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# Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation

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# EFFICIENCY AND PROTECTION, OR EMPOWERMENT AND RECOGNITION?: THE MEDIATOR'S ROLE AND ETHICAL STANDARDS IN MEDIATION

*Robert A. Baruch Bush\**

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## I. INTRODUCTION: MEDIATION STANDARDS OF PRACTICE AND THE MEDIATOR'S ROLE

The values and dangers of mediation and other alternative dispute resolution (ADR) processes have been the subject of vigorous, even passionate debate for quite some time.<sup>1</sup> However, ADR critics and

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1. Two series of articles exemplify this exchange. See Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) (first series); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); Flanders, *Commentary: Blind Umpires — A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534-55 (1986) [hereinafter Resnik, *Failing Faith*] (second series).

advocates alike agree that, with ADR use expanding in practice even as the debate continues, the public interest clearly dictates that ADR practitioners be subject to appropriate and uniform professional standards.<sup>2</sup> This general concern for professional standards is nowhere greater than in relation to mediation, commonly described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.<sup>3</sup> This particular concern for standards in mediation is understandable; the absence of any structure of procedural or substantive rules in mediation is viewed as presenting the greatest danger of abuse by inept or unscrupulous practitioners.<sup>4</sup> Moreover, unlike other

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Many dispute resolution processes, including arbitration, mediation, bilateral negotiation, mini-trial, summary jury trial, "private judging," and mandatory settlement conferences, are now commonly called "ADR" processes. See, e.g., AMERICAN BAR ASS'N, *ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER* (1987); Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1361-65; Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424-45 (1986); Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 20-24 (1985). All these processes are seen as "alternatives" in the sense that they resolve disputes by means other than full-blown adjudication of the case in court. All are seen as having, in varying degrees, at least some common elements distinguishing them from adjudication — most notably, privacy, relaxation of procedural formality, nonapplication of substantive legal rules, and emphasis on compromise to produce a resolution. See, e.g., Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 11-14 (1987). These are, of course, precisely the elements that make ADR controversial. Some scholars question the practice of treating all ADR processes as related, see, e.g., Menkel-Meadow, *supra*, at 499-500, but it remains common nonetheless.

This article focuses on mediation, which clearly manifests the four major characteristics cited above. FLA. STAT. § 44.301(1) (1987) contains a good description of the mediation process. See *infra* text accompanying note 63. Florida's statutory definition closely parallels that of the mediation literature. See, e.g., Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88-91 (1981).

2. See, e.g., J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 233-34, 244, 258-60 (1984); Ange, *Mediation: Panacea or Placebo?*, N.Y. ST. B.J., May 1985, at 6, 12; Bishop, *Standards for Family and Divorce Mediation*, DISPUTE RESOLUTION F., Dec. 1984, at 3-5; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668, 683 (1986); Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 297-99 (1986); Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 232-33 (R. Tomasic & M. Feeley eds. 1982).

3. See, e.g., AMERICAN BAR ASS'N, *supra* note 1, at 1-2; J. FOLBERG & A. TAYLOR, *supra* note 2, at 7-8; Riskin, *supra* note 1, at 22; Stulberg, *supra* note 1, at 88.

4. See J. FOLBERG & A. TAYLOR, *supra* note 2, at 244; Delgado, *supra* note 1, at 1374, 1387-89. Some claim that due to the fluidity and unstructured character of the mediation process,

ADR practitioners such as arbitrators, mediators do not presently operate under any generally accepted professional code of conduct.<sup>5</sup> Therefore, voices on all sides are calling for uniform standards for mediator qualifications and practice.

The concern for standards is especially urgent not only because of the growth of voluntary mediation in recent years,<sup>6</sup> but also because of a growing trend toward state legislation providing for mandatory, court-connected mediation of civil disputes. Two states, Florida and Texas, recently have adopted laws empowering judges to order mediation in any civil case.<sup>7</sup> Several others have empowered judges to do the same in limited areas, particularly divorce or custody disputes.<sup>8</sup>

"[t]he principal thrust of recent criticism of ADR has been aimed primarily at mediation . . . ." Goldberg, Green & Sander, *supra* note 2, at 292-93. Mediation is thus controversial not only with respect to standards for practitioners, but as a process generally.

5. See J. FOLBERG & A. TAYLOR, *supra* note 2, at 258-59. Several proposed codes of practice have been drafted in recent years, but none has gained widespread acceptance. See *infra* notes 9, 81-96 and accompanying text. On the contrary, as with conceptions of the mediator's role, described *infra* in notes 10-14 and accompanying text, the proliferation of codes reflects the fact that no generally accepted set of standards yet exists. On the other hand, arbitrators' codes of practice have gained wide acceptance. See, e.g., AMERICAN ARBITRATION ASS'N, CODE OF ETHICS FOR COMMERCIAL ARBITRATORS (1987); Hay, Carnevale & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 JUST. SYS. J. 228, 236-40 (1984). As for neutral third parties in processes like mini-trial, summary jury trial, and private judging, some occupy roles similar to that of trial judge or arbitrator; they can be guided by arbitrator or judicial codes of practice. Others function more like mediators, in which case they are unguided like other mediators. In any event, while other neutral third parties may be affected, the problem of standards is most pressing with regard to mediation.

6. See, e.g., Goldberg, Green & Sander, *supra* note 2, at 297; Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30-34 (1982).

7. See FLA. STAT. § 44.302 (1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021-.023 (Vernon 1987). According to some reports, a number of other states are presently contemplating introducing similar legislation. Interview with Hon. Frank Orlando, in Ft. Lauderdale, Florida (Nov. 7, 1988). I note that the statutes in question also provide for court-ordered referral to other ADR processes, including arbitration in Florida, and mini-trial, settlement conference, summary jury trial, or arbitration in Texas. See FLA. STAT. § 44.303 (1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.024-.027 (1987). The Florida Rules of Civil Procedure establish some limitations on court referral; they delineate limited categories of cases in which courts may not order mediation or arbitration. See FLA. R. CIV. P. 1.710(b), 1.800(a).

8. See, e.g., ALASKA STAT. § 25.20.080 (1983) (domestic relations); CAL. CIV. CODE § 4607 (West 1983 & Supp. 1989) (domestic relations); COLO. REV. STAT. 14-10-129.5 (1987) (domestic relations); HAW. REV. STAT. § 672-73 (1986) (malpractice); LA. REV. STAT. ANN. § 9:351 (West Supp. 1989) (domestic relations); ME. REV. STAT. ANN. tit. 19 §§ 636, 665, 752 (Supp. 1988) (domestic relations); MICH. COMP. LAWS ANN. § 600.4951 (West 1987) (personal injury); MONT. CODE ANN. § 39-71-2401 (1988) (workers' compensation). See generally STAND-ING COMMITTEE ON DISPUTE RESOLUTION, AMERICAN BAR ASS'N, STATE LEGISLATION ON DISPUTE RESOLUTION (1988).

Such laws put us on the threshold of a potentially major expansion in the scope of mediation practice; they make the call for uniform standards even more compelling. Indeed, a number of efforts already have been made to draft uniform standards of practice, particularly for divorce mediation.<sup>9</sup>

Despite this urgency, a sound response to the call for uniform standards requires that a deeper question first be addressed. Any guidelines for mediation practice must rest upon a governing conception of the mediator's role. That is, one can articulate qualifications and standards of practice only by reference to some basic, overall vision of what the mediator's job or function is.<sup>10</sup> Therefore, the adop-

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9. See, e.g., ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Society of Professionals in Dispute Resolution 1987) [hereinafter SPIDR STANDARDS], reprinted in DISPUTE RESOLUTION F., Mar. 1987, at 3; MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Association of Family & Conciliation Courts 1984) [hereinafter AFCC STANDARDS], reprinted in MEDIATION Q., June 1985, at 75; STANDARDS OF PRACTICE FOR PRIVATE AND PUBLIC MEDIATORS IN HAWAII (State of Hawaii Judiciary Program on Alternative Dispute Resolution 1986) [hereinafter HAW. STANDARDS]; PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS (Mediation Council of Illinois 1985) [hereinafter MCI STANDARDS], reprinted in MEDIATION Q., June 1985, at 89; STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984) [hereinafter ABA STANDARDS], reprinted in 18 FAM. L.Q. 363 (1984); CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS (Colorado Center for Dispute Resolution 1982) [hereinafter CCDC CODE], reprinted in J. FOLBERG & A. TAYLOR, *supra* note 2, at 349. As is evident from the number of codes cited in this partial list, no specific set of standards has yet gained widespread acceptance. See *supra* note 5 and accompanying text; *infra* notes 10-15 and accompanying text. Efforts have also begun to establish qualification and training standards for mediators, see, e.g., Hay, Carnevale & Sinicropi, *supra* note 5, at 230, 236-40, but the focus of this article is on standards of ethical practice.

10. Another way of stating this proposition is that the role served by the practitioner of a given profession should be a primary factor in determining professional ethical standards. See J. FOLBERG & A. TAYLOR, *supra* note 2, at 250-51. For example, the general conception of the lawyer's role, as the loyal and zealous advocate of the client's interests, plays a large part in shaping the ethical code of the legal profession. Likewise, the general conception of the physician's role, as the expert healer and guardian of the patient's life and health, shapes the ethical code of the medical profession. See *id.* The same should hold true for mediators' ethical standards, which makes it clear that a conception of the mediator's role is a necessary starting point in articulating ethical standards.

This is one reason that this article focuses on defining the mediator's role as mediator, regardless of whether he or she practices some other profession as well. The roles of professionals such as lawyers, therapists, and others, have been relatively clearly conceptualized and agreed upon; the same cannot be said for the role of the mediator. See *infra* notes 11-15, 19-52 and accompanying text. Moreover, until we have a clear conception of the mediator's role as such, and the ethical obligations that arise from it, it will be difficult to reach sound conclusions about the particular obligations of the multi-profession mediator.

For example, several authors have addressed the questions of legal ethics that may arise for lawyers who act as mediators. See, e.g., Crouch, *Divorce Mediation and Legal Ethics*, 16

tion of common standards, no matter how urgent, requires as a first step the acceptance of a common conception of the mediator's role on which to base such standards. Unfortunately, no such common conception exists today, nor has one even been sought before now.<sup>11</sup> On the contrary, until now pluralism has reigned in mediation practice. Mediation has been seen by some as a vehicle for citizen empowerment;<sup>12</sup> by others as a tool to relieve court congestion;<sup>13</sup> and by still others as a means to provide "higher quality" justice in individual cases.<sup>14</sup> These and other visions of mediation have coexisted and produced very different conceptions of the mediator's role. But no one conception has found general acceptance. Therefore, even if the public interest urgently demands common standards, we cannot reasonably meet this demand without first choosing which conception of the mediation process and the mediator's role should govern. Moreover, this choice must be careful and deliberate, for the coherency and quality of the standards will depend heavily on the soundness of the conception we choose for a foundation. Professor Riskin, among others, has rightly criticized mediator standards proposed until now as failing to understand and articulate "the overall objectives of the mediation process or the neu-

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FAM. L.Q. 219 (1982); Gaughan, *An Essay on the Ethics of Separation and Divorce Mediation*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 321 (American Bar Ass'n ed. 1982); Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICHMOND L. REV. 325 (1988); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982). However, until we have a clearer conception of the mediator's role and mediator's ethics, it will be difficult to say how, or whether, a practitioner can satisfy both sets of ethical standards, because we now have only half the picture. Therefore, I want to clarify from the outset that this article does not address the issue of legal ethics problems of lawyers acting as mediators. I am interested in the other, less developed part of the picture: the question of mediator's ethics as such.

11. See J. FOLBERG & A. TAYLOR, *supra* note 2, at 258-59; Goldberg, Green & Sander, *supra* note 2, at 297-99.

12. See, e.g., Shonholtz, *The Citizen's Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS AM. ACAD. POL. & SOC. SCIEN- TISTS, Nov. 1987, at 42.

13. See, e.g., Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38; Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982); Glover, *New Mediation and Arbitration Legislation for Florida's Courts*, FLA. DISPUTE RESOLUTION CTR. NEWSLETTER, Summer 1987, at 1; Lieberman & Henry, *supra* note 1, at 432.

14. See, e.g., Galanter, " . . . A Settlement Judge, not a Trial Judge": *Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 2-3 (1985); McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 238-39 & 239 n.6 (1981); Menkel-Meadow, *supra* note 1, at 504-05; Riskin, *supra* note 6, at 34.

tral . . . [mediator].”<sup>15</sup> In other words, previously proposed standards have not been based on a clear and sound conception of the mediator’s role.

The purpose of this article is to encourage legislators, practitioners, academics, and others concerned with this issue to reflect on this fundamental question before making a commitment to any specific set of standards: What general conception of the mediation process and the mediator’s role should govern that set of standards? Specifically, I challenge the reader to resist adopting what seem to be the two currently prevailing conceptions of the mediator’s role. I argue instead for a conception based on traditional mediation theory and practice, and implied in recent state legislation.

Part II of this article identifies two current conceptions of the mediator’s role. While both are popular among their respective constituencies, both are fundamentally flawed. According to the first, the mediator’s role is to facilitate agreements in as many cases as possible, thus obviating the need for trial in court. According to the second, the mediator’s role is to ensure that neither party’s rights are compromised in the settlement process. The first I refer to as the efficiency conception, and the second as the protection-of-rights conception. This article explains why neither conception is coherent, and why neither is a sound basis for mediator standards.

In Part III, I argue in favor of a third, sounder conception of the mediator’s role — the empowerment-and-recognition conception. According to this conception, the mediator’s role is neither to promote agreement nor to protect rights *per se*. Instead, the mediator’s role is to encourage the parties’ exercise of their autonomy and independent choice in deciding whether and how to resolve their dispute, and to promote their mutual recognition of each other as fellow human beings despite their conflict. Part IV explores how this third conception would guide us in choosing, and rejecting, specific mediator standards.

The concrete focus of this article, particularly the final section, is on the impact of the conception of the mediator’s role on standards of ethical mediation practice.<sup>16</sup> Moreover, this article focuses on the

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15. Riskin, *supra* note 10, at 346; *see also* Gaughan, *supra* note 10, at 324, 327-34 (“responsive set of ethics for family law practice has not been very well developed”; ethical principles for mediation by attorneys suggested). *See generally* Hobbs, *supra* note 10 (a general discussion of ethics and standards a lawyer should demonstrate in divorce mediation).

16. As noted above, I start from the premise that the role played by the practitioner of a given process should be a primary factor in determining professional ethical standards. *See supra* note 10 and accompanying text. That role, I believe, should also be a primary factor in determining professional qualification and training requirements. Therefore, the thesis of this

mediator's role and responsibilities *as mediator*, regardless of whether the mediator is a professional who occupies other roles as well. For, whatever other professional ties bind them, mediators occupy a unique role which they are ethically obligated to understand and fulfill. This role, and the responsibilities that accompany it, are the concern of this article.<sup>17</sup>

## II. WHAT THE MEDIATOR'S ROLE IS NOT

As noted earlier, under the common definition of mediation, a neutral third party works with the disputing parties to help them reach a mutually acceptable resolution. This definition might itself appear to answer the question of what the mediator's role should be. However, this standard definitional language can be read in different ways, and it does not reflect in practice any common conception of the mediator's role in the process. On the contrary, as discussed above, many different conceptions exist. Among these, however, two call for special and critical discussion. Both the efficiency and protection-of-rights conceptions of the mediator's role are quite popular today; both have greatly influenced the operation of mediation programs and the articulation of mediation standards. Nevertheless, neither merits such popularity or influence. Despite their prevalence, both conceptions are deeply flawed, and for similar reasons.

### A. *The Efficiency and Protection-of-Rights Conceptions*

The efficiency conception holds that the mediator's primary role, and the main value of the mediation process, is to remove litigation

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article also contains implications for those requirements. *See, e.g.*, J. FOLBERG & A. TAYLOR, *supra* note 2, at 236-40; Goldberg, Green & Sander, *supra* note 2, at 299; Hay, Carnevale & Sinicropi, *supra* note 5. Development of those implications, however, is beyond the scope of this article.

17. *See supra* note 10 and accompanying text; *infra* note 66 and accompanying text. This article does not attempt to distinguish between differences in the mediator's role, and consequent obligations, in different contexts or types of cases. While such differences may exist, *see, e.g.*, J. FOLBERG & A. TAYLOR, *supra* note 2, at 130-31, I believe that the most basic elements of the mediator's role are the same regardless of the context or type of case in question. It is that basic conception of the mediator's role, and the basic obligations flowing from it, that I address in this article. Clarifying this basic conception is necessary as a starting point from which ethical standards relevant to all types of mediators can be articulated. From this common basis, further refinement can proceed. I note that this approach seems to be accepted in professions such as law and medicine, in which certain common ethical standards exist and apply to all practitioners, regardless of the types of cases they handle, based on some common and basic conception of the practitioner's role, regardless of specialty. While additional standards may apply to specialists, the common basis applies to all. I suggest that the same approach makes sense in mediation.



from the courts by facilitating settlement agreements in as many cases as possible. This reduces court congestion, frees scarce judicial time, and economizes on public and private expense.<sup>18</sup> Sometimes this conception is framed more narrowly by saying that the mediator's role is simply to facilitate agreements. However, this characterization is usually only a surrogate for the efficiency conception, since the value of agreements in this view is that they represent conservation of public and private resources. Therefore the efficiency conception usually is accompanied by a focus on mediators' settlement rates and time-and-cost figures.<sup>19</sup> This conception is advanced most commonly by judicial administrators and planners, and by the business-law community, as part of the search for "alternatives to the high costs of litigation."<sup>20</sup>

By contrast, the protection-of-rights conception holds that the mediator's primary role, and the main value of the mediation process, is to safeguard the rights of the disputing parties and potentially affected third parties by imposing various checks for procedural and substantive fairness on an otherwise unconstrained bargaining process. This prevents settlement agreements from compromising important rights.<sup>21</sup> Sometimes, this conception is expressed by saying that the

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18. See, e.g., Burger, *supra* note 13, at 276; Cadwell, *Circuit Civil Mediation*, FLA. DISPUTE RESOLUTION CTR. NEWSLETTER, Summer 1987, at 4-5; Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983); United States Dep't of Justice, Neighborhood Justice Center Program (July 11, 1977) (mimeograph) (cited in Tomasic, *supra* note 2, at 240); see also Menkel-Meadow, *supra* note 1, at 493 ("Proponents of the settlement conferences point to its ability to dispose of cases efficiently decreasing the delay of case resolution and increasing the likelihood of achieving settlements."); Sander, *Varieties of Dispute Processing*, in ADDRESSES DELIVERED AT THE NAT'L CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, 70 F.R.D. 111, 112-14 (1976) (alternative ways of resolving disputes outside of courts reduces judicial caseload).

19. See, e.g., Cadwell, *supra* note 18.

20. See, e.g., Burger, *supra* note 13, at 276; Cadwell, *supra* note 18, at 4-5; Center for Public Resources, *Cal. Insurer Uses Mediation, Saving \$10M in Legal Fees*, ALTERNATIVES TO THE HIGH COST OF LITIGATION 145 (1988); Shuart, Smith & Planet, *supra* note 18; United States Dep't of Justice, *supra* note 18.

21. See, e.g., Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, MEDIATION Q., June 1984, at 61, 66-70 [hereinafter *Neutral Mediator*]; Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971) (specifically discussing the role of the judge as mediator in settlement conferences, but with applicability to nonjudicial mediators as well); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 42-47 (1981); Riskin, *supra* note 10, at 348-52 (discussing the rights-oriented character of mediator standards proposed in Crouch, *supra* note 10, and ABA STANDARDS, *supra* note 9).

mediator's role is to ensure that agreements are based on informed consent and that they are not fundamentally unfair to either side. This characterization, however, is really only a surrogate for the protection-of-rights conception, for the primary concern is avoiding unknowing waivers of legal rights, including the right to fundamental fairness inherent in legal doctrines such as unconscionability. Therefore, the protection-of-rights conception usually engenders a focus on mediator duties, especially on the duty to advise and urge parties to obtain independent legal counsel and the duty to terminate a mediation that threatens to produce an unreasonably unfair agreement. Advocates of disadvantaged groups and the trial practice segment of the bar are among those advocating this conception.<sup>22</sup> It has heavily influenced most of the mediation practice codes proposed in recent years.<sup>23</sup>

The efficiency and protection-of-rights conceptions, as described, might seem to be exaggerations of the views different groups actually hold. Perhaps efficiency advocates also really care about protection of rights, and vice versa, and the differences are only ones of emphasis. However, the question at hand is which conception should govern. When two conceptions clash, they cannot both govern; and in practice the efficiency and protection-of-rights conceptions are bound to conflict. A mediator focusing on reaching agreements, and doing so expeditiously, will inevitably be insensitive to protection of rights. Conversely, a mediator focusing on protecting rights will often hesitate about or even resist reaching an agreement, and certainly will be in no hurry to do so. It is no exaggeration to describe each conception as focusing on one role as the primary role of the mediator which, even if other roles are acknowledged, takes precedence and governs in practice.

Therefore, in their primary focus, the efficiency and protection-of-rights conceptions of the mediator's role are not only distinct, but poles apart. The efficiency conception sees mediation as a more economical alternative to trial in court, while the protection-of-rights conception sees mediation as a more principled alternative to the unconstrained bargaining of settlement negotiations. Despite their dissimilarity, however, two observations apply equally to both. First, both take an essentially negative view of mediation as the avoidance of something bad — expensive court involvement or unprincipled bar-

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22. See, e.g., Crouch, *supra* note 10; Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 FAM. L.Q. 451 (1984).

23. See, e.g., ABA STANDARDS, *supra* note 9; MCI STANDARDS, *supra* note 9; see also *infra* text accompanying notes 82-96.

gaining — rather than a positive view of mediation as the accomplishment of something good in itself. This negative approach sadly misses the positive essence of mediation, which I discuss in parts III and IV below.<sup>24</sup> Second, both conceptions of the mediator's role are fundamentally and similarly flawed, in two critical respects.

### B. *The Flaws in Both Conceptions*

The first flaw in both conceptions is that efficiency and protection of rights are both interests that third parties other than mediators can promote much more effectively than mediators themselves. Therefore, why give either of these jobs to mediators in the first place? If efficiency is the concern, an arbitrator can be more effective than a mediator in removing cases from court and disposing of them expeditiously and finally. The greater structure of the arbitration process, and the arbitrator's decisional authority, make speedy and final disposition much more likely in arbitration than in mediation.<sup>25</sup> On the other hand, if protection of rights is the primary concern, a judge can do so far more effectively than a mediator. As many have observed, the informality and privacy of mediation, and its de-emphasis on substantive rules of decision, inevitably place rights and fairness at risk.<sup>26</sup> By

24. See also Riskin, *supra* note 10, at 349-50, 352 (Crouch proposed standards unlikely to be flexible; ABA Standards seem dedicated "to avoiding the worst").

25. Regarding the character of the arbitration process, see MacLean, *Voluntary Arbitration as an Alternative to Litigation*, 10 COLO. LAW. 1300 (1981); Max, *Arbitration — The Alternative to Timely, Costly Litigation*, 42 ALA. LAW. 309 (1981); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961) (general discussion of commercial arbitration); Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Courts*, 94 HARV. L. REV. 1592, 1599-1601 (1981) (discussing arbitration and "private judging"). Regarding the effects of arbitration on speed and finality, see Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 987-88 & n.202; MacLean, *supra*, at 1303-05; Max, *supra*, at 311. Perhaps the key factor here is not even speed, but finality. Because arbitrators' decisions are appealable only on very limited grounds, see, e.g., MacLean, *supra*, at 1306, cases that private arbitrators handle are effectively removed from the courts. Even in court-ordered arbitration, although parties typically have the right to trial *de novo* if dissatisfied with the arbitrator's decision, this right is rarely exercised, again effectively resulting in permanent removal of the cases from the court system. See Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 273-76 (1986). On the other hand, mediators have no formal decisional authority, and "success rates" in obtaining disposition through agreement in mediation are almost certainly less than final disposition rates in either voluntary or mandatory arbitration.

26. See Abel, *The Contradictions of Informal Justice*, in I THE POLITICS OF INFORMAL JUSTICE 267, 295-301 (R. Abel ed. 1982); Hofrichter, *Neighborhood Justice Centers Raise Basic Questions*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA, *supra* note 2, at 193, 196-97; Riskin, *supra* note 10, at 353. See generally J. AUERBACH, *JUSTICE WITHOUT LAW?* 136 (1983) ("mediation processes dispensed with due-process safeguards.").

contrast, adjudication's emphasis on procedural formality, substantive rules, and neutral supervision of zealous advocates assures greater protection of rights and fairness than mediation could possibly afford.<sup>27</sup> In short, if the concern is efficiency or protection of rights, mediation can be dismissed altogether as superfluous, because other processes can perform both these functions much more effectively.<sup>28</sup>

One answer to this criticism is that mediation can accomplish something else of value that these other processes cannot. If so, however, then this value and not the two in question should define the mediator's role, as I indeed argue in part III below. Another answer is that, while other processes can more effectively promote either efficiency or protection of rights, mediation somehow can combine both functions as those other processes cannot. As argued above, however, in practice these two functions are bound to conflict with one another. Thus, it is difficult to see how mediation, or any process, could effectively serve both.

In fact, this leads to the second flaw common to both the efficiency and protection-of-rights conceptions. Not only are mediators incapable of serving *both* these roles simultaneously, they actually are incapable of serving *either* of them separately. Indeed, the attempt to serve either will render the mediation process either useless or abusive.

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27. Regarding the formal, rule-based character of adjudication, see Delgado, *supra* note 1, at 1367-75; Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 642-45 (1976); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-71 (1978). Regarding the effects of adjudication on protection of procedural and substantive rights, see Delgado, *supra* note 1, at 1387-91; Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1019-21 (1979). Regarding the possibility of unfairness in mediation because of unequal positions, see Diamond & Simborg, *Divorce Mediation's Weaknesses*, 3 CAL. LAW., July 1983, at 37; Fiss, *Against Settlement*, *supra* note 1, at 1076-78.

28. Some may argue — and I am indebted to Professor Leonard Riskin for this observation — that the position I take here is overstated. That is, it exaggerates the efficiency and protection capacities of, respectively, arbitration and adjudication, and ignores similar capacities in mediation itself. Thus, for example, some empirical research questions the conventional view that speed and economy characterize arbitration. See, e.g., Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis*, 8 JUST. SYS. J. 6, 17-19 (1983). Moreover, several commentators have argued that the protections of adjudication are very costly to obtain and often go to the highest bidder, so that in practice they are least available to those who need protection most. See, e.g., Goldberg, Green & Sander, *supra* note 2, at 293; Resnik, *Failing Faith*, *supra* note 1, at 545 & n.232; Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48, 66-70 (1976).

On the other hand, research on mediation indicates that mediated resolutions produce a remarkably high rate of compliance, and thus finality, which may be a key factor in overall speed and economy. Cf. McEwen & Maiman, *Mediation in Small Claims Court: Achieving*

If we adopt the efficiency conception, under which the mediator's primary role is simply to reach agreements as expeditiously as possible, the effect is to create a role devoid of any clear ethical constraints on mediator behavior. Mediators become little more than case-movers; the only performance standards are their agreement rates and time/cost figures.<sup>29</sup> Such a conception creates perverse incentives; it opens the door to, and indeed encourages, manipulative and coercive mediator behavior, especially in a process unconstrained by procedural or substantive rules or fear of publicity. Mediation becomes the "forced march to settlement" that many of its critics have rightly decried.<sup>30</sup> One might expect two possible outcomes from the adoption of such a role for the mediator: disputants with any presence of mind simply will balk, rendering the process useless; or disputants with less presence of mind will be intimidated, rendering the process abusive. The

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*Compliance Through Consent*, 18 L. & SOC'Y REV. 11 (1984) (mediation defendants almost twice as likely to comply with the agreement terms as adjudication defendants). Some have also argued that the mediator's "power balancing" capacity can produce greater protection in practice, for a less powerful disputant, than the formal protections of adjudication, which a wealthier party can subvert by technical maneuvering. See, e.g., Davis & Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, MEDIATION Q., Dec. 1984, at 17. I myself have made a similar argument that the conventional wisdom tends to overstate the powers of adjudication and arbitration relative to mediation, producing a distorted view of their relative effectiveness. See Bush, *supra* note 25, at 972-1004.

All of these arguments, however, are based on the imperfections of the present institutional structures of adjudication and arbitration. Therefore, if efficiency and rights protection are the goals, then the real question is whether improving the operation of adjudication and arbitration, which by nature are geared to these goals, is not a more effective strategy than relying on mediation. In fact, many scholars argue that greater attention to judicial reform and improved access to court, rather than reliance on mediation, is the best way to protect rights and promote efficiency. See, e.g., Nader, *supra* note 27, at 1019-20; Resnik, *Failing Faith*, *supra* note 1, at 544-46; Tomasic, *supra* note 2, at 246-48. Moreover, regardless of the limitations of adjudication and arbitration, real doubt exists as to whether mediators can protect rights and promote efficiency without rendering the mediation process either ineffective or abusive. See *infra* text accompanying notes 29-34. Therefore, while I admit to stating the argument in the text a bit strongly, I think an emphatic argument is necessary to draw attention to the real problems of the efficiency and protection-of-rights conceptions of the mediator's role. Thus, I do not think the emphasis is unfair or overstated.

29. See Abel, *supra* note 26, at 273, 279, for the view that this has already happened in "neighborhood justice center" mediation. Davis & Salem, *supra* note 28, at 23, and Sander, *Family Mediation: Problems and Prospects*, MEDIATION Q., Dec. 1983, at 3, 6, both imply a concern that this may be happening to mediators, and caution against it.

30. See, e.g., Felstiner & Williams, *Mediation as an Alternative to Criminal Prosecution[:]* *Ideology and Limitations*, 2 L. & HUM. BEHAVIOR 223, 244 (1978); Tomasic, *supra* note 2, at 225-28.

mediator either cannot or should not succeed in the role of efficient case-mover.

On the other hand, if we adopt the protection-of-rights conception, mediators cannot effectively serve this role without undermining their usefulness altogether. As Professor Stulberg has argued, mediators who try to protect substantive rights and guarantee that agreements are fair must adopt substantive positions that inevitably compromise their impartiality, either in actuality or in the parties' eyes.<sup>31</sup> Yet, impartiality is crucial to the mediator's many tasks. The mediator has to create an effective environment for bargaining, develop information, and persuade parties to explore different options, search for areas of agreement and exchange, and finally accept something different from their initial demands; and the ability to do all this depends on maintaining the trust and confidence of both parties in the mediator's complete impartiality.<sup>32</sup> Thus, making protection of rights the mediator's primary and direct role prevents the mediator from serving many other crucial functions. The same is true if the mediator tries to protect rights indirectly, by urging the parties at every significant juncture in the process to consult independent outside counsel. Doing so undermines the mediator's ability to develop the sense of movement, rapprochement, and trust with and between the parties that is crucial to attaining mutually acceptable agreements.<sup>33</sup>

In short, mediators can succeed in the protective role only by limiting their function to protection and nothing more, transforming mediation into simply a kind of regulated negotiation process. Even then, the substantive positions a mediator takes may doom the negotiation process itself, as the party disfavored by the mediator's positions simply may balk at a "regulated" settlement. Alternatively, if

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31. See J. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 141-49 (1987); Stulberg, *supra* note 1, at 87, 96-97; see also McCrory, *Environmental Mediation — Another Piece for the Puzzle*, 6 VT. L. REV. 49, 80-81 (1981).

32. See J. STULBERG, *supra* note 31, at 31-41, 141-49; see also Nicolau & Cormick, *Community Disputes and the Resolution of Conflict: Another View*, 27 ARB. J. 98, 111-12 (1972) (to maintain impartiality, the mediator must not push the parties to the mediator's view).

33. See Riskin, *supra* note 10, at 350-52; Silberman, *supra* note 10, at 122. This is not to suggest that impartiality is important simply because it helps produce agreements. This logic would suggest — I think erroneously — that Stulberg and others concerned with impartiality ultimately subscribe to the efficiency conception of the mediator's role. The key language here is "mutually acceptable" agreements. The full meaning of this language, as explained in the text below, makes clear that the ultimate concern behind impartiality, for Stulberg and others, is not efficiency, but rather a combination of empowerment and recognition. See *infra* text accompanying notes 63, 75-78.

parties succumb to the mediator's positions, which by nature are subjective and unreviewable, the result may be an agreement that simply substitutes the mediator's personal views of right and fairness for those of the parties. This may be just as abusive, in its way, as the agreement-oriented mediator's "forced march to settlement."<sup>34</sup>

To summarize, the mediator cannot effectively and coherently fulfill the role envisioned by either the efficiency or the protection-of-rights conception. On the other hand, neutral third parties in other processes, such as arbitration and adjudication, *can* fulfill these roles. Therefore, neither the efficiency nor the protection-of-rights conception offers a sound basis for establishing uniform standards for mediator qualifications, training, and practice. For this reason, it is important to resist the tendency to gravitate toward either conception, both of which remain extremely influential despite their deficiencies. The only basis for resisting them, however, is the articulation of another conception of the mediator's role which is sounder, more fruitful, and more in touch with the positive essence of mediation. This is the conception I referred to in the introduction as the empowerment-and-recognition conception.

### III. WHAT THE MEDIATOR'S ROLE IS

The flaws in the two prevailing conceptions of the mediator's role are revealed by examining what mediation cannot do that other processes can. The basis for a sounder conception of the mediator's role lies in examining what mediation *can* do that other processes cannot. In other words, what important powers or capacities are unique to mediation that are not found to the same degree, if at all, in other methods of dispute resolution? The mediator's role should then be to act in ways that fulfill these unique capacities.<sup>35</sup>

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34. See *Neutral Mediator*, *supra* note 21, at 65-73; Hay, Carnevale & Sinicropi, *supra* note 5, at 240-43; Stulberg, *supra* note 1, at 115.

35. Again, this article focuses on the mediator's role as mediator, regardless of whether he or she is a member of another profession who therefore occupies other roles as well. I am interested in the role and responsibilities of mediators as such to the mediation process and profession, not in their responsibilities to some other profession as, for example, *lawyer- or therapist-mediators*. See *supra* notes 10, 16 and accompanying text; *infra* note 66 and accompanying text.

The notion expressed in the text that different dispute resolution processes have different capacities that uniquely serve, and to some extent embody or manifest, different values, has been most profoundly explored in the work of Lon Fuller. See Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Fuller, *supra* note 27, at 363. The work of other dispute resolution scholars also reflects this notion. See, e.g., Fiss, *Against Settlement*, *supra* note 1; Fiss, *Fore-*

### A. *The Empowerment-and-Recognition Conception*

Thoughtful mediation theorists and practitioners have given much consideration to identifying mediation's unique powers. In their comments, two points consistently are expressed regarding the capacities of the mediation process.

The first special power of mediation, and what some call "[t]he overriding feature and . . . value of mediation," is that "it is a consensual process that seeks self-determined resolutions."<sup>36</sup> Mediation places the substantive outcome of the dispute within the control and determination of the parties themselves; it frees them from relying on or being subjected to the opinions and standards of outside "higher authorities," legal or otherwise.<sup>37</sup> Further, mediation not only allows the parties to set their own standards for an acceptable solution, it also requires them to search for solutions that are within their own capacity to effectuate. In other words, the parties themselves set the standards, and the parties themselves marshal the actual resources to resolve the dispute.<sup>38</sup> When agreement is reached, the parties have designed and implemented their own solution to the problem. Even when the parties do not reach an agreement, they experience the concrete possibility, to be more fully realized in other situations, that they can control their own circumstances. They discover that they need not be wholly dependent on outside institutions, legal or otherwise, to solve

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ward: *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAVIOR 121 (1982); Resnik, *Failing Faith*, *supra* note 1; Resnik, *Managerial Judges*, *supra* note 1; Riskin, *supra* note 6; Riskin, *supra* note 10. Both Fuller and Riskin also recognize, and base their arguments on, the notion that the special values served by a process should determine the role conception, and ethics, of a practitioner of that process. See, e.g., Fuller, *supra* note 27, at 382-93; Riskin, *supra* note 10, at 332-33, 347-59; see also Hobbs, *supra* note 10, at 367, 371; Lande, *Mediation Paradigms and Professional Identities*, MEDIATION Q., Dec. 1984, at 19; *supra* note 10.

Some commentators question or entirely reject this notion, and argue that no unique and inherent connection exists between particular forms of dispute resolution and particular values. See, e.g., Menkel-Meadow, *Review Essay — Dispute Resolution: The Periphery Becomes the Core*, 69 JUDICATURE 300, 301 (1986).

36. J. FOLBERG & A. TAYLOR, *supra* note 2, at 245.

37. See *id.* at 35; *Neutral Mediator*, *supra* note 21, at 65-70, 72-73; Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice*, in PEOPLES' LAW REV. 42 (R. Warner ed. 1980); Riskin, *supra* note 10, at 335-36, 351, 357. This does not mean that mediation necessarily renders such standards irrelevant, but rather that it allows the parties themselves to determine the relevance and importance of those standards. See Friedman, *supra*, at 43, 47; Center for Mediation in Law, *The Place of Law in Mediation* (1983) (training materials).

38. See J. FOLBERG & A. TAYLOR, *supra* note 2, at 35. The mediator, of course, plays a role in this, but it is a facilitative role, not a directive, paternalistic one. See also J. STULBERG, *supra* note 31, at 33-34; Davis & Salem, *supra* note 28, at 19, 23.



their problems. I call this the empowerment function of mediation: its capacity to encourage the parties to exercise autonomy, choice, and self-determination.

Some authorities explicitly recognize empowerment as a unique value of mediation,<sup>39</sup> while others do so implicitly. For example, the value of empowerment certainly is one of the implied premises of Professor Stulberg's cogent argument against requiring mediators to control the "fairness" or "efficiency" of agreements.<sup>40</sup> Concern for empowerment also underlies what could appear to be a distinct view of the special power of mediation, which stresses its capacity to "foster unique and creative solutions that respond to the parties' needs."<sup>41</sup> While this could be seen as a separate power of mediation, I believe that its value ultimately is connected to the concern for individual empowerment. That is, self-determination and empowerment are furthered through outcomes that are designed by and for the parties, rather than outcomes designed by and (at least in part) for outsiders. Mediated outcomes empower parties by responding to them as unique individuals with particular problems, rather than as depersonalized representatives of general problems faced by classes of actors or by society as a whole.<sup>42</sup>

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39. See *supra* note 36 and accompanying text; see also Shonholtz, *supra* note 12; Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205, 209-10 (Supp. 1978) (trend toward mediation in America); *supra* notes 37-38 (discussing roles of mediator and parties and providing additional resources on this topic).

40. See Stulberg, *supra* note 1, at 113-16; see also *Neutral Mediator*, *supra* note 21, at 72-73; Davis & Salem, *supra* note 23, at 23-25; Nicolau & Cormick, *supra* note 32, at 111-12 (the mediator should not determine goals or success of the mediation).

41. See, e.g., Galanter, *supra* note 14, at 2-4 (citing comments of a number of federal judges reflecting the "better solutions" theme); Goldberg, Green & Sander, *supra* note 2, at 293; Riskin, *supra* note 6, at 34; Sander, *supra* note 29, at 6; see also Menkel-Meadow, *supra* note 1, at 504-05 (advantages of settlement); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-829 (1984) (creates a model of problem solving to meet varied and complementary needs). Some commentators, following this view of mediation, suggest that the mediator's role is to ensure a "pareto-optimal" or "gain-maximizing" resolution. See, e.g., Riskin, *supra* note 10, at 358-59; Susskind, *supra* note 21. Such a conception, however, presents serious problems. See *infra* note 42.

42. The notion that adjudicated outcomes treat the parties as proxies for classes of actors, and that judges look to class and societal impacts and not just individual circumstances in deciding cases, is a common view of the adjudication process. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 18-19 (2d ed. 1977); Englard, *The System Builders: A Critical Appraisal of Modern Tort Theory*, 9 J. LEGAL STUD. 27, 40, 54 (1980). Mediated outcomes, by contrast, must treat the parties as individuals and respond to their unique problems; otherwise, the parties would never agree to them in the first place.

The second special power of mediation was described classically by Professor Lon Fuller: "The central quality of mediation [is] its capacity to reorient the parties to each other . . . 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."<sup>43</sup> What Fuller describes here is not just a technique to produce agreements, but an inherently valuable accomplishment uniquely attainable through mediation. Fuller sees mediation as evoking in each party recognition and acknowledgment of, and some degree of understanding and empathy for, the other party's situation, even though their interests and positions may remain opposed. Of course, such

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Beyond the point made in the text, there is another reason to see the "creative solutions" capacity of mediation as part of empowerment rather than as a separate value of the process. Viewing the creative solutions capacity as a separate value naturally leads to a distinct conception of the mediator's role as "welfare maximizer" or "guarantor of best results for the parties." *See supra* note 41. This is problematic because such a conception, like the rights-protection and efficiency conceptions, involves serious flaws of incoherency and potential abuse.

Like the rights-protection role, the maximizer role would require mediators to take substantive positions regarding the "best" outcome. This would not only compromise impartiality, thereby undermining mediators' ability to mediate at all; it would also disregard the parties' capacity for self-determination, thereby threatening to disempower them. *See supra* text accompanying notes 31-34. In effect, the maximizer role would make the mediator either a Posnerian judge interested in society's welfare, or a paternalistic therapist interested in what is "best" for the parties according to some outside theoretical standard. The result would be to render the process either ineffective or abusive, depending on how "successful" mediators were in this role. For a similar critique of this conception of the mediator's role, see Stulberg, *supra* note 1, at 106-17.

At the same time, like the efficiency conception, the maximizer role would put the mediator under constant pressure, in this case to find "creative solutions" that "meet the parties' needs." This would create perverse incentives to employ whatever gimmicks and manipulations are necessary to find the "right" answer to the parties' problems. *See Riskin, supra* note 10, at 336.

Therefore, viewing the "creative solutions" power of mediation as a separate value produces a highly problematic and dangerous conception of the mediator's role. On the other hand, viewing this power of mediation, as the text suggests, as an inherent and important *part* of the empowerment value is quite natural, and both fits in with and enriches the empowerment conception of the mediator's role. Thus, for example, the search for "self-determined resolutions" involved in the empowerment role naturally includes exploration of creative and novel possibilities based on the parties' unique needs. In short, unique and creative solutions are a natural byproduct of self-determination. Helping the parties attain these solutions is part and parcel of the mediator's larger role of empowering the parties. Regarding the "creative solutions" value in this way is thus more accurate and more helpful in generating a coherent conception of the mediator's role than regarding it as a separate and distinct concern. I note that the "creative solutions" value also can be considered as related to the recognition value and the recognition conception of the mediator's role. *See infra* note 44.

43. Fuller, *Mediation — Its Forms and Functions*, *supra* note 35, at 325.

mutual recognition often will help produce concrete accommodations and an ultimate agreement. But even when it does not, evoking recognition is itself an accomplishment of enormous value: the value of escaping our alienated isolation and rediscovering our common humanity, even in the midst of bitter division.<sup>44</sup> Professor Riskin observes accordingly that one of the great values of mediation is that it can "encourage the kind of dialogue that would help . . . [the disputants experience] a perspective of caring and interconnection."<sup>45</sup> Others also have stressed this special power of mediation to "humanize" us to one another, to translate between us, and to help us recognize each other as fellows even when we are in conflict.<sup>46</sup> I call this the recognition function of mediation.

### B. *What Mediators Can Do — And Others Cannot*

Here, then, are the special powers of mediation: It can encourage personal empowerment and self-determination as alternatives to institutional dependency, and it can evoke recognition of common humanity in the face of bitter conflict. Both powers involve restoring to the individual a sense of his own value and that of his fellow man in the

44. Fuller's own language expresses this value. He refers to the mediator's "primary task" as "induc[ing] this attitude of mind and spirit" and "mutual understanding" in which "the parties . . . come to understand each other's problems . . . ." *Id.* at 326-27.

I note that Fuller offers these characterizations in relation to disputants with the potential for reciprocal relationships of mutually beneficial exchange. *See id.* at 315-17, 326-27. Arguably, in this context, even language like that quoted above could be read to mean that the value of mediation is simply its power to aid in realizing the potential for joint gain. This is what Riskin calls the "maximization" value. *See Riskin, supra* note 10, at 358-61; *see also supra* note 41 and accompanying text (mediation offers creative solutions tailored to the parties' needs).

Nonetheless, I read both Fuller and Riskin as saying, at a deeper level, that the value of mediation being discussed here is not that it helps realize maximum gain through reciprocal exchange. Rather, its most important value is that it encourages the self-transcendence and recognition of the other which is reflected in but not dependent on a reciprocal exchange, and which may still occur even if the exchange itself does not. On the connection between mediation or "compromise" processes of dispute resolution and the value of self-transcendence and recognition of other, see Kuflik, *Morality and Compromise*, in *NOMOS XXI: COMPROMISE IN ETHICS, LAW AND POLITICS* 38, 48-54 (J. Pennock & J. Chapman eds. 1979); *see also* R. Bush, *Mediation v. Adjudication: A Battle of Underlying Values* (1988) (unpublished manuscript); *infra* note 47 (relationship between mediation and social attitudes). Finally, the focus on maximization of gain *per se* would create serious difficulties for the conception of the mediator's role. *See supra* note 42.

45. Riskin, *supra* note 10, at 354; *see also id.* at 332, 347-49, 352, 359 (referring to the value of caring and interconnection); Riskin, *supra* note 6, at 56-57 (relating mediation to the shift in public values from self-fulfillment to the ethic of commitment).

46. *See* Bush, *supra* note 25, at 963 & n.134, 1027-32; Felstiner & Williams, *supra* note 30, at 244; Smith, *supra* note 39, at 209; R. Bush, *supra* note 44.

face of an increasingly alienating and isolating social context.<sup>47</sup> These are valuable powers indeed. Further, they are unique to mediation. These are functions mediation can perform that other processes cannot.

As for evoking empathetic recognition of the other fellow, adjudication and arbitration at best treat such recognition as irrelevant. More often, they destroy the very possibility of empathy by encouraging strong, frequently extreme, adversarial behavior.<sup>48</sup> While in negotiation, recognition may occur, but only haphazardly, for no one stands above the fray to encourage and help the parties rise above their own positions and acknowledge those of their opponents.<sup>49</sup> As for empowerment, it is almost by definition impossible in adjudication and arbitration. Both disempower the parties in differing degrees, whether by their authoritative and legalistic character, or by their heavy reliance on advice and representation by professional advocates.<sup>50</sup> Although empowerment is more of a possibility in negotiation, the diffi-

47. See Smith, *supra* note 39, at 209; Riskin, *supra* note 6, at 56-57; Riskin, *supra* note 10, at 331-33, 361-62. Smith and Riskin both point to the relationship between interest in mediation and the larger context of changing attitudes toward individualism and community in the United States. I concur in this view of mediation as both a reflection of and a response to the broader development of what has been called a "communitarian" social vision. See, e.g., R. BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); Macneil, *Bureaucracy, Liberalism and Community — American Style*, 79 NW. U.L. REV. 900, 934-48 (1985); Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15.

I have written elsewhere about this vision and its connection to mediation and ADR. See Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1529-42 (1986); Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U.L. REV. 335 (1988); R. Bush, *supra* note 44.

48. Many have commented on the often extreme adversarial nature of adjudication. See, e.g., Bok, *supra* note 13; Burger, *supra* note 13; Gaughan, *supra* note 10, at 321-22; Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 620-25 (1980). Arbitration, despite its lesser emphasis on procedural formalities, can still be quite formalized and adversarial. See Bush, *supra* note 25, at 987-88, 991-94; Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 918-22 (1979); Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979); Mentschikoff, *supra* note 25, at 864-65; Mentschikoff, *The Significance of Arbitration — A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 693, 706-07 (1952).

49. Menkel-Meadow offers a thorough discussion of the adversarial character of negotiation as "traditionally" practiced. See Menkel-Meadow, *supra* note 41, at 755-94.

50. See *supra* note 27 regarding the adjudication process. Arbitration, while introduced as an alternative to legalistic dispute resolution, has for a variety of reasons undergone a gradual and quite extensive "legalization," making professional representation important and quite common. See J. AUERBACH, *supra* note 26, at 95-114; Mentschikoff, *supra* note 25.

culty of reaching settlement in unassisted negotiations often frustrates this possibility,<sup>51</sup> and negotiation through professional advocates again involves disempowerment in its own way.

Thus, what mediation can do that other processes cannot, is to encourage empowerment of the parties and evoke recognition between them. These are its unique and valuable capacities. The mediator's role is to act so as to fulfill these unique capacities. Accordingly, in general terms, the mediator's role is: (1) to encourage the empowerment of the parties — i.e., the exercise of their autonomy and self-determination in deciding whether and how to resolve their dispute; and (2) to promote the parties' mutual recognition of each other as human beings despite their adverse positions.<sup>52</sup> I emphasize here that this role can and should be performed successfully whether or not the parties reach an agreement, and whether or not any agreement reached satisfies some external standard of right or fairness. In other words, it is not the mediator's job to guarantee a fair agreement, or *any* agreement at all; it is the mediator's job to guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment. Mediators who ignore this job have not fulfilled their profes-

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51. The recent popularity of "how-to" books on negotiation, many of which are quite sophisticated, is a good indication of the difficulty of successfully negotiating on one's own behalf. *See, e.g.*, R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983); J. ILICH & B. JONES, *SUCCESSFUL NEGOTIATING SKILLS FOR WOMEN* (1981); C. KARRAS, *GIVE AND TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS* (1974); G. NIERENBERG, *FUNDAMENTALS OF NEGOTIATING* (1982); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1973).

52. These capacities of mediation are considered valuable because of the importance attached to the underlying values of self-determination and self-transcendence. *See supra* notes 36-46 and accompanying text. My view is that these two values are interconnected, and that they stand in a certain priority relative to one another. Specifically, self-transcendence is the higher value, while self-determination is important because it lays a foundation, through strengthening the self, for the ultimate setting aside of the self in the act of acknowledging the other. In effect, the greater the strength of the self, the greater the moral value of a self-transcending act. *See* R. Bush, *supra* note 44; Kuflik, *supra* note 44.

The corollary of this view is that in mediation, the two roles of the mediator are also interconnected and prioritized. Mediators must first seek to fulfill the empowerment role; but in order to fulfill the true value of that role, they must then go on to fulfill the recognition role as well. In fact, few of the mediation theorists who stress the empowerment role lay similar emphasis on the recognition role. *See, e.g.*, J. FOLBERG & A. TAYLOR, *supra* note 2, at 245; *Neutral Mediator*, *supra* note 21; Stulberg, *supra* note 1, at 91-94. In my view, this is a significant failing in mediation theory to date. *See also infra* note 76 and accompanying text (mediator's recognition role).

sional responsibilities, even if the parties reach an agreement. Conversely, mediators who do this job *have* fulfilled their responsibilities, even if the parties reach *no* agreement.

### C. *Is Anyone Really Interested in This?*

Before analyzing the concrete dimensions of the empowerment-and-recognition conception of the mediator's role, consider the following question: Could such a conception possibly appear realistic and viable to those involved in developing mediator standards, especially in relation to court-connected mediation? In many states, trial judges are the ones who decide whether to refer cases to mediation.<sup>53</sup> Lawyers also are deeply involved, both as mediators and as participants in the development of mediator standards.<sup>54</sup> Is it realistic to expect judges to accept this view of the mediator's role rather than the efficiency conception, when conservation of court resources is supposedly a major reason for the judicial interest in mediation? Further, will lawyers accept this view rather than the protection-of-rights conception, when their professional identity is so tied to advocating clients' rights? What follows is a brief but hopeful answer to these questions.

First, the notion that judges see the value of mediation primarily in terms of efficiency has been seriously challenged of late.<sup>55</sup> At a recent conference, one federal judge said that he would use alternative processes like mediation "even if I had no docket problem at all."<sup>56</sup> The reason, echoed by other judges in explaining their practice of encouraging and even mediating settlements, is not administrative convenience but superior quality. "In most cases, the absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement."<sup>57</sup> In short, judges may be motivated more by quality concerns than efficiency concerns. If so, then the quality focus of the empowerment-and-recognition conception of the mediator's role should appeal to them.

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53. See, e.g., FLA. STAT. § 44.302(1) (1987); TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon 1987).

54. See, e.g., FLA. R. CIV. P. 1.760(b)-(c).

55. See, e.g., Galanter, *supra* note 14, at 2-5; Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986).

56. Hon. Richard Enslen, United States District Court for the Western District of Michigan, Remarks at Workshop on Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes, Univ. of Wisconsin-Madison (July 13-14, 1987).

57. Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, in PROCEEDINGS OF SEMINAR FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, 75 F.R.D. 89, 203 (1976).

As for lawyers, they too are probably far from unanimous in seeing mediation in terms of protection-of-rights values. Many of the pioneers of humanistic mediation — in divorce and community mediation and elsewhere — have been veteran lawyers disillusioned with the quality of justice in the adversary system and searching for “higher quality” alternatives.<sup>58</sup> One can safely say that many lawyers still working in the adversary system share this outlook. To these lawyers, at least, the empowerment-and-recognition conception should be attractive.

Other professionals involved in mediation, as well as disputing parties themselves, are even more likely to favor the empowerment-and-recognition conception. Professionals such as counselors, therapists and the like, a large part of whose work involves helping clients to understand themselves and others better and to “take responsibility” for their responses to problems, should find the empowerment-and-recognition conception an appropriate extrapolation of their usual professional role, albeit in a new context.<sup>59</sup> As for disputing parties themselves, the high rates of party satisfaction with mediation that researchers report seem directly related to the opportunities mediation presents for self-determination and mutual acknowledgment.<sup>60</sup> If so, then adopting the empowerment-and-recognition conception should be very responsive to the factors that make mediation desirable to the parties in the first place.

I do not mean by the above argument to understate the problem of persuading legal professionals to accept the empowerment-and-recognition conception. Conferences of judges and court administrators, for example, regularly emphasize efficiency and economy as the most important advantages of mediation to the court system. Much less, if any, attention is paid to the questions of self-determination and recognition. Nevertheless, one of the major reasons for judges’ interest in ADR is plainly their concern for public satisfaction with the system of justice they administer.<sup>61</sup> Judges see ADR as a means to dispel dissatisfaction with the formal adjudication process. As noted above, however, the public favors mediation precisely because of its capacity

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58. See, e.g., Friedman, *supra* note 37; Friedman & Anderson, *Divorce Mediation's Strengths*, CAL. LAW., July 1983, at 36; Gaughan, *supra* note 10; see also Menkel-Meadow, *supra* note 41, at 794-829.

59. See, e.g., J. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 3-14 (1981).

60. See, e.g., Tyler, *The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities*, 66 DEN. U.L. REV. 419 (1988).

61. See, e.g., Fox, *supra* note 21, at 142.

to promote self-determination and recognition, and not necessarily because of its speed or economy. Thus, if adequately educated on the issue, judges should eventually see that adopting the empowerment-and-recognition conception is the best way to realize the capacity of mediation to increase public satisfaction with the justice system.<sup>62</sup>

Finally, while the empowerment-and-recognition conception of the mediator's role may stem from the idealistic strain of mediation theory and practice, I believe that it is strongly implied in the language of recent state legislation. For example, according to Florida Statute section 44.301(1):

"Mediation" means a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.<sup>63</sup>

This statutory language, which is more precise than that of many proposed mediation standards, stresses empowerment and recognition in a number of ways. First, it specifies that the mediator should not prescribe the resolution, suggesting the empowerment function. Second, it specifies that the process should be nonadversarial, suggesting the recognition function. Finally, while it certainly contemplates agreement as the aim of the process, it qualifies that objective with the requirements of mutuality and acceptability.

These are not superfluous terms. Each connotes one of the special values mediation can achieve. Mutuality suggests the value of promoting mutual recognition; acceptability suggests the value of encouraging self-determination and individual choice. That similar language frequently is used to describe mediation should not deprive it of its real meaning. Honoring that meaning, I suggest, requires us to read the Florida law, and others like it,<sup>64</sup> as much closer to adopting the empowerment-and-recognition conception of the mediator's role than either

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62. Furthermore, the efficiency, rights-protection, and maximization conceptions of the mediator's role are ultimately incoherent, and the adoption of any of them would probably render mediation either ineffective or abusive. *See supra* notes 29-34, 42 and accompanying text. If judges are informed of this likelihood, they should accept the empowerment-and-recognition conception as a sounder alternative. This implies, of course, that a real effort must be made to educate judges and other legal professionals regarding the ramifications of different conceptions of the mediator's role. This article is but one step in that direction; much more remains to be done.

63. FLA. STAT. § 44.301(1) (1987).

64. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.024(b) (Vernon 1987).



of the alternatives discussed above. This is but one more reason to rest the development of mediator standards on this conception of the mediator's role.

#### IV. CONCRETE IMPLICATIONS

I began this article with the premise that we cannot establish specific standards for mediators without first adopting some governing conception of the mediator's role. This crucial first step has been my primary focus thus far. We must now move from the general conception of the mediator's role to the more concrete question of what we should actually expect (and not expect) the mediator to do in fulfilling this role. Extensive discussion of this is beyond the scope of this article, but some reference to concrete implications is in order. In this final section, I do this both positively, suggesting some specific implications that follow from adoption of the empowerment-and-recognition conception, and negatively, criticizing provisions common to several recently proposed codes of mediation practice.

Discussing concrete implications will help clarify what kind of specific standards for qualification, training, and practice should be established. This discussion also will begin to meet a crucial need of mediators themselves, one that often is missing in the world of practice: a clear indicator of what is expected of a mediator. Other dispute-resolution professionals — judges, arbitrators, advocates — operate under fairly clearly defined expectations. Mediators and those they serve deserve no less.<sup>65</sup>

Again, I stress here that I am concerned with the specific responsibilities of the mediator as mediator, rather than, for example, the separate responsibilities of lawyer-mediators under their own code of professional responsibility. For no matter what separate standards they may have to abide by as members of other professions, all

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65. For mediators to serve without clear, publicly-defined expectations is unfair to mediators as well as to the parties. It exposes mediators to criticism from all sides, even if they explicitly advise parties what to expect, because the public confusion regarding mediation standards may undercut the individual mediator's statements about expectations. In some contexts, especially public and court-connected programs, lack of clarity about expectations will lead some mediators to pursue one standard of success, others to pursue different criteria, and still others to try vainly to satisfy them all. Not only do the parties suffer, but the mediators suffer the anxiety of never knowing whether they are doing a responsible job. See Richard A. Salem, Comments at Conference on Mediation in the Judicial Environment, Florida State University (Feb. 25-26, 1988) (summarized in a letter to the author, Mar. 12, 1988), where Salem calls for "empowering the mediator" by clarifying mediator standards.

mediators also must fulfill their responsibilities as mediators. If they fail in this regard, the special capacities of mediation for empowerment and recognition cannot be realized in practice.<sup>66</sup>

### A. *What We Should Expect of the Mediator*

The empowerment-and-recognition conception of the mediator's role relieves the mediator of any sense of obligation to produce agreements or to ensure against "unfair" agreements; for the definition of success in this role is neither reaching agreements nor protecting rights.<sup>67</sup> However, the empowerment-and-recognition conception by no means frees mediators entirely from a sense of professional obligation; it merely redirects the concern. Now the mediator will feel obligated to do everything possible to ensure that the parties are empowered to exercise their autonomy and self-determination, and that on some level they acknowledge and recognize each other's common humanity.<sup>68</sup> Yet this question still remains: How do mediators know whether they have fulfilled these obligations responsibly? In other words, what specific expectations should mediators strive to satisfy?

I suggest first that both empowerment and recognition require, so to speak, a "pushy" mediator. This means a mediator willing and able to "push" the parties, not in an antagonistic or hostile sense, but in the positive sense of inviting, supporting, encouraging, motivating, and urging the parties to work through the processes of self-determined choice and mutual acknowledgment. Both of these processes are typically so difficult, especially in the midst of disputes, that many

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66. See *supra* notes 17, 35 and accompanying text. Therefore, the controversy over what standards lawyer-mediators must adhere to, as a matter of legal ethics, is beyond the scope of this article. See *supra* note 10. Of course, however that controversy is resolved, lawyer-mediators are bound to honor those standards. But they must also then honor their ethical obligations as mediators *per se*, arising out of their role as mediators. These are the obligations with which I am concerned in this article.

It may, of course, be very difficult to honor both sets of standards simultaneously. While some argue that it is possible to "integrate" the lawyer and mediator roles, see *infra* note 75, it may be that lawyers who wish to serve as responsible mediators without violating legal ethics may have to stop "lawyering" while mediating. In other words, the two functions may have to be separate in order for lawyers who mediate to practice both responsibly. See, e.g., CCDD CODE, *supra* note 9, which contemplates this kind of separation of functions for lawyers who mediate.

67. Anyone who has ever served as a mediator can easily imagine the sense of relief that would follow. The "no agreement means failure" and "was the agreement fair" syndromes are endemic among mediators and cause much recrimination and distress.

68. See *supra* note 52 regarding the relatedness and relative priority of these two general obligations.

individuals may give up (or not even try) for lack of confidence that they can accomplish anything of value. In fact, with some skilled support and guidance, they often can accomplish wonders. Therefore, fulfilling the empowerment-and-recognition role requires the mediator to push the parties in this positive and supportive sense. To put it another way, and to avoid the possible misimpression that I am simply arguing for an aggressive *style* of mediation, mediators must push *for* the parties to engage in self-determined choice and mutual acknowledgment, using whatever style and strategies they find most effective.<sup>69</sup> Style is a matter of choice and judgment; pushing for self-determination and acknowledgment is a matter of duty.

With this understanding of what I mean by "pushing" in general, let me be more specific about what kind of pushing the mediator should do. Fulfilling the empowerment role requires the mediator to ensure that the parties act with full information and understanding in making their decisions. In the absence of such knowledge and comprehension, autonomous choice and self-determination are illusory. Therefore, the mediator should push for the parties to disclose and otherwise marshall all information relevant to resolving the dispute. Alternatively, if significant pieces of information cannot be known, the mediator should push for the parties to carefully assess the importance of the missing pieces in deciding whether and how to proceed in their absence.

Apart from the marshalling of information, the mediator should push for the parties to fully comprehend all the information before them, including the range of issues presented and each party's positions. Therefore, the mediator should summarize, clarify, question, and test for comprehension before allowing decisionmaking to proceed. On another level, and in light of the information marshalled, the mediator should push for the parties to fully identify and consider all possible options for resolving the issues, before they focus on specific options and actually make decisions.<sup>70</sup>

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69. Stulberg makes a similar distinction between specific styles and strategies mediators use, which may vary from "quiet" to "histrionic," and the mediator's general obligations to "throw out ideas for settlement, force people to reconsider their positions, and prod people. . . ." See J. STULBERG, *supra* note 31, at 145. The point is that even a "quiet" mediator strategy, such as "active or empathic listening," see Richard A. Salem, *supra* note 65, is used by the responsible mediator to *push for* some aspect of self-determination or recognition. Thus, *pulling* the parties, or drawing them out, with such empathic strategies, is simply one approach to use in *pushing for* empowerment and recognition.

70. The obligations noted here are not simply strategies for mediators to use at their option, like deciding whether to call a caucus. They are duties, parts of the mediator's basic professional responsibility. Mediators who do not perform these specific duties cannot satisfy their general

Perhaps most important, as the process begins either producing the terms of an agreement or moving toward impasse, the mediator should push for the parties to consider and understand fully the consequences of *either* outcome, before they decide for or against agreement. Phrased in the negative, the mediator should make every effort to prevent the parties from either reaching *or* failing to reach an agreement on the basis of inaccurate or incomplete information or understanding, including failures of either side to understand the other's positions.<sup>71</sup>

The empowerment role also defines the mediator's obligation with respect to law and legal advice. On one hand, the empowerment role is based on the premise that the law need not control the parties' decision regarding how to resolve the dispute; some recent legislation is quite clear about this.<sup>72</sup> On the other hand, the empowerment role assumes the importance of ensuring that decisions are based on all

obligation to guarantee a full opportunity for self-determination in dispute resolution. On the other hand, how the mediator performs these duties, in terms of the specific strategies chosen, is a matter of individual judgment and style. *See supra* note 69.

I note that the duties to push for identification of all issues and all possible solutions, although stemming from the empowerment conception, also relate to the "better solutions" value of mediation. *See supra* notes 41-43 and accompanying text; *see also* Menkel-Meadow, *supra* note 41, at 794-817 (problem solving to meet varied and complementary needs). That is, by fulfilling their duties under the empowerment conception, mediators also help realize the capacity of mediation to achieve "unique and superior solutions."

71. The protection-of-rights conception, and mediator standards based on it, usually express this duty in *one* direction only — to ensure that the parties are informed of and fully understand the consequences of any agreement before signing. *See, e.g.,* HAW. STANDARDS, *supra* note 9, at Standard VI.1; ABA STANDARDS, *supra* note 9, at Standards IV.B, VI.A, VI.D; AFCC STANDARDS, *supra* note 9, at Standard VI.A. The empowerment-and-recognition conception makes clear that the mediator's duty also runs the *other* way — to ensure that the parties fully understand the consequences of *no* agreement before walking out. *See* J. STULBERG, *supra* note 31, at 149-53.

Current codes touch upon some of the obligations described in the text. *See, e.g.,* HAW. STANDARDS, *supra* note 9, at Standard VIII.1; MCI STANDARDS, *supra* note 9, at Standard VI; ABA STANDARDS, *supra* note 9, at Standards IV.A, V.B; AFCC STANDARDS, *supra* note 9, at Standard VIII. Reading these provisions in the context of their respective codes, however, they seem to stand for the rather narrow and limited duty to signal the need for, and urge the parties to obtain, various kinds of information and expert outside advice. These codes say little, if anything, about the mediator's positive obligation to push for (and work with) the parties to analyze that information and advice for themselves, as well as to decide how to proceed if it is unobtainable. In other words, these "empowerment" provisions of present codes are quite weak, and even suggest a form of "mediated disempowerment" and continued reliance on outside experts. *See* Riskin, *supra* note 10, at 348-52.

72. *See, e.g.,* FLA. STAT. § 44.301(1) (1987).

available information. Clearly, information about the law may be relevant to the parties "as an indication of what is obtainable from the legal marketplace, . . . as an indication of societal standards, . . . [or] as an expression of underlying principles . . . which the parties might want to consider in approaching their own resolution."<sup>73</sup> Accordingly, the mediator's obligation here must be two-sided. The mediator should push for the parties to obtain and consider independent legal advice before committing themselves to an agreement. However, the mediator also should push for the parties not to abdicate their autonomous judgment and power of choice by mechanically deferring to legal experts and law, but rather to assess their own best interests independently, and make independent decisions in light of all considerations.<sup>74</sup> These obligations should apply whether or not the mediator directly provides the parties with information about the law.<sup>75</sup>

Turning now to the recognition role, fulfilling this role requires the mediator to make every effort to evoke mutual acknowledgment and recognition between the parties. Therefore, the mediator should first of all push for the parties to articulate their positions and the reasons behind them as clearly, forcefully, and yet as respectfully as possible. This will help ensure that each party's views are accessible and therefore able to evoke acknowledgment from the other. Second, as recognition rarely is automatic, the mediator should go further and affirmatively translate and explain each party's positions and reasons

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73. Center for Mediation in Law, *supra* note 37.

74. *See supra* note 71.

75. Numerous questions regarding the mediator's role in providing information about the law are beyond the scope of this article. In general, some argue that even a lawyer-mediator should have no such role at all. *See, e.g.*, MCI STANDARDS, *supra* note 9, at Standard III.D.3; ABA STANDARDS, *supra* note 9, at Standard IV.C; CCADR CODE, *supra* note 9, at 351-52. Others argue that lawyer-mediators should provide "information about the law," as distinguished from legal advice, and that this is necessary to fulfilling the empowerment role. *See, e.g.*, Riskin, *supra* note 10, at 351-52.

Exploring this argument is beyond the scope of this article. I note only that I am much less sanguine than Riskin about the potential for integrating mediation and law through neutral lawyer-mediators. *See* Riskin, *supra* note 1, at 27; *see also supra* note 66 (possible need to separate roles as lawyer and mediator). As long as the lawyers' code of professional responsibility demands and enforces an ethic of client loyalty and zealous advocacy, *see* Crouch, *supra* note 10; Silberman, *supra* note 10, lawyer-mediators providing "legal information" will stand on uncertain ground, and may be unable to wholeheartedly fulfill the empowerment-and-recognition role. 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.

to the other, in terms most likely to evoke the other's recognition and empathy. Finally, the mediator should push for each party to hear and understand the other's position without feeling threatened, to the point where each can feel, and if possible somehow express, a measure of recognition of the other party's situation.<sup>76</sup>

The above description of specific obligations flowing from the empowerment-and-recognition role is illustrative, not exhaustive. Yet it includes some of the most important elements of what we should expect mediators to do. One crucial element not mentioned above is the obligation of impartiality, which is necessary to fulfill both aspects of the empowerment-and-recognition role. What I mean by impartiality, however, goes beyond the usual connotation of disclosure of conflicts and neutrality regarding outcome.<sup>77</sup> In reading my description of the "pushy" mediator's job, one might ask how mediators can do so much pushing without alienating one or both parties. Apart from my earlier caveat regarding the positive meaning of "pushy" and "pushing for,"<sup>78</sup> the answer lies in an expanded conception of the obligation of impartiality.

Mediators should be visibly evenhanded or two-sided in their pushing. In other words, they should direct their invitations, support, encouragements, challenges, and urgings toward each party in turn, and each should see clearly that the other is receiving similar treatment. If necessary, mediators should explicitly assure the parties that they intend to behave identically toward each side, and of course they should always fulfill this assurance. Mediators whose pushing is positive in character, and who adhere to the requirement of *active* impartiality, can serve for each side as translator to the other and also serve each side as devil's advocate for the other. And they can do so without ever losing the trust and confidence of both sides that is necessary to fulfilling both aspects of the mediator's role.<sup>79</sup> I should note, however, that this may be much easier to do if the mediator

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76. The point of the recognition value in mediation is not the acknowledgment that each party gets, but rather the recognition and acknowledgment that each gives to the other. See *supra* notes 43-47 and accompanying text. This giving is the experience of self-transcendence that is the essence of the recognition value.

None of the existing codes or proposals contain any provisions that touch on the kinds of obligations described in the text. See *supra* note 9.

77. See, e.g., HAW. STANDARDS, *supra* note 9, at Standards II.4, III.1-2, VI.1; AFCC STANDARDS, *supra* note 9, at Standards II.B, VI.A.

78. See *supra* note 69 and accompanying text.

79. For an excellent discussion of how this can and should be done, see J. STULBERG, *supra* note 31, at 95-122.

does at least some of this pushing while meeting separately with each side, a point I return to below.

One other aspect of the obligation of active impartiality is also quite important in fulfilling both aspects of the empowerment-and-recognition role. The impartiality of mediators means not only that they are allied with neither side, but that because of a lack of personal investment, they have more distance and perspective on the parties' discussions. This position "above the fray" should not be a passive listening post. Rather, it should be the basis for what I call the mediator's job of narration. The mediator can impartially hear, and impartially report to the parties, many crucial parts of their own dialogue that they themselves may not have grasped fully or even heard because of their closeness to the situation. Offers, counteroffers, new options for resolution, actual agreements on issues, and statements of acknowledgment and recognition all are presented frequently in mediation sessions without one or both parties even realizing what has occurred. To fulfill both the empowerment and recognition functions, the mediator can and should be an actively impartial *narrator* who lets no relevant exchange between the parties go unheard or ignored.<sup>80</sup>

To conclude this discussion, I must emphasize the fact that almost all the obligations I have described as flowing from the empowerment-and-recognition conception are affirmative obligations, not constraints or restrictions. The reason for this is, as suggested above, that this conception of the mediator's role stems from a positive view of mediation as *seeking* something good in itself, namely empowerment and recognition. The negative view of mediation as *avoidance* of trial or unprincipled bargaining, and the efficiency and protection-of-rights conceptions that derive from this view, tend to produce negative or restrictive definitions of the mediator's obligations (or none at all). Because I reject these conceptions, I also reject the negative approach of several recent "codes" of mediation practice that stem from them.<sup>81</sup> While my purpose here is not to delve into detail, I want to add some final critical comments on some of the common provisions of those

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80. The potential positive impact of the mediator's narration function cannot be exaggerated. I often have witnessed mediations in which the mediator's impartial recapitulation of statements made by the parties, but not understood or even heard by each other, prevented an impasse and paved the way for fuller communication and ultimate resolution.

81. Riskin also characterizes the approach of the recent codes as negative. See Riskin, *supra* note 10, at 346-53. For examples of standards that are relatively more positive in tone and substance, see CCCR CODE, *supra* note 9; Gaughan, *supra* note 10.

codes. These comments indicate what I think should be avoided in moving from the general conception of the mediator's role to setting specific standards.

### B. *What We Should Not Expect of the Mediator*

A good deal of commonality exists among the codes of mediator practice proposed or adopted in recent years.<sup>82</sup> My comments here are directed to certain types of provisions that appear in most of these codes or proposals. My criticism derives from my previous argument regarding the importance of the empowerment-and-recognition conception, and from my sense that the provisions in question are inconsistent with responsible fulfillment of that conception.

Consider first provisions imposing a duty on the mediator to advise and "urge" the parties to obtain outside legal advice throughout the mediation process, especially before signing or even "reaching an emotional commitment" to an agreement.<sup>83</sup> Even codes addressed to lawyer-mediators impose this duty. As argued above, the empowerment role obliges the mediator to push for the parties to acquire and consider legal advice. But these provisions go further and seem by their tone to require (or at least allow) the mediator to encourage parties to follow the legal advice they receive without first fully and independently assessing the matter for themselves. This is inappropriate, for it implicates the mediator in disempowering the parties by allowing or encouraging them to submit to legal experts and the law.<sup>84</sup> These provisions simply reflect the protection-of-rights conception, and make little sense once that conception is rejected.<sup>85</sup>

Next, consider provisions imposing a duty on the mediator to ensure the fairness of the agreement, or a duty to "terminate" mediation if the process will result in an unfair or "unreasonable" agreement.<sup>86</sup>

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82. See *supra* note 9.

83. See HAW. STANDARDS, *supra* note 9, at Standards II.3, VII.2; MCI STANDARDS, *supra* note 9, at Standards III.D.4, VI.D; ABA STANDARDS, *supra* note 9, at Standards I.G, IV.C, VI.A, VI.D.

84. Compare the obligation of the empowerment-and-recognition mediator to positively encourage such independent assessments. See *supra* notes 74-75 and accompanying text.

85. Subsequent legal review of any proposed agreement reached in mediation, coupled with a "waiting period" before any signed agreement becomes effective, can serve to protect rights. See Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION, *supra* note 10, at 339, 354-55. Thus the protection-of-rights role is left to lawyers, who can fulfill it coherently and without conflict.

86. See MCI STANDARDS, *supra* note 9, at Standards III.D.5, VI.A; ABA STANDARDS, *supra* note 9, at Standards III.C, V.A.



Beyond the fact that they compromise impartiality and therefore impair the mediator's effectiveness,<sup>87</sup> such provisions again derive from the protection-of-rights conception and are antithetical to the premise of self-determination inherent in the empowerment conception.<sup>88</sup> This is not to say that mediators have no right to voice concerns about fairness. In one sense, doing so forms part of their obligation to push for full understanding. If the mediator senses real unfairness in an agreement with which the "exploited" party seems satisfied, the mediator should consider testing that party's comprehension of the terms and consequences of the agreement, especially those aspects the mediator considers "unfair."<sup>89</sup> If, however, the party is fully aware of the implications, and still satisfied, then the mediator's "termination" of the process is simply an act of disempowerment.

Mediator concerns for fairness also may relate to the recognition function, for severe unfairness may indicate an absence of recognition on one side, and may toll the mediator's duty to push more with that party to evoke acknowledgment of the other party's situation. Nevertheless, I see no justification for terminating mediation if recognition is absent. The only circumstance that would toll a duty to terminate is when it appears clear that a party lacks the capacity to participate in the process or make self-determined choices because of his or her mental, emotional, or physical condition.<sup>90</sup> Of course, as Professor Stulberg has noted, the mediator may certainly choose to withdraw from a mediation because of personal moral qualms,<sup>91</sup> but this differs greatly from imposing an actual duty to terminate.

I turn now to provisions that require the mediator to prevent intimidation, assure "balanced dialogue," and terminate the mediation if a party acts in "bad faith."<sup>92</sup> What is striking about these provisions is their negative and restrictive character. They say that the mediator should prevent and control intimidation, imbalance, and bad faith. But

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87. See *supra* text accompanying notes 31-33.

88. See *supra* notes 36-40 and accompanying text.

89. See Davis & Salem, *supra* note 28, at 23-25.

90. Most of the present codes and proposals contain provisions to this effect. See, e.g., HAW. STANDARDS, *supra* note 9, at Standard VIII.2; ABA STANDARDS, *supra* note 9, at Standard V.A; AFCC STANDARDS, *supra* note 9, at Standard IX.B.2. These provisions, however, usually join the duty to terminate for incapacity with a duty to terminate for unfairness or unreasonableness of agreement. I have already expressed my objection to this latter type of provision. See *supra* text accompanying notes 86-89.

91. See Stulberg, *supra* note 1, at 116.

92. See MCI STANDARDS, *supra* note 9, at Standards III.D.5, VI.C; ABA STANDARDS, *supra* note 9, at Standards I.E, V.C.

they say nothing about the mediator's positive capacity, and obligation, not only to balance but to enrich the dialogue: to translate, explain, evoke, and thereby arouse the parties to mutual recognition. Mediators can do much more than balance and control the dialogue, and they should do more. Unfortunately, these provisions ignore any such positive obligation. In effect, they totally ignore the recognition value of mediation, and the mediator's role in realizing that value.<sup>93</sup>

Finally, and worth special note, consider the provisions restricting the mediator from meeting separately with the parties without prior consent from both sides.<sup>94</sup> As discussed above, the empowerment-and-recognition role requires the mediator to do considerable pushing with both parties. The separate meeting or caucus is, in the view of many mediators, an invaluable tool for this work.<sup>95</sup> For numerous reasons, it is neither possible nor desirable to push as strongly with either party when the other is present.<sup>96</sup> As a result, the mediator accomplishes less, both in pushing for full understanding and consideration of all information and options, and in pushing for recognition of the other party. Restricting the mediator's access to this tool might help protect rights, but it greatly hinders fulfillment of both the empowerment and recognition aspects of the mediator's role.<sup>97</sup> As for the potential concern for impartiality noted above, the mediator certainly can maintain active impartiality by caucusing with both parties in an evenhanded way.

To conclude this brief critique,<sup>98</sup> I note that what is remarkable about the existing codes is not only how many provisions they contain

93. See *supra* notes 52, 76 and accompanying text. Because I view this value as the highest purpose of mediation, I consider the absence of any attention to such obligations particularly regrettable.

94. See ABA STANDARDS, *supra* note 9, at Standards I.H, III.E.

95. See, e.g., J. STULBERG, *supra* note 31, at 108-09.

96. See *id.* For example, pushing one party in the presence of the other may simply reinforce that party's rigidity out of defensiveness and a perceived need to save face. It may undermine both parties' perceptions of the mediator's impartiality. Finally, it may deny both parties the time and space to consider a new option calmly and without pressure.

97. I note that the Florida Rules of Civil Procedure grant the mediator discretion to use the caucus. See FLA. R. CIV. P. 1.720(e).

98. Other aspects of the present codes and proposals could be similarly criticized, and some commentators have already done so. See Hobbs, *supra* note 10, at 364-75; Riskin, *supra* note 10, at 346-53. Perhaps the most serious additional criticism of these standards, beyond those offered in the text, is their lack of internal coherency. For example, they admonish the mediator not to intrude upon the parties' right to determine the outcome for themselves, but simultaneously oblige the mediator to watch over, and ensure, the fairness and reasonableness of the agreement. See, e.g., ABA STANDARDS, *supra* note 9, at Standards I.C, III.C-D, V.A. The

of negative and restrictive character, like those criticized here, but how few provisions they contain of positive and directive character. They tell mediators in great detail what not to do, but give them much less guidance about what *to* do. Ultimately, these codes reveal a stunted picture of the mediator's role. By focusing primarily on the negative, they miss the point, which is the enormous positive opportunity for empowerment and recognition inherent in mediated dialogue, and the need to dedicate the mediator to the fullest possible realization of that opportunity. That is the mediator's role and professional obligation.

## V. CONCLUSION: CRUCIAL CHOICES

The choices made in the coming years regarding the governing conception of the mediator's role, and the standards of practice that follow from that role, will determine whether mediation simply becomes another tool for administrative efficiency or protection of individual rights, or whether it fulfills its unique capacities for promoting personal empowerment and interpersonal acknowledgment. The recent state legislation on court-connected mediation possesses the clear potential to lead us in the latter direction. For the reasons discussed herein, I urge all those involved to weigh the options carefully and to transform that potential into the reality of the mediator's role. Doing so may make mediation more, rather than less, controversial,<sup>99</sup> but at least it will be controversial for the right reasons.

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plain inconsistency of such provisions shows the real problems inherent in trying to pursue simultaneously both the empowerment and the protection-of-rights conceptions. *See supra* note 62 and accompanying text.

99. *See supra* note 4 and accompanying text.