# COURT MEDIATION AND THE SEARCH FOR JUSTICE THROUGH LAW

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TABLE OF CONTENTS



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> Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult.
>
> Roscoe Pound[1]

## INTRODUCTION

Mediation, an ancient,[2] private, non-legal dispute resolution process, has recently found a welcome reception in the civil justice system.[3] Within

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1. Roscoe Pound, Address Before the American Bar Association Annual Meeting (Aug. 29, 1906), *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE app. at 337, 340 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter POUND CONFERENCE].

2. For examples of ancient mediation systems, see JAY FOLBERG & ALISON TAYLOR, MEDIATION 1-2 (1984) (China and Japan); P.H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 25-26 (1979) (African moots); Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966). Biblical references to mediative conflict resolution are found in St. Paul's admonition to the people of Corinth. 1 *Corinthians* 6:1-4.

3. *See generally* NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (Susan Keilitz ed., 1994) [hereinafter NATIONAL SYMPOSIUM].

the last fifteen years, in both state and federal courts, litigants have often been required to attend a mediation session before they will be allowed to be heard by a judge.[4]

The trend toward court mediation[5] is remarkable because our civil justice system has traditionally promised justice[6] through law.[7] The promise of mediation is different: Justice is derived, not through the operation of law, but through autonomy and self-determination.[8] When mediation occurs in court, significant policy questions arise: What happens to law? To justice? Do they collapse in the experience of self-determination? If so, what then happens to the promise of justice through law,

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4. ELIZABETH PLAPINGER & MARGARET SHAW, CENTER FOR PUB. RESOURCES LEGAL PROGRAM, COURT ADR: ELEMENTS OF PROGRAM DESIGN 1 (1992). *See generally* CENTER FOR PUB. RESOURCES LEGAL PROGRAM, ADR & COURTS: A MANUAL FOR JUDGES AND LAWYERS (Erika S. Fine & Elizabeth S. Plapinger eds., 1987) (including descriptions of selected mediation rules and programs in federal district courts).

Oddly enough, commentators still refer to mediation as an "alternative" to the overcrowded courts, or as an "alternative" way to obtain justice for those who cannot afford the courts. *See, e.g.*, James Podgers, *Chasing the Ideal*, A.B.A. J., Aug. 1994, at 56, 60.

5. Throughout this article, the term "court mediation" refers to mediation which occurs under the auspices of the court system. This is variously labeled in specific state and federal court programs as court-connected, court-annexed, court-ordered, and court-referred mediation.

6. Volumes have been written on the meaning of "justice." In this article, "justice" means fairness, giving to each his or her due. *See* ARISTOTLE, NICOMACHEAN ETHICS 136-79 (F.H. Peters trans., 2d ed. 1884) (discussing justice and injustice, and the types of acts with which they are concerned). *See also* HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 125-36 (1957).

"Justice through law," the type of justice which litigants expect to receive in the court system, has both procedural and substantive components. Procedurally, it means a fair process—the opportunity to be heard; substantively, it is based on the application of objective legal norms. In this regard, I refer to David Luban's concept of "legal" justice or "justice within the system" and his differentiation of this from "revisionary" justice:

> The former treats the social world we live in and the constraints it imposes as given, seeking justice within the terms defined by that social world and those constraints. Revisionary justice measures justice according to a more detached or even utopian standard, abstracts from constraints imposed by the system as it is currently constituted, and subjects the social world in which we live to assessment and criticism.

David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 384 (1989).

7. I refer here to positive law and the rules and norms of practice which govern the legal system. *See* Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 782 (1989).

8. The Standards of Conduct for mediators, developed by the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR), state that "[s]elf-determination is the fundamental principle of mediation." STANDARDS OF CONDUCT (1994), *reprinted in* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE app. c, at 268 (1994) [hereinafter STANDARDS OF CONDUCT].

particularly where one or both of the parties are not represented by lawyers?[9] These are the questions I address in this article.

My inquiry focuses specifically on the role of law in mediation—how it affects the process, the outcome and, ultimately, the type of justice that parties achieve in court mediation. This subject has been widely noticed, but largely unexamined.[10] To date, the debate has suffered from lack of empirical understanding about how law is included or excluded in the mediation process.[11] Critics recoil from mediation due to the absence of law in the process while proponents applaud mediation's freedom from law's grasp. In this article, I question the premise of both assumptions when mediation occurs in the court system. Relying on case studies from a small claims court mediation clinic[12] and other empirical research, I demonstrate that law neither automatically appears nor disappears in court mediation. The law's influence in the mediation process depends in large measure upon the individual mediator's approach to the mediation process.[13] This unpredictable character affects the kind and quality of justice currently available in court mediation.[14]

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9. My particular concern throughout this article is with court mediation programs in the informal courts where parties generally participate without attorneys. Informal courts include a broad array of fora, including small claims courts, magistrate courts, and justice of the peace courts, where monetary awards are generally the sole relief available, the dollar jurisdictional amount is limited, and litigants often appear without lawyers.

To the extent that these courts dispense with formal rules of procedure and rigid application of formal law, they may be considered part of a wider system of "informal" justice, which includes local community dispute centers, victim services organizations, and other entities that offer mediation services on a walk-in basis.

10. Some earlier commentators assumed that law, like adjudication, operated totally outside the mediation process. *See, e.g.*, CATHIE J. WITTY, MEDIATION AND SOCIETY: CONFLICT MANAGEMENT IN LEBANON x (1980) ("Analysis of mediation as an integral and necessary component of a dispute settlement system also specifically and directly questions the role of law and adjudication in American Society.").

11. This theory-practice gap is understandable in view of mediation's recent popular appeal.

12. I am the director of the Fordham Law School Mediation Clinic, which operates in the New York City small claims courts of Manhattan, Bronx, Brooklyn, and Queens. Much of my thinking in this area derives from my own and my students' mediation experiences in these courts over the last eight years.

13. I am referring here to cases where questions of law are involved.

14. It also raises a question about the circumstances under which court mediation agreements comport with general notions of justice. The same issue has been raised with respect to a wide variety of settlements. *E.g.*, HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS 2 (1987); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); Susan P. Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

The question of justice in mediation is discussed more fully in Part IV; *see infra* notes 174-241 and

Analysis of the mediation case studies suggests that, to the extent law is a relevant concern in court mediation, at least two fundamental policy questions must be addressed: What are the limits of self-determination? And, when does self-determination trump the protections of law? In exploring the role of law in these cases and how it affects the kind of justice achieved in court mediation, a tale of three kinds of justice emerges: justice through law based on objective legal norms, which parties typically expect to receive when they bring their disputes to court in the first instance; "individualized" justice based on subjective standards, which court mediation programs purport to deliver; and finally, hit-or-miss justice, which is what often actually results under current court mediation regimes. In my view, we should expect more. When the legal institutions of our court system require or strongly encourage mediation, the values of the legal system come into play and must be served. Thus, I urge an understanding of justice in court mediation which focuses on whether parties achieve the counterpart to justice through law, what I call "equivalency" justice.[15] I do not equate "equivalency justice" with the likely court outcome, but rather with its capacity for responding to the parties' reasonable expectations for a fair result when they first come to court. Parties choose the legal system to resolve disputes primarily because they want what courts have to offer, namely, a resolution of their disputes based on principles of law.[16] When parties are required to resolve disputes differently, through the mediation process, their bargaining should be informed by knowledge of law. Thus, how legal rights[17] are acknowledged or ignored determines in large measure whether parties achieve "equivalency" justice in court mediation.

Part I of this article traces the development of court mediation over the past twenty years. Part II begins to explore the normative question of what role law should play in court mediation and presents two case studies from a court mediation project. These studies provide the framework for discussion in the remainder of the article. Part III considers the predominant positions concerning the relationship between law and mediation;

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accompanying text.

15. This "equivalency justice" has both procedural and substantive components. *See infra* notes 201-16 and accompanying text.

16. Of course, parties may also choose the court system because they are unaware of alternatives to court adjudication of disputes or simply because they wish to harass their opponents through legal means. *See infra* note 76 and accompanying text.

17. In this article, "legal rights" refers to entitlements provided by law.

particularly, criticism that law is excluded from the mediation process. Part III also discusses the merits of including law in the mediation process. Part IV calls for greater understanding of the meaning of justice in court mediation.

## I. COURT MEDIATION

The traditional promise of the court system is to provide litigants with justice through law.[18] This promised goal may not always be achieved,[19] but at least it is the normative ideal. With the growing popularity of the alternative dispute resolution (ADR) movement, courts have shown increased interest in mediation's potential as an official settlement process. As mediation programs are institutionalized in court, litigants find themselves directed off their original course of seeking justice through law.[20] In a very real sense, their original expectations for a process and an outcome based on legal procedures and principles are suspended in court mediation.[21]

### *A. The Mediation Process*

As a starting point, I offer an operational definition of mediation which encompasses its traditional understanding as an informal, consensual process in which a neutral[22] third party, without power to impose a settle-

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18. This is not to suggest, however, that law and justice are synonymous. *Cf.* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664-65 (1985) (arguing that law and justice are not synonymous).

19. *See generally* Jeffrey M. Blum, *Critical Legal Studies and the Rule of Law*, 38 BUFF. L. REV. 59 (1990); Radin, *supra* note 7.

20. *See* James Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994).

21. Generally, if parties fail to resolve their disputes in court mediation, they have the right to return to court for a trial before a judge.

22. There are a number of differing views on the meaning of neutrality and its value in mediation. *See* Sara Cobb & Janet Rifkin, *Neutrality As a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, *in* 11 STUD. L., POL. & SOC'Y 69, 70 (Austin Sarat & Susan S. Silbey eds., 1991); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35 (1991); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55; Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 96 (1981); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 8 (1981).

Research has shown that in some areas, such as child custody, mediators are not neutral and this affects the outcome. *See, e.g.*, Cheryl Regehr, *The Use of Empowerment in Child Custody Mediation: A Feminist Critique*, 11 MEDIATION Q. 361, 362 (1994) (citing studies which show mediator preference

ment, "assists disputing parties in reaching a mutually satisfactory resolution."[23] Lon Fuller's classic formulation reminds us of mediation's "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[24]

There are, today, a number of differing views about the mediation process, and this, in turn, has generated a variety of opinions about the appropriate role of the mediator.[25] The label "mediation" is attached to a wide variety of practices ranging from court conferences strongly suggesting settlement[26] to exercises in moral development.[27] At one end

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for shared parenting and joint custody and how these values affect decisions made by couples).

23. KOVACH, *supra* note 8, at 16-18. Mediation is defined differently in a number of texts and articles. *See, e.g.*, FOLBERG & TAYLOR, *supra* note 2, at 7 (defining mediation as the process by which the participants and a neutral person "isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement"); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 14 (1986) (defining mediation as the intervention into a dispute by a neutral third party to assist disputing parties in reaching an acceptable settlement); Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 24 (1985) (defining mediation as "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement").

The problem of defining mediation is connected to its contextual nature. With the increased use of mediation in a wide variety of settings, new practice models are continually emerging. *E.g.*, JAMES C. FREUND, THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES (1994); JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES (1995); WHEN TALK WORKS: PROFILES OF MEDIATORS (Deborah M. Kolb et al. eds., 1994) [hereinafter WHEN TALK WORKS].

24. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

25. *E.g., compare* James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 NEGOTIATION J. 367, 372 (1994) (arguing that the proper role of mediators is to attempt to gain agreement between parties) *with* ROBERT A.B. BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 12 (1994) (arguing that the proper role of mediators is to empower parties and help them grow morally). For a discussion of the mediator's role with unrepresented parties in court mediation, see *infra* notes 217-37 and accompanying text.

26. A description of a recent mediation session in small claims court is illustrative:

> They were sitting elbow to elbow in Manhattan Small Claims Court but they were miles apart. . . . "Enough!" said Kevin McClanahan, the mediator presiding over the case, who wanted the litigants to split the difference and forgo a trial. . . . Glaring at the condo owner, Mr. McClanahan assured him that he had the right to a trial but also offered a warning. "Maybe the judge will get to your case that first night or maybe she won't. So you'll return and wait another four or five hours. Even then she might not get to you, so you'll come back again. After all that, you might lose."
>
> A woman sitting beside the condo owner murmured to him, "Even if you win, she can appeal and you'll have to come back again."
>
> "O.K., O,K.," he finally conceded. "I'll give her the $900."

J. Peder Zane, *Tell It to the Judge . . . but Only If You Feel You Really Must: In Small Claims Courts,*

of the spectrum is the instrumentalist vision of mediation as an efficient means of managing court calendars—a perfunctory process which settles cases and clears dockets.[28] At the other extreme is a more noble vision of mediation as a process of moral development which helps individuals realize their ends and develop a stronger sense of efficaciousness.[29] Somewhere in between is the ethical pragmatists' view that mediation is a good method of resolving some disputes when it is responsive to human needs.[30]

Depending upon one's philosophy of mediation, the cardinal virtues of this process can be self-determination,[31] autonomy,[32] empowerment, transformation, and efficiency.[33] Mediation is thought to enhance parties'

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*a Move to Peacemaking*, N.Y. TIMES, July 16, 1995, § 3, at 8.

27. *See, e.g.*, John Lande, *Mediation Paradigms and Professional Identities*, MEDIATION Q., June 1984, at 19 (describing mediation as "an expression of a set of positive values about how people should deal with one another").

28. *See, e.g.*, Morris L. Medley & James A. Schellenberg, *Attitudes of Indiana Judges Toward Mediation*, 11 MEDIATION Q. 329, 334 (1994).

29. This is what Bush and Folger call the "transformative approach." BUSH & FOLGER, *supra* note 25, at 12; *see also* Frank Dukes, *Public Conflict Resolution: A Transformative Approach*, 9 NEGOTIATION J. 45, 47 (1993).

30. I count myself among this group. *See, e.g.*, Sally E. Merry, *Albie M. Davis: Community Mediation as Community Organizing*, *in* WHEN TALK WORKS, *supra* note 23, at 245; Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION J. 17, 23 (1989) (stating that mediation is "designed to go with, not against, the grain of humanity"); *cf.* 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, 7-8 (1991) (stating that alternative forms of dispute resolution, unlike adjudication, may help solve many human problems); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 58 (1982) (stating that mediation "highlights the interconnectedness of human beings").

31. Mediator standards of conduct, developed jointly by the AAA, ABA, and SPIDR, hold that self-determination is the central principle of mediation. *See supra* note 8.

32. In the context of mediation practice, "autonomy" has been defined as that which exists "when an individual has the capacity to make a choice among real alternatives, and can make that choice using reasons with which he or she is comfortable." David E. Matz, *Mediator Pressure and Party Autonomy: Are They Consistent with Each Other?*, 10 NEGOTIATION J. 359, 360 (1994).

33. Commentators have articulated various core values of mediation. *See, e.g.*, BUSH & FOLGER, *supra* note 25, at 31-32 ("transformation of human moral awareness and conduct"); Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution; A Myth: Bridge Makers Who Face the Great Mystery*, 25 U. TOL. L. REV. 253, 258 (1994) (arguing that there are four core values that underlie mediation: "First, mediation should promote the self-actualization or self-determination of the individual. Second, the individual should take ownership or responsibility for her own actions. . . . Third, the individual has the responsibility to understand the experience of the others in the dispute. Fourth, the individual has the responsibility to act in ways which acknowledge the previous understanding."); Robert A.B. Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-70 (1989) (empowerment and recognition); Carrie Menkel-Medow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEG. J. 217, 240 (1995) (book

self-determinative capabilities because it permits them to structure and consent to the outcome of the bargaining process.[34] Unlike decision making by a neutral third party in the adjudication process, decision making in mediation rests solely with the disputing parties. Some commentators consider mediation to be a fairer process than adjudication because the affected parties have complete authority in selecting what values will govern the resolution of their dispute.[35] Finally, mediation is thought to result in greater litigant satisfaction than does judicial adjudication of disputes.[36] There has been a significant amount of scholarly activity directed toward testing and validating these assumptions.[37]

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review) (arguing that "mediation is transformative because it is educational").

34. The empowerment value of mediation has also been recognized in the context of client decision making. *See* Mary M. Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 3 CLINICAL L. REV. 593, 613 (1995).

35. *See* Riskin, *supra* note 30, at 34. Riskin argues that fairness is the "ultimate issue in mediation." Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 349 (1984). For empirical studies on perceptions of fairness in mediation, see MICHELE HERMANN ET AL., THE METROCOURT PROJECT FINAL REPORT 105 (1993) (reporting that both mediation respondents and claimants perceived the outcomes as being more fair and less biased than adjudication); Susan Keilitz, *Civil Dispute Resolution Processes*, *in* NATIONAL SYMPOSIUM, *supra* note 3, at 9 (reporting that 75% of litigants and attorneys perceived mediation to be fair according to a study of Hennepin County, Minnesota); Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 31, 33 (Kenneth Kressel & Dean G. Pruitt eds., 1989) [hereinafter MEDIATION RESEARCH] (reporting that disputants typically perceived outcomes of mediation to be "significantly fairer" than those of court proceedings).

36. For studies showing litigant satisfaction with mediation, see HERMANN ET AL., *supra* note 35, at 116 (noting that minority claimants and respondents reported higher satisfaction with mediation than with adjudication despite the fact that they fared less well monetarily in mediation); John A. Goerdt, *How Mediation Is Working in Small Claims Courts*, JUDGES' J., Fall 1993, at 12, 49 (reporting that 77% and 79% of users were satisfied with outcomes and procedures, respectively, in mediation); Joan B. Kelly & Mary A. Duryee, *Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings*, 30 FAM. & CONCILIATION CTS. REV. 34, 43-44 (1992) (reporting user satisfaction rates ranging from 41% to 78% in two California studies); Jessica A. Pearson, *Family Mediation*, *in* NATIONAL SYMPOSIUM, *supra* note 3, at 63 (noting that user satisfaction rates in family mediation cases fall in the 70% to 90% range); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 463-65 (1985) (observing that mediation users are extremely pleased with the process whether or not they reach an agreement). *See also* Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23, 23 (1993) ("[R]eluctant parties often use mediation effectively and evaluate their mediation experiences positively."). *But see* Wendy Clark, *One Consumer's View of ADR*, NIDR FORUM, Summer/Fall 1993, at 14 (discussing dissatisfaction with mediation in a landlord-tenant dispute).

37. On compliance with mediation agreements, compare Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 20-22 (1984) (noting a "strikingly high level of full compliance") with Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 L. & SOC'Y REV. 515,

### *B. The Role of Law in Mediation*

Conventional wisdom concerning mediation holds that substantive law is not dispositive in the mediation process[38]—it operates simply as a template to show what might be available in a more formal, legalistic setting.[39] Instead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute.[40] Thus, the moral reference point in mediation is the self,[41] and individualized notions of fairness, justice, morality, ethics, and culture may trump the values associated with any objective framework provided by law.

Some scholars have argued that because mediation operates outside the supposed protection of law and the legal process, it has potential to do the most good.[42] Disputing parties have the ability to resolve their problems in a wider framework than the limited confines of the legal system. Mediation does not silence the parties in ways that law does with rules of evidence, procedure, and the like.[43] Rather, it engages them in a valuable

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542-45 (1984) (concluding that "[m]uch more research on the problem of compliance is needed").

38. *See* Gary Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice, in* THE PEOPLE'S LAW REVIEW 42 (Ralph Warner ed., 1980); CENTER FOR LAW AND HUMAN VALUES, BEYOND THE ADVERSARY MODEL, MATERIALS ON MEDIATION AND ALTERNATIVE APPROACHES TO LAW PRACTICE, VOL. II, THE PLACE OF LAW IN MEDIATION, MEMO # 6 (1984) (copy on file with author); Riskin, *supra* note 35, at 330.

39. As mediation is practiced in new arenas, this traditional understanding is being modified. In special education mediation, for example, Susan Silbey has observed that "the law and institutional practices made available by law are *actively* shaping both the mediation and the outcomes." Susan S. Silbey, *Patrick Davis: To Bring Out the Best . . . To Undo a Little Pain in Special Education Mediation, in* WHEN TALK WORKS, *supra* note 23, at 61, 64. *See also* JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986).

40. *Accord* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 77 (1978) (calling for an approach to justice that retains an openness to other sources of knowledge instead of adherence to a "formalist, rule-bound" tradition).

41. I refer to "self" in the collective sense of both parties to the conflict, bearing in mind Lon Fuller's conceptual understanding of the relational aspect of mediation. *See* Fuller, *supra* note 24, at 325. This highly individualistic moral reference point in court mediation raises significant questions about the ownership of disputes. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2680 (1995); Professor Frank Sander, Remarks at the Association of American Law Schools Annual Meeting, San Antonio, Texas (Jan. 4, 1996) [hereinafter Sander Remarks].

42. *See, e.g.*, BUSH & FOLGER, *supra* note 25, at 16; Riskin, *supra* note 30, at 34; Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

43. *See* Albie M. Davis & Janet Rifkin, *A Conversation Between Friends*, CONCILIATION Q., Winter/Spring 1994, at 2, 3 (noting that "mediation makes it possible for people to tell their stories" and that "[o]ther forums silence talk").

therefore, is not abandoned in mediation, but it shares a home with a family of diverse values including autonomy, self-determination, and personal recognition.[44]

### C. *The Development of Court Mediation*

The development of court mediation over the past twenty years is part of the overall growth of the alternative dispute resolution (ADR)[45] movement.[46] The 1976 Pound Conference, at which judges, court

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44. *See, e.g.*, Bush, *supra* note 33, at 267-70 (describing the "unique capacities" of mediation); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 52-53 (1985) (suggesting that mediation can "modify the harshness of the adversarial process and expand the kinds of solutions available").

45. In this article, the term "alternative dispute resolution" refers to processes which are alternatives to court adjudication of disputes. These include arbitration, mediation, negotiation, mini-trials, and summary jury trials. *See generally* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (2d ed. 1992).

46. However, mediation is not a new phenomenon in the United States. Mediative forms of conflict resolution were common among early immigrant and religious groups. *See* FOLBERG & TAYLOR, *supra* note 2, at 3-4; Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, ARB. J., June 1993, at 14; Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627, 630 (1973); George S. Odiorne, *Arbitration and Mediation Among Early Quakers*, 9 ARB. J. 161 (1954). *See generally* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983). Other conciliatory approaches to conflict resolution may be found in the culture of Native American peacemaking. *See generally* Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

In the early-twentieth century, Congress turned to mediation to resolve labor-management disputes. In 1913, Congress created the Department of Labor and provided that the Secretary of Labor act as a mediator. WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25 (2d ed. 1986). In 1947, Congress created the Federal Mediation and Conciliation Service to mediate labor disputes. *Id.* at 25, 37-38. The continued use of mediation in labor-management conflicts attests to its longstanding value in these types of labor disputes.

In the late 1960s and early 1970s, community mediation programs were developed and encouraged by the federal government primarily to resolve interpersonal disputes in urban areas. Much of the activity was carried out by the Law Enforcement Assistance Administration (LEAA) Division of the United States Department of Justice. KOVACH, *supra* note 8, at 21-22. Community programs and Neighborhood Justice Centers used volunteer mediators from the community. *Id.* at 22. Today, most community programs have expanded intake to include more than minor disputes, and thus, many are now called Dispute Resolution Centers. *Id. See also* Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 60, 64-66 (Roman Tomasic & Malcolm M. Feeley eds., 1982) (describing types of disputes handled in minor dispute center projects).

Parallel activities have developed in the private sector as well. Over the last two decades, the business of mediation has flourished, with retired judges, lawyers, and non-lawyers competing for cases. Promoted as a "better way" to resolve disputes and as the "sleeping giant of business dispute resolution," JAMES F. HENRY & JETHRO K. LIEBERMAN, THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES: BETTER RESULTS WITHOUT LITIGATION 57 (1985), mediation services are now offered by a growing market of private dispute resolution providers. An example of this would be the recent

administrators, and legal scholars examined general dissatisfaction with the justice system, marked the beginning of a systematic effort to introduce mediation in the courts as an alternative to adjudication.[47] Experimentation began in small claims court, the paradigmatic informal court instituted at the turn of the century to provide an "alternative" to the formal court system.[48] The informality and low financial stakes of small claims court made it a good testing ground for introducing mediation to the court system.[49]

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DISPUTES: BETTER RESULTS WITHOUT LITIGATION 57 (1985), mediation services are now offered by a growing market of private dispute resolution providers. An example of this would be the recent publication of the MARTINDALE-HUBBELL DISPUTE RESOLUTION DIRECTORY (1994). *See generally* Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC'Y 367 (1992).

47. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). The Pound Conference, held on April 7-9, 1976, in St. Paul, Minnesota, had a significant influence on establishing court ADR programs. KOVACH, *supra* note 8, at 21. *See generally*, POUND CONFERENCE, *supra* note 1.

48. It is paradoxical that mediation practice in small claims court involves one "alternative" that displaces the "other." Having spent a number of years conducting a mediation clinic in small claims courts, I feel compelled to mention some of the benefits of mediation for litigants in this arena. In general, mediation may provide litigants with a meaningful alternative to trial before a judge or arbitrator. Litigants may gain access to a wider range of relief than would otherwise be available in court. Even though the courts' jurisdiction is limited to money awards, money is not always an important issue for litigants in the informal courts. Some parties have a strong desire to tell their stories rather than to achieve specific outcomes. Often, parties need an apology, equitable relief such as rescission or specific performance, assurances of compliance, or simply the opportunity to clear the air. All these are possible in mediation, but are not generally available in adjudication. Litigants who lack communication skills and the resources to hire an attorney to negotiate for them often benefit from a mediator's assistance in their negotiations. *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248, 249 (1993) (explaining how mediators can help parties overcome various barriers to negotiation). Additionally, many of the problems in cases that are brought to small claims court involve relationships that will continue after a judgment is rendered. More often than not, parties will leave mediation on speaking terms with each other even if they do not settle. Finally, I note that empirical studies show high compliance rates with mediated outcomes. *See, e.g.*, Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 260-64 (1981).

For a general discussion of the advantages of mediation over adjudication, see Riskin, *supra* note 30, at 34. For a reflective listing of the most favorable aspects of settlement see Menkel-Meadow, *supra* note 41, at 2692.

49. Much has been written on the use of mediation in small claims courts. *See, e.g.*, WILLIAM DEJONG ET AL., U.S. DEPT. OF JUSTICE, THE USE OF MEDIATION AND ARBITRATION IN SMALL CLAIMS DISPUTES (1983); Michael S. Gillie, *A State-Level Approach to Community Arbitration and Mediation*, MEDIATION Q., Sept. 1984, at 53; McEwen & Maiman, *supra* note 48, at 243-68; Robert V. Strena & George D. Westermark, *Arbitration and Mediation in a Neighborhood Small Claims Project*, MEDIATION Q., Sept. 1984, at 39; Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127 (1985); Neil Vidmar, *The Mediation of Small Claims Court Disputes: A Critical Perspective*, *in* 1 RESEARCH ON NEGOTIATION IN ORGANIZATIONS (R. Lewicki et al. eds., 1986);

Today, mediation practice has expanded from informal courts[50] to state and federal courts[51] of general jurisdiction.[52] Settlement rates have been significant.[53] Programs range from the purely voluntary to mandatory,[54]

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Vidmar, *supra* note 37, at 522-49.

Mediation continues to have a visible presence in small claims courts today. *See* Goerdt, *supra* note 36, at 13. *See generally* Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RESOL. 55 (1993).

50. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 24-26 (1990).

51. *See generally* BRUCE BRODIGAN ET AL., AMERICAN BAR ASS'N, FEDERAL LEGISLATION ON DISPUTE RESOLUTION (ABA Standing Comm. on Dispute Resolution Monograph Series No. IIIB 1988); GOVERNMENTAL AFFAIRS AND PUB. SERV. GROUP, AMERICAN BAR ASS'N, LEGISLATION ON DISPUTE RESOLUTION (1990). *See also* PLAPINGER & SHAW, *supra* note 4, at x; NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE ch. 5 (2d ed. 1994).

52. *See generally* FEDERAL JUDICIAL CTR., COURT-BASED DISPUTE RESOLUTION PROGRAMS (1991). The development of many mediation programs in federal court has resulted from the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified as amended at 28 U.S.C. §§ 471-482 (Supp. V. 1993)), which requires federal courts to examine their caseloads and develop a management plan, referred to in the Act as a "civil justice expense and delay reduction plan" (EDRP). 28 U.S.C. § 471. Congress recommended that courts, in implementing the EDRP, "refer appropriate cases to alternative dispute resolution programs." 28 U.S.C. § 473(a)(6). Mediation was specifically mentioned as a possible alternative. 28 U.S.C. § 473(a)(6)(B). A large number of EDRPs in federal courts today provide for mediation. REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT, 1992 A.B.A. SEC. ON LITIG. 38.

Some courts have instituted mandatory mediation programs as a result of the Act (e.g., Southern District of New York), while others have voluntary programs (e.g., Eastern District of New York). PLAPINGER & SHAW, *supra* note 4, at 150. For a list of ADR programs adopted under the Act by the end of 1991, see *id.* app. b.

53. For multi-jurisdiction studies of settlement rates, see JOHN A. GOERDT, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS 32 (1992) (finding 50% to 95% settlement rates); Henry W.K. Daley & Susan Keilitz, *Court-based Family Mediation Programs*, STAT. CT. J., Fall 1992, at 24, 26-27 (reporting agreement rates ranging from 34% to 74% in four jurisdictions, three of which mandate mediation); Goerdt, *supra* note 36, at 13 (reporting 47% to 85% agreement rates in mediations conducted in three urban jurisdictions, with those having voluntary programs reporting the higher rates); Pearson, *Family Mediation*, *supra* note 36, at 60 (concluding from fifteen studies that in contested custody and visitation cases, 50% to 75% of cases result in settlement). For single jurisdiction studies of settlement rates, see McEwen & Maiman, *supra* note 48, at 249-50 (finding that 66.1% of small claims cases resulted in an agreement); Pearson & Thoennes, *supra* note 36, at 456 (finding that 41% of users of a mandatory mediation program in California, and 35% and 41% of users of voluntary programs in Connecticut and Minneapolis, respectively, reached final agreements in mediation); Raitt et al., *supra* note 49, at 67 (finding that over 50% of small claims cases referred to mandatory mediation in Multnomah County, Oregon resulted in settlement); *id.* at 80 (citing JOSHUA ROSENBERG ET AL., UNIVERSITY OF SAN FRANCISCO FINAL REP. TO THE JUD. COUNCIL 2 (1992)) (reporting 80% settlement rate in California small claims mediation program).

54. There are many variations in the level and degree of mandatory programs. Thus, it is often difficult to be accurate in labeling a mediation program either mandatory or voluntary. *See* Sander Remarks, *supra* note 41. Courts use a variety of strategies short of forced engagement to induce parties

depending upon state legislatures[55] and court administrators. Low voluntary usage[56] has resulted, however, in a gradual shift to mandatory mediation.[57] Despite much critical concern,[58] mandatory mediation programs continue.[59]

The growth of mandatory court referral programs[60] undercuts the

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to mediate, including mandatory information and evaluation sessions for divorce mediation. *See, e.g.*, Nancy A. Burrell et al., *Evaluating Parental Stressors of Divorcing Couples Referred to Mediation and Effects on Mediation Outcomes*, 11 MEDIATION Q. 339, 343 (1994) (discussing WIS. STAT. ANN. § 767.11(8) (West 1993), which "mandates that couples filing for divorce with custody or visitation issues attend information and evaluation sessions to learn about mediation as a means for resolving disputes and to assess the appropriateness of the process for their individual cases"). For a detailed discussion on the meaning of participation in mandatory mediation programs, see ROGERS & MCEWEN, *supra* note 51, § 7:06.

55. Several statutes provide that courts may exclude from mediation certain categories of cases such as child abuse and domestic violence. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 750, para. 5/607.1(c)(4) (Smith-Hurd 1993) (providing that courts may not order mediation in cases of domestic violence); NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie Supp. 1993) (permitting exclusion of child abuse and domestic violence cases from mediation programs).

56. McEwen & Milburn, *supra* note 36, at 23; Sally E. Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 151-54 (1984); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 427 (1982).

57. *See* PLAPINGER & SHAW, *supra* note 4, at 1-13. *See generally* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2084-2089 (1993) (discussing and applying four principles for determining forms of participation in court-ordered ADR that are consistent with the litigation system).

58. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, 56 MOD. L. REV. 441 (1993); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. DISP. RESOL. 1, 12 (1993). *See generally* ROGERS & MCEWEN, *supra* note 51, ch.7. Some commentators, however, have suggested that parties express satisfaction with mandatory mediation. *See, e.g.*, McEwen & Milburn, *supra* note 36, at 23; Rosenberg, *supra* note 42, at 468 (citing Mary A. Duryee, *A Consumer Evaluation of a Court Mediation Service*, *in* REPORT TO THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA (1991)).

59. The National Standards for Court-Connected Mediation Programs give guarded approval to mandatory court mediation programs. Standard 5.1 provides: "Mandatory attendance at an initial mediation session may be appropriate, but only when a mandate is more likely to serve the interests of parties (including those not represented by counsel), the justice system and the public than would voluntary attendance." CENTER FOR DISP. SETTLEMENT, INSTITUTE OF JUD. ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS standard 5.1 (1992) (hereinafter NATIONAL STANDARDS).

60. For a critique of court-referred mediation, see Louis J. Weber, Jr., *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom?*, 46 SMU L. REV. 2113, 2114 (1993) (describing court-referred ADR as an "additional" rather than an "alternative" dispute resolution process that benefits lawyers more than the public). For a discussion of four forms of participation required in ADR, see Sherman, *supra* note 57, at 2089-111.

traditional voluntariness of mediation.[61] Unlike disputing parties who go "to a mediator because they are stuck,"[62] court mediation often "sticks" parties with a mediator.[63] Given the coercive behavior of some mediators,[64] unrepresented parties are at risk.[65] Even in programs which are not strictly mandatory, when court personnel encourage parties to mediate, the invitation is not lightly refused. Particularly for unrepresented litigants, such a suggestion from an authority figure can easily be perceived as a command.[66] Without lawyers, parties may not recognize the subtle

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61. Additionally, unlike traditional mediation, court-based mediation is likely to have the attributes of a zero-sum game. The notion that parties should be searching for mutually acceptable resolutions may not appeal to litigants who expect a winner and a loser; parties who come to court may be less interested in building consensus than in claiming their legal entitlements or seeking vengeance. Particularly in a small claims court setting, where judicial relief is generally limited to monetary awards, issues are likely to appear predominantly "distributive" in nature and are not easily processed through the integrative bargaining approach of problem-solving negotiation.

62. David E. Matz describes the typical disputant who chooses mediation:

> Parties come to a mediator because they are stuck. Going ahead with their dispute without mediation has become too painful, expensive, or difficult; and, conversely, letting go of the dispute and ignoring it does not seem possible either. The parties are too invested in the dispute to let go or ignore it. Thus they are stuck, and come to the mediator to help them get unstuck.

Matz, *supra* note 32, at 360.

63. This happens unless litigants are permitted to choose mediators. Practice varies from state to state.

64. *See, e.g.*, James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66 (1991) (discussing three "distinct styles" of mediators). *See also* Nader, *supra* note 58, at 13 ("Discussion of blame or rights is avoided and replaced by the rhetoric of compromise and relationship; cultural notions of justice are factored out.").

It should be noted that mediators have an arsenal of techniques which can be used to pressure parties into settlement. *See, e.g.*, Peter J.D. Carnevale et al., *Contingent Mediator Behavior and Its Effectiveness*, *in* MEDIATION RESEARCH, *supra* note 35, at 213, 216-17 (listing thirty-six mediation tactics). Some commentators believe that pressuring parties is permissible. *See, e.g.*, David E. Matz, supra note 32, at 360 ("I believe it is accurate to say that almost all mediators apply pressure on the parties with whom they work. This is inevitable and, in my judgment, it is a good thing."). Some commentators have also suggested that mediators can influence parties into ignoring their fundamental interests. *See* Boskey, *supra* note 25, at 368.

Other studies show that mediators use various strategies, but all of them are directed toward producing settlements. *See* BUSH & FOLGER, *supra* note 25, at 37-39, 44-45; Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 19 (1986) (describing a bargaining and a therapeutic style of mediation).

65. Other types of ineffectual mediator behavior can also be harmful to unrepresented litigants. One unsatisfied tenant in small claims court mediation who had sued her landlord, an attorney, described her mediator as "soft spoken, somewhat timid. She did not point out that personal testimony and private details were irrelevant." Clark, *supra* note 36, at 15.

66. Recognizing this danger, SPIDR has suggested that "[w]hen the parties are unrepresented by counsel, special efforts should be made to make the parties aware of alternatives to settlement and to avoid practices that make them feel that they must settle." LAW & PUB. POLICY COMM., SOCIETY OF

differences between referral to mediation, compulsion to mediate, and friendly coercion to reach a settlement.[67] Fortunately, the developing case law in this area shows that courts do not require that settlement be reached when mediation is required.[68]

The rhetoric of early proponents suggested that mediation was a boon to the legal community as well as to disputants,[69] and that it would result in a "peaceful and evolutionary revolution in the way people think and act in general."[70] The reality is different.[71] Many courts have adopted an instrumentalist, rather than a transformative or peacemaking approach, looking to mediation as a way to bring greater efficiency and reduce dockets.[72] Settlement is the goal of this enterprise,[73] and judges view

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PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 20 (1991) [hereinafter SPIDR REPORT].

67. The National Standards for Court-Connected Mediation Programs require courts to be sensitive in this area. Standard 11.2 provides: "Courts should provide parties who are required to participate in mediation with full and accurate information about the process to which they are being referred, including the fact that they are not required to make offers and concessions or to settle." NATIONAL STANDARDS, *supra* note 59, standard 11.2.

68. In Decker v. Lindsay, 824 S.W.2d 247, 252 (Tex. Ct. App. 1992), for example, a trial judge's order requiring parties to mediate was set aside because it was held to have exceeded the relevant statutory provision, which required only mandatory referral, not mandatory negotiation.

There are a growing number of cases dealing with "referral" to mediation: *In re* Stone, 986 F.2d 898, 903, 905 (5th Cir. 1993) (holding that attendance by a representative with full settlement authority may be required by a district court at pretrial conferences, but when the government is a litigant, courts should consider less drastic steps before requiring the government to do so in all circumstances); Physicians Protective Trust Fund v. Overman, 636 So. 2d 827, 829 (Fla. Ct. App. 1994) (holding that a court's order requiring an entire Board of Trustees to attend mediation as sanction for previous noncompliance does not depart from "the essential requirements of law"); Avril v. Civilmar, 605 So. 2d 988, 989-90 (Fla. Ct. App. 1992) (holding that state mediation statute does not require parties to settle or even make an offer at mediation); Graham v. Baker, 447 N.W.2d 397, 401 (Iowa 1989) (holding that attendance and refusal to deviate from pre-mediation position satisfies the minimal participation required by state statute); Obermoller v. Federal Land Bank, 409 N.W.2d 229, 231-32 (Minn. Ct. App. 1987) (holding that continued attendance accompanied by refusal to waive argument that mediation laws do not apply to case insufficient to prove bad faith).

69. Lawrence H. Cooke, *Mediation: A Boon or a Bust?, in* MEDIATION IN THE JUSTICE SYSTEM 3, 17 (Maria R. Volpe et al. eds., 1983).

70. Lande, *supra* note 27, at 19.

71. I note that in the informal courts, the reality of litigation may also be quite different from what parties expected. *See infra* notes 102-09 and accompanying text.

72. *See, e.g.*, Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876, 1882 (1986). *But see* BUSH & FOLGER, *supra* note 25, at 274 (reporting that some courts are now more interested in mediation as a means of providing a valuable "community service" than as a mere settlement device).

73. This approach is contrary to that adopted by the National Standards for Court-Connected Mediation. Standard 11.4 provides: "Settlement rates should not be the sole criterion for mediation program funding, mediator advancement, or program evaluation." NATIONAL STANDARDS, *supra* note

mediation as a tool of good court management.[74] Indeed, some studies suggest that a majority of Americans also adopt the utilitarian, or instrumentalist, approach to court mediation.[75]

### *D. The Paradox of Court Mediation*

Litigants come to court for different reasons. Some seek justice through law; that is, a judge's decision based on the rule of law. Other litigants hope to coerce their opponents through legal means.[76] Whatever their original purpose in seeking the court's intervention in their disputes, after referral to mediation, their dispute resolution activity takes place without the official power of law, but nonetheless under its aegis.[77] When the court refers litigants to mediation, the litigants themselves are required to become the decision makers. This, then, is the paradox of court-based mediation: Despite the initial search for justice based on an objective standard outside of themselves, namely law, disputing parties are required by courts and coached by mediators to place the locus of decision making in themselves. The result is "individualized justice."[78] The parties' original expectations for justice through law have been suspended. The court is now

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59, standard 11.4.

74. Medley & Schellenberg, *supra* note 28, at 334. *See also* Goerdt, *supra* note 36, at 13, 49 (evaluating success of mediation programs based upon, among other things, their ability to alleviate heavy caseloads). *But see* Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. 229, 234 (1994) (conveying one judge's view that alternatives such as mediation should be supplied by the private sector, not the federal courts).

75. An ABA Journal-Gallup poll showed that 87% of Americans believe that requiring mediation or arbitration for some types of cases is a way to reduce costs of the justice system. Don J. DeBenedictis, *Struggling Toward Recovery*, A.B.A. J., Aug. 1994, at 50, 52.

76. Unfortunately, attorneys play a role in some of this behavior. *See, e.g.*, THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 13 (1994).

77. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (observing, in the context of negotiations outside court, the probable outcome in court if the parties do not reach an agreement).

78. My thinking in this regard has been influenced by Professor P.S. Atiyah's essay, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1259 (1980). Professor Atiyah laments that in the modern trend away from the deterrent function and toward the dispute settlement function of law, there is an assumption that "[j]ustice can only be done by the individualized, ad hoc approach, by examining the facts of the particular case in great detail and determining what appears to be fair, having regard to what has happened." *Id.* at 1256. He characterizes this trend as the move from principles to pragmatism. *Id.*

Recently, the concept of individualized justice has been the subject of much discussion in connection with the settlement of mass tort cases. *See* Cramton, *supra* note 14; Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1203-05 (1995).

promising a form of justice which results more from individual preferences than from externally imposed standards. In addition to considering the law, parties are also invited to act creatively and pursue their personal sense of fairness based on nonlegal values such as culture, morals, and individual ethics.

But referral to mediation does not necessarily diminish the importance of law for those parties who sought its protection when they first came to court.[79] In fact, law may have an exaggerated sense of value because of the feeling that the parties have lost the right to see a judge.[80] Parties who choose to bring their conflicts into the public domain of the court system are likely to have strong beliefs about their legal entitlements.[81] For them, law may be an important, if not predominant, value.[82] Otherwise, they might have resolved their disputes with less costly solutions, such as

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79. Of course, why people settle or do not settle in mediation may have little to do with the law. In my experience in the informal courts, parties may settle a case based on nuisance value, to avoid coming back to court on a future date, or to avoid ever having to deal with their adversaries again. Likewise, parties may refuse to settle based on "principle," or because of a desire for black-robed justice. *See generally* Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn from Mediation*, 56 MOD. L. REV. 361 (1993).

80. *See, e.g.*, Clark, *supra* note 36, at 14. In criticizing her experience with small claims court mediation, the author writes: "I think I'll always fantasize about a courtroom experience where the judge bellows out commands like a Roman senator, ordering the landlord to produce the appropriate documents, even scolding the landowner for cheating the serf!" *Id.*

For a different view however, see SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, AMERICAN BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION: WHO'S IN CHARGE OF MEDIATION? 78 (1982). One commentator, in speaking of a mediation program, said: "In a court-based program such as in Waterbury, people have their chance to go to court and have the judge refer their case to mediation. At least, they have had the chance to see the 'man'; they have had their day in court." *Id.*

81. For a lego-anthropological view on the meaning of law in local courts, see Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989).

82. According to Merry and Silbey's study:

> [C]itizens do not use alternatives voluntarily to the extent hoped for by proponents of [Alternative Dispute Resolution Mechanisms] because by the time a conflict is serious enough to warrant an outsider's intervention, disputants do not want what alternatives have to offer. At this point, the grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the "truth" and declare the other party wrong.

Merry & Silbey, *supra* note 56, at 153.

I am aware, of course, that reasons other than the vindication of rights bring parties to court. For example, research by Professors O'Barr and Conley suggests that "The People's Court" television show, what they term the "Wapner factor," may be a significant factor in a decision to bring a case to small claims court. William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 L. & SOC'Y REV. 137, 152 n.11 (1988); *see also* Raitt et al., *supra* note 49, at 56 n.5 (suggesting that the TV show "The People's Court" encourages people's litigiousness by making it seem "OK to sue over two bucks' worth of pizza." (citations omitted)).

avoidance or a handshake.

In Part II, I offer a normative view of the value of law in court mediation. I then discuss two case studies that suggest that the role of law in court mediation is very much dependent upon the mediator's behavior.

## II. THE INFLUENCE OF LAW IN COURT MEDIATION

### *A. Why Law Matters in Court Mediation*

Court mediation is different from other types of mediation because it takes place under the auspices of the legal system. Unlike mediation that occurs in a neighbor's garden or a sidewalk cafe, where no one expects that their legal rights will be protected, or for that matter, necessarily respected, court mediation carries with it higher expectations of legal protection. Court-bound individuals are generally a rights-conscious group. The claim or assertion of legal rights is usually what brings them to court in the first instance.[83] To the extent that bargaining is part of the dispute resolution process of court mediation, knowledge of law should be part of the process in which those claims are modified and compromised. Legal rights are, in some form or shape, the subject matter of the bargaining, and it is difficult to imagine any credible bargaining session in which the subject matter of the bargaining is absent from discussion.

I am not suggesting that law should be the primary focus of the court mediation process.[84] Parties will assert or disregard their legal rights in proportion to the value they place on them. For some litigants, conserving time may be more important than receiving an award of money. For others, the opportunity to vent may be more important than the right to void a contract. However, despite the choice of nonlegal values that may influence or determine the outcome of court mediation, law is still very much connected to the enterprise. Law motivates the choice of court as the forum for resolving disputes; law prompts the claims that are asserted; law determines the legality and enforceability of the outcome. I suggest that law should also inform whatever bargaining takes place, because in court

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83. As Frank Michelman has noted, "the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions." Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Own Rights* (pt. I), 1973 DUKE L.J. 1153, 1177.

84. If that were the case, then why not have a judge?

mediation, there is a dialectical relationship[85] between legal and nonlegal values: rights are often interdependent with the parties' nonlegal and equitable interests. Thus, parties in court mediation have dual tasks: they must be able to understand their legal rights and at the same time be able to acknowledge how their individual and community interests find expression in or outside of these rights.

The legal right to receive treble damages for violations of the housing code may be less important to a tenant than her immediate need for habitable housing. Likewise, the right to assert a statute of limitations defense in a small claims court trial may pale in importance to the time savings of a quick settlement for a busy business person.[86] The cathartic effect of confronting a person who has personally offended you and receiving an immediate apology from that person can outweigh the value of an impersonal court judgment.[87] In short, balancing legal rights and nonlegal interests involves tradeoffs, and making informed decisions about tradeoffs requires knowledge of law. It is in this dualism that authentic self-determination is exercised and that the counterpart to justice through law is achieved.[88]

The reality of court mediation practice today is otherwise. As I demonstrate in the following two case studies, unrepresented litigants may not be capable of making informed decisions about the tradeoffs involved with balancing legal and nonlegal interests. The sad result is often a hit-or-miss type of justice.

### *B. Case Studies*

The following cases offer some practical understanding of the role of law in court mediation today. They illustrate some of the ways in which law is included and excluded in the court mediation process where one or both of the parties are unrepresented by counsel. These case studies are based on actual mediation sessions in a New York City small claims court[89] and

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85. *See generally* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

86. In Manhattan Small Claims Court, it is not unusual for parties to make three appearances several months apart before they will be granted the right to a trial before a judge.

87. There is no shortage of anecdotal evidence on this from the Fordham Mediation Clinic.

88. *See infra* notes 207-16 and accompanying text.

89. A "small claim" is defined in the relevant New York statutes as "any cause of action for money only not in excess of two thousand dollars." N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 1989); N.Y. UNIFORM DIST. CT. ACT § 1801 (McKinney 1989). *See also* N.Y. CITY CIV. CT. ACT § 1801 (McKinney Supp. 1995) (three thousand dollar maximum).

were mediated by a law student in the Mediation Clinic at Fordham University School of Law.[90] Notice the mediator's control over the extent to which law influences the mediation sessions and how this control ultimately affects the outcome of the mediation process. In the first case, the mediator's uneasy avoidance of law, while it contributed to settlement, raises questions about the ultimate fairness of the agreement reached in that settlement. In the second case, the mediator's exclusive focus on the legal merits of the case prevented settlement.[91]

*1. The Health Club Membership Dispute*

*a) Background*

The claimant purchased a one-year membership from a fitness club, paid an initiation fee of $312.00, and agreed to pay monthly charges of $75.00. After using the club facilities for two months, he tried to cancel his membership because he believed that he had been misled about available equipment and facilities. The club refused to cancel the claimant's membership because the claimant failed to cancel within the time prescribed in his contract. The claimant then attempted to sell his membership but was prevented from doing so when the club offered the potential buyer a lower price. (The club denied this accusation.) The claimant was charged monthly fees of $75.00 to his credit card for nine months, during only two of which he actually used the club. He sued in small claims court to recover the $312.00 initiation fee.

In court, the club was represented by its corporate counsel. The claimant appeared pro se. During the mediation session, the claimant sought to recover the monthly charges that had been charged to his credit card despite the fact that his initial complaint was simply to recover the initiation fee.

The case was settled in mediation with the defendant agreeing to credit $200.00 to the claimant's credit card and terminate the contract.

*b) Mediator's Reflections*

While tough, the defendant's attorney seemed willing to talk settle-

90. The student who mediated these cases gave me permission to use her narratives. These cases are presented as illustrations of some of the ways in which legal issues arise in court mediation programs where one or both parties are not represented by counsel.

91. This exclusive focus on law blocked her vision to non-legal values which could have contributed to a beneficial resolution acknowledging the dignity of jointly-shared values.

ment. . . . This case was important, first and foremost, because it was my first settlement and I was beginning to think I would never settle any (I think it's the hallway[92] thing). The only thorny legal issue that bothered me during the negotiations was the initial misrepresentation by the club. This kind of gnawed at me; I kept feeling that if the claimant could prove this, then the court might rescind the contract altogether. Nonetheless, I concentrated on what the parties wanted. It became clear that the inexperienced claimant (who was only suing for the initiation fee) wanted out of the contract and that the club wanted to get this guy off their back. Consequently, the legal issue of misrepresentation became incidental to the negotiations . . . . The only ethical issue which arose was how to deal with the inequity of legal knowledge of the parties. While the young claimant (college age) was intelligent and handled himself well given the circumstances, it was difficult not [to] help him out a little. I think I did okay because I have found that when I have an attorney and a pro se party, I keep impartiality if I treat them both as if they are parties, irrespective of their professional status. In this particular case, this was easy to do because the attorney for the defendant was understanding and amiable. All in all, I think that both parties left satisfied, especially the claimant.

*c) Discussion*

The mediator was initially troubled by what she considered the health club's misrepresentation. Its tortious act "gnawed" at her, suggesting that the remedy of rescission might be available to the claimant if the case were decided by the court.[93] However, is protecting the claimant's legal rights part of her responsibility?[94] In this case, she focused on the merits of party autonomy and self-determination.[95] Thus, despite her initial misgivings, she decided to go ahead with the mediation and "concentrated on

92. This mediation session occurred in a private hallway behind the courtroom, with all parties standing up.

93. In fact, equitable relief is generally not available in small claims court. *See* Hellman v. Ploss, 359 N.Y.S.2d 823, 826 (N.Y. App. Div. 1974) (Shapiro, J., dissenting) (stating that it is generally beyond jurisdiction of small claims court to grant equitable relief), *appeal dismissed*, 330 N.E.2d 645 (N.Y. 1975); Goldstein v. Stephens, 463 N.Y.S.2d 137, 138 (N.Y. App. Term 1983) (same); *cf.* Scott v. Dale Carpet Cleaning, Inc., 465 N.Y.S.2d 680, 681 (N.Y. Civ. Ct. 1983) (holding that small claims courts "possess[] strictly limited equitable powers").

94. The mediator's quandary is part of an ongoing debate about the propriety of giving legal advice in mediation. *See, e.g.*, James Alfini & Gerald S. Clay, *Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spring 1994, at 8. *See infra* notes 148-61 and accompanying text.

95. This mediator's decision to focus on what the parties wanted supports the view that self-determination is the controlling principle in mediation. *See supra* note 8.

what the parties wanted," which was quite simply to end their business relationship.

Still, an ethical dilemma remained: How would she manage the "inequity of legal knowledge of the parties"?[96] The mediator's response was a decision to "help" the claimant "a little."[97] We are not told what she did, so we can only speculate about how this help was offered. Did she advise the claimant to consult with a lawyer?[98] Did she discuss her thoughts about misrepresentation or rescission with him? Probably not. Her next immediate concern was with mediator neutrality.[99] "I think I did okay because I have found that when I have an attorney and a pro se party, I keep impartiality if I treat them both as if they are parties, irrespective of their professional status."

The narrative ends on a comforting note for the mediator who concludes that both parties, especially the claimant, were satisfied with the result. While this is good news for the mediator, it is not surprising. Empirical studies generally show a high degree of party satisfaction with the mediation process.[100] The real question, however, is whether a more knowledgeable claimant would have been satisfied with this mediation agreement.[101]

The claimant who sued for $312.00 settled in mediation for $200.00 and termination of his contract with the health club. It is unknown whether he would have achieved a better result through court adjudication.[102] If,

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96. Professor Robert A.B. Bush has identified this as an ethical dilemma in mediation. *See* ROBERT A.B. BUSH, NATIONAL INST. FOR DISPUTE RESOLUTION, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS 15 (1992), *reprinted in* 1994 J. DISP. RESOL. 1, 21.

97. The mediator's concern over the pro se litigant's lack of legal knowledge is not unlike the discomfort experienced by small claims court judges when pro se litigants are opposed by parties with legal counsel. While some judges' instinctive reaction is to give assistance to the pro se party, they report qualms about doing so because it conflicts with their role. JOHN C. RUHNKA ET AL., NATIONAL CTR. FOR STATE COURTS, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 29-31 (1978).

98. *See infra* notes 162-66 and accompanying text.

99. *See supra* note 22.

100. *See supra* note 36. *See also* BUSH & FOLGER, *supra* note 25, at 16-18; Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes, in* MEDIATION RESEARCH, *supra* note 35, at 53, 58-59; Roehl & Cook, *supra* note 35, at 33, 44.

101. I refer here to knowledge about legal rights. *See infra* notes 108-09 and accompanying text.

102. We need more empirical research comparing adjudicated outcomes with mediated outcomes. Michele Hermann's study comparing outcomes in mediation and adjudication shows that minority claimants fare less well monetarily in mediation. HERMANN ET AL., *supra* note 35, at 116; *see also* Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study,* 21 FORDHAM URB. L.J. 343 (1994) (examining claims that plaintiffs often win in small claims court).

during a trial, the claimant had questions about the relevant laws or procedures,[103] it is likely that the small claims court judge would have helped him.[104] For, despite some misgivings about violating neutrality, judges[105] in the informal courts play an active role in assisting litigants, developing their testimony, and transforming their stories to fit theories of liability.[106] Assuming that the claimant met his burden of proof[107] with or without the judge's assistance, if the court awarded him the $312.00 initiation fee and he established fraud on the part of the Health Club under the Health Club Services Law,[108] he might have been entitled to treble

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103. As a practical matter, he would probably not even know what questions to ask. *See* BUSH, *supra* note 96, at 15, *reprinted in* 1994 J. DISP. RESOL. at 21.

104. However, legal assistance from the judge would not necessarily guarantee a different result in this case. In the informal courts, there are significant differences among individual judges in their approaches to dispensing justice. *See* CONLEY & O'BARR, *supra* note 50, at 111 ("[T]he legal system is less a system than it is an inconsistent collection of varying styles and approaches to law."); RUHNKA ET AL., *supra* note 97, ch. 2. Judges vary so much in outlook and orientation that, within the same court, litigants may be presented with different perspectives. Depending upon which judge a litigant draws, informal justice may mean a range of offerings from mediation to authoritative decision making. *See* John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 481-82 (1988).

For example, Professors Conley & O'Barr have identified five contrasting approaches of judges: (1) the Strict Adherent to the Law, (2) the Lawmaker, (3) the Mediator, (4) the Authoritative Judge, and (5) the Proceduralist. CONLEY & O'BARR, *supra* note 50, at 82-112, 125. Further, even within the Authoritative Judge Category, there are several different approaches. A different analysis is offered by John Ruhnka's study of small claims court judges, which identifies two styles of judging: The "inquisitorial" approach of the active judges involves asking plaintiffs specific questions "to establish the necessary cause of action and proof of damages," asking defendants questions to establish any defenses or mitigating elements, and cutting off "rambling or extraneous testimony" to speed up trials; and the more passive approach of judges, who ask fewer questions and thus, give litigants more freedom. RUHNKA ET AL., *supra* note 97, at 20.

105. The professional backgrounds and educational qualifications of informal court judges vary considerably—some are not lawyers. CONLEY & O'BARR, *supra* note 50, at 27.

106. Professors Conley and O'Barr observed a number of cases in which judges intervened to take an active role in developing the testimony of one or both parties. CONLEY & O'BARR, *supra* note 50, at 49, 55. John Ruhnka's study of small claims courts reports that judges who helped pro se litigants to explain their legal positions and to identify relevant facts worried about maintaining their neutrality. RUHNKA ET AL., *supra* note 97, at 29-30. Judges were even more troubled when a pro se litigant was opposed by an attorney: "When one side is without an attorney, the natural tendency of a judge is to favor the underdog—and when the judge is acting as the lawyer for one side, as well as the judge, you can imagine the judge's client will not lose too often." *Id.* at 30.

107. The claimant's burden of proof is less onerous in small claims court than it would be in the formal courts. The rules of evidence and procedure are relaxed in small claims court, and the statute provides that the court must "do substantial justice between the parties." N.Y. CITY CIV. CT. ACT § 1804 (McKinney Supp. 1995).

108. The Health Club Services Law created a private right of action to recover damages caused by a health club's failure to provide promised services. N.Y. GEN. BUS. LAW § 628 (1984). The purpose

damages and would have received over nine hundred dollars instead of the two hundred dollars that was credited to his charge account.[109]

In the final analysis, the mediator measured success by the parties' satisfaction level, especially the claimant's. But was the result fair? Did justice result?

### 2. *The Stolen Purse*

#### a) *Background*

The claimant's purse, containing $600.00 in cash and valuables, was stolen from her chair while she attended a play at a local community center. The claimant sued the center for $600.00 in damages. During the mediation session, the claimant argued that she had expected safety and that there should have been better security. The defendant denied liability, claiming that the center was a public place and that while he felt sympathetic to the claimant, the potential for crushing liability made it impossible for him to ensure that the property of everyone who entered the place would be safe. The defendant also presented evidence of signs that disclaimed liability for stolen or lost property. The claimant stated that she did not see any signs. The case did not settle in mediation and it was returned to the trial calendar.[110]

#### b) *Mediator's Reflections*

Given the facts as I understood them, I saw no way of settling the case.

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of the statute was discussed in Faer v. Vertical Fitness & Racquet Club, Ltd., 462 N.Y.S.2d 784 (N.Y. Civ. Ct. 1983), *modified*, 486 N.Y.S.2d 594 (N.Y. App. Term 1984), the only reported case under the statute:

> [T]he purpose of this article is to safeguard the public and the ethical health club industry against deception and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of health club services by prohibiting or restricting false or misleading advertising, erroneous contract terms, harmful financial practices, and other unfair, deceptive and discriminatory practices which have been conducted by some health club operators.

*Id.* at 787 (quoting N.Y. GEN. BUS. LAW § 620).

109. If the claimant had chosen instead to arbitrate in small claims court, he might not have been awarded treble damages because the arbitrator might have been unaware of this provision in the law. Parties generally waive their right to appeal in small claims court. *See, e.g.*, N.Y. CITY CIV. CT. ACT § 1807 (McKinney 1989).

110. I am unaware of the ultimate disposition of this case. It is likely that the parties returned to court one or two additional times before having a trial. In the Manhattan Small Claims Court, the volume of cases makes it difficult to be heard by a judge at the first or even second court appearance. There are an average of one hundred and twenty-five cases on the calendar each evening.

I caucused with the defendant first and simply asked him if he was prepared to make any offer whatsoever. He said no. Then I caucused with the claimant and she did everything she could to get me to advise her of the law involved. I declined to advise her on the law and appeased her with an analogy; I said that I had read an article in the newspaper that explained how thousands of people involved in the World Trade Center bombing were suing the Port Authority for injuries and damage caused by the bombing, but that they had no cause of action against the Port Authority because it was the criminals who were responsible and liable and not the Port Authority. I think she got my message, and she very amicably decided that she would try her luck in front of the judge. (She realized that she would probably lose, but she felt that she had nothing to lose.)

This case was instructive, as was my other case this evening, in teaching me how to deal with situations where criminal activity is involved and the claimant is trying to get monies from a party other than the thief. In situations like the one presented here, there is obviously not going to be a settlement, and it is important to recognize that and still be fair to the parties.

*c) Discussion*

The mediator is convinced from the outset that the claimant has no case and, therefore, there is no way for the parties to settle.[111] Her opinion is reinforced by the defendant's refusal to make any offer of settlement. The claimant, however, is not similarly persuaded.[112] She "did everything she could" to obtain legal advice from the mediator, who decided to "appease" rather than "advise" her.[113] Appeasement occurred through the use of an analogy, a tactic seemingly calculated to influence the claimant.[114]

The mediator suggested to the claimant that just as the injured victims of the 1993 bombing at the World Trade Center could not successfully sue the New York Port Authority because of intervening criminal activity, so too the claimant could not sue the center. The analogy is imperfect since there are many differences that a judge might find between suing a local

111. This mediator's orientation certainly supports the view that lawyers as a group tend to be adversarial and need to acquire a different mindset when mediating. Law tends to be the controlling factor for them. Riskin, *supra* note 30, at 43-44.

112. Litigants often fail to understand the limited relief available in small claims court.

113. Under prevailing ethical standards, the mediator should have advised the claimant to consult with an attorney. *See infra* notes 162-66 and accompanying text.

114. The mediator's behavior is consistent with the view that all mediators apply pressure to achieve specific results. *See* Matz, *supra* note 32, at 360. Ironically, in this case the pressure was not in favor of, but against settlement.

entity such as the Port Authority, and suing a private community center.[115] But the unrepresented claimant did not understand the legal nuances. Relying on the mediator's legal opinion,[116] disguised as an analogy, she concluded that she was not going to recover anything through settlement and decided to "try her luck" with the judge.

The mediator reported little interaction with the defendant beyond acknowledging his "no liability" claim. She seemed to agree with his position that because the center was a public place and because he posted signs disclaiming liability, he would never be held liable to the claimant. Their mutual interpretation of the law aborted the mediation process.[117] Both in her initial screening, and continuing throughout the mediation session, the mediator concluded that the claimant had no case: "Given the facts as I understood them, I saw no way of settling the case . . . . In situations like the one presented here, there is obviously not going to be a settlement . . . ." In short, as far as the mediator was concerned, the cards were stacked in favor of the defendant.[118]

The mediator's exclusive focus on the legal merits of this case blocked her vision to other values which could have contributed to a mutually beneficial resolution, or at least brought greater understanding between the parties.[119] She could have empathized with the defendant's concerns about unlimited liability, but still have discussed the benefits of settlement.[120] Did the defendant understand that reaching a private resolution through the mediation process might have ultimately been more beneficial to him than "winning" at a trial, where there would be public acknowledgement that people could have their property stolen, without recourse, at his

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115. In addition to the problem of bias, *see* Note, *supra* note 72, at 1889, a mediator who gives legal advice may be exposed to liability if the advice is incorrect. *See* ROGERS & MCEWEN, *supra* note 51, ch. 11.

116. For a discussion of professional standards regarding the propriety of a mediator giving legal advice, see *infra* notes 162-66 and accompanying text.

117. The mediator's and defendant's interpretation of the law is not necessarily the correct one and might be at odds with a judge's view of this case. A court might find that the center, as a public establishment, had an affirmative duty to warn the claimant about the possibility of theft.

118. It is difficult to understand how the mediator could know with such certainty that there would not be a settlement. Even if her interpretation of the law were correct, a settlement could still be possible. Knowing that they must return to court one or two additional times for a trial, some parties might prefer to make the case go away and settle for nuisance value.

119. Also, the mediator's "control" mindset, namely, that *she* saw "no way of settling the case," impedes parties from more active involvement.

120. Statistics suggest that plaintiffs generally win in small claims court. *See* Best et al., *supra* note 102, at 344.

community center? How would this have affected the center's reputation and future business? The mediator could have explored whether the center was insured against theft, and if the defendant was unable or unwilling to give the claimant monetary damages, perhaps he could have offered her free tickets to upcoming events, or even an apology.[121] None of this happened because the mediator assumed that without a "legal case," there could be no settlement.

### *C. Law as Activated by the Players*

The promise of individualized justice in court mediation includes the possibility that parties may consider relevant principles of law in choosing an outcome. Under current court mediation practices, however, the manner in which law is acknowledged or ignored depends upon the parties' and the mediator's legal knowledge, and the mediator's approach to facilitating the process. These variables are interrelated. The parties' legal knowledge is usually dependent upon legal representation.[122] The mediator's legal knowledge typically depends upon whether the mediator is a lawyer.[123] However, the actual role of law in court mediation is measured not by legal knowledge, but by the mediator's philosophical approach to the process.[124]

Consider the application of these variables to the Health Club case. The mediator, a third-year law student, knew only some of the law relevant to the claim.[125] This knowledge served as an uncomfortable reminder to her of what a court might have done if the case were adjudicated. Nevertheless, she dismissed the law's relevance to the resolution of this dispute. Why?

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121. In my experience with small claims court mediation, apologies are usually well-received.

122. Of course, there are some unrepresented parties who will know the law, e.g., "repeat players" and parties who themselves are lawyers. It is not entirely clear, however, that the knowledge provided by legal representation would inform the parties' choice of outcome in mediation. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1385-86 (1994) (arguing that "'repeat players' will have a richer and more nuanced grasp of relevant precedents than occasional or 'one shot' participants").

123. I realize that nonlawyer mediators may have abundant legal knowledge in specific substantive areas of law. For example, court personnel who mediate on a regular basis in Small Claims Court and in Housing Court often have legal expertise in housing or consumer law.

124. *See supra* notes 93-99, 111-21 and accompanying text. Using Professor Bush's examples, the "protection-of-rights" mediator would tell the law; the "empowerment-and-recognition" mediator would not. Bush, *supra* note 33, at 261, 283. *See also* William M. O'Barr, *Juju Atkinson: Blurring the Distinction Between Mediation and Adjudication*, *in* WHEN TALK WORKS, *supra* note 23, at 359-72.

125. The mediator knew, for example, that misrepresentation could result in rescission of the contract. *See supra* note 93 and accompanying text. Even if the mediator were a lawyer, however, she might not have been aware of the provision for treble damages.

Because in her view, the parties' need to end their business relationship was more compelling than their interest in receiving a decision about who was right or wrong. The defendant's lawyer, on the other hand, probably negotiated with awareness of all the relevant law. Without a doubt, he knew that if he failed to reach a settlement in mediation, his client would be exposed to treble damages in court under the Health Club Services Law. This legal knowledge probably informed and motivated his decision to settle with the claimant for $200.00 and terminate the contract. Finally, the claimant, who sought justice through law, presumably knew the least about the law.[126] This may explain his apparent satisfaction with the $200.00 settlement.

In contrast to the Health Club case, law wielded a greater influence in the Stolen Purse case, where the mediator and the defendant were stuck on the lack of a legal remedy. Their mutual fixation with legal remedies paralyzed the mediation process. The unrepresented claimant wanted to know more about the law as she asked the mediator for legal advice. Ultimately, the law as interpreted by the mediator, and indirectly communicated to the claimant, convinced the claimant to abandon mediation and try her "luck" with the judge.[127]

Law, therefore, is not self-executing in court mediation. It is activated by the players: both the parties and the mediator have to know about relevant law in the first instance, decide what it means, and finally, decide whether to embrace or ignore it. Whether law influences the outcome may well depend upon the mediator's approach to the process.[128] Unless the mediator's dominant approach is adjusted by the parties or their lawyers, there is a strong probability that the individual mediator will determine the influence of law in the mediation process.[129] Thus, if justice has anything to do with making knowledgeable choices based on an understanding of relevant law,[130] then under current court mediation practices, justice is

126. The mediator was likewise ignorant of the Health Club Services Law, but given her decision to exclude the law of misrepresentation from the mediation discussion, it is doubtful that she would have been any more interested in, or willing to discuss, this specific consumer protection statute.

127. Given the varied approaches among judges in the informal courts, the claimant was indeed correct in her quest for "luck" with the judge. *See supra* notes 103-06 and accompanying text.

128. In the words of one court mediation consumer, "[p]erhaps mediation is a crapshoot and depends entirely on who is assigned to mediate." Clark, *supra* note 36, at 15.

129. Disregarding the law, as in the Health Club case, and focusing on the law, as in the Stolen Purse case, are distinct approaches to court mediation.

130. As I discuss later in this article, justice has everything to do with such a decision making process. *See infra* notes 174-216 and accompanying text.

serendipitous, depending upon which mediator a disputant draws. The two case studies show the dangers of both ignorance of the law and over-reliance on it. The immediate consequence of ignoring relevant law, as demonstrated in the Health Club Case, is that the result may not be fair because law provides greater relief. I do not suggest that the result is unfair simply because it is incongruent with the law.[131] It is unfair because the claimant had no knowledge of his possible right to collect treble damages when he decided to settle for $200.00. On the other hand, over-reliance on law may yield a result like that in the Stolen Purse case, where the mediator's perception of what law would allow prevented settlement[132] and the parties never experienced the benefits of mediation.[133]

The case studies in the preceding sections raise uncomfortable questions about the quality of justice available in court mediation. Some litigants who seek justice through law may reach an agreement in mediation based on a fundamental understanding of law.[134] Other litigants will mediate and reach agreements in ignorance of law. Thus, under current practices, the influence of law on court mediation is, at best, unpredictable in any given case. In my view, this imbalance has significant implications for the ultimate fairness of court mediation. This is not just a question of the "haves" versus the "have-nots." Rather, it is a question that relates to the fundamental fairness of court-instituted procedures that purport to deliver justice. It is also a question that suggests that the story of court mediation today is really a story about hit-or-miss justice.

In Part III, I explore current views about the relationship between law and mediation as expressed in both the literature and in existing mediation statutes. Further, I demonstrate some of the weaknesses in the regulatory structure of existing mediation statutes.

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131. Of course, as legal realists remind us, rules of law do not decide cases. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY, 65-66 (1960); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); C. Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 ST. MARY'S L.J. 77, 78 (1980).

132. This supports the view that there is a danger of bias when mediators are allowed to give legal assistance. *See* Note, *supra* note 72, at 1889.

133. *See supra* notes 31-36, 48 and accompanying text.

134. This is so even though they may choose to disregard the provisions of law.

## III. MEDIATION AND LAW—THE CURRENT FRAMEWORK

### *A. The Critical View*

Conversations about the appropriate role of law in mediation are dominated by criticism that law is excluded from mediation and predictions about the consequences which flow from this exclusion.[135] Mediation, as a constitutive part of the ADR movement, is susceptible to some of the recurring objections to ADR: it fails to protect public values,[136] represents inferior justice for poor people,[137] and forgoes several constitutional rights.[138]

Some commentators fear that in the privatization of justice inherent in ADR processes, the value of law is lost.[139] Others worry that "ADR will replace the rule of law with nonlegal values."[140] Critics generally compare

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135. *See, e.g.*, CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); Grillo, *supra* note 58. However, not all commentators agree that law is excluded from the settlement process. Professor Menkel-Meadow argues:

> [I]t is important to observe here that settlements *are* affected by precedent—both in the *ratio decidendi* of arriving at particular solutions and in the creation of new precedents. Precedent makes its voice heard and power felt in every settlement, if only because one reason the parties may choose to settle is to avoid the effects of previous lawmaking.

Menkel-Meadow, *supra* note 41, at 2680.

136. *See, e.g.*, Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 17 (1987); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 553-54 (1986). *But see* Barbara A. Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1238 (1983) (observing that in litigation, the parties "may never address many of the real interests involved in the dispute" and thus, mediation may be preferable to litigation in environmental impact cases). Phillips and Piazza claim that in the context of public interest disputes, the failure to use mediation is "a lost opportunity for mutual education, for building consensus." *Id.* at 1240.

137. *See, e.g.*, Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?* 70 N.D. L. REV. 269, 273 (1994) (discussing possible disadvantages of ADR use by the poor).

138. *See* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989) (analyzing limits placed by the constitutional rights to trial by jury, due process, and equal protection on mandatory ADR programs).

139. *See, e.g.*, Fiss, *supra* note 136, at 1085. *See also* Ingleby, *supra* note 58, at 450-51. *See generally* Luban, *supra* note 136. *Cf.* Jules Coleman & Charles Silver, 4 SOC. PHIL. & POL'Y 102, 104, 106-08 (1986) (arguing that trials offer advantages that cannot be obtained through settlement).

140. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677 (1986). Edwards finds some mediation troubling because, while it increases settlement of cases, "we have no satisfactory explanation as to why there may have been a variance from the rule of law." *Id.* at 678.

mediation unfavorably to adjudication, a process in which law plays a predominant role.[141] They find mediation inherently vulnerable because it operates outside the protections of the formal legal system.[142] Somehow mediation implies a loss in securing all that the law promises.[143]

Some feminist scholars have criticized mediation for its potentially threatening assault on women's rights, and argue that disadvantaged groups may be the most vulnerable in mediation.[144] Likewise, critical legal scholars and critical race scholars have also criticized the threat to legal rights inherent in alternative dispute resolution processes.[145] The recurring

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141. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372 (1978) (stating that "courts are essential to the 'rule of law'").

142. *See* Nader, *supra* note 58, at 12 ("Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view."); *see also* Laura Nader, *Trading Justice for Harmony*, NIDR F., Winter 1992, at 12 ("[T]he legal problems that need creative new forms of administration of justice are those between people of unequal power.").

143. *See* Sally E. Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, *in* 2 THE POLITICS OF INFORMAL JUSTICE 17, 39 (Richard L. Abel ed., 1982) (questioning the quality of justice in the mediation programs of some citizen dispute resolutions centers). *But see* Thomas Christian, *Community Dispute Resolution: First-Class Process or Second-Class Justice?*, 14 N.Y.U. REV. L. & SOC. CHANGE 771, 779 (1986) ("Mediation is a first-class process that provides first-class justice.").

144. *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 523 (1992); Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CAN. J. WOMEN & L. 134, 152-54 (1989); Grillo, *supra* note 58, at 1549-50; Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 267-69 (1984); Regehr, *supra* note 22, at 362; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 435-36 (1985). I note that "law" and the legal system have also failed to protect battered women even with orders of protection. Both the law and the legal system must do more in these very serious situations. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, 766-67 (1988) (noting that joint custody through mediation sometimes leads to wife abuse); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 318-25 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984) (discussing criticisms of mediation as a remedy for wife abuse); Penny L. Willrich, *Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases*, 22 CLEARINGHOUSE REV. 1373, 1377 (1989) ("In the domestic violence situation, mediation has been deemed dangerous for the battered woman, because neither good faith nor equality of bargaining power exists in a battering relationship.").

145. *See, e.g.*, Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 267, 270-71 (Richard L. Abel ed., 1982) (observing that informal justice can "extend the ambit" and disguises the presence of state control); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400 (concluding from social science studies of bias that the informality of ADR tends to increase prejudice toward minority disputants). *See also* Susan Silbey & Austin Sarat, *Dispute Processing in Law and*

theme in critical scholarly literature is that law should play a more dominant role in the mediation process.[146] Among mediation practitioners, however, there is no consensus on this issue.[147]

### *B. Legal Assistance*

#### *1. The Current Debate*

Given the lack of consensus about the role of law in mediation, it is not surprising that there is considerable debate about the propriety of mediators giving legal assistance.[148] Complicating the debate is the uncertain application of the unauthorized practice of law doctrine[149] and the related question of whether mediation is the practice of law.[150] With respect to lawyer-mediators, Professor Leonard Riskin suggests that one of the chief values in choosing a lawyer as a mediator is the lawyer's "ability to tell the participants what the law provides" and predict a probable court outcome.[151] Professor Riskin would permit attorney mediators to give impartial legal information, but he would require them to advise the parties

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*Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437 (1989).

146. *See, e.g.*, Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347 [hereinafter Maute, *Mediator Accountability*]; Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 533-34 (1991) [hereinafter Maute, *Public Values*].

147. *See, e.g.*, Lande, *supra* note 27, at 37 (stating that "mediators vary widely on what is the proper role of law in mediation"); Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 96-101 (1993) (presenting several opinions concerning the use and relevance of legal norms in divorce mediation).

148. In this article, the term "legal assistance" includes both legal information and legal advice.

149. This doctrine generally restricts the practice of law to licensed attorneys. Several professional ethics opinions have discussed the application of this doctrine in the context of divorce mediation. For a general discussion of the doctrine as it applies to mediation, see ROGERS & MCEWEN, *supra* note 51, § 10:05.

150. Of course, if mediation were the practice of law, then non-lawyers would generally be excluded from practicing it. A recent amendment to the ABA Model Rules of Professional Conduct regarding "law-related services" by lawyers makes conflict of interest rules applicable to mediation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7(b) (1994); ABA COMM. ON ANCILLARY BUSINESS, RECOMMENDATIONS AND REPORT TO THE HOUSE OF DELEGATES 5 (1994). *See also* Bruce E. Meyerson, *New ABA Rule Affects Lawyer-Mediators*, DISP. RESOL. MAG., Summer 1994, at 7; New Jersey Supreme Court Advisory Committee on Professional Ethics Op. No. 676 (1994) (providing that mediation is the practice of law).

151. Riskin, *supra* note 35, at 351. Riskin, writing chiefly in the context of divorce mediation, acknowledges, however, that "such neutral lawyering is unusual, problematical, and perhaps even dangerous if not conducted carefully." *Id.*

about the risks involved in such an endeavor.[152] Professor Judith Maute offers that where parties are unrepresented, mediators should be required to tell them enough about the law to adequately inform their settlement decisions.[153] Litigants would then "knowingly and voluntarily agree to deviate from the probable litigated outcome."[154]

The counterarguments suggest that giving legal assistance goes beyond the role of the mediator.[155] Dean James Alfini argues that parties would consider the mediator's advice authoritative, and this would threaten party self-determination.[156] Likewise, Professor Robert Baruch Bush suggests that it may be preferable to separate the functions of lawyer as mediator

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152. Riskin, *supra* note 30, at 40. Riskin was agreeing with the approach taken by the Oregon bar ethics committee in an opinion on divorce mediation, which allowed legal advice in the presence of both parties, but required the mediator to tell the parties to seek independent legal counsel before executing the agreement. *Id.* (citing Oregon Bar Assoc., Opinions, No. 79-46 (proposed 1980)). In a later article, Professor Riskin stated that he would allow mediators to define legal issues without applying the law directly. Riskin, *supra* note 35, at 336.

A number of other commentators support various types of legal assistance. *See, e.g.*, Richard E. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 249 (1982) ("A party who objects to the lack of private legal advice will be informed of its availability from independent legal counsel unconnected with the mediation. . . . Legal advice will be given to the parties only in the presence of each other."); Andrew J. Pirie, *The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?*, 63 CAN. B. REV. 378 (1985); Sandra E. Purnell, Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 1008 (1985) ("In disputes with important legal dimensions, a legally trained mediator can contribute to effective decision making by providing the parties with fair, accurate, and impartial information."); *cf.* Rosenberg, *supra* note 42, at 487 ("The fact that a mediator might explain to parties what the law directs a court to do is not a reason to condemn the process of mediation.").

153. *See* Maute, *Mediator Accountability*, *supra* note 146, at 366. In a later article, Professor Maute contends that proposed Model Rule 2.4 should govern the conduct of lawyers who mediate. Maute, *Public Values*, *supra* note 146, at 514. Part of the rule provides: "When the parties are not separately represented, the mediator should provide them with sufficient information about the law and its possible application so that each party can make adequately informed decisions. Explanation of the applicable law shall occur in the presence of both parties to the mediation." *Id.* (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.4(b) (1983)).

154. Maute, *Mediator Accountability*, *supra* note 146, at 366.

155. *See* Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 899 (1992-93) (stating that "mediators . . . are obliged not to provide legal advice").

To the extent that giving legal advice removes the cloak of neutrality from the mediator, Professor Joseph Stulberg would argue against it. *See* Stulberg, *supra* note 22, at 86; *see also* Note, *supra* note 72, at 1889 (arguing that allowing mediators to comment on the law invites personal bias).

156. Alfini & Clay, *supra* note 94, at 8. Alfini and Clay summarize the arguments against giving legal advice: the mediator may give the wrong information; there is a lack of certainty as to what a court will actually do; legal assistance usually advantages one party over the other; and the legal profession may exercise too much control over the process to the disadvantage of nonlawyer mediators. *Id.*

from lawyer as dispenser of legal information and advice.[157]

The legal advice discussion becomes more critical as court mediation programs increase,[158] particularly when unrepresented parties are involved.[159] These are the most vulnerable players because many of them do not even know what questions to ask of the mediator, let alone make informed decisions about their legal rights.[160] Ultimately, however, the question of whether mediators should give legal assistance depends upon an understanding of the more fundamental question of what court mediation can be expected to accomplish.[161]

*2. Ethical Standards*

In existing professional and ethical standards regarding the role of law in mediation, law is separated out into categories related to legal information and legal advice, with different consequences attached to each classification.[162] Mediators are generally cautioned not to offer legal advice, but instead to refer parties to independent legal counsel.[163] The consensus from existing standards is that even when the lawyer-mediator does provide legal assistance, the parties should still be advised to obtain independent legal counsel.[164]

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157. According to Bush: "Mediation might fare better if lawyer-mediators simply set aside their substantive legal knowledge and use their professional training instead as a 'skills bank' for effective mediator strategies, leaving the business of legal information and advice to lawyers operating as such, either inside or outside the mediation room." Bush, *supra* note 33, at 280 n.75.

158. *See supra* notes 45-75 and accompanying text.

159. Like the claimants in the two case studies, the majority of small claims litigants are not represented by lawyers. In many states, small claims court procedures exclude lawyers from participating on the theory that this is contrary to the role of the small claims court as a people's court. *See, e.g.*, ARIZ. REV. STAT. ANN. § 22-512(B) (1990); COLO. REV. STAT. ANN. § 13-6-407(2) (West 1989); IDAHO CODE § 1-2308 (1990 & Supp. 1994); KAN. STAT. ANN. § 61-2707(a) (1994); MICH. COMP. LAWS ANN. § 600.8408(1) (West 1987 & Supp. 1995); NEB. REV. STAT. § 25-2803(2) (1989 & Supp. 1994); OR. REV. STAT. § 55.090(1) (1993). Should the same rationale apply in mediation where the parties have no real right of appeal?

160. *See* BUSH, *supra* note 96, at 15, *reprinted in* 1994 J. DISP. RESOL. at 21.

161. *See infra* notes 174-79 and accompanying text.

162. As a general rule, legal information is permitted, but legal advice is not. Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 714 (1994).

163. This is generally referred to as the "independent counsel rule." For representative rules and standards, see appendix. Under this rule, parties cannot be required to obtain independent legal counsel but may be advised of the risk of proceeding without it. Emily Kofron, *Remaking the Philosophical Map? New Rules for Attorney Mediators*, J. KAN. B. ASS'N, April 1989, at 21, 25.

164. *See, e.g.*, Comm. on Professional Ethics of the Florida Bar Ass'n, Formal Op. 86-8 (1992) (providing that lawyer-mediators should explain risks of proceeding without independent legal counsel).

*3. Unrepresented Parties*

The standard response to the plight of unrepresented parties is similar: A mediator should warn unrepresented parties of the dangers of proceeding without legal counsel[165] or advise them to obtain independent counsel.[166] The "independent counsel" rule is a woefully inadequate response to the problem of unrepresented parties in court mediation. Lack of access to the courts is a pervasive problem in the United States,[167] with less than half of moderate and low income families using the justice system to resolve their legal problems.[168] Despite the increased interest in mandatory pro bono service by the bar, vast segments of the American public are

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The proposed Joint Standards of the ABA, AAA, and SPIDR do not specifically address the role of law in mediation. Mediators are simply urged to refrain from providing professional advice and, instead, advise parties to seek outside professional help or choose another method of dispute resolution. STANDARDS OF CONDUCT, *supra* note 8, app. c at 272.

The ABA Standards of Practice for Lawyer Mediators in Family Disputes, approved in 1984, permit mediators to "define the legal issues," but not advise the parties based on the mediator's understanding of the legal situation. AMERICAN BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES standard IV(C) (1984), *reprinted in* GOLDBERG, *supra* note 45, at 472. Instead, the mediator is advised to recommend to the parties that they obtain independent legal counsel so that they can obtain a "sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement." *Id.* At least seven times throughout the ABA standards, mediators are advised to recommend that parties consult independent legal counsel. *Id.* at 469-74. State professional responsibility codes and court rules governing family mediation practice echo similar themes. *See, e.g.*, IOWA RULES GOVERNING STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES Rule 4(B) (providing that a mediator shall "recommend expert or legal consultation in the event it appears that additional knowledge or understanding is necessary for balanced negotiations"); KAN. SUP. CT. R. 901(b)(3) (stating that an attorney-mediator must advise parties to seek independent legal advice before executing any settlement agreement); OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (1986), *reprinted in* GOLDBERG, *supra* note 45, at 322-23 ("A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it.").

165. *See* MINN. STAT. ANN. § 572.35(l) (West 1988).

166. *See* KAN. STAT. ANN. § 23-603(a)(5) (1988).

167. *See also* Podgers, *supra* note 4, at 56 (describing the struggle to provide equal justice for all Americans due to lack of access to the justice system for those who cannot afford to pay); Spain, *supra* note 137, at 270 (noting that the poor have not had equal access to the legal system). *See generally* CONSORTIUM ON LEGAL SERV. AND THE PUBLIC, AMERICAN BAR ASS'N, CIVIL JUSTICE: AN AGENDA FOR THE 1990S (Esther F. Lardent ed., 1991) [hereinafter CIVIL JUSTICE]; COMMITTEE ON LEGAL AID, N.Y. STATE BAR ASS'N, THE NEW YORK LEGAL NEEDS STUDY(1993).

168. ROY W. REESE & CAROLYN A. ELDRED, INSTITUTE FOR SURVEY RESEARCH AT TEMPLE UNIV., FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 19-21 (1994). A major aspect of legal services work is turning away clients who have important legal problems which should be managed by lawyers. Zulack, *supra* note 34, at 633.

unable to afford lawyers for their most basic legal problems.[169] It is not just poor, but also moderate income[170] and middle class Americans who are affected.[171] The independent counsel rule is a particularly illusory concept for litigants in the informal courts whose initial attraction was the promise of a people's court where lawyers would be unnecessary.[172] Thus, the response of existing professional mediation standards to the problem of unrepresented litigants, while theoretically attractive, is practically unfeasible for the majority of Americans. It is unlikely that those who cannot afford to hire lawyers to access the legal system will now be able to afford lawyers to counsel them in court mediation.[173]

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169. *See* CONSORTIUM ON LEGAL SERV. AND THE PUBLIC, AMERICAN BAR ASS'N, LEGAL SERVICES FOR THE AVERAGE CITIZEN (1977); Douglas S. Eakeley, *Background Paper, in* A LAWYER AT A PRICE PEOPLE CAN AFFORD: EQUAL JUSTICE UNDER LAW CONFERENCE (1975); Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1088-1094 (1984) (explaining that prices for legal services are subject to market forces); Deborah Chalfie, *Break the Lawyers' Legal Advice Monopoly*, NEWSDAY, Dec. 3, 1989, at 4 (noting studies that show low- and middle-income people being "shut out of America's legal system" because they cannot afford lawyers); Susan Freinkel, *Breaking Up Is Hard to Do*, RECORDER, Nov. 2, 1992, at 1 (discussing the increase in number of litigants without lawyers in California courts).

170. Gerry Singsen, *Legal Clinics and Access to Justice, in* CIVIL JUSTICE, *supra* note 167, at 77, 80.

171. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 574 (1983); Robert W. Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A. J. 1092 (1971); John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451, 454-55 (1989) (book review) ("The poor and middle classes continue to experience problems in obtaining access to legal services."); *cf.* JONATHAN B. MARKS ET AL., DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 17 (1984) (noting that the cost of attorney fees is one factor that prevents many middle-class citizens from access to the courts); Cyril A. Fox, Jr., Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. PITT. L. REV. 811, 812 (1965) (noting that the increasing demand for legal guidance will come from the "'forgotten middle income class,' who can neither afford to pay proportionately large fees nor qualify for ultra-low-cost services.").

172. For an alternative critique of the independent counsel rule, see Pirie, *supra* note 152, at 400-01 (claiming that the independent counsel rule threatens trust in the mediator).

Other commentators have noted that some mediators object to the notion of independent legal review, fearing that lawyers' self-interest will cause them to reject the mediation agreement in favor of litigation. *See* SUSAN M. LEESON & BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA 140 (1988).

173. The sad reality of so many Americans without legal services has prompted calls for some form of deregulation of the practice of law. *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 159-60; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 97-98 (1981); Meredith A. Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203 (1990).

## IV. JUSTICE IN COURT MEDIATION

The search for justice through law is suspended in court mediation. The search for justice in court mediation must begin, therefore, with a conceptual understanding of what court mediation is expected to accomplish. This calls for a clear understanding of the nature of court mediation and of the mediator's role in that process.

### *A. Court Mediation—The Face of Equity*

What is it that distinguishes court mediation from other docket-clearing processes?[174] I suggest that beneath the surface of settlement ideology, there is a deeper level of motivation that can and should inform decisionmaking in court mediation. This motivation is an equitable perspective that supplements the rigidity that often accompanies the application of legal principles to human conflict.

The equitable perspective first affirms the humanity of the opposing party before deciding how to negotiate with that person as an "opponent." Operating within the framework of an equitable perspective, a mediated settlement, if it occurs, is not solely a legal or economic[175] decision but a human one that takes into account basic fairness, interpersonal relationships, and numerous intangible interests,[176] such as the need for an apology, venting, and acknowledgment of human dignity.[177] This, the face of equity in court mediation,[178] captures the human elements often

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174. For example, what distinguishes court mediation from judicial settlement conferences? For a discussion of these types of conferences, see Robert C. Zampano, *Judicially Supervised Settlement Conferences*, *in* GOVERNMENTAL AFFAIRS GROUP, AMERICAN BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES 12 (Philip J. Harter ed., 1991).

175. For a review of the economic literature on settlement, see Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989). *See generally* Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

176. Cases often settle for reasons other than legal or economic ones. *See, e.g.*, Galanter & Cahill, *supra* note 122.

177. The equitable perspective in court mediation may not necessarily result in the transformation envisioned by Professors Bush and Folger. *See* BUSH & FOLGER, *supra* note 25, at 20-22.

178. A deeper analysis of the intangible values of court mediation may suggest a parallel with some of the moral values underlying historic equity practice. These values underlie equitable maxims such as the clean hands doctrine, equitable estoppel, and the idea that litigants should do justice if they seek justice. *See* WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 39, 41 (2d ed. 1956). However, despite some of the parallels between court mediation and historic equity practice, to date, court mediation lacks any general principles of jurisdiction. Equity, for example, would act only if the remedy at law were inadequate. Court mediation contains no such limitations.

concealed behind the "masks of the law."[179]

It is in its commitment to an equitable perspective that court mediation is—or ought to be—distinguishable from other types of settlement negotiations. Such a commitment, however, does not preclude the presence of legal knowledge. Law must supplement and inform the equitable perspective in court mediation. For, just as Maitland observed that "[e]quity without common law would have been a castle in the air, an impossibility,"[180] I argue that court mediation without knowledge of law offers simply the illusion of justice. Unless bargaining is informed by knowledge of law,[181] justice in court mediation is also a "castle in the air."

### *B. Evaluating Justice in Court Mediation*

#### *1. Inadequacy of Prevailing Criteria*

As I suggested earlier in this article, most litigants come to court seeking justice through law. Unless they decide to settle,[182] they will receive a public outcome in court which is reviewable through the appellate process. In providing the alternative of mediation, courts offer litigants the possibility of a creative and private outcome based on "individualized justice."[183] How should this be evaluated?[184]

Under prevailing criteria, mediation is evaluated generally in terms of self-determination, participant satisfaction, and efficiency. As applied to court mediation, these criteria may be useful indicators for evaluating process, but are less helpful when evaluating outcome. These criteria tell us only that litigants were doing something, that they felt good about it, and that dockets were cleared as a result.[185] They tell us little about whether

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179. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 19-21 (1976).

180. F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 19 (*revised by* John Brunyate, 1949).

181. *See infra* notes 209-16 and accompanying text.

182. I note that litigants may be pressured into settlement by court personnel, so that the "decision to settle" may not be an entirely voluntary one.

183. This may or may not approximate the "shadow verdict" defined by Luban as "the anticipated result of a fair trial." Luban, *supra* note 6, at 400.

184. Several commentators have written about criteria for evaluating the justice of ADR. *See, e.g.*, Brunet, *supra* note 136, at 8-9; Luban, *supra* note 6, at 401-03; *cf.*, Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

185. In the Supreme Court, Civil Branch of New York County, there are over 44,000 cases pending in which there has been a request for judicial intervention. Over 7300 of these cases are ready for trial. Telephone Interview with John Werner, Chief Clerk and Executive Officer of the Supreme Court, Civil

litigants actually knew what they were doing or why they were doing it. Thus, these criteria tell us little about justice in court mediation.

*2. Confronting the Limits of Individualized Justice*

The appealing rhetoric of mediation suggests that "individualized justice" is a good thing.[186] The familiar story goes something like this: Mediation is the end product of autonomous parties mutually exercising self-determination. The parties who are personally affected by a dispute decide the outcome of that dispute. They personally invest in the process and have ultimate control over the outcome. Their participation and power result in enormous satisfaction with the mediation process and ultimately, in a high degree of compliance with mediation agreements.[187]

While the above-described process seems wonderful, there are danger zones in this idealized world. Take satisfaction, for example. Certainly, it is important that parties be satisfied with court mediation, but should it be the *sole* criteria for measuring justice? If my opponent sues me for one thousand dollars and I settle in mediation by paying him one hundred dollars, I might be personally quite satisfied. If I learned afterward, however, that my opponent's claim was time barred, I might feel otherwise about the result. Similarly, in the Health Club case, both the parties and the mediator were personally satisfied with the outcome. In fact, we are told that the claimant seemed very happy. However, if he had known about the possibility of collecting treble damages (in that case about $900) from the health club, would he still have been satisfied with two hundred dollars and the ability to terminate the contract? And if the mediator knew about the treble damages provision of the statute, would she still think that she "did

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Branch, in New York County, N.Y. (July 25, 1995).

186. I realize that some commentators have argued for a more communitarian idea of mediation. *See* BUSH & FOLGER, *supra* note 25.

187. *See supra* note 36. The empirical studies showing high compliance rates with mediation agreements and reports of user satisfaction are not surprising. After all, win or lose, parties in mediation have control over the outcome. As in Rawls' gambling example, so long as the procedure is fair (i.e., bets are made voluntarily, no one cheats, etc.), and the procedure has been properly followed, then the outcome is also fair (i.e., distribution of cash after the last bet is fair. Rawls gives this as an example of pure procedural justice. *See* JOHN RAWLS, A THEORY OF JUSTICE 86 (1971).

Empirical studies also point to the success of mediation programs based on the number of cases that are settled. Mediation is viewed as a tool of good court management—the more cases that settle, the more time judges will have for serious matters. Cleared dockets, however, are more a measure of efficiency than justice. *See supra* note 36.

okay" or would her initial ethical misgivings return to gnaw at her?[188]

Even mediation's most favored virtue, self-determination,[189] may be of limited value as an indicator of the justice of court mediation. Without knowledge of their legal rights, the exercise of self-determination is simply a feel-good process. People are satisfied and sometimes even happy for reasons that may have more to do with simply getting it over with than satisfying their initial quest for justice through law.

*3. Dangers for Unrepresented Parties*

Court mediation without knowledge of legal rights has the capacity to confuse, coerce, and mislead unrepresented parties.[190] In this regard, the case of *Wright v. Brockett*[191] is even more instructive than the two case studies discussed previously in this article.[192] *Wright* involved a landlord-tenant harassment dispute which was referred to a local dispute resolution center by a Bronx criminal court. The dispute was allegedly resolved during a mediation/arbitration session,[193] with the seventy-four-year-old unrepresented tenant agreeing, as part of the settlement, to vacate the apartment where she had lived for nearly twenty years.[194] Ultimately, the tenant refused to vacate the apartment and the landlord brought an ejectment action.[195] In seeking to set aside her settlement agreement, the tenant argued that the agreement resulted from coercion, lack of legal representa-

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188. David Luban suggests that participant satisfaction is an inadequate criterion for measuring justice. He gives four reasons: (1) externality problems (i.e., one's happiness may cause another individual's misery); (2) sour grapes and cooling out (i.e., participants' expectations may be illegitimately lowered); (3) distributional insensitivity (i.e. "nonchalance about how satisfaction is distributed among the parties"); and (4) informational poverty (i.e. lack of "information about resources, their utilization, and the lives of the participants"). Luban, *supra* note 6, at 403-07.

189. *See supra* note 8.

190. Perhaps there is a parallel here to the relationship between equity and law. In this regard I note Maitland's warning that while equity and law worked well together, "equity without common law had the capacity to be unwieldy or chaotic." Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 1001 (1987).

191. 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991).

192. *See supra* notes 89-121 and accompanying text.

193. The combination of the mediation and arbitration processes, known as "med-arb," involves an agreement by the parties "that a mediated agreement may be entered as an arbitration award, or if there is a failure to agree, the matter may be referred to the arbitrator for a decision." 371 N.Y.S.2d at 663 (citing GOVERNMENTAL AFFAIRS GROUP, AMERICAN BAR ASS'N, EXPANDING HORIZONS: THEORY AND RESEARCH IN DISPUTE RESOLUTION 92-93 (Thomas F. Christian et al. eds., 1989).

194. 571 N.Y.S.2d at 661-62.

195. *Id.* The tenant first learned that the landlord's rental to her was in violation of the Housing Code while this action was pending. Aff. in Opp'n to Pls.' Mot. for Payment of Use and Occupancy at 3, *Wright* (No. 16904/89).

tion, and the mediator's failure to explain her rights.[196] The court declined to grant a judgment of ejectment, noting that the settlement agreement was not "a provident decision by the tenant, free of coercion."[197]

Have courts come full circle in *Wright*, referring parties to mediation and then refusing to enforce agreements made in that process? This is certainly a more dramatic case in terms of outcome than the two case studies discussed earlier, and it rightfully deserved post-mediation attention by a court. The consequences for the unrepresented, ailing,[198] and elderly tenant in this mediation were severe—surrendering her home of twenty years.[199] Fortunately, this tenant was able to successfully challenge the agreement. How many other unrepresented parties will have the same ability?

It is one thing to extol the merits of autonomy in a voluntary setting among equals when litigants have the power to choose freely the outcome of a dispute. It is quite another to talk about it in a court setting where parties may be required to participate and/or may be ignorant of the options that would have been available had they been permitted to pursue their original quest for justice through law. Presumably, parties who are represented by counsel are aware of their legal rights and are able to freely choose the outcome of their dispute—the ultimate test for self-determination. However, what about unrepresented, unknowledgeable litigants? To talk of autonomous decision making for them is not unlike the fiction of incompetent patients exercising autonomy in medical decision making.[200]

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196. 571 N.Y.S.2d at 662. In an affidavit submitted to the court in connection with this case, the tenant stated: "The mediator did not discuss my rights in terms of my apartment nor was I told that I need not agree to leave." Aff. in Opp'n to Pls.' Mot. for Order to Enforce IMCR Disp. Resol. Ctr. Award at 2, *Wright* (No. 16904/89).

197. 571 N.Y.S.2d at 665.

198. The tenant claimed that she had several ailments, including high blood pressure and heart problems. Aff. in Opp'n to Pls.' Mot. for Payment of Use and Occupancy at 1, *Wright* (No. 16904/89).

199. If this tenant had found herself in Housing Court, rather than at a local mediation center, the result may not have been much better. For a discussion of the plight of unrepresented tenants in New York Housing Court, see 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956 (N.Y. Civ. Ct. 1992) (vacating stipulation signed by tenant who was not represented by counsel in a summary nonpayment eviction proceeding). *See also* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process,* 20 HOFSTRA L. REV. 533 (1992) (describing how unrepresented tenants fared in a Baltimore housing court).

200. "[A]utonomy has long been the dominant rhetorical value in American medical law and medical ethics." Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age,* 68 IND. L.J. 727, 727 (1993).

### C. *Goal of Court Mediation: Achieving the Equivalent of Justice Through Law*

Court is a forum where litigants expect to achieve justice through law. For this reason, court mediation should be judged by a different standard than noncourt mediation.

The fundamental questions about court mediation go well beyond the individualized justice which finds expression in autonomy, self-determination, and feelings of satisfaction. They go well beyond administrative efficiency and clearing dockets. Rather, the fundamental questions about court mediation concern fairness.[201] What were the parties' reasonable expectations when they brought their dispute into the legal system? Did they achieve them in court mediation? The central inquiry in this analysis is whether parties who initially sought justice through law in court adjudication[202] received the closest analogue to justice through law in court mediation.[203]

What does it mean to achieve the equivalent of justice through law in mediation? A "shadow verdict"?[204] Litigants who leave court well-

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201. As Judge Jon O. Newman has observed, "[f]airness is the fundamental concept that guides our thinking about substantive and procedural law. Fairness provides the measure by which we gauge the virtues of familiar arrangements and the risks of innovation." Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985).

202. I include here both arbitration and judicial trials.

203. These questions also have a public dimension. We might ask, for example, whether the public's interest in regulating health clubs was served by the mediated settlement in the Health Club case. As discussed earlier, the purpose of the Health Club Services law is to protect the public against unfair practices. *See supra* note 108. Thus, in the Health Club case, mediation allowed the health club to avoid sanctions and nullified the remedial effect of the statute. If Fiss is right that "[the court's] job is 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," then the agreement reached in this case may fall short of the mark. Fiss, *supra* note 136, at 1085.

The result in the Health Club case, however, is not surprising. It is consistent with the public policy in favor of settlement. *See* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992) ("It is a truism that the law favors a policy of settlement and compromise."). It is also not peculiar to mediated agreements. The same thing happens when courts vacate their opinions at the parties' request, approve consent decrees, and encourage other types of private settlements. For a criticism of this process, see Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. ENVTL. L.J. 191 (1993); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325 (1994). An extended analysis of the public interest question in court mediation is beyond the scope of this article.

204. *See* Luban, *supra* note 6, at 400.

satisfied? At a minimum, court mediation should produce what court adjudication should produce—"just results at the end of just proceedings."[205] Procedurally, parties should experience the functional equivalent of having their day in court.[206] The outcome they achieve must be voluntarily and knowledgeably chosen by them. This means that parties participate in a process that allows them to negotiate from an equitable perspective with knowledge of their legal rights.

Equivalency justice does not mirror the likely court outcome. Instead, it responds to the parties' reasonable expectations: the fair result parties seek in initially coming to court. Parties choose courts to resolve disputes because they want what courts have to offer—dispute resolution based on principles of law. To the extent that courts require parties to resolve disputes differently through the mediation process, they should be able to freely and consciously reject what the law has to offer.

### *D. Achieving Equivalency Justice in Court Mediation*

#### *1. The Principle of Self-Determination*

The controlling principle of mediation is self-determination.[207] Underlying this notion is the fundamental ideal of autonomy, which has been a longstanding principle in American jurisprudence.[208] Whatever the merits of extolling self-determination as a guiding principle for mediation generally, its invocation in the context of court mediation is problematic on two levels. First, it assumes that court mediation is just like other types of

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205. I share the late Professor Maurice Rosenberg's view in this regard. *See* Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 809 (1988).

206. This means an opportunity to tell their story and be heard. Empirical studies on user satisfaction suggest that parties do experience procedural fairness in court mediation. *See supra* note 36. A fair process, however, does not necessarily guarantee a fair outcome. *See* Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223, 225-26 (1993).

207. *But see* BUSH & FOLGER, *supra* note 25, at 37 (observing that many practicing mediators "are willing to be quite directive" in pursuit of their objective of achieving "good-quality settlements").

208. This is particularly true in the context of medical decision making. *See* Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."), *overruled on other grounds by* Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).

In addition to its presence in the common law theory of self-determination in the context of medical decision making, autonomy has also been a predominant principle in right of privacy jurisprudence. This is evidenced by the Supreme Court's acknowledgement of the right of privacy, described by Brandeis as "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

mediation. Second, invoking self-determination as a controlling principle says nothing about its operative effects in court mediation.

*2. Prerequisite for Exercising Self-Determination in Court Mediation*

Court mediation requires parties to place the locus of decision making in themselves; to become active participants in the resolution of their own disputes.[209] In order to engage fully in this decisionmaking process, disputants must be positioned to make conscious, informed choices. Thus, knowledge of legal rights is a necessary prerequisite to the exercise of self-determination in court mediation.[210] Without such knowledge, the fairness of the mediation process and its outcome are suspect.[211]

In arguing that conscious choice in court mediation requires relevant legal knowledge, I am not suggesting that perfect knowledge is possible.[212] However, uninformed self-determination is hollow. Parties in court mediation who resolve disputes based on their ethics, culture, sense of morality, personal fairness and the like, instead of law, should have consciously chosen to disregard their legal rights.[213] In order to achieve the analogue to justice through law, parties must know their legal rights before choosing to abandon them in mediation. In short, the exercise of self-determination in mediation should be informed. For if the self is unknowing, just what is it determining?

Presumably, parties represented by lawyers would have relevant legal

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209. On the other hand, parties who seek a judge's decision based on the rule of law are generally passive participants in the resolution of their legal disputes. Their participation, if any, occurs through their attorneys.

210. The relationship between knowledge and self-determination raises jurisprudential inquiries which are beyond the scope of this Article. I note, however, that this topic has been the subject of lively debate by scholars. *See, e.g.*, Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 682 (1982) ("[s]elf-rule is fostered by the receipt of information that enables the individual to make life-affecting decisions in a more informed fashion."); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). *But see* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 661 (1982) ("Self-rule and democracy can and do operate without full and complete information.")

211. I am aware, of course, that knowlege of legal rights does not guarantee fairness. Parties may lack the resources to exercise their rights. This is particularly true in the informal courts.

212. Certainly court adjudication does not require parties to have perfect knowledge.

213. Professor Judith Maute argues that litigants should knowingly deviate from the probable court outcome before making agreements in mediation. Maute, *Mediator Accountability*, *supra* note 146, at 360. However, assessing probable court outcome might be an impossible task in the informal courts because of variances among individual judges. *See* RHUNKA ET AL., *supra* note 97, at 18-24, 34-38 (discussing the role and attitudes of small claims court judges).

knowledge,[214] but most unrepresented parties—a growing population inside and outside the justice system—are at the "short end of the stick." The unrepresented claimant in the Health Club case bargained "in the dark,"[215] while the represented defendant was presumably "in the know."[216] They reached an agreement that probably complied with mediation's goal of party self-determination, but we are left to ponder what result might have been achieved if the claimant's exercise of self-determination had been more informed.

### 3. *The Mediator's Role with Unrepresented Parties in Court*

Despite the proliferation of mediation statutes in a wide range of subject areas,[217] little attention has been focused on unrepresented parties as an identifiable group[218] and on the mediator's responsibilities to them.[219] The few rules and statutes that specifically refer to unrepresented parties require that mediators encourage them to consult with independent legal counsel.[220] However, as discussed earlier in this article, the "independent counsel" rule is an illusory concept for the majority of Americans who

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214. *But see* Galanter & Cahill, *supra* note 122, at 1385-86 (discussing studies where lawyers had difficulty understanding court standards and predicting court outcome).

215. The claimant was unaware of the serious consequences for the club if its actions were construed not merely as a breach of promise, but as consumer fraud. Both the claimant and the mediator were unaware of the private right of action created by the Health Club Services Law.

216. Presumably, the only player "in the know" here was the "tough" attorney for the health club, who, as the mediation session progressed, became "understanding and amiable" and willing to talk settlement.

217. *See generally* ROGERS AND MCEWEN, *supra* note 51, app. B.

218. The National Standards for Court-Connected Mediation offer three suggestions to mediators when dealing with unrepresented parties:

> Where one or more parties are unrepresented, mediators may reduce any actual or perceived imbalance that results by any of the following means:
> (1) Advising unrepresented parties of their right to have an attorney present and of possible sources for obtaining legal representation.
> (2) Maximizing the use of separate sessions, so that the unrepresented party will be less intimidated and so that the mediator may spend additional time with the unrepresented party, if necessary.
> (3) As a last resort, the mediator may decide that the case is not appropriate for mediation.

NATIONAL STANDARDS, *supra* note 59, Standard 10.2 cmt.

219. One notable exception is in the area of mandatory divorce mediation. *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, app. at 1396 (1995).

220. *See, e.g.*, DEL. SUPER. CT. CIV. INTERIM R. 16.2 (i)(1994) ("Unrepresented parties to the mediation are encouraged to consult with counsel prior to executing a mediation agreement."); ALTERNATIVE DISP. RESOL. SEC., STATE BAR OF TEX., ETHICAL GUIDELINES FOR MEDIATORS § 11, cmt. b (1994) ("A mediator should explain generally to pro se parties that there may be risks in proceeding without independent counsel or other professional advisors.").

cannot afford lawyers.[221] Thus, there is no real system in place to protect unrepresented parties in court mediation. Should court mediators protect them?[222]

There is considerable variance today in how mediators conceptualize their role.[223] Moreover, much ink has been spilled by commentators who also differ on this question.[224] The current divide lies somewhere between the vision of a mediator as a "disinterested referee"[225] and as an "empowerment specialist."[226] Locating the discussion within the context of court mediation and the role of law raises significant policy questions for unrepresented parties.[227] Should mediators guarantee a fair agreement? Or, is it enough that the agreement be legal? What type of legal assistance, if any, should mediators offer? Legal advice? Legal information? Even

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221. *See supra* notes 166-73 and accompanying text.

222. This would require considerable legal expertise and could lead to a monopolization of court mediation practice by attorneys.

223. Behavior ranges from trashing and bashing to therapeutic intervention. *See* Alfini, *supra* note 64, at 66-73 (explaining the mediation styles of "trashing," "bashing," and "hashing it out"); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19-25 (1986) (describing two types of mediation styles: bargaining and therapeutic). Additionally, mediators report ethical dilemmas in resolving role conflicts. BUSH, *supra* note 96, at 8-26, *reprinted in* 1994 J. DISP. RESOL. at 9-40 (describing major types of dilemmas reported by practicing mediators).

224. The lack of certainty regarding the role of mediators may be reflective of a more fundamental, definitional problem with mediation today. *See generally* Jacqueline M. Nolan-Haley, 45 J. LEGAL EDUC. 149, 150 (1995) (reviewing KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE (1994)).

Professor Leonard Riskin has proposed a system for classifying mediator orientations in order to assist parties in selecting a mediator. It begins with two basic questions: "Does the mediator tend to define problems narrowly or broadly?" and "[d]oes the mediator favor an evaluative or facilitative role?" Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111 (1994). For a longer version of this article, see Leonard Riskin, *Understanding Mediators' Orientation, Strategies, and Techniques: A Guide for the Perplexed*, 1 HARV. NEG. L. REV. (forthcoming 1996).

225. I refer here to a facilitator who is absolutely neutral as to process and outcome. *See* JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 143-45 (1987).

226. I refer here to Professor Bush's model mediator who helps parties experience the transformative power of mediation. *See* BUSH & FOLGER, *supra* note 25, at 20-22; Bush, *supra* note 33, at 267-70.

227. I also note that determining the appropriate role of the court mediator has important implications for mediation skills training. If the mediator is a super-negotiator for the parties, then negotiation skills would obviously be emphasized. If the mediator is simply a director of the communication process or upholder of the integrity of the mediation proceeding, then process facilitation skills predominate. On the other hand, if the mediator is a predictor of probable court outcome, then significant legal training would be required and it is likely that non-lawyers would generally be precluded from mediating in court programs. For a "generic" approach to mediation skills training, see Jacqueline M. Nolan-Haley & Maria R. Volpe, *Teaching Mediation as a Lawyering Role*, 39 J. LEGAL EDUC. 571, 576-77 (1989).

though existing professional and ethical standards distinguish between these two forms of legal assistance,[228] the distinction is not always clear in practice. Moreover, such inquiries cannot be neatly bundled into these two packages. Unrepresented litigants ask court mediators a wide variety of legal questions ranging from simple procedural matters to complex questions of law. Some questions can be answered quite easily by court clerks, some require legal counsel, and still others have no clear answers. Difficult policy questions remain.

The increased use of court mediation requires more guidance for mediators who work with unrepresented parties.[229] Specifically, we need further empirical research of the kinds of legal assistance requested by unrepresented litigants in court mediation programs. This data can inform our thinking about the situations in which legal assistance by the mediator is or is not appropriate. As a beginning for this inquiry, I suggest four categories of legal questions that commonly arise with unrepresented litigants:[230] administrative, informational, analytical, and strategic. Questions in the administrative category relate to issues such as amending a complaint, bringing a counter-claim, adding a third-party defendant, executing a judgment, suing in civil court without an attorney, or supporting specific claims with documentary proof. Information regarding these matters is often found in brochures distributed by the court and is regularly provided by court personnel.[231] Mediators should be permitted

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228. *See supra* note 162 and accompanying text.

229. This has already been recognized in connection with mandatory programs. "When parties are unrepresented by counsel, special efforts should be made to make the parties aware of alternatives to settlement and to avoid practices that make them feel that they must settle." *See* SPIDR REPORT, *supra* note 66, at 18.

230. These categories are based on the experience of the Fordham Law School Mediation Clinic in New York City's small claims courts. I do not intend this as a definitive list but simply as a place to begin the discussion.

231. In New York, for example, the court provides a brochure that, among other things, instructs parties on evidentiary matters:

> Before trial, you should gather all the evidence necessary to prove your claim or your defense. Anything that will help prove the facts in dispute should be brought to court. This includes photographs, written agreements, an itemized bill or invoice that is receipted or marked "paid", written estimates of the cost of service or repairs, a receipt for the purchase of an item or the payment of a debt, cancelled checks and correspondence. If you rely on estimates, two different written itemized estimates of the cost of repairs or service are required. If possible, merchandise that is in dispute should be brought to court.
>
> Testimony, including your own, is evidence. Any witness whose testimony is important to your case may testify. This can be a person who witnessed your transaction or someone whose special knowledge and experience makes him or her an expert on the cost of the services or repairs that were provided or may be required.

NEW YORK STATE UNIFIED COURT SYSTEM, A GUIDE TO SMALL CLAIMS COURT 5, 6 (1994).

to respond to such inquiries.[232]

The second category of questions, informational, relates to information about specific areas of law. Examples from our clinic include inquiries related to the statute of limitations, admissibility of evidence at trial, enforceability of oral agreements, and availability of specific types of damages.[233] Responding to these questions is problematic for the court mediator because they raise a host of additional, interrelated questions. How much information is enough? At what point does legal information fall under the rubric of legal advice? Is it ever possible to provide nonpartisan legal information without favoring one of the parties? Mediators should exercise extreme caution in responding to these inquiries, which, in my view, represent some of the most difficult questions in court mediation practice today.[234]

Questions in the analytical category relate to ultimate issues and probable court outcomes.[235] Am I liable under this contract? How would the judge rule if this case were in court?[236] Is the defendant liable for any damages? Answering questions in the analytical category goes beyond the boundaries of legal information to the realm of specific legal advice. In my view, court mediators should not engage in this practice with unrepresented parties.

Finally, there are questions related to strategy and tactics. Common examples of such questions would be: What should I make for an opening offer? Do you think I should take his offer or try to get more? Do you think I am better off before a judge? Giving specific answers to these questions requires the mediator to act in a representational capacity, a role which is inconsistent with the nature of mediation.[237]

*4. Courts' Responsibilities to Unrepresented Litigants*

Courts have special responsibilities towards unrepresented parties to ensure that their participation in the mediation process is informed[238] and

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232. The mediator should do so only if he or she is knowledgeable about the specific subject matter.

233. Inquiries about the possibility of collecting damages for emotional distress are quite common.

234. I note here also that any response to these inquiries by non-lawyers may raise concerns with the unauthorized practice of law doctrine.

235. In fact, some mediators evaluate cases and predict court outcomes. *See* Moberly, *supra* note 162, at 715; Riskin, *supra* note 224.

236. This is perhaps one of the most frequently asked questions.

237. *But see* Riskin, *supra* note 224 (discussing the role of evaluative mediators).

238. A significant effort in this direction is found in the CAL. R. CT., RECOMMENDED STANDARDS OF JUDICIAL ADMIN. § 26(h)(l) (1995), which provides: "Balancing power in mediation should be a

that the outcomes they reach are both informed and consensual. It is the second aspect of informed consent that is most problematic because it requires judgments about whether unrepresented parties had an understanding of their legal rights before entering into agreements in mediation.[239] Important questions must be addressed: Who should make such judgements about informed consent? The mediator?[240] Judges? Court employees? Court-appointed lawyers? Can unrepresented parties waive an understanding of their legal rights?[241] A great deal of empirical research is required in this area.

*5. Fundamental Questions*

In this article, I have suggested that recent experience with the practice of mediation in the judicial system raises questions about what we can realistically expect to achieve from court mediation. Certainly, the mediation process allows litigants to acknowledge multiple human values that may not be recognized in law.[242] Empirical studies show high settlement rates and suggest that both efficiency and individual satisfaction can be achieved. However, a closer look at what actually happens in court mediation tells a more unsettling story about the results of bargaining in ignorance of the law—the story of hit-or-miss justice.

The "alegal character"[243] of mediation exposes the inherent vulnerability of persons who come to court without knowledge of the law. The worst-case scenarios are unsettling: the possibility of unequal bargaining power; dominance by the more powerful party or an overbearing mediator;[244] and

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continuing process and requires continuing mediator attention. An important means of empowering parties to reach informed decisions is through the provision of careful and detailed descriptions of the mediation process by the court, counsel, and mediator, and through premediation education. . . ." *See also* ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY FOR THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION § 2 (1987) ("The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.").

239. Much more empirical work needs to be done in this area.

240. I am sensitive to the burdens that would be imposed on mediators if they had to make judgments about parties' legal rights.

241. I am exploring this question in a separate article.

242. *See supra* notes 174-79 and accompanying text.

243. Riskin, *supra* note 30, at 34.

244. This may occur more frequently in the informal courts where some unsophisticated parties may think that the mediator is a judge. One of my students who worked in the Bronx Small Claims Court reported on some of the effects of this phenomena:

> It was very easy to become judgmental and make all the decisions, especially when the parties decided that you were a judge despite all your introductions. It is very seductive to just

unknown relinquishment of legal rights.[245] If all these contingencies occur, parties may still leave court fully satisfied. Consider the case studies discussed in this article. The claimants did not fully understand their legal rights, but both left mediation seemingly satisfied. We can only speculate about the results that might have occurred if they had been represented by lawyers[246] or had received legal assistance from the court.[247] All of this raises fundamental questions about the future direction of court mediation programs. Should parties be represented by lawyers in court mediation?[248] If one or both parties are not represented by lawyers, should mediation ever

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tell people how to solve their problems and act like they have no choice, because many people will believe you. You have to constantly remind yourself that your role is not to settle, settle, settle, but to help people come to a decision or not, as they chose. Listening to my classmates, I see that many mediators have this problem, though they may not see it as such.

245. Riskin, *supra* note 30, at 34-35.

246. In the Health Club case, a lawyer would probably have informed the claimant of the statutory provision for treble damages in the Health Club Services Law. Economically, however, considering the cost of paying an attorney for this legal advice, the claimant may have achieved close to the same result as he did in mediation. In the Stolen Purse case, a lawyer might have helped the claimant persuade the respondent that his sign disclaiming liability, although indicative of his genuine attempts to warn his patrons, would not necessarily protect him from liability.

For a discussion of the benefits of legal representation in mandatory divorce mediation, see McEwen et al., *supra* note 219.

247. As noted earlier in this article, the place of legal advice in mediation is a subject on which scholars and practitioners differ widely. *See supra* notes 148-61 and accompanying text. Discussions of legal advice also raise concerns about the unauthorized practice of law doctrine. *See* articles cited *supra* note 173.

248. If so, then this also calls for a greater understanding of the role of the lawyer representing a client in court mediation. THE NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION provide some guidance for this understanding. Rule 10.3 states: "Courts and mediators should work with the bar to educate lawyers about: (a) the difference in the lawyer's role in mediation as compared with traditional representation; and (b) the advantages and disadvantages of active participation by the parties and lawyers in mediation sessions." NATIONAL STANDARDS, *supra* note 59, rule 10.3. *See also* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Clients' Interest*, 8 ME. B.J. 38 (1993). In McEwen's study of lawyers in divorce mediation in Maine, the lawyers viewed themselves as "rights-oriented advocate[s], advising and protecting their clients during the mediation process." Craig McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 163 (1994). *See also* Jennifer A. Mastrofski, *Reexamination of the Bar: Incentives to Support Custody Mediation*, 9 MEDIATION Q. 21 (1991) (discussing the role of attorneys in custody mediation).

There is no magic, however, to the presence of a lawyer in mediation. Without an understanding of the mediation process, lawyers may actually deprive parties of the benefits of working toward settlement—the freedom to talk without being bound by rules of evidence and procedure, reconciliation, telling a story, and being heard. We need more studies of the behavior of lawyers who act as advocates in mediation and more training for lawyers on how to represent parties in mediation.

be mandated?[249] In short, who should be allowed to mediate in court?[250]

Full examination of these questions may lead to the conclusion that, in order for parties to achieve the equivalent of justice through law, we must observe greater fidelity to the original understanding of mediation as a voluntary process among parties with relatively equal bargaining power.[251] Such a finding might signal the end of all mandatory court mediation programs for unrepresented parties.[252] I do not make this suggestion lightly. It is becoming increasingly apparent to me that settlement is too often the unitary goal of court mediation programs. Given the pressure techniques used by some court mediators[253] and the high number of reported settlement rates,[254] I believe that there are serious fairness concerns for the litigants who originally came to court seeking justice through law; many of them will settle in mediation and experience instead hit-or-miss justice. Those who are knowledgeable about their legal rights will receive a "hit," while the others will miss out. Thus, until there is a

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249. SPIDR has established the following criteria that should be met before mandatory dispute resolution is imposed:

> 1. The funding for mandatory dispute resolution programs is provided on a basis comparable to funding for trials.
>
> 2. Coercion to settle in the form of reports to the trier of fact and of financial disincentives to trial is not used in connection with mandated mediation. . . .
>
> 3. Mandatory participation is used only when a high quality program (i) is readily accessible, (ii) permits party participation, (iii) permits lawyer participation when the parties wish it, and (iv) provides clarity about the precise procedures that are being required.

SPIDR REPORT, *supra* note 66, at 2-3. *See also* Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 J. DISPUTE RESOL. 287 (1992).

250. These questions acquire increased significance in the courts of the informal justice system (*e.g.*, housing court, small claims court, and to some extent family court) where parties are not generally represented by lawyers.

251. However, if the results of a recent ABA Journal-Gallup poll represent the sentiments of the majority of Americans, it may be that mandatory mediation is here to stay. DeBenedictis, *supra* note 75, at 52.

252. Some efforts have been made to assist unrepresented parties in court mediation. *See, e.g.*, FLA. STAT. ANN. § 440.25(3) (West 1991 & Supp. 1994) (providing that the employer's lawyer may not attend a mediation conference unless employee's lawyer is also present); RULES AND PROCEDURES FOR THE OKLA. DISP. RESOL. ACT rule 10 (providing for an "assisting party" to advise client). In other mediation contexts, nonlawyers have been permitted to represent parties in mediation. *See, e.g.*, CAL. EDUC. CODE § 56500.3(b) (West Supp. 1995) (special education); N.H. REV. STAT. ANN. § 186-C:24 (Supp. 1994) (same). *See also* IOWA RULES GOVERNING STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES rule 6 (providing that a mediator must advise the parties to obtain independent legal counsel, and if the parties decide to proceed without such counsel, the mediator must provide a written statement to the parties informing them, among other things, that they may be giving up legal rights in mediation).

253. *See supra* note 64 and accompanying text.

254. *See supra* note 53 and accompanying text.

clearer consensus on goals other than efficiency, such as process and outcome fairness, we should question the imposition of court mediation on unrepresented parties with potentially unequal bargaining power.[255]

## V. CONCLUSION

Court mediation can help litigants express human values that may be overlooked in law. This does not mean, however, that law should be overlooked.[256] Court mediation offers litigants a forum for private, individualized, and efficient justice, but its private and individualistic nature calls for public attention and critical evaluation in order to prevent good intentions from running amok. What is at stake is public trust in the legal system. As courts jump on the ADR bandwagon, encouraging, directing, and mandating participation in settlement processes such as mediation, there is serious danger that court mediation programs will parallel the official legal system without the benefits of that system; namely, the protections available in justice through law.[257]

Thus, court mediation's promise of individualized justice requires greater scrutiny. It is time to confront the limits of this promise. Specifically, we must pay careful attention to what happens to unrepresented parties, a growing population in the court system. The camouflage and disguises of the mediation process—buzzwords such as self-determination and autonomy—are powerful traps for them. Unaware of their legal rights, unrepresented parties may unwittingly surrender them and still profess great satisfaction with the court mediation process.[258] This kind of ignorance has no place in court ADR programs.[259] Otherwise, justice in court mediation continues to remain serendipitous.

Confronting the limits of court mediation means that in our desire to promote mediation as an enlightened vision of disputing, we must be

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255. I am more sanguine about the prospect of voluntary court mediation with unrepresented parties. *Cf.* McEwen et al., *supra* note 219, at 1392 (arguing that the best alternative may be to allow *pro se* parties to "opt out" of mandatory mediation).

256. *See supra* notes 180-81 and accompanying text.

257. Due process, full hearing, and appellate review, for example.

258. *See supra* note 36.

259. Worse still, unrepresented parties will have little recourse after they settle their cases in court mediation. How would they "discover" that they had been had? How would an unrepresented defendant in court mediation learn that the plaintiff's claim was barred by the statute of limitations? Or, how would an unrepresented tenant learn that the landlord's rental to her was in violation of the housing code? In both of these cases, how would the unrepresented parties go about setting aside the mediation agreement made in ignorance of these factors?

careful not to devalue the parties' reasonable expectations for securing justice through law. Court mediation is a subculture operating officially within the main legal culture. The fundamental question it presents is one of fairness: Will those whose cases are shunted from the courtroom to the mediation room[260] receive a fair shake? I believe they will if their bargaining is informed by law.[261] If not, court mediation is an impoverished alternative to judicial adjudication that demeans both the courts and the mediation process.

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260. I use the word "room" loosely. The setting for court mediation ranges from the informality of crowded, noisy hallways to the dignity of a separate room.

261. *See supra* notes 209-13 and accompanying text.

## APPENDIX

REPRESENTATIVE SAMPLE OF ETHICAL RULES AND STANDARDS ON REFERRAL FOR INDEPENDENT LEGAL ADVICE

ARIZONA: STANDARDS OF CONDUCT FOR MEDIATORS 2 (proposed draft approved by the Arizona Dispute Resolution Association, Credentials Committee, June 1995):

> Independent Advice and Information. The mediator shall encourage participants to obtain independent legal advice and independent legal review of any mediated agreement as is reasonably necessary for the parties to reach an informed agreement.

COLORADO: CODE OF PROFESSIONAL CONDUCT (adopted by Colorado Council of Mediation Organizations, January 1982), *reprinted in* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 299, 303 (1986):

> Mediators shall refer parties to appropriate attorneys for legal advice.

FLORIDA: FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS RULE 10.090(b), *reprinted in* Proposed Standards of Professional Conduct, 604 So.2d 764, 768 (Fla. 1992):

> Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

HAWAII: STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAII (adopted by the Hawaii Supreme Court, April 22, 1986), *reprinted in* Robert Coulson, BUSINESS MEDIATION—WHAT YOU NEED TO KNOW 83, 85, 90 (1987).

> II. (3) Where a mediator concludes that the parties are not informed of their rights, the mediator has a duty to encourage the parties to seek qualified legal, . . . or other professional advice before or during the mediation process.
> VII. (1) Professional Advice
> A mediator shall encourage and assist the participants to obtain independent expert information and advice when such is needed to reach an informed agreement or to protect the rights of a participant. A mediator may give information only in those areas where qualified by training or experience and only with the caution that disputants are encouraged to seek independent advice and counsel on the matters at hand.

INDIANA: IND. R. FOR ALT. DISP. RESOL. 2.7(A)(5):

> The mediator shall advise each of the parties to consider independent legal advice.

NEBRASKA: NEB. REV. STAT. § 25-2913(6) (Supp. 1994):

> The mediator shall be aware of and recommend outside resources to the parties whenever appropriate. The mediator shall advise participants to obtain legal review of agreements as necessary.

OKLAHOMA: CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS, RULES AND PROCEDURES FOR THE OKLA. DISP. RESOL. ACT app. A:

> The mediator shall allow parties to independently assess their legal position and/or seek the assessment of an attorney.