-divorce development and denies them the entitlements formal adjudication would provide. *Id.* at 1565. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 523 (1992) ("[W]omen will obtain more advantageous outcomes when negotiating lawyers rely on law than when mediators rely on vague and biased equity norms."); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *HARV. L. REV.* 668, 679 (1986) ("In the last ten years, women have belatedly gained many new rights, including new laws to protect battered women and new mechanisms to ensure the enforcement of child-support awards. There is a real danger, however, that these new rights will become simply a mirage if all 'family law' disputes are blindly pushed into mediation."). See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 *HARV. L. REV.* 727 (1988) (arguing that mandatory child custody mediation disadvantages women because mediators are biased in favor of joint, rather than sole, custody arrangements, even where the mother served as primary caretaker of the children throughout the marriage); Carol Lefcourt, *Women, Mediation and*

Others critiqued the application of mediation to criminal offenses,⁸⁹ arguing that Victim-Offender Mediation (VOM) devalues the substantive and procedural norms observed in public prosecutions.⁹⁰ The mediation of public policy and environmental disputes sparked similarly framed debates.⁹¹ Who, it was asked, would advance society's interest in preserving scarce resources? Who would protect the rights and entitlements of those not directly involved in the mediation? Viewing mediation as a broadside assault on the rule of law, one observer advised that lawyer-mediators evaluate the fairness of any mediated agreement according to its approximation to the likely adjudicated outcome.⁹²

Family Law, 18 CLEARINGHOUSE REV. 266, 267 (1984) (arguing that increasing use of family mediation "undermines efforts and achievements by women in the family law arena"). For a summary of the salient themes in these critiques, see Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 114-20, 123-27 (1993).

89. See Roman Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 237-42 (Roman Tomasic & Malcolm M. Feeley eds., 1982); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1808-10 (1986); Gynn Davis et al., *Reparation in the Service of Diversion: The Subordination of a Good Idea*, 27 THE HOWARD JOURNAL 127, 133 (1988) ("[R]eparation is being seen as something outside justice, or instead of justice. It is a device whereby our machinery for resolving these matters—questions of fairness and obligation, innocence and blameworthiness—need not be brought into play."). For a more recent critique, see Jennifer G. Brown, *The Use of Mediation To Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

90. Brown, *supra* note 89, at 1251. Brown decries VOM's neglect of state criminal law, and its neglect of the retributive and deterrent goals of the criminal justice system generally. *Id.* at 1297-1301.

91. See Susskind, *supra* note 85, at 7-8 ("If the key parties involved in an environmental dispute reach an agreement with which they are pleased, but fail to take account of all impacts on those interests not represented directly in the negotiations, the public health and safety could be seriously jeopardized."). *But see* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) ("Susskind's demand for a nonneutral intervenor is conceptually and pragmatically incompatible with the goals and purposes of mediation.").

92. See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 515 (1991). To ensure that mediation does not supplant established legal norms, Maute would replace ethical rule 2.2 governing lawyer intermediaries with a new ethical rule governing lawyer-mediators. This rule would require:

When the parties are not separately represented, the mediator may prepare a written agreement resolving the dispute subject to the following conditions:

- (1) the terms approximate a likely adjudicated outcome, or the parties are adequately informed and voluntarily agree to different terms;
- (2) the parties are informed of their right to seek independent legal advice, and urged to do so when the agreement addresses important legal rights;

The mediation field responded to these concerns. Disputes surrounding issues where societal norms are clear and compelling⁹³ may still be mediated. However, what is termed mediation in these specialized areas often constitutes a norm-based process utilizing mediative techniques.

One variety of norm-based mediation is the norm-educating model. Below, I describe the norm-educating model, canvass its use in a number of different contexts, and suggest the paradigm case for its application.

B. A Description of the Norm-Educating Model Using Mediative Techniques

What follows is an example of the norm-educating model applied in a divorce dispute. While the model is now used in a variety of settings, it is perhaps most closely identified with divorce mediation practice.

Dan and Linda had been married 15 years when they decided to divorce.⁹⁴ Dan earns \$65,000 a year; Linda earns \$300 a month as a part-time secretary at the local church. She is resistant to the divorce, but knows she cannot prevent it. They have two daughters, Denise, age three, and Marie, age nine. They have been separated for five months. In that time, Dan has had very little contact with Denise and Marie. To avoid acrimony and expense, Dan and Linda have decided to mediate their divorce.

At the first mediation session, the mediator, Ms. K., provided Dan and Linda detailed information about the goals and assumptions of the mediation process. She showed them a copy of her Rules and Guidelines (Rules) which discuss confidentiality, courtesy, the nonrepresentational, neutral role of the mediator, and the necessity of obtaining outside counsel to review whatever mediated settlement is reached. In addition, the Rules require the parties to refrain from selling marital property or incurring large debts without first obtaining the other's approval. She then inquired briefly about

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

Id. at 515.

93. As discussed *infra* at notes 140-46, compelling social norms are important in the sense that they confer bargaining endowments on traditionally marginalized parties and protect unrepresented third parties. Social norms that embody the principles of equality, fundamental rights, and individual dignity are compelling. Even compelling social norms, however, may be waived or disregarded in situations where such waiver will not seriously disadvantage either the parties or the public at large.

94. This scenario is loosely based on one divorce mediator's account of a case "typical of the more than 500 divorce cases" that he has mediated. Stephen K. Erickson & Marilyn S. McKnight Erickson, *Dan and Linda: A Typical Divorce Mediation Case*, 21 *MEDIATION Q.* 3 (1988).

their most pressing issues. She learned that, for Linda, finances presented the most urgent problem, while, for Dan, his scant contact with his children was his greatest concern. After securing from both a commitment to the mediation process, Ms. K. then asked them to independently fill out a six-page questionnaire providing property, income, expenses, and other financial information before meeting for a second session.

Having assessed Dan's concern about not seeing his children as the most urgent, Ms. K. began the next session by suggesting that they begin talking about the children and custody issues. Ms. K. redefined the custody issue by explaining that the discussion was not about who would control the children, but rather an exploration of how both Dan and Linda could continue to be the kind of parents they wished to be. Ms. K. asked Dan and Linda to speak briefly about their hopes and fears about post-divorce parenting and to describe the parenting arrangements throughout the separation.⁹⁵ After learning about the ad hoc arrangements that had developed, Ms. K. explained that current psychological data reveals that most couples and children benefit from having a definite exchange schedule. In this way, each family member can plan and be certain about his or her schedule. Ms. K. then drew a twenty-eight box grid on a flipchart, with each box standing for a day of the month, and began to work with Dan and Linda on developing a custody and visitation plan that would accommodate their own, and the children's schedules. The presence in Dan's apartment of Dan's new girlfriend was a sticking point for Linda. However, when Ms. K. reflected back to Linda her resentment toward the woman and probed the lack of connection between the girlfriend's presence and the children's ability to spend quality time with their father, Linda dropped the objection. By the end of the session, they had worked out a temporary schedule for the next month.

At the next session, Ms. K. complimented the couple on reaching agreement concerning the children and suggested moving to the financial issues. Both Dan and Linda listed their income and expenses and constructed a budget of what they needed to survive. Ms. K. pointed out that given their combined income and expenses, the couple as a whole were 786 dollars short each month. Ms. K. suggested that couples generally chose one of four options when facing a shortfall: 1) cutting expenses; 2) increasing income; 3) borrowing from assets; or 4) using tax-planning principles to reduce taxes, thereby yielding more income to meet their needs.

After Dan and Linda explained to each other the basis for some of the expenses listed, they agreed to divide the shortfall equally. Dan did state, however, that the finances would be easier if Linda would get a real job instead of "volunteering" her time at church. Linda expressed interest in developing a more lucrative career, and Ms. K. suggested she give some thought to a plan to increase her earning

95. The mediator in *Dan and Linda: A Typical Divorce Mediation Case* did not engage in this intervention. See Erickson & Erickson, *supra* note 94. However, many other divorce mediators do. See Haynes, *supra* note 38, at 25-26.

potential. Dan was asked to obtain detailed information about his pension plan.

At the next session, when Linda began to talk about her financial future, it became clear that schooling was essential. Linda's nursing studies had been interrupted by the marriage, and she now wished to continue those studies. Dan, however, did not want to pay the \$4,000 per year tuition. Dan stated that Linda could pay for the tuition and books from her 1/2 share of the \$18,000 money market account they planned to divide equally. Linda felt Dan should pay for tuition since she had dropped out of nurse's training in the first year of their marriage to help Dan obtain his M.B.A. degree. When Linda queried Ms. K. if she had a right to a share in Dan's M.B.A. degree, the mediator replied that several courts, particularly New York State Courts, had ruled that a wife had an ownership interest in her husband's medical degree.⁹⁶

As the conversation degenerated into bickering over who had worked harder at the marriage, the mediator interrupted, shifting the focus from the past to the future, from casting blame to solving problems. Ms. K. advised,

I'm quite sure that if I sat here for the next three hours and listened to both of you, I would never be able to figure out all the facts exactly the way they happened. In fact, you didn't hire me to listen to the two of you present evidence about why Linda is now dependent on the marriage for support. I'm sure that each of you would have made very different choices during the last fifteen years had you known you would be sitting in my office today.

Ms. K. then pointed out that Linda and Dan shared a mutual desire to facilitate Linda's economic independence from Dan and suggested they work at brainstorming ways to accomplish that goal. They ultimately agreed that Linda would receive \$14,000 from the money market account, and Dan would receive \$4,000. Ms. K. then wrote up the custody and financial agreements in a memorandum, and sent a copy to Dan and Linda, with copies to their attorneys to file with the court.

96. See Erickson & Erickson, *supra* note 94, at 17. In the actual case, the author/mediator expressed his opinion that "it is probably easier to see the husband's degree as something that allows him to earn an income permitting him to pay spousal support." *Id.* Rather than treating the degree as a property asset, the mediator "encouraged them to view it as another aspect of the spousal support decision." *Id.*

Scant precedent exists for mediator suggestions based on how the mediator personally thinks issues might best be approached. While it is acceptable practice for mediators to reference social norms and evaluate disputant proposals according to those norms, it is less acceptable for mediators to evaluate or suggest that disputants adopt evaluative criteria based on the mediator's idiosyncratic views. *But see* JOHN M. HAYNES, *DIVORCE MEDIATION* 135 (1981) ("Although the mediator has the responsibility to honor the choices of the clients, this must always be tempered by the mediator's values. . . . When the values of the mediator and those of either or both of the couple clash too sharply, the mediator has a responsibility to discuss this with the couple. . . . If these differences cannot be compromised, either the couple will quit or the mediator should terminate them.").

Clearly, the model which Ms. K. employed is similar in many ways to the model which Mr. M. used. Ms. K. proceeded through the standard mediation stages, beginning with an introduction to and explanation of the process, and moving on to story telling, agenda-setting, option-generating, option-selection, and, finally, the concluding agreement writing stage.

In addition, Ms. K. availed herself of the full panoply of mediative techniques displayed by Mr. M. She engaged in active listening, reframed issues so as to avoid a win-lose perspective, encouraged empathic understanding of opposing views, separated needs from positions, helped the parties generate and evaluate options according to explicitly articulated criteria, and refocused the parties on the future instead of the past.

Ms. K.'s approach differed from Mr. M.'s, however, in her reference to relevant social and legal norms, which she used to provide a baseline framework for discussion of disputed issues. She adverted to these norms twice: first when Dan and Linda were beginning to consider what sort of custody and visitation arrangement to adopt, and, second, when questions arose as to whether Dan should be required to pay Linda some share of her tuition. In the first instance, the mediator educated the parties about existing norms in the child psychology field.⁹⁷ In the second, the mediator informed the parties about prevailing legal norms.⁹⁸

Ms. K. did not insist that the parties' agreement implement these norms.⁹⁹ It is likely that if Dan and Linda both strongly desired to retain a visitation schedule that was ad hoc and changeable from day-to-day, the mediator would have assisted them in codifying that agreement.¹⁰⁰ Similarly, if Dan and Linda both agreed that Dan's M.B.A.

97. See, e.g., Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer-Mediators*, 10 GA. ST. U. L. REV. 487, 517 (1994) (suggesting mediators use parenting experts and cite professional opinions on the effect of various custody arrangements on children in order to educate parents and focus them on their children's needs). For an example of the type of professional opinions that a mediator might reference in educating parents about child development, see ROBERT E. ADLER, *SHARING THE CHILDREN: HOW TO RESOLVE CUSTODY PROBLEMS AND GET ON WITH YOUR LIFE* 207-18 (1988).

98. The legal norm allocating compensation to a spouse who contributed financially toward the educational degree of the other spouse is well-established. See, e.g., *In re Marriage of Fahy*, 567 N.E.2d 552 (Ill. App. 1st Dist. 1991) (holding that professional degree is not marital property, but that working spouse's financial contributions to student spouse should be considered in the distribution of marital assets).

99. Neither did the mediator upon whom Ms. K. is based. See Erickson & Erickson, *supra* note 94, at 14-18.

100. It should be noted, however, that some mediators would not accede to this type of arrangement. When mediation disputants propose to deviate from social norms in ways

could fairly be excluded from all consideration, the mediator would likely have supported that conclusion, so long as she felt that the parties understood the implications of their decision.¹⁰¹

This model, then, is a norm-educating model which utilizes meditative techniques. Contrary to the norm-generating model, where discussion of societal standards is thought to impede autonomy and distract parties from their true needs, this model's consideration of

that seriously threaten third party interests, many mediators would advocate for inclusion of those norms, thus shifting to the norm-advocating model. *See, e.g.*, Donald T. Saposnek, *What is Fair in Child Custody Mediation?*, 8 *MEDIATION Q.* 9, 10 (1985) ("Although the child custody mediator is not explicitly burdened by the task of deciding justice for the child, there nevertheless exists an implicit ethical and moral responsibility for the mediator to influence a settlement that, in his or her opinion, seems at least in the adequate if not best interests of the child."); *The Association of Family and Conciliation Courts' Model Standards of Practice for Family and Divorce Mediation, Standard VI (B)*, in NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY & PRACTICE*, App. D, at 18 (1994) ("The mediator has a responsibility to promote the participants' consideration of the interests of children and other persons affected by the agreement"); Joseph P. Folger & Sydney E. Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10 *MEDIATION Q.* 5, 15 (1985) (reporting study in which a majority of mediators surveyed rejected parties' proposed settlement because it failed to consider the needs of the parties' children). Similarly, some mediators would not sign an agreement in which an impoverished wife released a financially secure husband from the obligation of paying any child support, because such an agreement would subvert the principle that children should not unduly suffer from their parents' decision to separate. *See, e.g.*, HAYNES, *supra* note 96, at 127-128 (asserting that a successful divorce mediation creates no victims and enables the children "to develop and maintain an ongoing relationship with both parents").

In certain court-referred child custody programs, enabling statutes require advocacy in favor of an agreement that benefits the divorcing parties' child(ren). *See* KAN. STAT. ANN. § 23-603(a)(8) (1995) (requiring that the mediator "ensure that the parties consider fully the best interests of the children"); CAL. FAM. CODE § 3180(b) (West 1994) ("The mediator shall use his or her best efforts to effect a settlement . . . in the best interest of the child . . .").

However, the dividing line between the norm-educating and norm-advocating model is a gray one. Much commentary, but little agreement, exists on the appropriate course of action when disputants contemplate an agreement that threatens harm to a third party. *See* David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 *LAW AND SOC. REV.* 613, 615 (1989) ("The tension between the professed commitment to self-determination and the imposition of an overriding ethical code remains unresolved by the mediation movement").

101. *See, e.g.*, John Lande, *Mediation Paradigms and Professional Identities*, 4 *MEDIATION Q.* 19, 37 (1984) (arguing that people's purposes should take precedence over particular rules, policies, and procedures when necessary to achieve substantive justice); Marlow, *supra* note 18, at 11 (explaining that legal norms, while not dispositive in mediation, may serve an instrumental purpose in "resolving the disagreement when all else fails"); Stephen K. Erickson, *The Legal Dimension of Divorce Mediation*, in *DIVORCE MEDIATION* 105-06 (Jay Folberg & Ann Milne eds., 1988).

social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible.¹⁰²

C. Uses of the Norm-Educating Model in Multiple Settings

This model is most visible in the divorce arena. The mid-eighties divorce mediation literature reveals skirmishes between those who thought that divorce mediation should mirror the generic norm-generating model¹⁰³ and those who believed that disputants should be educated about the norms encoded in family law.¹⁰⁴ Today the battle has largely subsided. Most commentators agree that a divorce mediator should have some familiarity with family law issues.¹⁰⁵ Descriptions of ongoing programs reveal that the mediator is active in ensuring that disputant negotiations are informed by relevant legal and social norms,¹⁰⁶ either by educating the parties himself¹⁰⁷ or by ensuring that they are educated by retained counsel.¹⁰⁸

102. See Nolan-Haley, *supra* note 72, at 86-95 (arguing that in court-based mediation programs, parties should be informed of their legal rights); Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified*, 30 U.S.F. L. REV. 665, 668 (1996) (stating that divorce mediators must be familiar with family and tax law in order to educate spouses about their legal entitlements and liabilities); CENTER FOR MEDICAL ETHICS, MEDIATION AND MEDICAL ETHICS: PROGRAM AND TRAINING MANUAL 2, 9 (1993) (on file with author) (defining mediation as process of "assisted decision-making" that provides participants "the best opportunity to reach an acceptable, durable agreement," achieved in part through the "[g]athering [of] necessary quality information").

103. See Waldman, *supra* note 88, at 96-100.

104. See, e.g., Foster & Kelly, *supra* note 102, at 668; STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, Standard IV(C) (Family Law Section of the American Bar Association 1983), reprinted in 17 FAM. L.Q. 455, 458 (1984) (recommending that mediators endeavor to assure that mediation participants are fully apprised of relevant statutory and case law by advising them to "obtain independent legal representation during the process").

105. See LINDA R. SINGER, *SETTLING DISPUTES* 40 (1994); Foster & Kelly, *supra* note 102, at 668.

106. Divorces implicate a number of different legal norms, including the rules which define and allocate community property, establish child and spousal support, and clarify the rights and obligations of custodial and non-custodial parents. Relevant social norms include psychological data illuminating the appropriate criteria for determining custody and visitation arrangements.

107. See Carol Bohmer & Marilyn L. Ray, *Regression to the Mean: What Happens When Lawyers are Divorce Mediators*, 11 MEDIATION Q. 109 (1993) (discussing attorney-mediators' practice in Georgia of educating divorcing spouses about relevant legal issues); GARY J. FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST* 31 (1993) (arguing that a mediator's job includes making sure that the parties have all the information—practical, economic, and legal—necessary to make "solid" decisions); see also Kenneth Kressel, *Frances Butler: Questions That Lead to Answers in Child Custody Mediation*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 19, at 17, 28, 42-43 (describing child custody mediator Frances Butler's directive style. Butler informs parents about child development re-

The norm-educating model, however, is not restricted to the divorce context. Court-referred cases, whose subjects range from bankruptcy,¹⁰⁹ to real property,¹¹⁰ to wrongful termination,¹¹¹ are likely to be "mediated" in the thick shadow of the law.¹¹² In Florida, a state

search and legal issues. According to Butler, "the workings of the legal machinery are not a mere hazard; a knowledge of the legal mechanism can . . . be a significant benefit by helping to point the way out of the legal quagmire into which the parties have tumbled.")

See also FOLBERG & TAYLOR, *supra* note 3, at 151-53 (recounting child custody mediation where mediator informs recalcitrant father seeking to limit the visitation rights of his in-laws, "[m]ore and more, the courts have been recognizing the rights of grandparents to visit their grandchildren after divorce"); FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION 10 (1983) (stating that as a mediator, she functions as an educator, "focus[ing] on teaching parents about the process of divorce and about their children's needs"); Adryenn Cantor, *Mediation and Family Law*, CAL. BAR J., 24, 24 (1995) ("The mediator's role at this juncture is to facilitate ongoing negotiations between the parties, using certain mediation skills . . . such as exploring whether the law, after it is explained to the parties, should be set aside for the parties' own equitable considerations."); Cohn, *supra*, note 97, at 502 (arguing that only lawyers should perform child-custody mediations "because a lawyer-mediator knows the legal system and knows the law").

108. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1357-73 (1995) (describing divorce mediation program where lawyers play an active role, both in informing parties of relevant legal norms and persuading parties to abandon claims that would be rejected by a court, if the divorce were to be litigated). See Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel"*, 12 MEDIATION Q. 17, 28-29 (1986) (suggesting that outside counsel can fulfill primary function of "ensur[ing] that society's, third parties', and the participants' interests are protected," while serving primarily as a neutral); Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 217-18 (1994) (arguing that attorneys should help clients formulate the result to be insisted upon in mediation and should prevent manipulation throughout the process).

109. See Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259 (1995).

110. See CAL. CIV. CODE § 1355(f) (West 1982) (requiring ADR processes in certain homeowner association disputes); see also Michael E. Klingler, *Practice Tips: Representing Clients in Real Estate Mediations*, 14 CAL. REAL PROP. J. 16, 24 (1996) ("Mediation is becoming the forum of choice for resolving most real estate disputes.").

111. See Matthew Mosk, *Judges Will Employ Mediators in Effort to Resolve Disputes*, L.A. TIMES, July 19, 1993, at B1 (explaining that judges in Ventura Courts are likely to refer wrongful termination cases to mediation because of the emotional component embedded in these cases).

112. Numerous statutes authorize local courts to mandate mediation in particular cases. See, e.g., ALASKA STAT. § 25.24.060 (Michie 1996); CAL. CIV. PROC. CODE §§ 1775-1775.16 (West Supp. 1997) (limiting mediation to cases where amount in controversy is less than \$50,000); IOWA CODE § 598.41(2)(d) (West 1996 & Supp. 1996); MASS. GEN. LAWS ANN. ch 211B, § 19 (West Supp. 1996) (authorizing chief justice for administration and management to establish pilot ADR program in various counties where properly screened cases will be sent to mediation); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1994); OR. REV. STAT. §§ 107.755-95 (1995); see also ROGERS & McEWEN, *supra* note 100, at 7:02, and App C. and 1996 Supp.

where court-sponsored mediation has grown exponentially,¹¹³ many mediators employ a "trashing" style, dissecting the flaws and weak points in each disputant's case according to prevailing legal norms.¹¹⁴ Further, the Florida rules governing court-appointed mediators acknowledge the use mediators make of legal rulings and standards by explicitly allowing mediators to provide legal information to disputants, provided the mediator is qualified to do so.¹¹⁵

A growing number of statutes require or allow for the mediation of disputes arising under their provisions.¹¹⁶ The statutes, however, clearly contemplate that the parties' negotiations will be informed by the duties and obligations created by statute, and, thus, implicitly require a norm-educating approach.¹¹⁷ In California, for example, the special education law creating educational entitlements for disabled children allows for mediation of those disputes arising under its terms. The law specifies that mediators must be knowledgeable regarding the

113. In 1991, nearly 50,000 cases filed in Florida were mediated, an increase of roughly 16,000 cases from 1989. FLORIDA DISPUTE RESOLUTION CTR., FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM, at viii and accompanying charts (1992), cited in Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 702 (1994). Legislation authorizing trial judges to mandate civil litigants mediate before pursuing their claim in court accounts for much of this dramatic growth. See FLA. STAT. ANN. §§ 44.1011-108 (West Supp. 1997) (renumbering and amending FLA. STAT. ANN. §§ 44.301-08 (1988)).

114. See James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47, 66-68 (1991). The other identified mediator styles are bashing and hashing. The bashing mediators chip away at the settlement figures brought to the table until the parties meet somewhere in the middle. *Id.* at 68-71. The hashing mediators most closely approximate the norm-generating model. The hashers approach the process flexibly, rely more on direct communication between the parties, and view themselves as orchestrators and referees rather than the hammer that pounds out a settlement. *Id.* at 71-73.

115. See FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS § 10.090(a) (1996). The Mediation Center of Kentucky also appears to utilize a norm-educating model. While Center mediators do not represent parties, in their role as agents of reality, mediators do provide information regarding relevant legal norms and will offer general guidance about how those norms might be applied if the dispute were to proceed through the adversary system. See Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 899-900 (1992-1993).

116. See, e.g., ALASKA STAT. § 45.45.355 (Michie 1996) (breach of motor vehicle warranty disputes); HAW. REV. STAT. § 205-5.1(e) (1993 & Supp. 1995) (geothermal energy development disputes); ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 1996) (land use mediation program); ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (1990 & Supp. 1994) (medical malpractice); OR. REV. STAT. § 109.305 (1990 & Supp. 1994) (adoptive child disputes). For a more extensive listing of statutes that provide for mediation of related disputes, see ROGERS & MCEWEN, *supra* note 100, at App. C and 1996 Supp.

117. In some instances, where the disputants are likely to enjoy vastly disparate power and where important third party interests are at stake, the statute might contemplate a norm-advocating model.

laws and regulations governing special education.¹¹⁸ Detailed observation of the mediations conducted by one experienced special education mediator revealed that the parties' negotiations take place in a "domain in which the bargaining is not merely in the shadow of law, but the law and institutional practices made available by law are *actively* shaping both the mediation and the outcomes."¹¹⁹

The norm-educating model figures prominently in employer-employee grievance disputes. *When Talk Works*,¹²⁰ a book profiling twelve well-respected mediators, devotes one chapter to the practice of William Hobgood, an established grievance mediator. It details his handling of a dispute over disciplinary action taken against a union member.¹²¹ In that dispute, Hobgood sought both to attain a fair outcome for Rosie, the union worker threatened with dismissal, and to improve safety in the employer's mine for all workers.¹²² Working with published company rules, Hobgood informally evaluated the parties' chances in arbitration, explaining how the collective bargaining agreement and company rules would likely be interpreted in Rosie's case.¹²³ Hobgood made clear that the parties could ignore his interpretation of the applicable norms as set forth in labor-management agreements. However, explanation of the norms and their likely implications was an important part of Hobgood's method.¹²⁴

118. See CAL. EDUC. CODE § 56504.5 (West Supp. 1997).

119. Susan S. Silbey, *Patrick Davis: "To Bring Out the Best . . . To Undo a Little Pain,"* in *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 19, at 64 (emphasis in original).

Sibley's portrait of Davis' work illustrates how the principles embodied in the special education statutes sculpt Davis' practice. In the first stage of the mediation depicted, Davis does not simply describe the mediation process to the parties, he discusses the legal requirement that children be placed in the least restrictive educational environment; see also Nolan-Haley, *supra* note 72, at 56 (noting that special education mediation practice has modified the traditional understanding that in mediation "individualized notions of fairness, justice, morality, ethics, and culture may trump the values associated with any objective framework provided by law.").

120. See *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 19.

121. See Deborah M. Kolb, *William Hobgood: "Conditioning" Parties in Labor Grievances*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 19, at 149.

122. *Id.* at 157-58, 183.

123. *Id.* at 178-82. See also Peter Feuille, *Why Does Grievance Mediation Resolve Grievances?*, 8 *NEGOTIATION J.* 131, 139 (1992) ("[T]he crucial feature of the mediator's role is the ability, as an experienced arbitrator, to inform the parties of the contractual strength or weakness of their grievance position."); Peter Feuille & Deborah M. Kolb, *Waiting in the Wings: Mediation's Role in Grievance Resolution*, 10 *NEGOTIATION J.* 249, 252 (1994) (describing mediator's prediction of how the grievance would be resolved if taken to arbitration as the "center-piece" of the mediation process).

124. Kolb, *supra* note 121, at 179-80 ("Hobgood argues that . . . 'it is the threat of arbitration that makes mediation work'"); see also Rolf Valtin, *The "Real and Substantial"*

Employers have also developed in-house mediation programs in an effort to stem the rising tide of discrimination, sexual harassment, and wrongful termination claims.¹²⁵ While not explicitly conceived as such, these programs typically adopt a norm-educating orientation. The procedures adopted by Science Applications International Corporation (SAIC), a high-tech, employee-owned company, provide one example. SAIC's Employee Dispute Resolution Guide [hereinafter Guide] sets out a four stage dispute management program in which mediation constitutes the third stage.¹²⁶ Although any employee may pursue the first two stages, management review and appearance before an appeals committee,¹²⁷ only employees with complaints involving legally protected rights may proceed to mediation.¹²⁸ The Guide describes the mediator as a third party who opens up communications, identifies options, and offers an objective perspective.¹²⁹ SAIC, however, only utilizes mediators with an employment law background.¹³⁰ The "objective perspective" is, thus, informed by judicial norms and standards.

Corporate counsel and employment law attorneys frequently extol the virtues of mediation as nipping potentially costly employee dis-

Benefits of Grievance Mediation, 9 NEGOTIATION J. 179, 182 (1993) ("[G]rievance mediation does not mean that the disputants proceed with sweetness and light, magnanimously reaching out for each other. They are still scrapping over contractual rights and obligations. However wide-ranging the discussion may become, attentiveness to contractual rights and obligations is inescapable.").

125. See, e.g., Howard A. Simon & Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, 21 EMPLOYEE REL. L.J. 29 (1995); see also John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist*, 12 NEGOTIATION J. 151 (1996) (describing the four-tiered dispute resolution system of a large private construction firm which includes both informal and formal mediation).

126. SAIC's EMPLOYEE DISPUTES RESOLUTION GUIDE 4-14 [hereinafter GUIDE] (on file with author).

127. Management review involves employee discussions with supervisory personnel. The Guide explains the review as "a voluntary process that allows you (the employee) to talk to your immediate supervisor or to a higher level of management without retaliation." See GUIDE, *supra* note 126, at 4. The appeals committee consists of a fellow employee, a member of the Technical Environment Committee, a manager from another department, and the corporate human resources director. Appearance before the appeals committee allows the committee to review the employee's problem and recommend solutions. *Id.* at 6.

128. See GUIDE, *supra* note 126, at 8. Mediation is deemed appropriate for discrimination, contract, and tort claims, as well as claims for violation of any federal, state, or administrative law or ordinance. *Id.*

129. *Id.*

130. Interview with Bob Levin, Corporate Counsel, SAIC (June 24, 1996).

putes in the bud.¹³¹ However, this praise is reserved for the norm-educating model of mediation. Those who laud the use of mediation in the employment context clearly assume that the mediator will be familiar with the relevant legal standards and will be able to offer information about how a judge or arbitrator would likely view the case.¹³²

The swift growth of mediation in the workplace prompted the American Arbitration Association to convene a consortium of government officials, corporate and union representatives, and plaintiff and management attorneys to discuss issues related to alternative dispute resolution in the workplace.¹³³ The group established a protocol for the mediation of statutory disputes arising out of employment relationships.¹³⁴ Designed to safeguard the due process rights of employees, the protocol requires the incorporation of legal norms into the process.¹³⁵ The protocol's centerpiece rests on improving mediator training and competence in employment and discrimination law. It notes that "the existing cadre of labor and employment mediators . . . although skilled in conducting hearings and familiar with the employment milieu . . . is unlikely, without special training, to

131. See Jane Bowling, *Business Turning to ADR to Avoid or Cut Short Litigation*, WARFIELD'S BUSINESS RECORD, Jan. 29, 1996; Robert B. Fitzpatrick, *Shouldn't We Make Full Disclosure to Our Clients of ADR Options?*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Dec. 7, 1995, available in WL at CAOI ALL-ABA 125, at 131-32; Stuart H. Bompey & Gary R. Siniscalco, *The Settlement Process in Employment Discrimination Litigation: A New Perspective*, in PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, June 5-6, 1995, available in WL at 522 PLI-LIT 329.

132. See Bowling, *supra* note 131, at 14 (quoting Timothy J. Geckle, Vice President and Deputy General Counsel of The Ryland Group Inc., "They're [the mediators] the ones who are playing the bad guy and saying 'Your case is a lousy case. You need to think about this and understand the risk. Defendant, you've got to understand that there's risk. You could get hit with this kind of result.'"); Fitzpatrick, *supra* note 131, at *131 ("They [the mediators] candidly discuss the strengths and weaknesses of each party's position as well as possible means of resolution."); Bompey & Siniscalco, *supra* note 131, at *385-86 ("An additional benefit of mediation is that both sides have the opportunity to hear how a knowledgeable neutral reacts to their respective versions of the events at issue without in any way being bound by the reaction. This not only will assist the former or current employee in assessing the claim, but it also should aid the employer in shifting from a defensive posture to a problem-solving orientation. In short, it provides 'a reality check' for both sides, which can then evaluate the risks and costs of litigation and, in turn, define what they are willing to give or take in settlement.").

133. See William K. Slate II, *Protocol Devised in Employment Conflicts: Resolution of Workplace Disputes Can be Achieved Through ADR*, THE LEGAL INTELLIGENCER, Nov. 13, 1995, at 11.

134. *Id.*

135. *Id.* at 12.

consistently possess knowledge of the statutory environment in which these disputes arise"¹³⁶ To remedy the problem, the protocol calls for training in statutory issues and suggests that such training be required of all mediators and be updated periodically.¹³⁷

The norm-educating model of mediation is viable and expanding.¹³⁸ It has been adopted in both private and public sector programs. Legislators, judges, advocates, policy makers, and mediators are attracted to this model because it allows for more expeditious, innovative, and congenial¹³⁹ dispute resolution, without wholesale subversion of established social norms. It appears particularly appropriate for disputes with certain features.

D. Identifying Paradigm Case(s) for Use of the Norm-Educating Model

Like the norm-generating model, the norm-educating model is appropriately used in disputes where party autonomy and relational concerns are the preeminent values for consideration. Yet, in these conflicts, unlike in disputes that call for the norm-generating model, application of social or legal norms is possible, conclusive, and relatively compelling. These disputes invoke norms that embody certain societal conclusions about what is just and unjust and confer entitlements on those who might otherwise remain disadvantaged and marginalized in private bargaining. Elsewhere, I have called these norms "protective norms" because they serve to protect one (or both) of the parties from exploitation or abuse.¹⁴⁰ Norms that require payment of permanent spousal support to a nonworking spouse after breakup of a long marriage, or prohibit the firing of an elderly worker solely because of his age could be characterized as protective norms.

136. *Id.*

137. *Id.*

138. See Waldman, *supra* note 21, at 723, 743-48 (reporting survey results in which a majority of San Diego Superior Court mediators inclined toward a norm-educating mediation model when confronted with divorce, personal injury, and employer-employee case studies); Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, *HAMLIN J. OF PUB. L. AND POL'Y* (Spring 1997) (forthcoming) (on file with author) (noting that 83.1 percent of lawyers practicing in Hennepin County, Minnesota who responded to a questionnaire from the state supreme court reported that they seek mediators who have substantive experience in the field of law related to the case. Additionally, approximately two-thirds of responding lawyers say that mediators frequently or always propose realistic settlement ranges.). These data suggest that Hennepin County mediators discuss legal norms in mediation with some frequency.

139. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 *OHIO ST. J. ON DISP. RESOL.* 211, 246 (1995) ("ADR is perceived to be friendly, flexible, and nicer than the uncivil exchanges that characterize litigation.").

140. See Waldman, *supra* note 21, at 739.

These standards grant rights to the displaced homemaker or terminated employee and safeguard both from impoverishment and rank injustice. Because these norms are protective in design and effect, it is important that parties be informed of their existence before making decisions which unknowingly dispense with the conferred entitlements.

The fact that a dispute implicates norms of which the parties should be informed does not, however, imply that the parties must adopt or implement them. In disputes calling for the norm-educating model, the parties' interests in reaching settlement, even a settlement that disregards social and legal norms,¹⁴¹ outweigh whatever societal interest exists in the application of those norms. Disputes in which party interests in settlement subordinate societal interests in norm-enforcement often share certain qualities.

First, the parties approach the mediation with sufficient resources such that their waiver of a legal entitlement does not appear coerced by circumstance. Although the parties may not enjoy equal power, they each possess sufficient competency that a decision to settle for less than the law might award represents a conscious, capable expression of will rather than a capitulation to oppressive conditions.¹⁴²

Second, the resolution of these disputes will primarily affect only the parties or entities at the table. The parties' resolution will not adversely affect third parties absent from the mediation. Equally important, while the dispute calls into play protective norms, they are not implicated so profoundly that their bypass will weaken social bonds and do violence to important public values. In certain contexts, the disregard of a protective norm, such as the antidiscrimination norms embodied in civil rights or gender equality legislation, creates a ripple effect. Far from affecting only the disputants, it places significant strains on the social fabric and casts doubt on the power and influence of the norm and its centrality in American life and institutions. A settlement in which one waitress trades her right to be free of

141. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2677 (1995) ("[P]arties may use settlement precisely to have other, nonlegal, principles structure their disputes and relationships. . . . [P]eople and entities in disputes may have a wide variety of interests (of which legal principles may be one class) and may decide that, in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their dispute.").

142. Clearly, distinguishing free consent from coerced surrender is no easy task. See *id.* at 2670 (challenging those who would develop a jurisprudence of settlement to consider "[w]hen is 'consent' to a settlement legitimate and 'real,' and by what standards should we (courts and academic critics) judge and permit such consent?").

admiring but objectifying comments at work for higher pay is less disturbing from a public policy viewpoint than a class action settlement in which thousands of women workers "agree" to continue to work in an obscene, insulting, and intimidating environment.¹⁴³ The norm-educating model is only appropriate in conflicts in which the relevant norms may be disregarded without weakening the ideals upon which our government and legal structure are based.

To further concretize this discussion, consider the custody dispute discussed in Part One. Imagine that both parents are relatively stable, resourceful, and powerful people. Imagine too that the father is threatening to withhold child support from the mother if she does not allow him to take the children five months of the year. In this situation, it is important that both parties be alerted to the legal norms which require noncustodial parents to pay child support, even when they object to existing custody arrangements. This norm protects both the child as well as the custodial parent, usually the mother.

Now, with this information, the mother may agree to the proposed seven-five month split, even though a court might have awarded her primary custody over the children for eleven and a half months of the year, and the same amount of child support being offered by the father. If so, the mother's desire to avoid a judicial proceeding and to settle for "less" than she might have obtained in court should be respected, so long as her decision is not forced or coerced.

Another important consideration involves whether the arrangement is beneficial or harmful to the child, a third party whose interests are unrepresented at the mediation. If norms in the field of child development indicate that such an arrangement would be detrimental to the child, as it would likely be if the child were school age, then arguably the parents should not be allowed to waive the standards established by those norms.

Waiver of legal norms should also be discouraged if the resulting agreement would seriously undermine the norms of gender equality, as it would if the child support payments were so low as to represent an effective abandonment of the mother and child. Arguably, the "divorce revolution" of the last twenty years represents a societal commitment (though not entirely successful) to avoid the impoverishment

143. Were counsel for the female Mitsubishi workers to settle their class action sexual harassment lawsuit against Mitsubishi for a minimal increase in salary, such public policy concerns would be primary. See Leon Jaroff, *Assembly-Line Sexism? Charges of Abusing Women-and Angry Denials-Rock a Midwestern Mitsubishi Auto Plant*, TIME, May 6, 1996, at 56.

of women and children following divorce. Private agreements which do injury to this commitment should be discouraged.

If, however, the parties' proposed custody and child support arrangement imperils neither the child nor the mother, and avoids seriously compromising the norms of gender equality, the parties should be permitted and encouraged to adopt and abide by it. Agreements which deviate from the legally determined outcome are permissible and encouraged, so long as the benefit to the parties outweighs any harms created.

The norm-educating model of mediation strikes a compromise between those who would bar discussions of law entirely from mediation practice and those who would outlaw mediation because it strays too far from the normative moorings of our adversary system. It stands for the proposition that the parties should be educated about their legal rights. However, if one or both of the parties decides to waive those rights, the mediator does not object. The norm-educating mediator views the parties, not society, as rightful possessor of the dispute. Consequently, the parties may, if they choose, reach a resolution that does not correspond entirely with societal norms.

This model, then, may be sensibly applied in disputes where the social or legal norms implicated are sufficiently important that the disputants should be made aware of them—but, the position of the parties and the context of the dispute does not demand their enforcement.¹⁴⁴ In other words, the disputant benefited by these norms may waive them, and such waiver is unproblematic, both from the disputant's and society's vantage point.

Although parties under this model may waive their rights and entitlements, such waivers, in the face of complete knowledge, seem less likely to occur and will likely be less dramatic than in the norm-generating mediation model.¹⁴⁵ Moreover, such rights-waivers, if made

144. I realize that this prescription is stated in such broad terms that it confounds precise application. Reasonable people may, and assuredly will, differ in their judgment as to which values should trump when. The task of matching a mediation model to an individual case is an undeniably contextual one. A full exploration of how this matching may be accomplished is beyond the scope of this article. My goal here is simply to sketch out one set of factors for consideration and future refinement.

145. See Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223 (1994) (comparing divorce settlements obtained by women in Georgia and New York in three separate fora: mediation, litigation, and a judicially assisted service. In Georgia, where lawyer-mediators informed parties of their legal rights, the mediated outcomes closely tracked the outcomes obtained in judicial settings. In New York, where most mediators are mental health professionals, women were disadvantaged, receiving fewer monetary rewards).

knowingly, may represent a party's conscious trade-off to obtain an alternate form of satisfaction. In such a situation, the legal right has served as an important bargaining chip,¹⁴⁶ and, to the degree that the legal entitlement has empowered one party to advance claims that she would otherwise be poorly situated to assert, the right has served its purpose; the norm has been effectuated. Thus, if a disgruntled employee, fired after alleging discriminatory treatment by a supervisor, waives her right to sue for wrongful termination in return for reinstatement, back pay, and contrite assurances of more respectful treatment, the legal norm prohibiting retaliatory discharge has, to some degree, been respected.

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

III. The Norm-Advocating Process Using Mediative Techniques

The following mediation case illustrates the model I term norm-advocating. It involves an ethical conflict which has arisen in the course of patient care.¹⁴⁷

A. A Description of the Norm-Advocating Model

Jennifer, an eighteen year old patient in the hospital intensive care unit (ICU), has Von Recklinghausen's disease ("elephant man disease"), a disfiguring condition in which the body is beset with growths, both internal and external. A tumor has developed on her neck, closing off the trachea and preventing her from breathing without mechanical support. Surgical removal of the tumor would enable her to breathe on her own. Jennifer, however, has refused the surgery, saying that she has suffered enough. Jennifer maintains

146. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 91 (1978); see also Mnookin & Kornhauser, *supra* note 81, at 968-69 (arguing that because negotiations take place in "the shadow of the law" legal entitlements may serve as bargaining endowments in negotiations).

147. This case was described in greater detail in NANCY N. DUBLER & LEONARD J. MARCUS, *MEDIATING BIOETHICAL DISPUTES* 44-47 (1994). The version presented here represents a slight condensation and variation of the original.

that the removal of the tumor will mean more pain and will do nothing to diminish the anguish, disablement, and disfigurement caused by her incurable condition. The attending physician in the ICU has bowed to Jennifer's refusal and has directed nurses to remove Jennifer from the ICU to a private room to die. He has further ordered that morphine be provided when needed.

The primary care physician is challenging this care plan and has called a consult with the bioethics mediator employed by the hospital. He tells the mediator, "How can we assist Jennifer in committing suicide? She doesn't truly know what she is doing."

The bioethics mediator assembles all the parties involved in Jennifer's case, including the ICU attending physician, the primary care physician, the primary nurse, the social worker, and a member of the psychiatry liaison service. The mediator begins by explaining that the purpose of the meeting is to achieve a meeting of the minds regarding Jennifer's care, and expresses the hope that an exchange of views and information will yield a resolution acceptable to all involved.

The mediator next moves into the "story-telling" phase, asking each caregiver to describe his or her understanding of Jennifer's medical history and present condition, including an assessment of Jennifer's mental state. All parties agree on the central facts of Jennifer's disease; however, there is some disagreement about her mental state. The primary care physician feels that Jennifer's decision is "suicidal," and suggests that she is not competent to determine the course of her care. The other parties agree with the attending physician's assessment that Jennifer is a mature and knowledgeable young adult, and, given her dire condition, her decision to refuse surgery is an eminently rational one.

After hearing the parties' understanding of the relevant medical facts and the controversies, the mediator constructs an agenda. She states that the issues seem to be whether the medical staff can or should ethically accede to Jennifer's refusal, and, if so, what care plan can be developed concordant with Jennifer's wishes and the medical staff's values.

The mediator asks the liaison psychiatrist to explain to the group the criteria for assessing patient capacity and then asks the psychiatrist to evaluate Jennifer's condition according to those criteria. The psychiatrist states that Jennifer does not appear to be clinically depressed; she appears able to understand the medical information conveyed, to appreciate its relevance to her condition, and to weigh the risks and benefits of the various alternatives. Thus, the psychiatrist states, in his view, Jennifer has the capacity to make important medical decisions.

The mediator next explains the ethical and legal consensus surrounding patient decisions to forego life-sustaining treatment. The mediator makes the following points:

- 1) Medical ethicists and courts distinguish between suicide, an act whose primary purpose is to cause death, and refusal of life-sustaining treatment, an act which seeks to avoid further burdensome medical treatment or disease-induced suffering.

When patients refuse treatment, their primary goal is to avoid extreme suffering; death is not their immediate object but the unavoidable by-product of their decision. Crucial differences in intent and causation differentiate permissible refusal of treatment from prohibited suicide.¹⁴⁸

2) The right of a decisionally capable patient to refuse life-sustaining care is based in the common law right of self-determination and in the constitutional right of liberty protected by the Fourteenth Amendment.¹⁴⁹

3) Many of the patients whom Dr. Kevorkian helped to die were not terminally ill. Even without treatment, they stood to live months and perhaps years with their disease. Dr. Kevorkian's machinery, not the underlying disease process, terminated those patient's lives. In Jennifer's case, her tumor will be the underlying cause of death.

The mediator's discussion reassures all medical staff that they can ethically go along with Jennifer's refusal. Disagreement persists, however, about how Jennifer is to be treated during the dying process. The mediator encourages the nurses and physicians to discuss their views on what medically and ethically should be done. The nurses express discomfort with the attending physician's order to remove Jennifer from her familiar surroundings in the intensive care unit, feeling that would be a form of abandonment. They are further uncomfortable with the provision of the amount of morphine ordered by the attending physician to keep Jennifer comfortable, fearing that will "cause" her death.

The mediator brainstorms with the parties, asking them to consider what options are available for allowing the present staff to continue caring for Jennifer, consistent with her decision. The mediator further informs the caregivers of ethics opinions promulgated by the American Nursing Association and the American Medical Association stating that "the secondary effect of hastening death is not a barrier to the necessary and effective use of pain medication." The mediator cites additional bioethics literature which encourages adequate provision of analgesia in terminal illness and locates the ethical difficulty in the failure to properly manage care at the end of life, not in morphine's side effects on respiratory function.

Because once Jennifer is removed from the respirator her death will likely be swift, one nurse proposes to keep Jennifer in the ICU with the staff she knows, ensuring that she is provided sufficient pain medication to avoid "air hunger" or other suffering. This option

148. See ALAN MEISEL, *THE RIGHT TO DIE* 66-69 (Supp. 1995) (discussing judicial rationales distinguishing the withholding or withdrawal of life-sustaining treatment from suicide).

149. See, e.g., *Thor v. Superior Court*, 855 P.2d 375, 381 (Cal. 1993) ("The common law has long recognized this principle: A physician who performs any medical procedure without the patient's consent commits a battery irrespective of the skill or care used."); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 277-78 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

ultimately commands universal agreement. By the end of the discussion, all parties, nurses and physicians, are comfortable with Jennifer's decision and a care plan that permits her to remain in the ICU until her death.

In this model, the mediator proceeded through the familiar stages common to the norm-generating and norm-educating models, using a repertoire of standard mediative techniques. In the introduction, she explained the mediation process to the parties. In the story-telling stage, she elicited from each party his or her perception of the relevant facts and issues. Next, she set an agenda, urged the parties to exchange ideas and brainstorm possible solutions, aided the parties in identifying the most realistic and satisfactory options for implementation, and then distilled the common ground reached into a written care plan.

In this process, however, the mediator not only educated the parties about the relevant legal and ethical norms, but also insisted on their incorporation into the agreement.¹⁵⁰ In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values. She apprised the parties of relevant social norms, not simply to facilitate the parties' informed decisionmaking and provide a beginning framework for discussion; she provided information about legal and ethical norms to secure their implementation.¹⁵¹

150. No health care provider is obligated to initiate a consultation to resolve an ethical dispute. See John A. Robertson, *Clinical Medical Ethics and the Law: The Rights and Duties of Ethics Consultants*, in *ETHICS CONSULTATION IN HEALTH CARE* 161 (John C. Fletcher et al. eds., 1989) (explaining that most institutions do not require ethics review or consultation). And a bioethics consultant's authority is generally limited to making recommendations to the parties. See John C. Fletcher & Maxwell Boverman, *The Evolution of the Role of an Applied Bioethicist in a Research Hospital*, in *ETHICS CONSULTATION IN HEALTH CARE*, *supra*, at 89. Further, the parties are not obligated to follow the consultant's recommendation. *Id.* at 90 ("When the bioethicist and a senior physician disagree about a proper course of action in a particular case, the bioethicist must withdraw after giving a recommendation and informing the physician's superior about the disagreement."). Thus, a mediator-consultant's "insistence" that the parties agreement concur with existing norms is limited by the fact that the parties may ignore this "insistence" if they choose. But see Susan M. Wolf, *Ethics Committees and Due Process: Nesting Rights in a Community of Caring*, 50 *MD. L. REV.* 798, 822-23 (1991) (arguing that ethics committees, by virtue of their claim to ethical expertise, exercise more power than their rhetoric suggests).

151. See DUBLER & MARCUS, *supra* note 147, at 43 (explaining that the boundaries of inquiry in any mediated bioethical dispute are set by "a finite catechism" of "ethical principles and legal rules" which "are central to and confine the process of mediation").

B. Uses of the Norm-Advocating Model in Multiple Settings

Although the norm-advocating model is less widespread, it is used to resolve a variety of conflicts, including bioethical,¹⁵² environmental,¹⁵³ zoning,¹⁵⁴ and, in some instances, discrimination disputes.¹⁵⁵

Environmental disputes involving public resources are often mediated via a norm-advocating model. In *Breaking the Impasse*, Lawrence Susskind and Jeffrey Cruikshank provide a theory of public policy dispute resolution and discuss several high profile environmental disputes that were successfully resolved through norm-advocating mediation.¹⁵⁶ Successful environmental mediations, they make clear, cannot be achieved merely by empowering the parties to decide matters according to their own agenda.¹⁵⁷ Rather, a successful mediation must both follow and set good precedent.¹⁵⁸ The resulting agreement should meet the same tests as agreements generated in "conventional judicial, administrative, and legislative mechanisms."¹⁵⁹

152. DUBLER & MARCUS, *supra* note 147; *see, e.g.*, Mileva Saulo & Robert J. Wagener, *How Good Case Managers Make Tough Choices: Ethics and Mediation*, 2 J. CARE MGMT. 10, 37 (1996) (describing a case manager mediating a dispute between an HMO plan member and her insurance provider. The mediator analyzed the case to identify the relevant ethical principles (autonomy, beneficence, and justice) and worked to achieve an allocation of health care resources that met a "clinically acceptable standard.").

153. *See infra* notes 156-168 and accompanying text.

154. *See* Barbara Filner & Michael Jenkins, *Performance-Based Evaluation of Mediators: The San Diego Mediation Center's Experience*, 30 U.S.F. L. REV. 647, 651 (1996) (discussing code violation mediation in which parties negotiated a resolution that conformed to relevant zoning regulations); *see also* CENTER FOR MUNICIPAL DISPUTE RESOLUTION, PROGRAM INFORMATION (1994) (on file with author) (discussing San Diego Municipal Court mediation program devoted to the mediation of zoning and other public policy disputes). The Center conducted its mediations within the framework established by local zoning ordinances. The Center's goal was to facilitate settlements that substantially complied with the regulations while improving constituent satisfaction and saving the city both time and money. Filner & Jenkins, *supra*, at 651. Interview with Susan Quinn, former director of the Center (July 12, 1996).

155. *See infra* notes 190-203. This should by no means be considered an exhaustive list of the uses of norm-advocating mediation, but simply an illustrative sampling.

156. *See generally* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987).

157. *Id.* at 21-25

158. *Id.* at 25.

159. *Id.* at 150. *See also* Lawrence E. Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 NEGOTIATION J. 117, 119 (1985) (suggesting that mediation should further larger societal goals, as well as the parties' interests: "When mediating public disputes, the goal is *not* to extract successive concessions from the parties or merely to settle differences through compromise. . . . The wise resolution of public disputes requires that attention be given not only to the interests of the parties at the table but also to the needs and concerns of future generations, diffuse interests and groups unable to articulate their interests effec-

Winsor Associates, an environmental mediation practice group, recently completed a mediation between the Pennsylvania Power and Light Company (PP&L) and the Pennsylvania Department of Environmental Protection (DEP).¹⁶⁰ PP&L, like many other utilities, had used PCBs (polychlorinated biphenyls, a carcinogen) as an insulator in transformers.¹⁶¹ PP&L knew that transformers at some sites had leaked, contaminating the utility pole and the surrounding soil.¹⁶² Because existing environmental codes mandated that PCB concentration not exceed certain levels, many of PP&L's sites required examination and remediation.¹⁶³ The DEP was responsible for monitoring this effort.¹⁶⁴ The parties chose to mediate the development of a multi-site remediation plan that would allow both company and agency to fulfill their legal responsibilities swiftly and economically.¹⁶⁵

Ultimately, the parties developed a technical model for identifying, prioritizing, and remediating sites, and a point system which enabled the parties to evaluate PP&L's progress each year.¹⁶⁶ In addition, they agreed to a spending cap, assuring PP&L that it would not be required to spend in excess of five million a year.¹⁶⁷ Although the ultimate goal of cleaning up the sites was predetermined, the parties discussed and reached an agreement on applicable technology, timing, and logistics. Environmental regulations defined the negotiating space within which PP&L was able to maneuver.¹⁶⁸ However, using a norm-advocating model, the mediator was able to spark innovative and creative problem-solving on implementation issues which the regulations did not address.

tively. The groups directly involved should feel their interests have been served, and the community-at-large should feel that a good precedent has been set (i.e., one that is consistent with prevailing notions of fairness).") (emphasis in original); Susan Carpenter, *Dealing with Environmental and Other Complex Public Disputes*, in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS (Karen G. Duffy et al. eds., 1991).

160. See generally Richard M. Thornburgh et al., MULTI-SITE AGREEMENTS: MANAGING ENVIRONMENTAL LIABILITIES THROUGH MEDIATION (1996) (unpublished draft on file with author).

161. *Id.* at 2.

162. *Id.*

163. *Id.*

164. *Id.* at 2, 11.

165. *Id.* at 2.

166. See *id.* at 7-8.

167. *Id.*

168. *Id.* at 10-11 (noting that DEP goals include "insur[ing] compliance with the appropriate environmental statutes and standards").

The conflict resolution structures set up to handle disputes arising under the North American Free Trade Agreement (NAFTA)¹⁶⁹ similarly contemplate a norm-advocating process utilizing mediative techniques. Complaints filed under Chapter Twenty¹⁷⁰ regarding interpretation or application of NAFTA¹⁷¹ proceed through three steps. First, the participating governments (Parties) consult on their own concerning the alleged violation or misinterpretation of NAFTA.¹⁷² If this is unsuccessful, the Free Trade Commission, consisting of cabinet-level representatives of the parties, attempts to mediate the dispute.¹⁷³ Finally, the Commission may convene an arbitral panel to render a recommendation.¹⁷⁴

In its efforts to facilitate a voluntary resolution prior to impaneling an arbitral board, the Commission is authorized to call on technical advisers, create expert working groups, or “make recommendations, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.”¹⁷⁵ Thus, Chapter Twenty mediations will consist, in part, of Commission members calling upon legal or trade experts to explicate the norms embodied in the 200 page NAFTA text and making recommendations to the Parties as to how they may modify their behavior so as to comply with those norms.¹⁷⁶

NAFTA also contains side agreements that establish separate dispute resolution procedures for environmental, health, and labor disputes.¹⁷⁷ The Environmental and Labor Accord procedures go into effect when one Party alleges a “persistent pattern of failure” by another Party to “effectively enforce” its environmental, labor, or health

169. North American Free Trade Agreement, 1993, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA].

170. *Id.* at 693-99 (citing arts. 2001—2022).

171. Chapter Twenty Proceedings are also triggered when “a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement” *See id.* at 694 (citing art. 2004).

172. *Id.* (citing art. 2006).

173. *Id.* at 695 (citing art. 2007).

174. *Id.* (citing art. 2008).

175. *Id.* (citing art. 2007(5)).

176. *See* David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT’L L.J. 407, 418-19 (1993) (arguing that NAFTA’s placement of mediation within the rubric of the Free Trade Commission will likely result in “stricter adherence to the agreement’s legal norms”).

177. North American Agreement on Environmental Cooperation, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter Environmental Accord]; North American Agreement on Labor Cooperation, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 [hereinafter Labor Accord].

laws.¹⁷⁸ The Complaint activates a four-step process, overseen by supranational commissions comprised of cabinet-level ministers from each Party:¹⁷⁹ the Commission for Environmental Cooperation handles environmental disputes, while the Commission for Labor Cooperation handles labor/health disputes.¹⁸⁰ As in Chapter Twenty disputes, consultation between the parties is the first step,¹⁸¹ followed by mediation by the relevant Commission,¹⁸² then arbitration by a panel,¹⁸³ and finally, if the panel report is not accepted by the violating Party, sanctions.¹⁸⁴ Significantly, even after the arbitration panel issues its report, the Accords allow for mediation among the disputing parties of an action plan which "normally shall conform with the determinations and recommendations of the panel."¹⁸⁵

The Commissions charged with mediating environmental and labor complaints are, like the Free Trade Commission, authorized to include experts in the mediation process, if helpful.¹⁸⁶ Indeed, under the Labor Side Agreement, an Evaluation Committee of Experts (ECE) may be established to analyze patterns in the enforcement of the health or labor standards at issue. The ECE reports its findings to the Commission for Labor Cooperation, and, with the benefit of the ECE report, the Commission is once again provided an opportunity to mediate with the Parties in an effort to avoid an arbitrated solution.

The NAFTA Side Agreements create an informal, flexible dispute resolution process that nonetheless works to bolster and uphold the domestic environmental and labor standards of each member Party. By weaving consultation, mediation, and arbitration functions together in a multi-step process, the Side Agreements give voice to

178. See Environmental Accord, *supra* note 177, at 1490 (citing art. 22 (1)); Labor Accord, *supra* note 177, at 1509 (citing art. 27(1)).

179. See Environmental Accord, *supra* note 177, at 1485-89 (citing arts. 8-19); Labor Accord, *supra* note 177, at 1504-07 (citing arts. 8-19).

180. Environmental Accord, *supra* note 177, at 1485-89 (citing arts. 8-19); Labor Accord, *supra* note 177, at 1504-07 (citing arts. 8-19).

181. Environmental Accord, *supra* note 177, at 1490 (citing art. 22); Labor Accord, *supra* note 177, at 1509 (citing art. 27).

182. Environmental Accord, *supra* note 177, at 1490 (citing art. 23); Labor Accord, *supra* note 177, at 1509 (citing art. 28).

183. Environmental Accord, *supra* note 177, at 1490-91 (citing art. 24); Labor Accord, *supra* note 177, at 1509-10 (citing art. 29).

184. Environmental Accord, *supra* note 177, at 1493-94 (citing art. 36); Labor Accord *supra* note 177, at 1512-13 (citing art. 41).

185. Environmental Accord *supra* note 177, at 1492 (citing art. 33); Labor Accord, *supra* note 177, at 1511 (citing art. 38).

186. Environmental Accord, *supra* note 177, at 1490 (citing art. 23); Labor Accord, *supra* note 177, at 1509 (citing art. 28).

the quality of life concerns embodied in environmental and labor restrictions while providing the Parties a measure of political flexibility.¹⁸⁷ The consultation and mediation steps are designed to allow the complained-against Party room to respond to allegations of noncompliance with domestic law, and to collaborate with trading partners in fashioning a mutually satisfactory remedy. However, the mediation process envisioned by the Side Agreements is clearly a norm-based one.¹⁸⁸ The designated third party neutrals—the Labor and Environmental Commissions—are directed to call upon both technical and legal experts to assist with mediation efforts. The Parties are also directed to mediate the creation of a remedial “action plan” following an arbitration ruling that domestic labor or environmental violations have occurred. The mediation process in NAFTA takes as its starting point the domestic regulatory structure of each Party and works solely within the interstices of that framework.¹⁸⁹

In like fashion, mediation of disability or discrimination claims under the auspices of the Equal Employment Opportunity Commission (EEOC) or the Department of Justice (DOJ) begins with the statutory mandate. In these mediations, the parties have an opportunity to articulate their needs and interests. However, these personal norms are effectuated only to the degree that they align with the statutory norms that the EEOC and DOJ are charged with enforcing.

In 1994, the EEOC, faced with a staggering backlog of cases,¹⁹⁰ initiated a pilot mediation program to handle employee discrimination

187. See Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 444 (1995) (arguing that the central feature of the NAFTA Side Agreements is its allowance for political adjustment. “The respondent is encouraged at every stage to improve its enforcement of environmental, health and labor standards, without having to appear to be responding to threats from the other governments.”).

188. *Id.* at 446-48 (stressing that while the ad hoc nature of the arbitral panels allows the United States to exert some economic leverage, reliance on post-negotiating bargaining power is curtailed to the degree the “dispute resolution procedure operates according to objective norms . . .”).

189. Unfortunately, NAFTA's dispute resolution structure only addresses difficulties created by one country's failure to abide by its own internal laws. It does not address problems created by the discrepancies between the environmental and labor standards of each Party. See Sam Howe Verhovek, *A Diplomatic Haze Pervades Park's Air Pollution Dispute*, N.Y. TIMES, June 7, 1996, at 1 (discussing air pollution created by coal-firing electricity plants that destroy views in Big Bend National Park. The plants meet Mexican environmental standards for emission of sulfur dioxide, but the Mexican emission standards are seven times less stringent than those of the United States.).

190. See Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 442 (1996).

claims.¹⁹¹ Following that effort, the EEOC convened an ADR Task Force to study the applicability of ADR techniques to EEOC functions. The Task Force endorsed "an ADR system built on principles of fairness and protection of statutory rights."¹⁹² The Commission approved the Task Force recommendation and voted to incorporate alternative dispute resolution into its charge-processing system.¹⁹³ Although the EEOC has embraced mediation with vigor and enthusiasm,¹⁹⁴ spokespersons stress that the Commission's evolving mediation initiative is not merely a device to speed the agency's handling of cases. Rather, the initiative is part and parcel of the Commission's "mission to vigorously enforce federal anti-discrimination law."¹⁹⁵ As ADR Task Force head Ricky Silberman explained, "First and foremost, the program must be fair, fair to the charging-party, fair to the respondent. To ensure fairness, all parties must be informed about their rights and responsibilities under the applicable statutes and about the mechanics of the ADR program, its potential benefits and drawbacks."¹⁹⁶ Given the EEOC's stated mission and objectives, it cannot adopt a mediation model which would leave to employees and employers the task of determining what disparate treatment means and what forms of discrimination will and will not be tolerated. Rather, mediation conducted by the EEOC seeks settlements which vindicate statutory norms.¹⁹⁷

191. *EEOC Pilot Suggests Mediation is Speedier Than a Typical Investigation by the Agency*, 13 ALTERNATIVES TO HIGH COST LITIG. 94 (1995). The EEOC contracted with the Center for Dispute Settlement to mediate cases referred by the Commission. Mediators from the Center for Dispute Settlement mediated 267 cases between April 1993 and February 1994. Settlement was reached in 52% of the mediated cases. When surveyed, 92% of the parties believed the process was fair. More than 80% said they would try mediation again. See Hodges, *supra* note 190, at 446-47.

192. News Release, U.S. Equal Employment Opportunity Commission, Apr. 28, 1995, at 2 (on file with author).

193. *Id.* at 1.

194. Congress's delay in reauthorizing the Administrative Dispute Resolution Act slowed development of the EEOC's ADR program. Since reauthorization, however, the District offices of the EEOC have continued implementing and expanding their program. Telephone Interview with Office of Communications, EEOC Headquarters (July 3, 1996); see also *EEOC Mediation Program Set to Begin*, 7 WORLD ARB. MEDIATION REP. 259 (Nov. 1996) (describing EEOC mediation program using law students and professional mediators to handle employment disputes).

195. News Release, *supra* note 192, at 2.

196. *ADR Task Force Presentation*, 4 EMPL. DISCRIMINATION REP (BNA) No. 17, at 554 (May 10, 1995).

197. See Hodges, *supra* note 190, at 486 n.301 ("Where mediation is occurring pursuant to a referral from the enforcement agency, the mediated agreements should be reviewed by the agency for consistency with the statute. Therefore, the mediator must be sufficiently knowledgeable to ensure such consistency.").

The Department of Justice, which, like the EEOC, has enforcement responsibility for several pieces of anti-discrimination legislation, has begun to use mediation to expedite processing of cases arising under the Americans with Disabilities Act (ADA).¹⁹⁸ The Department of Justice has awarded two grants to train mediators in the processing of ADA claims.¹⁹⁹ In both of these programs, the mediators are educated about the substantive provisions of the Act to ensure that they are equipped to analyze party suggestions in light of the parties' legal rights.²⁰⁰ As one mediator explained, "ADA mediations are 'rights-based' rather than 'interest-based,' which means that applicable law determines parameters of an equitable settlement, rather than a settlement being determined solely by the declared interest of the parties."²⁰¹ The parties to ADA mediations negotiate

198. Americans with Disabilities Act, 42 U.S.C. § 12101 (1990). The ADA prohibits discrimination against individuals with disabilities by employers, state and local governments, and in public accommodations. 42 U.S.C. §§ 12101-12213 (Supp. V 1993). See, e.g., *Administrative Conference Votes to Adopt ADR Recommendation for ADA*, 27 PENS. & BENEFITS REP. (BNA) No. 26 at 1516 (June 26, 1995) (stating that the Administrative Conference of the United States recommends that the agencies charged with enforcing the Americans with Disabilities Act should collaborate in designing mediation program).

199. See Amy Hermanek, *Title III of the Americans With Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457 (1994). The Justice Department funded a training project implemented by the Community Board Program in San Francisco in which mediators in San Francisco, Chicago, Denver, Boston, and Atlanta were trained to mediate ADA cases. See TARGETING DISABILITY NEEDS: A GUIDE TO THE AMERICANS WITH DISABILITIES ACT FOR DISPUTE RESOLUTION PROGRAMS, at 42 (1994) (on file with author); ANN HODGES, DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT 22 (1995). In addition, the Department has funded the Key Bridge Foundation to train and establish a network of mediators available to mediate ADA claims. See Hodges, *supra* note 190, at 446; KEY BRIDGE FOUNDATION, ADA-MEDIATION WORKSHOP: SELECTING, TRAINING, AND MONITORING PROFESSIONAL MEDIATORS FOR ADA COMPLAINT REFERRAL (no date) (on file with author) [hereinafter KEY BRIDGE TRAINING MANUAL].

200. See HODGES, *supra* note 199, at 60-61; KEY BRIDGE TRAINING MANUAL, *supra* note 199, at 28 ("Mediators have standards of practice that mandate bringing the highest level of expertise to the resolution of any dispute. Mediators who do not understand the ADA should not be resolving ADA complaints."); Lynn R. Anders, *Settling ADA Disputes Through Mediation*, CONN. L. TRIBUNE, Aug. 8, 1994, at 21 (stating that all volunteer mediators receive 15 hours advanced training for mediating disability-discrimination cases); Hodges, *supra* note 190, at 486-87.

201. Anders, *supra* note 200, at 21. It should be noted however that other mediators who handle disability disputes would likely characterize ADA mediations as both rights and interest-based. Indeed, in the Key Bridge Mediation training which this author attended on March 9, 1997, it was clear that the trainers intended mediators to attend to both the parties' rights and interests. Indeed, when Peter Maida, trainer and principal at Key Bridge, modeled for the trainees how he would conduct a disability mediation, he avoided discussion of the statute, focusing primarily on the parties' interests. Nevertheless, Mr. Maida made clear in the training that mediators should avoid concurring in mediation outcomes which contravene the express language and intent of the ADA.

over what the statutory mandate to “reasonably accommodate” and take “reasonably achievable” measures requires, given the claimant’s particular handicap and the respondent’s particular business situation.²⁰² In framing a solution, they will give content to the norms of tolerance and inclusion embodied in the statute. However, they will not be generating the operative norms themselves. Those norms are supplied by the statute.²⁰³

C. Identifying Paradigm Case(s) for Use of the Norm-Advocating Model

To some, norm-advocating mediation is a contradiction in terms.²⁰⁴ Yet, its growing use is undeniable. One explanation for this growth is that some disputes will be best resolved through a process which combines the informality of mediation with the reliance on legal and social norms characteristic of adjudication. These disputes often involve interconnected issues, ongoing relationships, and highly-charged disputant emotions. For these reasons, mediation’s informal, communication-oriented approach offers clear benefits.²⁰⁵ However, these conflicts are ill-suited to a norm-generating or even norm-educating approach for one of two reasons. First, the conflict implicates important societal concerns, extending far beyond the parties’ individual interests.²⁰⁶ Second, the conflict only involves the interests of the

202. The ADA requires that employers make “reasonable accommodations” to the known physical or mental limitations of an otherwise qualified applicant or employee. See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A), 12113(a)(Supp. 1996). The ADA further requires public accommodations to remove architectural and communication barriers where such removal is “readily achievable.” See 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv).

203. “[M]ediation negotiations will not determine whether the law applies or what are the respective legal rights and obligations; rather, negotiations will focus on how to achieve compliance with applicable law, based on the needs of the individual with the disability and the resources of the business, governmental entity or employer.” Anders, *supra* note 200, at 21. See also HODGES, *supra* note 199, at 60 (“While the mediator is not a legal advisor to the parties, the mediator must be aware of the legal context in which the dispute arises and the standards that would be applicable if the case were to be litigated.”).

204. See Kimberly K. Kovach & Lela P. Love, “*Evaluative*” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST OF LITIG. 31 (1996).

205. See DUBLER & MARCUS, *supra* note 147. Throughout their text, Dubler and Marcus point to the volatile, multi-layered, and highly charged nature of bioethical conflict, and to the fact that the conflict often ensnares family members, and colleagues who must work together in the most stressful of conditions. Mediation, as opposed to a medical consult or legal hearing, “provides the opportunity for staff, patients, and family members to vent their fears, articulate their concerns, and share their sorrows, all pieces of a principled resolution.” *Id.* at 43.

206. See Hoffmann, *supra* note 75, at 870 (expressing concern that norm-generating mediation may result in “a patient or family member ceding legal rights to a health care provider or institution, . . . lead[ing] to a violation of state laws and policy as well as constitutional principles”) (emphasis omitted).

parties, but one party is so structurally disenfranchised that allowing her to negotiate away legal rights and entitlements would make the mediator complicit in her continued oppression.²⁰⁷

The bioethics conflict described earlier was well-suited to norm-advocating mediation because it both implicated important societal concerns and involved a vulnerable disputant, Jennifer. The bioethics controversy which arose around Jennifer's refusal of treatment raised profound questions about how the values of autonomy and beneficence are to be balanced in the treatment of seriously ill patients. Is Jennifer competent or capable of refusing treatment? How is such an assessment to be made? Even if held to be competent, should a competent patient be able to refuse care when such refusal means death?

The legal and ethical conclusions reached reflect a societal consensus that individual autonomy and dignity are supreme values which require full and unfettered expression.²⁰⁸ Thus, a strong legal and ethical consensus exists that a competent patient's wishes must be respected.²⁰⁹ Further, the competency standard adopted by courts and ethicists, which requires only that patients be able to understand and weigh relevant information, not that they come to a "medically rational" decision, reflects a desire to effectuate patient decisions which reflect long-standing personal beliefs and commitments.²¹⁰ By informing the parties of these norms and urging their incorporation in the decision-making process, the mediator reinforces significant social values and protects a disputant who has little power at the mediation table—the patient.²¹¹

207. See generally Hoffmann, *supra* note 75 (cautioning against the use of norm-generating, and implicitly norm-educating, mediation to resolve disputes over the provision of life sustaining treatment because such a process does not adequately protect the patient); see, e.g., DUBLER & MARCUS, *supra* note 147, at 41 (noting that in bioethics mediations, where party negotiations converge on a resolution that would violate the patient's integrity, the mediator is forced to "trump" the agreed-upon solution).

208. While communitarians challenge the weight that is accorded autonomy in liberal theory, respect for the individual will remain a dominant value, both in ethical theory generally and in bioethics. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58-60, 69-92 (4th ed. 1994).

209. See, e.g., H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 303 (2d ed. 1996) ("The fact that some individuals' choices are for others troublesome, bizarre and tragic does not of itself mean that one may use force to stop them.").

210. See *In re Conroy*, 486 A.2d 1209, 1241 (N.J. 1985) ("A patient may be incompetent because he lacks the ability to understand the information conveyed, to evaluate the options, or to communicate a decision."); 1 PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *MAKING HEALTH CARE DECISIONS* 57-60 (1982)[hereinafter 1 PRESIDENT'S COMMISSION].

211. See DUBLER & MARCUS, *supra* note 147, at iii, 2 (stressing that the mediator must be knowledgeable about the legal and ethical principles and rules that form the basis for

In environmental disputes, public resources—air, water, fragile ecosystems, endangered species—are often at stake. Legal rules exist to protect these public goods. Where the rules are clear and require specific action, they should be articulated and enforced—no less in mediation than in a court of law. The same may be said in disputes involving discrimination claims or other legally circumscribed activity.

What the legal, ethical, or social norm requires in each case, however, is often a matter for much discussion. While ethical norms may dictate that life-support decisions be made in the “best interests” of the patient, family and medical staff may differ on what exactly the patient’s interests are. The Environmental Protection Agency regulations may require the clean up of PCB contaminated sites, but the timeline and mechanics of the cleanup may be a proper subject of negotiation. The Americans with Disabilities Act may require an employer to “reasonably accommodate” a disabled employee, but the accommodation could conceivably take different forms, depending on what the parties want.

Where the norm to be applied is sufficiently open-textured that it permits several equally acceptable outcomes, then the mediation shifts to a norm-generating mode. Within the open boundaries that the norm establishes, the parties are free to bring their own interests, concerns, and creative thinking to bear on the problem. Thus, the differences between norm-advocating and norm-generating mediation are not as dramatic as might be originally imagined. The differences may be framed in high relief where the norms to be applied are precise and dictate the parties follow a particular action plan. The differences fade, however, in disputes where the norms to be applied are indeterminate, leaving the parties free to decide precisely how and in what manner those norms will be given content and effect.

The norm-advocating model, then, is applicable in disputes which require application of a normative framework, but present gray areas within that framework for negotiation. It may be argued that a process that limits the options available to the parties to those congruent with pre-existing norms is too constrictive to be called mediation. However, considerable negotiation may take place in the open space which normative guidelines leave uncertain. If the mediator uses mediative techniques to help the parties reach agreement within those

bioethical analysis in order to promote good patient care and ease the suffering often experienced by caregivers, family, and loved ones).

regions, that process should be regarded as mediation. To call it something else spawns needless confusion.

IV. Why Recognition of the Three Models—and the Divergent Role Social Norms Play in Each—Matters

As the preceding sections demonstrate, many individual practitioners and institutions utilize either the norm-educating, or norm-advocating models, or some combination. Indeed, in delineating these three models, I do not mean to suggest that they are always, or even usually, used singly. Rather, many mediators will combine these various models, depending on the nature of the dispute. A divorce mediator, for example, may employ a norm-educating model when discussing spousal support and property division. She may shift to a norm-advocating model if the parents contemplate a visitation plan that would place the child at risk. And, she may adhere to a norm-generating model when assisting the parties in how property of only sentimental value should be divided.²¹²

Despite the prevalence of the norm-educating and advocating models, academic commentators and practitioners alike tend to conceive of the norm-generating model as the authentic article and recognize the more norm-based procedures, if at all, as aberrant stepchildren. Both Professor James Alfini, in describing “evaluative” mediation, and Professors Craig McEwen, Nancy Rogers, and Richard Maiman, in depicting Maine’s lawyer-dominated divorce mediation program, question whether these procedures represent “real mediation.”²¹³ Scholars and mediators Robert A. Baruch Bush and Joseph P. Folger recognize two distinct mediator orientations which they label transformative and problem-solving.²¹⁴ Both of these approaches, however, are based on the norm-generating model.²¹⁵ Bush and Fol-

212. See generally FRIEDMAN, *supra* note 107.

213. See James Alfini & Gerald S. Clay, *Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spring 1994, at 8; McEwen, *supra* note 108, at 1392, 1394 (suggesting that while divorce mediation traditionalists may view Maine’s mediation as facilitated pretrial settlement conferences rather than “real” mediation, “[l]awmakers should discard traditional mediation, even if it seems more ‘real’ or satisfying to the mediator, if it fails to serve the families’ needs or ensure fairness”).

214. See generally BUSH & FOLGER, *supra* note 17.

215. Both the transformative and problem-solving styles envision a process in which party settlements derive solely from party norms. The transformative approach seeks to improve a disputant’s moral sensibility through empowerment and cultivation of empathetic response. *Id.* at 81-89. The problem-solving approach aims to “find solutions that meet the needs of all involved parties to the greatest possible degree, and thus maximize joint satisfaction.” *Id.* at 56. Both the problem-solving and transformative methods fit

ger's 284-page tome on the "promise of mediation" nowhere mentions social norms and their possible place in mediation practice.

In *When Talk Works*, researchers identified a persistent mediation mythology in which all mediation follows the norm-generating model. According to this mythology, mediators are passive actors, completely neutral with regard to the proposed outcome of the dispute, and unwilling to use social norms to constrain the disputants' settlement autonomy.²¹⁶ Although the actual practice of the profiled mediators departed sharply from this theoretical ideal,²¹⁷ the mediators nonetheless continued to adhere to the myths as formal virtues.²¹⁸ Although the mediators were aware that many of their behaviors undercut and exposed the cleavage between myth and reality, this disjunction did not prompt them to question the myth's validity.²¹⁹ This may be, as the researchers suggest, because the "mythic 'frame' . . . gives direction and inspiration amidst uncertainty, isolation, and complexity."²²⁰ A concomitant explanation is simply that the norm-generating model, inspired by a communitarian vision of autonomous, self-actualizing individuals realizing mutual gains while rediscovering community norms, presents an attractive vision. While the vision may not bear a close resemblance to much that transpires in real life, it continues to command strong ideological allegiance.

within the norm-generating paradigm in limiting the scope of inquiry and discussion to the parties' own articulated norms. See FOLBERG & TAYLOR, *supra* note 3, at 7-15.

216. See *WHEN TALK WORKS: PROFILES OF MEDIATORS*, *supra* note 19, at 459-60, 479-80 ("The mythic world of mediation is one in which one practitioner of the art is pretty much like another in regard to motives and orientation to the role. In the mythic world, mediators are impartial neutrals who have no authority and no wish to impose their views on the disputing parties. . . . Most of the mediators bow in the direction of the voluntariness of the mediation process and the need to respect the parties' autonomy. This is part of the myth of mediation. Yet nearly every profile illustrates the working mediator attempting to shape the process and substance using some very strenuous and powerful tactics.").

217. *Id.* at 473 (describing settlement-oriented mediators who educate the parties about the social norms that would shape their dispute in another forum).

These settlement-oriented mediators are quite willing to acknowledge that they make judgments about what is a good and bad agreement and try to influence the parties in the direction of good. There is an activist view of the mediation role, and they are eager to campaign to persuade or motivate the parties to concur. They thrust themselves forcefully into the conflict and are strongly inclined to believe that without their substantive and procedural know-how, the parties would flounder and settlement would be elusive.

Id. at 473-74.

218. *Id.* at 490.

219. *Id.*

220. *Id.*

But, clinging to obsolete phantasms that no longer capture a dynamic reality poses numerous dangers for a burgeoning profession.²²¹ Here, I will focus on two tasks greatly hindered by the lack of an adequate theory. The first is the establishment and implementation of training and qualification standards for practitioners. The second is the creation of clear and consistent ethics codes.

A. Training and Evaluating: When Diversity Becomes Disarray

One of the hallmarks of "professional status" lies in the creation of performance standards and a regulatory system designed to ensure that they are met. Most professions require aspirants to matriculate from accredited educational institutions and pass standardized exams.²²² These achievements are accepted proof (or at least compelling evidence) that the student-cum-professional has acquired and demonstrated the knowledge base and skills necessary for competent practice.

In mediation, the question of what knowledge and skills qualify a mediator for professional practice remains open-ended. The various mediation courses offered throughout the country may contain overlapping material. However, this coincidence is serendipitous. No uniform core curriculum exists,²²³ nor does a standardized method of presenting information, teaching skills, or evaluating progress.²²⁴

221. "In the press to professionalize the work, these myths become the bases for selection and training of new mediators and so are perpetuated in the ongoing practice. Without examining the myths, the risks of demoralized practitioners, oversold or misleading claims, and a general intellectual and professional stagnation are likely."

Id. at 490 (citation omitted).

222. For example, attorneys must sit for and pass a state bar exam accepted in the jurisdiction where they will practice; physicians must receive a passing score on the standardized medical boards before being permitted to practice medicine.

223. See Joseph B. Stulberg, *Training Intervenors for ADR Processes*, 81 Ky. L.J. 977 (1992-93).

224. *Id.* at 1006 ("The methods for ensuring competent trainee performance vary widely No standardized check list or pivot points exist to help provide uniform and consistent feedback among various trainers to each participant."). Little empirical exploration has been done to determine what sort of training produces skilled and successful mediators. The scant data that does exist suggests that training is only indirectly related to mediator settlement rates, and the type of training received does not appear to have a significant impact. See Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 109, 160 (1988) (citing study undertaken in the Franklin County Court of Common Pleas in Ohio involving mediators, parties, and attorneys in 460 cases).

The prerequisites for participation in the numerous state and federal court-annexed mediation programs in existence²²⁵ reveal a complete lack of consensus on what training, experience, or academic background best prepares an individual to mediate. Review of a sampling of these court mediation rules illustrates their heterogeneity.

Some courts require that mediators have a law degree,²²⁶ others do not.²²⁷ Individuals seeking to mediate in the Bankruptcy Court for the District of Oregon must possess a license either as an attorney, accountant, real estate broker, appraiser, engineer, or other professional.²²⁸ Oklahoma's Dispute Resolution Act, which authorizes local state courts to refer to mediation criminal misdemeanors, housing, employment, debtor-credit disputes as well as cases ordinarily sent to small claims, imposes no professional degree or license requirement.²²⁹

Among jurisdictions that rely exclusively on lawyers, the amount of required legal experience varies. The District Court for the Eastern District of Washington State, for example, requires that mediators of court-referred cases be attorneys, admitted to law practice in a state court for five years, and a member of the bar of the Washington District Courts.²³⁰ The District Court for the Eastern District of Pennsylvania certifies lawyers to mediate who have been a member of a state bar for fifteen years.²³¹

Requirements for training in mediation range from the nonexistent, to attendance at a mediation course spanning several dozen hours. Washington's Western District Court program requires no me-

225. Virtually all Federal District Courts have responded to the Civil Justice and Reform Act's injunction to implement expense and delay reduction plans. See 28 U.S.C.A. §§ 471-482 (West 1993); ELIZABETH PLAPINGER AND DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 3 (1996). Of these, fifty-one district courts have established mediation programs. *Id.* at 4, 17. Additionally each state has introduced mediation to the judicial system in some form. See ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION*, apps. D, E (1994); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 871-72 (1996).

226. U.S. DIST. CT., E. DIST. PA., LOC. R. CIV. P. 53.2.1(b); U.S. DIST. CT., E. DIST. TENN., LOC. R. 16.4(k); U.S. DIST. CT., E. DIST. WASH., LOC. R. 16.2(b)(2).

227. IN. ADR R. 2.5; LA PARISH OF ORLEANS, CIV. DIST. CT. R. 18 § 3; N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 8(B)(2); N.J. CT. R. 1:40-10(a)2.1(a); OHIO SUMMIT COUNTY CT. R. 22.04 (1996-1997); OKLA. RULES & PROC. FOR THE DISP. RESOL. ACT, R. 11(A) (West 1996); TEX. CIV. PRAC. AND REM. CODE ANN. § 154.052 (Vernon Supp. 1997).

228. U.S. BANKR. CT., DIST. OR., LOC. R. MEDIATION 9019-2B(1)(a)(1).

229. OKLA. R. AND PROC. R. 11(A).

230. U.S. DIST. CT., E. DIST. WASH., LOC. R. 16(2)(b)(2)(a)-(b).

231. U.S. DIST. CT., E. DIST. PA., LOC. R. 53.2.1(b).

diation training;²³² Ohio's Summit County Court of Common Pleas requires six hours;²³³ Louisiana's Parish of Orleans originally required sixteen and now requires thirty-two;²³⁴ and Florida's circuit court demands forty.²³⁵

The specification of training content varies widely as well. Individuals wishing to mediate under the Oklahoma Dispute Resolution Act must obtain training which covers a particular set of topics.²³⁶ These include: instruction and practice in the introduction to mediation, calming techniques, listening skills, negotiations, holding private meetings within mediation, working toward an agreement, and specifying terms in an agreement.²³⁷ North Carolina's Superior Court program requires nonattorneys to attend six hours of training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, and to participate in twenty hours of basic mediation training.²³⁸ A California certification bill recently defeated in committee would have required certified mediators to receive education in "the distinction between . . . directive and facilitative process[es] . . . [u]nderstanding power imbalances, confronting unrealistic expectations, being an effective agent of reality, making responsible evaluations, abstaining from giving legal advice, ensuring informed consent, maintaining standards of fairness and impartiality, and the importance of confidentiality."²³⁹ In contradistinction to these precisely elaborated training requirements, many court programs simply require some hour amount of generic training without detailing the content or nature of the training.²⁴⁰

232. U.S. DIST. CT., W. DIST. WASH., LOC. R. 39.1(b).

233. OHIO SUMMIT COUNTY CT. R. 22.04(a).

234. LA. PARISH OF ORLEANS, CIV. DIST. CT. R. 18 § 3.

235. See FLA. R. FOR CERTIFIED AND CT. APPOINTED MEDIATORS 10.010(c)(1).

236. See OKLA. R. AND PROC. R. 11(c)(3).

237. *Id.* at R. 11(A)(2).

238. N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 8B(2)(a), (c). Interestingly, North Carolina attorneys need not obtain the additional training regarding ethics and confidentiality. Attorneys are also exempt from the mediation experience requirements placed on non-attorneys. *Id.* at B(1)(a)-(b). The North Carolina statute seems to assume that an attorney or retired judge's prior legal experience will amply equip her for the rigors of mediation.

239. CAL. S.B. 1428 § 2 (to have been codified at CAL. BUS. & PROF. CODE § 464.3 (B), (E)).

240. See, e.g., U.S. BANKR. CT., DIST. OR., LOC. R. MEDIATION 9019-2.B(a)(4)(a) (mediators must have "completed a mediation training course qualifying for at least twelve hours of Oregon State Bar continuing legal education credit"); U.S. DIST. CT., E. DIST. TENN., LOC. R. 16.4(k) (all Mediators must have had formal training, including at least twenty hours of formal Mediation training).

The credentials and training required for participation in court-referred custody and visitation programs are equally variable.²⁴¹ No one academic specialty or professional background serves as a precondition to selection. Individuals may conduct family mediation in Florida if they are either an attorney, certified public accountant, a psychiatrist licensed to practice either adult or child psychiatry, or possess a Masters or Ph.D. in social work, mental health, or one of the behavioral or social sciences.²⁴² New Jersey mediators must hold a graduate degree or certification of advanced training in one of the behavioral or social sciences.²⁴³ Conversely, anyone with a bachelors degree from an accredited institution can conduct family mediation in Indiana.²⁴⁴ Michigan requires domestic relations mediators be attorneys with an active divorce practice,²⁴⁵ and Nebraska and Minnesota courts dispense with degree requirements entirely.²⁴⁶

The knowledge base thought necessary to conduct family mediation varies as well from jurisdiction to jurisdiction. Minnesota's list of minimum qualifications includes knowledge of: "the court system, . . . procedures used in contested child custody matters, . . . other resources in the community to which the parties to contested child custody matters can be referred for assistance, . . . child development, clinical issues relating to children, the effects of marriage dissolution on children, and child custody research."²⁴⁷ Indiana considers possession of this knowledge preferable, but optional.²⁴⁸ In Illinois' eleventh judicial circuit, mediators must receive specialized education in family law, as well as child development and family relations.²⁴⁹ Georgia requires that its divorce and child custody mediators receive special

241. See Jennifer A. Mastrofski, *Mediation in Court-Based Systems: More Variations than Similarities*, 11 NEGOTIATION J. 257, 262 (1990) (stating that in the six Pennsylvania court-sponsored mediation programs studied, "where judges did not rely on bar support, . . . mediators were chosen according to unclear and unspecified criteria . . .").

242. See FLA. R. FOR CERTIFIED AND CT. APPOINTED MEDIATORS 10.010(b)(2).

243. See N.J. R. 1:40-10(a)2.1(a).

244. IND. ADR R. 2.5 (C)(1).

245. MICH. SPECIAL PRO. AND ACTIONS R. 3.216(F)(1)(a)-(c).

246. MINN. STAT. ANN. § 518.619 (West Supp. 1997); NEB. REV. STAT. § 43-2905 (1993).

247. MINN. STAT. ANN. § 518.619(4)(a)-(c).

248. IND. ADR R. 2.5(C)(2) ("To the extent practicable, mediators must have knowledge of the Indiana judicial system, the procedures used in domestic relations cases, the resources in the community to which the parties can be referred for assistance, child development, clinical issues relating to children, the effects of dissolution of marriage on children, and family systems theory.").

249. IL. LOC. R. 11TH CIR., APP. D, SEC. 5(c)(1).

training in domestic violence.²⁵⁰ Missouri requires a twenty hour child custody training, but provides no further detail on its content.²⁵¹

Whether the mediator must possess substantive knowledge about the issues in dispute appears a particularly bedeviling question. Edward Hartfield has argued that, for mediators of public policy or environmental disputes, too much subject matter knowledge can be a dangerous thing.²⁵² He maintains, "Where an individual has too much knowledge about an industry or environmental subject, it may adversely affect his openness to certain kinds of resolutions."²⁵³ At the same time, Hartfield notes that "[o]f course, every mediator wants to be as informed as possible about the subject areas of the mediation. If a mediator knows nothing about the subject area, then it will be difficult to assist the parties in an effective fashion."²⁵⁴ The conclusion would appear to be that some subject matter knowledge is important, but too much could close the mediator's mind to innovative ideas. Professor and mediator Margaret L. Shaw, summarizing a symposium discussion of qualifications, observes that while "general knowledge" of the subject matter of a dispute was considered useful in a number of ways, the same conclusion cannot necessarily be drawn about technical expertise.²⁵⁵ However, the panel also concluded that technical expertise may be relevant in particular cases where "the mediator will be called upon to play a very assertive role which occurs when the parties are either unusually hostile or passive."²⁵⁶ Thus, according to at least one group of commentators, general knowledge as opposed to technical knowledge is necessary for artful mediation, but technical knowledge may only be important when working with particularly challenging disputants.²⁵⁷

Christopher Honeyman, a pioneer in the exploration of mediator qualifications, published a set of performance-based standards that

250. GA. ALTERNATIVE DISP. RESOL. R., APP. B.

251. See MO. S. CT. R. OF SPECIAL ACTIONS 88.05 (a)(2).

252. See Edward F. Hartfield, *Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes*, 12 SETON HALL LEGIS. J. 109 (1988)

253. *Id.* at 117.

254. *Id.*

255. Shaw, *supra* note 224, at 132-33.

256. *Id.* at 133.

257. *Id.* at 132-33. The panel noted that a mediator's grasp of subject matter information is to be considered for its usefulness in helping the parties reach agreement, not for its use in ensuring the fairness or viability of the resulting agreement. This suggests that the panel was working primarily within a norm-generating model. *Id.* at 133.

have proved highly influential.²⁵⁸ Although Honeyman included substantive knowledge among his seven parameters of effectiveness,²⁵⁹ he added the caveat that such substantive knowledge “is not established as an essential part of a mediator’s background. . . . There may well be circumstances in which . . . a program would deliberately choose to assign a complex dispute to a mediator lacking substantive knowledge but known to be an effective investigator.”²⁶⁰ Several years later, a group of prominent scholars and practitioners published the *Interim Guidelines for Selecting Mediators*.²⁶¹ These guidelines list mediator tasks and competencies and establish a set of evaluation criteria that can be used to assess a mediator’s progress and proficiency. The Guidelines’ authors assumed that individual mediation programs would place varying weight and emphasis on the substantive knowledge component. Consequently, they omitted substantive knowledge as a criteria for mediator selection.²⁶² While noting that a new mediator needs enough knowledge of the type of dispute to “be able to facilitate communication; develop options; empathize; and alert parties . . . to the existence of legal information relevant to their decision to settle,”²⁶³ they also state that “there is at least anecdotal evidence that a mediator’s substantive knowledge requirements are often overestimated by the parties,” and that in highly complex disputes, it

258. See Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (1990). For a report on how the standards, adapted slightly, fared as a diagnostic measure of mediation competence, see Brad Honoroff et al., *Putting Mediation Skills to the Test*, 6 NEGOTIATION J. 37 (1990).

259. Honeyman, *supra* note 258, at 27-32. The seven parameters included investigation, defined as “effectiveness in identifying and seeking out relevant information pertinent to the case”; empathy, defined as “conspicuous awareness and consideration of the needs of others”; inventiveness and problem-solving, defined as “pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties”; persuasion and presentation skills, defined as “effectiveness of verbal expression and ‘body language’ in communicating with parties”; distraction, defined as “effectiveness at reducing tensions at appropriate times by temporarily diverting parties’ attention”; managing the interaction, defined as “effectiveness in developing strategy, managing the process, coping with conflicts between clients and professional representatives”; and substantive knowledge, defined as “expertise in the issues and type of dispute.” *Id.*

260. *Id.* at 30.

261. INTERIM GUIDELINES FOR SELECTING MEDIATORS (Nat’l Inst. of Dispute Resol. ed., 1993).

262. Christopher Honeyman, *A Consensus on Mediators’ Qualifications*, 9 NEGOTIATION J. 295, 305-06 (1993).

263. *Id.* at 306.

is enough if someone at the table, not necessarily the mediator, has the necessary legal or technical expertise.²⁶⁴

These discussions suggest that the question of whether substantive knowledge is necessary for a competent mediator can only be answered by "it depends."²⁶⁵ But this answer makes little sense according to an omnibus theory of mediation that recognizes only the norm-generating model. According to this theory, the mediator need never possess any substantive knowledge surrounding the issues in dispute; her role does not include providing information about or advocating inclusion of social norms.

Recognizing the existence of norm-based as well as norm-generating models explains why mediator familiarity with the issues in dispute may sometimes be necessary. It clarifies that mediators using a norm-generating model need process skills only; mediators using a norm-educating or norm-advocating model, however, must have some familiarity with the relevant social norms in order to employ those models effectively. This insight has implications for programs attempting to determine what sorts of academic or professional background and skills to require.²⁶⁶ Once a mediation program determines which model or combination of models is best suited to its mix of cases, then it can better fashion appropriate training and performance standards.²⁶⁷

264. *Id.* at 308 n.3. See also THE TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS 25 (Nat'l Inst. of Dispute Resol. ed., 1995) (concluding that no universal guidelines may be formulated specifying the importance of mediator knowledge of the disputed issues).

265. See George H. Friedman & Allan D. Silberman, *A Useful Tool for Evaluating Potential Mediators*, 9 NEGOTIATION J. 313, 314 (1993) ("The requirement for substantive expertise varies with the dispute, the mediation program (e.g. court system or administrative agency), and the parties' expectations and needs.").

266. For example, a mediation program designed to handle civil matters referred from the court could self-consciously decide to adopt either a norm-generating or norm-educating model. If the program chose a norm-generating model, it could reasonably decide to impose no professional or academic degree requirements, and require no legal or other subject matter expertise. If the program decided to adopt a norm-educating model, it might then seek a mediation roster of attorneys equipped to provide general legal information about the referred disputes.

267. Recognizing the existence of norm-based approaches in addition to the norm-generating model is, of course, only the first step toward the development of clear professional standards for mediators. Practitioners and program directors must next become sophisticated in determining when specific models should be used.

Others have proposed a taxonomy for determining which cases should be litigated, arbitrated, or mediated. See Bush, *supra* note 66; Sander & Goldberg, *supra* note 70. This form of analysis should be extended to the subset of cases that are deemed suitable for mediation. This paper briefly suggests certain considerations which may inform the choice

B. Confusion in Ethical Standards and Codes

Over the last fifteen years, a number of professional associations have promulgated ethical codes or guidelines for mediators. The codes are purely advisory; violations are not investigated or punished. However, they have an important effect on the industry, as they purport to represent the "gold standard" in mediator conduct.

Unfortunately, in many cases, the codes create more ambiguity than clarity. One set of standards flatly contradicts another,²⁶⁸ while a number of codes are internally inconsistent.²⁶⁹ This is largely due to the codes' failure to recognize the existence of different mediation models. The codes contemplate one set of principles to be applied in a uniform manner to all mediation. Unfortunately, each mediation model places a different weight and emphasis on the values of fairness, disputant autonomy, social justice, and self-determination. Predictably, the tensions, both within and among the ethical guidelines, occur at the points where the ethical vectors in the three mediation models begin to diverge. The competing ethical imperatives of each model create unavoidable strains and inconsistencies.

The most obvious inconsistency in the codes lies in the simultaneous recommendation that mediators promote disputant autonomy while ensuring that mediated agreements are fair according to societal norms. The codes drafted by the American Arbitration Association (AAA), American Bar Association (ABA), Society of Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators (AFM), and the Colorado Council of Mediation Organizations (Colorado) all state that enhancing disputant self-determination is a primary goal of mediation.²⁷⁰ At the same time, these same standards

of mediation model. A more precise taxonomy identifying the types of cases best treated by a norm-generating, norm-educating or norm-enforcing approach is needed.

268. See Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 *MEDIATION Q.* 63 (1994) (contrasting codes developed by the Colorado Council of Mediation Organizations, the Academy of Family Mediators (AFM), and the American Bar Association (ABA)).

269. See *infra* notes 270-280 and accompanying text.

270. See, e.g., Colorado Council of Mediation Organizations Code of Professional Conduct (1982) reprinted in GOLDBERG ET AL., *supra* note 70, at App. B, 476 ("The primary responsibility for the resolution of a dispute rests on the parties themselves At no time should a mediator coerce a party into agreement. The mediator should not attempt to make a substantive decision for the parties."); ACADEMY OF FAMILY MEDIATORS, STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard Nos. 1, 3 [hereinafter ACADEMY OF FAMILY MEDIATORS] (The primary responsibility for the resolution of a dispute rests with the participants At no time shall a mediator coerce a participant into agreement or make a substantive decision for any participant); Code adopted jointly by the Society of Professionals in Dispute Resolution, the American Arbitration Association, and

exhort mediators to consider whether the mediation agreement they are facilitating is "fair," both to the disputants and absent third parties. For example, Standard III, Section D of the ABA Code states that mediator impartiality does not preclude the mediator from assessing the fairness of the agreement.²⁷¹ Standard IV, Section A of the AFM Code similarly requires mediators to be impartial "while raising questions" of fairness and equity.²⁷² The Colorado Code suggests a range of mediator options if the parties reach an agreement that the mediator feels is unfair, inequitable, or "not likely to hold."²⁷³ These choices range from informing the disputants of the fairness concerns to withdrawing as a mediator and revealing publicly the general reason for taking such action.²⁷⁴ The Illinois Code simply suggests that mediators "disassociate" themselves from agreements that "they perceive to be so far outside the parameter of fairness that they do not believe them to be fair and reasonable."²⁷⁵

Few codes provide explicit guidance as to how the mediator should assess the fairness of the proposed mediated agreement.²⁷⁶ The Illinois Code is the most direct, offering "case precedent, legal requirements, and learned common sense to help us to evaluate fairness."²⁷⁷ Others are more elusive. Those codes that insist that disputants be provided access to relevant legal or technical data²⁷⁸ implicitly propose that the parties' knowledge of such data is relevant in assessing the fairness of any resultant agreement.²⁷⁹

The codes, then, call upon mediators to assume blatantly contradictory stances. On the one hand, they are to promote disputant au-

the American Bar Association (Joint Code), Standard No. 1 *reprinted in* KOVACH, *supra* note 12, at 268 (self-determination is the fundamental principle of mediation).

271. See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, *supra* note 104, at 457.

272. See ACADEMY OF FAMILY MEDIATORS, *supra* note 270, at 2.

273. See GOLDBERG ET AL., *supra* note 70, at 479-80.

274. *Id.*

275. Joan Dworkin & William London, *What is a Fair Agreement*, 7 MEDIATION Q. 3, 6 (1989) (quoting MEDIATION COUNCIL OF ILLINOIS, PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS, Section IV (1984)).

276. *Id.*

277. *Id.*

278. See GOLDBERG ET AL., *supra* note 70, at 472 (quoting Standard IV of the ABA Code, which states that "[t]he mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge").

279. See Sarah C. Grebe, *Ethics and the Professional Family Mediator*, 10 MEDIATION Q. 155, 161-62 (1992) (noting that both the AFM and ABA codes require the mediator to advise disputants to obtain legal review from outside counsel, and arguing that "[t]he effect of this emphasis is to moderate the already indirect support of autonomy and self-determination found in [the codes]").

tonomy by enabling the disputants to decide for themselves how they wish to resolve their disputes. Towards this end, mediators are to assiduously avoid making any substantive suggestions or otherwise coerce disputant decisionmaking. On the other hand, the mediator is expected to challenge disputants when they are inclining towards agreements that the mediator deems unfair, inequitable, unlikely to hold, disadvantageous to the parties, disadvantageous to third parties, or simply uninformed.²⁸⁰ The codes rhetorically proclaim allegiance to disputant self-determination, while authorizing the mediator to trump disputant judgments when the mediator considers them unfair or unwise.

These contradictions create uncertainty in mediator practice. A study analyzing ethical dilemmas in mediator practice highlighted the frequency with which mediators report themselves torn between trying to preserve self-determination and promote fairness.²⁸¹ Comments from a seminar devoted to ethical concerns in mediation practice reflect further haziness.²⁸² One seminar participant, a law professor-mediator, claimed that in her practice, she respected the parties' right to make their own decisions, while ensuring that those decisions are "good ones," according to her own judgment.²⁸³

280. See GOLDBERG ET AL., *supra* note 70, at 479-80; Program on Alternative Dispute Resolution Standards for Private and Public Mediators in the State of Hawaii (1986), reprinted in Margaret Shaw, *Alternative Dispute Resolution: How to Use it to Your Advantage*, 976 AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION 757, 779-80 (1994), available in WL at C976 ALI-ABI Course of Study.

281. See ROBERT A. BARUCH BUSH, *THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS, A REPORT ON A STUDY FOR THE NATIONAL INSTITUTE FOR DISPUTE RESOLUTION 1*, 15 (1992). The study, conducted in Florida, involved interviews with 80 mediators culled from the divorce, community, and civil arenas. The mediators were asked to identify scenarios from their practice that they considered ethically problematic. *Id.* at 6. Mediators reported being troubled by cases in which they felt that the mandate to preserve disputant self-determination could only be achieved by becoming a party to a "gross injustice." *Id.* at 15-18. More specifically, mediators were likely to feel conflicted when the parties formulated a solution which the mediator felt was: illegal; unfair because it violated fundamental rights; adverse to the interest of an absent third party (especially children). *Id.*

282. Cooks & Hale, *supra* note 268.

283. *Id.* at 71. For this academician, the mediator who handled the landlord tenant dispute which served as the focal point of the ethics discussion failed because he did not support the tenant adequately.

[T]he mediator does nothing to empower her to make . . . choices. . . . It seems to me that the mediator could talk to her about her fears and options instead of saying, "Well, you're not making the right choices and I'm not going to help you make any choices because I don't want to tell you what to do." There's a difference in mediation between letting people do what they want and not letting them

The effort to construct a code suitable for all manners of mediation fails because it does not recognize the divergent, and often competing, dictates which issue from each model. Mediation is not a "one-size-fits all" process; it cannot be guided by a "one-size-fits all" code.

Replacing our existing theoretical lens with a multi-tiered prism would allow for the construction of internally consistent codes, tailored to fit each of the mediation models. The codes could straightforwardly acknowledge that mediators cannot pay absolute deference to party autonomy while ensuring that mediated agreements reflect societal norms and value judgments.

Rather, the codes could specify that mediators are to give greater weight to disputant autonomy in the norm-generating model than in the norm-educating or norm-advocating processes. Conversely, fairness concerns and the safeguarding of third party interests should loom larger in the mediator's consciousness when she is employing more norm-based procedures. If both mediator and disputants are in agreement regarding the particular mediative approach to be used, it is unlikely that either value—fairness or autonomy—will be unduly compromised.

Conclusion

As the ADR revolution continues, metamorphosis remains the governing state of affairs. Although mediation observers concede that the field is not standing still, recognition of these changes is inchoate. Mediation theory remains oriented towards the traditional norm-generating process, ignoring much of what is actually practiced in the mediation "trenches."

This Article urges a reworking of mediation theory to enhance its descriptive and normative functions.²⁸⁴ Others have noted that practitioners veer between dichotomous styles. This article suggests we ap-

mess themselves up by doing that, and I try to come out in the middle by empowering them to make good choices.

Id.

While this vision of empowerment makes sense within the norm-educating paradigm, it contradicts the norm-generating assumption that parties know best what is in their own interest and benefit most when they are supported in making their own decisions.

284. See Peter J. Carnevale, *The Usefulness of Mediation Theory*, 8 NEGOTIATION J. 387, 389-90 (1992) ("If usefulness of mediation theory is in the eye of the user, then perhaps the greatest value of general mediation theory is the possibility that it will improve the user's vision. Models of mediation may help us see aspects of particular situations that we might otherwise have missed.").

proach these variations by examining the mediator's relationship to, and use (or disuse) of social norms. It describes and presents examples of three separate mediation models—norm-generating, norm-educating, and norm-advocating—and suggests that each of these models may be profitably employed in different dispute contexts. Disentangling various mediation modalities according to this scheme will help explain existing practice, as well as mark the course for future growth and improvement.

The push towards professionalism poses many challenges. Determining how mediators are to be educated, trained, and perhaps certified and regulated, requires precise thinking regarding what mediators do and should do. Further, if mediators, like most professionals, are expected to obtain informed consent to their interventions,²⁸⁵ they can do so only by providing thoughtful and accurate information about the process.²⁸⁶ Further discussion and reflection is needed to close the gap between mediation theory and reality. The conceptual vocabulary suggested in this Article offers additional tools to assist in this task.

285. Medical professionals, for example, must secure informed consent to their interventions from patients or face negligence claims. *See generally* *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972). Typically, this requires the physician to inform the patient of all material information regarding her condition and the risks and benefits of suggested and alternative treatment. *See* 1 PRESIDENT'S COMMISSION, *supra* note 210, at 15-23.

While the duty to secure informed consent is usually only imposed where a client voluntarily seeks professional services, it may be that the duty of disclosure is more compelling when the professional's services are mandated, as they often are in court-referred mediation.

286. The Alaska Judicial Council encourages consumers to actively pursue the information necessary to provide informed consent to mediation. The Council's Consumer Guide to Selecting a Mediator (Guide) urges consumers to decide, in advance, what they want from mediation, review a mediator's written qualifications, and follow up that review with an in-person interview. At the interview, the Guide suggests that consumers question the mediator about her background and methodology, including: what ethical standards apply; what confidentiality protections does she respect; what is the fee; and what is the mediator's approach to mediation? *See* ALASKA JUDICIAL COUNCIL PROVIDES INFORMATION FOR CONSUMERS ON SELECTING MEDIATORS, 6 WORLD ARB. AND MEDIATION REP. (Sept. 1995). While the Council is to be commended for its effort to spur consumers to make informed choices regarding mediation providers, that effort is necessarily dependent on the accuracy and insightfulness of the answers mediators provide to consumer inquiries.

