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INFORMED CONSENT IN MEDIATION: A GUIDING  
PRINCIPLE FOR TRULY EDUCATED  
DECISIONMAKING†.

*Jacqueline M. Nolan-Haley\**

I. INTRODUCTION: MEDIATION AND CONSENT RHETORIC

As a matter of general practice, mediation fails to provide for truly educated decisionmaking, especially where the parties do not have lawyers. This problem has become more acute with the dramatic rise in mediation due to parties' increased desire to seek alternative dispute resolution (ADR) and to court requirements that parties seeking judicial resolution first seek mediation.<sup>1</sup> Not only are the num-

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1 See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 6-11 (2d ed. 1992), for an historical account of the alternative dispute resolution movement and the place of mediation in that movement. Mediation's increased appeal is due to a variety of reasons including decreased costs, high satisfaction, and compliance rates. See, e.g., Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 *HAMLIN J. PUB. L. & POL'Y* 376 (1997) (stating that attorneys value mediation because of the perception that it encourages early settlement and therefore reduces costs of litigation). There are, however, inconsistent reports of reduced costs. See, e.g., JAMES S. KAKALIK ET AL., *JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 20 (1996)* [hereinafter *RAND REPORT*] (stating that mediation programs studied did not necessarily solve cost and delay problems). There are consistent reports that parties experience high levels of satisfaction with the mediation process. See, e.g., Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 *OHIO ST. J. ON DISP. RESOL.* 885 (1998) and

bers of mediated matters large and growing, but the subject matters are important and complex. Mediation is used to resolve the loss of a roof over one's head<sup>2</sup> or the termination of a life support system.<sup>3</sup> The absence of truly educated decisionmaking means that mediation may very well result in uninformed and potentially harmful results. To remedy the problem, this Article recommends requirements to help ensure that parties make knowledgeable choices about using the mediation process and about accepting the terms of proposed resolutions ("informed consent").

Advocates of mediation might find this recommendation odd. They claim that mediation is the vindication of individual choice. Much ADR rhetoric is predicated on assumptions about the value of consent.<sup>4</sup> The discourse of consent suggests that autonomy and its legal equivalent, self-determination,<sup>5</sup> longstanding values in Anglo-American jurisprudence,<sup>6</sup> are central values in mediation.<sup>7</sup> My claim,

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sources cited therein; Robert A. Baruch Bush, "What Do We Need a Mediator For?" *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996) (citing the value of participation as the reason for high satisfaction rates).

2 See *Wright v. Brockett*, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991) (finding that tenant gave up the only housing she had known for twenty-seven years).

3 Some states permit mediation of actual life and death issues. In New York, for example, decisions about whether to terminate life support may be made through the mediation process. See N.Y. PUB. HEALTH LAW § 2972 (McKinney 1993); NANCY NEVELOPP DUBLER & LEONARD J. MARCUS, *MEDIATING BIOETHICAL DISPUTES: A PRACTICAL GUIDE* 44-47 (1994) (describing mediation of dispute over patient's decision to forego life-saving medical care); see also Diane E. Hoffmann, *Mediating Life and Death Decisions: A Critique*, 36 ARIZ. L. REV. 821 (1994); Diane E. Hoffman & Naomi Karp, *Mediating Bioethical Disputes*, A.B.A. DISP. RESOL. MAG., Spring 1996, at 10-12.

4 See, e.g., *Administrative Dispute Resolution Act: Hearings on H.R. 2497 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong. 66 (1990) (statement of Marshall J. Breger, Chairman, Administrative Conference of the United States, that the purpose of the Administrative Dispute Resolution Act was based "[w]holly on the principle of consent" and that based on consent parties could "shape procedures to meet their needs on a case by case basis). The purpose of this Act was to encourage federal government agencies to use alternatives to litigation in resolving disputes. Congress did not extend the Act and the legislation expired in 1995. See also Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1 (stating that "voluntariness is consistent with the underlying philosophy of ADR"); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, nn.129-38 (1995).

5 Respect for autonomy is the moral equivalent of the legal right of self-determination. See RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 120 (1986).

6 See JOHN STUART MILL, *ON LIBERTY* 6 (1873). Mill wrote:

however, is that the absence of informed consent in mediation undermines this commitment to autonomy.

Mediation shares a common goal of the court system: to achieve justice and fairness in the resolution of disputes. Mediation, however, is different from litigation because it is governed by the principle of consent. Parties must agree to engage in the process and to its outcome. In this respect, the values of mediation are quite different from litigation. The value of consent promotes self-determination and autonomy giving parties control. Disputing parties are said to be empowered jointly in owning their dispute, participating in the process of its resolution, and controlling its outcome.<sup>8</sup> Underlying the consent and empowerment rhetoric is a central inquiry: what does informed consent require in mediation? Unlike the concept of informed consent in the physician-patient and attorney-client relationships,<sup>9</sup> the meaning of informed consent in mediation practice has received little attention.

Mediation is a process of assisted negotiation in which a neutral third party assists individuals in resolving a dispute.<sup>10</sup> The idea of consent is important in mediation and triggers a number of questions about whether that consent is based on a true understanding of what is occurring. Our legal system recognizes in a wide variety of contexts that an individual's purported consent to a process, an agreement, or

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[T]he sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number, is self-protection . . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right absolute. Over himself, over his own body and mind, the individual is sovereign.

See also *Natanson v. Kline*, 350 P.2d 1093 (Kan. 1960) (stating that "Anglo-American law starts with the premise of thorough-going self-determination"); *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E.2d 92 (N.Y. 1914).

7 See STANDARDS OF CONDUCT FOR MEDIATORS, Preface to Joint Committee of Delegates from the American Arbitration Association, American Bar Association Sections of Dispute Resolution and Litigation, and the Society of Professionals in Dispute Resolution (1994) [hereinafter JOINT STANDARDS OF CONDUCT]. Standard I provides: "Self determination is the fundamental principle of mediation. It requires that the mediation process rely on the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time." *Id.*

8 *Id.*

9 There is voluminous literature on informed consent in medical decisionmaking and modest but growing interest in informed consent in lawyering. See *infra* Part II.

10 See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1986); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 14 (1986).

a waiver of rights is legally suspect unless that person has a certain level of understanding and disclosure.<sup>11</sup> I will call this notion the "principle of informed consent." In mediation, the principle of informed consent serves the same function that we imagine litigation serves, even though we know it does not always do so—it helps to promote fairness.<sup>12</sup> Informed consent prepares the way for a party to participate voluntarily and intelligently in the mediation process and to accept its outcome. It serves as a check on the mediator's power, a way of making sure that the mediator has not used her position of authority to cajole or bamboozle parties into consent. In short, informed consent matters because the potential for coercion, incapacity, and ignorance can impede the consensual underpinnings of the mediation process.<sup>13</sup>

There are two separate but related components of informed consent in mediation: disclosure and consent. At a minimum, the principle of informed consent requires that parties be educated about the mediation process before they consent to participate in it, that their continued participation in mediation be voluntary, and that they understand and consent to the outcomes reached in mediation. The disclosures required by informed consent promote autonomous decisionmaking. This in turn reduces the likelihood that parties will attempt to rescind settlement agreements, thereby enhancing the efficiency of mediation as a dispute resolution system.

The problem is that the state of informed consent in mediation today is often more illusory than real.<sup>14</sup> Parties, particularly those without lawyers, often enter mediation without a real understanding of the process and leave mediation without a real understanding of

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11 See *infra* Part II and Part IV.D.

12 Fairness is a predominant concern in the mediation community. Few commentators would disagree that it is the normative standard governing mediation. Determining what constitutes fairness, however, is a difficult question. See *infra* note 57. The notion of fairness in mediation has both substantive and procedural elements. While most mediators agree on the necessity of fairness in the mediation process, there is considerable debate about whether mediators should be responsible for the fairness of mediation outcomes. I share the late Professor Maurice Rosenberg's conception that equates fairness with justice: "an optimal dispute resolution system is one that produces just results at the end of just proceedings." Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 809 (1988).

13 These impediments can also affect the outcome of mediation. For a discussion of informed consent as an ethical dilemma in mediation, see Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 15 (1994).

14 See *infra* notes 151–65 and accompanying text.

the result. Disclosure requirements are modest, focused primarily on information related to the mediation process itself.<sup>15</sup> There is little regard for disclosures related to the outcome of mediation or to the importance of understanding what has been disclosed, a concept that has different meanings for represented and unrepresented parties. This limited conception of disclosure diminishes the quality of consent in mediation.

My goal is to promote critical, reflective examination of the principle of informed consent in mediation and to give content to that principle.<sup>16</sup> In my view, a theory of informed consent for mediation should focus on the parties' acts of decisionmaking throughout the mediation process. I argue, therefore, against a "thin" conception of the principle of informed consent, one that is satisfied with signed forms to indicate that disclosures have been provided and that individual consent is freely given. The principle of informed consent in mediation is not just about information flow and signatures. Parties, particularly those who are unrepresented by lawyers, need to understand what it means to participate voluntarily in mediation, how the consent process operates, and what it means to reach an agreement. They need to understand that a decision to settle through mediation may result in a waiver of legal rights and remedies.

We must also pay more attention to the disparate circumstances, locations, and human conditions under which mediation occurs. Parties come to mediation in courts, public agencies, community dispute centers, and private providers' offices with varying degrees of voluntariness and legal representation.<sup>17</sup> The range of mediation consumers extends from sophisticated, repeat players to illiterate, unrepresented parties. A sustained informed consent theory in mediation should differentiate disclosure and consent requirements based on these disparate factors and human conditions.<sup>18</sup> This requires an understanding,

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15 See *infra* Part III.B.

16 This is a continuation of a larger project on the role of law and justice in mediation. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996) [hereinafter Nolan-Haley, *Court Mediation*]; Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) [hereinafter Nolan-Haley, *Lawyers, Clients and Mediation*].

17 Some parties may not be represented by counsel at the actual mediation session, but they may have been prepared or coached by attorneys prior to the session.

18 This approach has been endorsed in other aspects of mediation practice. The Society of Professionals in Dispute Resolution recommends as a central principle "that the greater degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualifications requirements." SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, REPORT OF THE SPIDR COMMISSION ON QUALIFICATIONS (1989) [hereinafter SPIDR REPORT]. See also NA-

not just of the substance of the principle of informed consent, but of the practices that foster it in all the settings in which mediation occurs.

I will propose a contextualized approach to informed consent with a sliding-scale model of disclosures. The amount and kind of information disclosed depends upon the location of the mediation,<sup>19</sup> the voluntariness of the parties' consent,<sup>20</sup> and the parties' representational status.<sup>21</sup> I will argue that unrepresented parties need more disclosure than parties who have lawyers and that when courts require unrepresented parties to mediate, fairness demands that they have a basic knowledge of their legal rights.<sup>22</sup>

Part II of this Article gives an overview of informed consent as an ethical, moral, and legal principle in law and medicine. This provides the framework for the discussion of informed consent in mediation.<sup>23</sup> Part III begins that discussion by examining the values served by the principle of informed consent in mediation: autonomy, human dignity, and efficiency. Part IV provides a view of the current informed consent landscape in mediation and argues that it is inadequate to support mediation's commitment to autonomous decisionmaking. It reviews the literature on informed consent, describes current disclosure and consent requirements, examines the developing informed consent jurisprudence, and, finally, suggests what is missing from our prevailing understanding of informed consent. Part V addresses the central inquiry of this Article, what the principle of informed consent requires in mediation. It examines four decisionmaking models in mediation and considers the requirements for disclosure and consent

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TIONAL INSTITUTE FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION FORUM, 3 (May 1989); Robert P. Schuwerk, *Reflections on Ethics and Mediations*, 38 S. TEX. L. REV. 757, 762 (1997) (arguing that standards governing mediators should differ in significant ways from the rules governing lawyers). Contextualized rulemaking has also been proposed for lawyers. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (arguing for contextualized regulation of the legal profession).

19 Mediation takes place today in a wide variety of formal and informal settings. See *infra* notes 260–62 and accompanying text.

20 Parties who voluntarily agree to enter into the mediation process are in a very different position from those who are required to attend a mediation session. See *infra* notes 248–59 and accompanying text.

21 See *infra* notes 263–87 and accompanying text.

22 Unrepresented parties should always be aware of their legal rights when they participate in mediation that involves legal issues. If they voluntarily choose to mediate, however, they may waive knowledge of those rights. See *infra* notes 217–30 and accompanying text.

23 I note here that transferring legal principles from one profession to another is fraught with difficulties. See *infra* notes 52, 236.

that should be operative in all models. Part VI offers implications for mediation practice. It considers how informed decisionmaking can be achieved in some of the disparate circumstances and conditions under which mediation occurs, with particular focus on the most vulnerable mediation consumers, unrepresented parties in mandatory court mediation programs.

## II. WHAT IS INFORMED CONSENT?

Informed consent is an ethical, moral, and legal concept that is deeply ingrained in American culture.<sup>24</sup> In those transactions where informed consent is required, the legal doctrine requires that individuals who give consent be competent, informed about the particular intervention, and consent voluntarily.<sup>25</sup> Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.

The principle of informed consent is the vehicle through which autonomy is measured in decisionmaking between physicians and patients, and, to a lesser degree, between lawyers and clients.<sup>26</sup> There are two separate aspects of the principle: disclosure and consent. Patients sue physicians who are generally presumed to be the agents of disclosure because they fail to inform fully before patients consent to particular treatments. Informed consent legal analysis that has developed largely in medical cases tends to focus on the dual requirements of disclosure and consent. In the context of disclosure, courts have

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24 According to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavior Research, the values underlying informed consent

are deeply embedded in American culture and the American character; they transcend partisan ideologies and the politics of the moment. Fundamentally, informed consent is based on respect for the individual, and in particular, for each individual's capacity and right both to define his or her own goals and to make choices designed to achieve those goals.

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Informed Consent as Active, Shared Decisionmaking*, in 1 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 16, 17 (1982) [hereinafter MAKING HEALTH CARE DECISIONS].

25 See PAUL S. APPELBAUM ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* 35-65 (1987).

26 Jay Katz distinguishes between what judges have done—the legal doctrine of informed consent—and what they have aspired to—the idea of informed consent. Katz claims that informed consent does not regularly govern the relationship between physician and patient in practice. See JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* xvi, 227 (1984).



grappled with problems of proof and legal definitions of the scope of disclosure,<sup>27</sup> attempting to determine what risks the law requires physicians to disclose and whether the failure to disclose them caused harm. The second requirement, consent, requires that individuals voluntarily agree to treatment with some understanding of their agreement.<sup>28</sup>

### A. *Informed Consent in the Physician-Patient Relationship*

The literature on informed consent in medical decisionmaking is voluminous.<sup>29</sup> The tort doctrine of informed consent requires that physicians disclose "relevant medical information" to patients and then obtain their consent before administering treatment.<sup>30</sup> There

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27 See APPELBAUM ET AL, *supra* note 25, at 56.

28 See *id.* at 57.

29 See, e.g., FADEN & BEAUCHAMP, *supra* note 5, at 30. There is currently a move to reform several aspects of informed consent in medical decisionmaking. Scholars have called for greater patient autonomy. See, e.g., Marjorie Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985). Others call for enhanced understanding. See e.g., Cathy J. Jones, *Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379 (1990) (arguing not just for doctor's duty to disclose but patient's right to comprehend; based on six months of research observing how doctors gave information to patients). Some scholars cite the need for increased trust, see, e.g., Nancy E. Kass et al., *Trust: The Fragile Foundation of Contemporary Biomedical Research*, 26 HASTINGS CENTER REP. 25 (1996), while others call for more contextualized models. See Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994). A growing bioethics literature argues in favor of less patient-centered ethics and more focus on process models and family involvement. See Jeffrey Blustein, *The Family in Medical Decisionmaking*, 23 HASTINGS CENTER REP. 6, 11 (1993) (arguing that patients should consider the interests of family members in making decisions but the ultimate decision is theirs); John Hardwig, *What About the Family?*, 20 HASTINGS CENTER REP. 5 (1990) (arguing for abandonment of the patient-centered ethic in favor of a presumption of equality of interests, both medical and nonmedical of each family member); James Lindemann Nelson, *Taking Families Seriously*, 22 HASTINGS CENTER REP. 6, 7 (1992) (stating that there is a presumption that a competent patient is the ultimate decisionmaker but the presumption can be rebutted by showing that family interests are sufficiently compelling to override the patient's wishes). For a focus on shared decisionmaking, see DAN W. BROCK, *LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS* 55 (1993); Ezekiel J. Emanuel & Linda L. Emanuel, *Four Models of the Physician-Patient Relationship*, 267 JAMA 2221 (1992); Mark G. Kuzcewski, *Reconceiving the Family: The Process of Consent in Medical Decision-Making*, 26 HASTINGS CENTER REP. 30 (1996).

30 For a discussion of the evolution of tort doctrine from a requirement of "simple" to "informed" consent, see APPELBAUM ET AL., *supra* note 25, at 35-62; FADEN & BEAUCHAMP, *supra* note 5, at 125-43. The phrase "informed consent" was first articulated in *Salgo v. Leland Stanford Jr. University Board of Trustees*, 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957) (discussing physicians' duty to give "full disclosure of facts necessary to an informed consent").

are two theories of liability for violation of informed consent requirements. Traditionally, the failure to inform patients of the risks associated with treatment or surgery was considered by courts as a battery on the theory that any subsequent touching was without consent.<sup>31</sup> Modern law treats such breaches in negligence.<sup>32</sup>

The specific type of information that physicians must disclose relates to the nature of the particular condition and the purpose, risks, and benefits of proposed treatment procedures.<sup>33</sup> In some jurisdictions, physicians may be required to disclose alternative methods of treatment that are generally considered reasonable by the medical community.<sup>34</sup> The detailed nature of information that physicians are required to disclose is considered the distinguishing characteristic of the legal doctrine of informed consent.<sup>35</sup> One of two different disclosure standards may govern, depending upon the jurisdiction: (1) the "professional practice standard," developed during the early years of informed consent legal doctrine, focuses on the custom for disclosure among physicians in general;<sup>36</sup> and (2) the "patient-oriented" stan-

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31 As Justice Benjamin Cardozo observed almost a century ago: "[A] surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E.2d 92, 130 (N.Y. 1914).

32 See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 190 (5th ed. 1984). The distinction between the use of both theories of liability is articulated by the court's opinion in *Scott v. Bradford*, 606 P.2d 554, (Okla. 1979): "If treatment is completely unauthorized and performed without any consent at all, there has been a battery. However, if the physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence . . . ." *Id.* at 559.

33 Physicians are required to disclose risks that are considered "material." *PROSSER & KEETON ET AL.*, *supra* note 32, at 191. See, e.g., *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) (reversing verdicts for defendants in medical malpractice cases where improper instructions were given to jury and stating that the physician is required "to make a reasonable disclosure . . . of the nature and probable consequences of the suggested . . . treatment, and . . . to make a reasonable disclosure of the dangers within his knowledge which were incident to, or possible in, the treatment he proposed to administer").

34 See, e.g., *Moore v. Baker*, 989 F.2d 1129 (11th Cir. 1993) (finding that disclosure of alternative treatment was required under Georgia law only where treatment is generally accepted by reasonably prudent doctors); *Gemme v. Goldberg*, 626 A.2d 318 (Conn. App. Ct. 1993) (finding a failure to inform patient of viable alternatives to treatment).

35 See APPELBAUM ET AL., *supra* note 25, at 57.

36 The relevant inquiry is directed towards what a reasonably prudent physician would do. See, e.g., *Brune v. Belinkoff*, 235 N.E.2d 793, 798 (Mass. 1968) (overruling the "locality" rule of *Small v. Howard* and holding that "a specialist should be held to

dard focuses on what a reasonable person in the patient's situation would find material in making decisions.<sup>37</sup>

Although the issue of obtaining a patient's consent for treatment has received less attention by the courts than disclosure, it is generally held that a patient's consent to treatment or a decision not to consent must be voluntary and with some degree of understanding.<sup>38</sup> There is little case law, however, on what is meant by "understanding."<sup>39</sup>

### B. *Informed Consent in the Lawyer-Client Relationship*

What are the informed consent obligations of lawyers? The principle of informed consent in the lawyer-client relationship is a similar principle to that in medicine. Clients should be educated about their choices and participate in decisionmaking.<sup>40</sup> The professional responsibility rules for the legal profession provide some conceptual support for the principle of informed consent, but give little practical guidance to lawyers.<sup>41</sup> Model Rule 1.4 mandates that lawyers "explain a matter to the extent reasonably necessary to permit the client to

the standard of care and skill of the average member of the profession practicing the specialty, taking into account the advances in the profession").

37 See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (holding surgeon liable for failure to reveal risk of paralysis involved in a laminectomy); *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972) (finding insufficient evidence to support theory of surgeon's negligence or failure to obtain patient's consent); *Wilkinson v. Vesey*, 295 A.2d 676 (R.I. 1972) (finding sufficient evidence to support theory of radiologist's negligence and holding that patient claiming lack of informed consent was not required to provide expert testimony regarding propriety of radiologist's silence as to hazards of radiation treatment). Some courts have adopted a more subjective causation test that focuses on what a particular patient would have deemed material. See PROSSER & KEETON ET AL., *supra* note 32, at 191, 192. Faden and Beauchamp observe, however, that the subjective standard has been created by legal scholarship rather than by the courts. See FADEN & BEAUCHAMP, *supra* note 5, at 33-34, 46 n.34.

38 See, e.g., *Canterbury*, 464 F.2d at 779-80 ("True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeable the options available and the risks attendant upon each . . . . From these . . . considerations springs the . . . requirement, of a reasonable divulgence by physician to patient to make such a decision possible.").

39 See *The Law of Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 24, at 193, 198.

40 See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1990).

41 In this regard, Professor Robert Cochran has observed that while "lawyer codes hold up client control as an aspiration . . . . [t]hose portions of the code that encourage client control do not require it." Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure To Allow the Client To Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 825 (1990).

make informed decisions regarding the representation."<sup>42</sup> While the informational requirements for lawyers contained in Model Rule 1.4 may not be as extensive as those imposed upon physicians under tort law,<sup>43</sup> they demonstrate a clear mandate for disclosure.<sup>44</sup> On the other hand, regulation of client "consent" rights is more ambiguous. Model Rule 1.2(a), that governs the allocation of decisionmaking power in the attorney-client relationship, establishes, in effect, an "ends/means" approach, in which the client decides the "ends" of a given problem and the attorney decides the "means."<sup>45</sup> The inherent complexity of determining what constitutes real ends and means has made it difficult to integrate this distinction in legal practice, leaving the principle of informed consent dangling on the outer fringes of the lawyer-client relationship.<sup>46</sup>

The foundational analysis of an informed consent principle in the lawyer-client relationship is rooted in the lawyer's professional obligation to inform clients of relevant information and in the client's autonomy interest in participatory decisionmaking.<sup>47</sup> The idea of an

42 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.4 (1997).

43 See *supra* notes 30–35 and accompanying text.

44 See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 488 (2d ed. 1994).

45 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.2(a) (1997) ("[A] lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by the client's decision whether to accept an offer of settlement of a matter . . . .")

46 David Luban has eloquently captured the inherent difficulty of the ends/means concept in his observation that it

assumes a sharp dichotomy between ends and means, according to which a certain result (acquittal, a favorable settlement, *etc.*) is all that the client desires, while the legal tactics and arguments are merely routes to that result. No doubt this is true in many cases, but it need not be: the client may want to win acquittal *by* asserting a certain right, because it vindicates him in a way that matters to him; or he may wish to obtain a settlement without using a certain tactic, because he disapproves of the tactic. In that case, what the lawyer takes to be mere means are really part of the client's ends.

David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. REV. 454, 459 n.9.

47 See, e.g., STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 69 (4th ed. 1995); JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* 49 (1997); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 604, 605 (2d ed. 1995); DEBORAH RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 411 (1994); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 149 (1986); RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 211 (1995). The nature of informed consent in the lawyer-client relationship is a topic that demands comprehensive treatment and is beyond the scope of this article.

informed consent principle to govern the attorney-client relationship is of recent origin<sup>48</sup> and, compared to the significant interest that the topic of informed consent has generated in the medical literature, surprisingly little legal literature exists.<sup>49</sup>

The first significant article urging adoption of an informed consent standard for the legal profession appeared in 1979 with Professor Mark Spiegel's proposal for expanded client decisionmaking and his claim that "shared decisionmaking is the solution to dilemmas that have long plagued the profession."<sup>50</sup> The notion that lawyers should provide information necessary for clients to become involved in decisionmaking has met with mixed reaction. Some scholars urge acceptance of the principle,<sup>51</sup> while others argue that, based on the difficulty of interpreting this standard in medicine, informed consent is not a

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48 See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Gary A. Munneke & Theresa Loscalzo, *The Lawyers's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391 (1989); Cornelius J. Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Lawyering and Client Decisionmaking*]; Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 [hereinafter Spiegel, *The New Model Rules*]; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987). More recently, the literature has focused on effective client decisionmaking rather than on mechanical concepts of informed consent. A recent law school casebook summarizes the issue as follows:

The central question is not, however, whether the lawyer can make a recommendation to clients. The central question is whether the lawyer has provided the information necessary for the client to be an effective decision maker . . . . Our experience . . . leads us to believe that with appropriate information from the lawyer—information about assessment, options, and predictions—most clients can be effective decisionmakers.

ROGER S. HAYDOCK ET AL., *LAWYERING: PRACTICE AND PLANNING* 86, 87 (1996). I have argued elsewhere for a deliberative client counseling model in representational mediation practice to help achieve the goal of informed consent in mediation. See Nolan-Haley, *Lawyers, Clients and Mediation*, *supra* note 16.

49 As a number of commentators have observed, the legal profession's lack of interest is all the more remarkable given its involvement in developing an informed consent model for the medical profession. See, e.g., Strauss, *supra* note 48, at 316, 317; Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 48, at 42 (stating that "[l]awyers created the doctrine of informed consent for the medical profession").

50 Spiegel, *Lawyer and Client Decisionmaking*, *supra* note 48, at 140.

51 See *supra* note 48.

desirable standard to govern the attorney-client relationship.<sup>52</sup> Over the past twenty years, specific informed consent discussions have been subsumed in broader conversations about the nature and limits of client decisionmaking,<sup>53</sup> the merits of client autonomy,<sup>54</sup> and justifications for lawyers exercising substantial control over their clients.<sup>55</sup> More recently, informed consent discussions have occurred in connection with the debate over whether lawyers have a duty to inform clients of their alternatives to litigation in resolving disputes.<sup>56</sup>

### III. VALUES INFORMED CONSENT SERVES IN MEDIATION

In mediation practice, the principle of informed consent is not an end in itself but is a means of achieving the fundamental goal of fairness.<sup>57</sup> Fairness requires that parties know what they are doing

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52 See, e.g., BINDER ET AL., *supra* note 40, at 278 n.46 (citing FADEN & BEAUCHAMP, *supra* note 5) (noting the debate in the medical profession about the quantity and kind of information that must be disclosed and the meaning of understanding). Binder accepts, however, the philosophy of an informed consent standard to the extent that it "would push lawyers towards making clients real partners in the decision-making process." *Id.*

53 See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996). In practice, decisionmaking questions are highly contextual. See Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

54 See, e.g., Cochran, *supra* note 41 (favoring greater client autonomy); Camille A. Gear, *The Ideology of Dominations: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473 (1998); see also Donald F. Harris, *Prisoners of Prestige? Paternalism and the Legal Profession*, 17 J. LEGAL PROF. 125 (1992) (stating that the Model Code and Model Rules do not adequately protect clients' autonomy).

55 See, e.g., Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (stating that paternalism is justified when actor's choice did not truly express his identity, for example, because of fear and depression); Luban, *supra* note 46 (stating that paternalistic coercion is justified when the client's goal fails to meet minimal tests of reasonableness); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (discussing "crude" versus "refined" views of autonomy); see also Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307 (1997) (arguing against Professor Simon's suggestion that there is no meaningful difference between autonomy and paternalism).

56 See Cochran, *supra* note 41; Lynn Nelson, *Legal Informed Consent: Is It a Concept Whose Time Has Come?*, 1991 A.B.A. SEC. DISP. RESOL. MAG. 1, 2; Frank E. A. Sander & Michael Prigoff, *At Issue: Professional Responsibility: Should There Be a Duty To Advise Clients of ADR Options?*, 74 A.B.A. J. 5050, 5050-51 (1990).

57 There is little dispute that fairness is the fundamental goal of any dispute resolution process including mediation. See, e.g., AMERICAN ARBITRATION ASSOCIATION,

when they decide to participate in mediation, that they understand all aspects of the decisionmaking process, including their right to withdraw consent and discontinue negotiations, and that they understand the outcome reached in mediation. Toward this end, the principle of informed consent in mediation protects the psychological and legal interests associated with the values of autonomy, human dignity, and efficiency.

### A. *Autonomy in Mediation Enhanced Through Informed Consent*

#### 1. Autonomy in General

Commentators have written about autonomy generally in the moral, political, and social spheres.<sup>58</sup> Central to the principle of autonomy is the notion of self-governance or self-determination.<sup>59</sup> From the classic liberal conception of individualism to feminist and communitarian understandings, autonomy is a term which evokes a wide spectrum of different views.<sup>60</sup> Given its rich literature and history,

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CONSUMER DUE PROCESS PROTOCOL 13-14 (May 1998) [hereinafter AAA CONSUMER PROTOCOL] (arguing that fairness is the fundamental goal of ADR processes); MELINDA OSTERMEYER & SUSAN L. KEILIZT, CENTER FOR DISPUTE SETTLEMENT AND INSTITUTE OF JUDICIAL ADMINISTRATION, STATE JUSTICE INSTITUTE, MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGERS 32 (1997) ("Above all else, ADR should be fair."); DANIEL MCGILLIS, COMMUNITY MEDIATION PROGRAMS: DEVELOPEMENTS AND CHALLENGES, 55 (1997) ("[I]t seems quite clear that if any process claims to render a high quality of justice, the disputants whose cases are handled by the process should view the process as fair."); MOORE, *supra* note 10, at 303 ("The goal of negotiation and mediation is a settlement that is seen as fair and equitable by all parties."). How to achieve the goal of fairness, however, has and no doubt will continue to be the subject of much debate. Compare Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347 with Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. DISP. RESOL. 909 (1998). See also Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); *infra* notes 88, 101 and accompanying text; Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223 (1993) (identifying four aspects of fairness in negotiation).

58 See, e.g., GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 3-10 (1988).

59 The word "autonomy" comes from the Greek words "autos," meaning self, and "nomos," meaning rule or law. *Id.* at 12.

60 See, e.g., TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 123 (4th ed. 1994) (discussing the elements of autonomous action); Gerald Dworkin, *Autonomy and Informed Consent*, in 3 *MAKING HEALTH CARE DECISIONS*, *supra* note 24, at 63; DWORKIN, *supra* note 58; James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 30 n.165 (1995); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 26 (1989) (stating that au-

there is much from which mediation scholars and practitioners may draw in understanding the relationship between the principle of informed consent and autonomous decisionmaking.

## 2. Mediation Autonomy

Respect for autonomy and its legal equivalent, the right of self-determination,<sup>61</sup> is widely accepted as the intrinsic value of mediation, and the principle of informed consent provides the structural framework through which this value is measured in mediation.<sup>62</sup> The value of autonomy in mediation lies in what Gerald Dworkin has described as its "intrinsic desirability of exercising the capacity for self-determination."<sup>63</sup> This capacity for self-determination is described in the Code of Professional Conduct for Mediators as the "fundamental principle" of mediation.<sup>64</sup> Mediation theorists and practitioners repeat the theme, emphasizing the self-governance and empowerment aspects of mediation.<sup>65</sup>

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tonomy includes feeling). Moral philosopher Joseph Kupper explains autonomy in terms of deliberation and action. See JOSEPH H. KUPFER, *AUTONOMY AND SOCIAL INTERACTION* 10-14 (1990).

61 See FADEN & BEAUCHAMP, *supra* note 5, at 120 ("[T]he right of self-determination is the legal equivalent of the moral principle of respect for autonomy").

62 Autonomy, however, is not the exclusive interest honored in mediation. A report of the Society of Professionals in Dispute Resolution describes several conflicting values and goals in dispute resolution including: (1) increased disputant participation and control of the process and outcome, (2) restoration of relationships, (3) increased efficiency of the judicial system and lowered costs, (4) preservation of social order and stability, (5) maximization of joint gains, (6) fair process, (7) fair and stable outcomes, and (8) social justice. See SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, *Ensuring Competence and Quality in Dispute Resolution Practice*, REPORT 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS 5 (1995).

63 Dworkin wrote that:

[T]here is value connected with being self-determining that is not a matter either of bringing about good results or the pleasures of the process itself. This is the intrinsic desirability of exercising the capacity for self-determination. We desire to be recognized by others as the kind of creature capable of determining our own destiny. Our own sense of self-respect is tied to the respect of others—and this is not just a matter of psychology. Second, notions of creativity, of risk-taking, of adherence to principle, of responsibility, are all linked conceptually to the possibility of autonomous action.

DWORKIN, *supra* note 58, at 112.

64 STANDARDS OF CONDUCT, *supra* note 7, Standard I.

65 See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); FOLBERG & TAYLOR, *supra* note 10, at 10; JOHN PAUL LEDERACH, *PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES* 61 (1995) (empowerment); James Al-



The idealized vision of autonomy in mediation, "mediation autonomy," is grounded in relational and communal values.<sup>66</sup> As a governing principle, it is concerned not just with one's self but with the other party to the dispute. Mediation autonomy is exercised in cooperation with the other party. In this regard, Lon Fuller's classic definition characterizes mediation's "capacity to re-orient the parties toward one another, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward each other."<sup>67</sup> Central to his definition is an understanding of "mediation autonomy" as a relational concept. Thus, unlike the way that autonomy is expressed and understood in traditional liberal theory<sup>68</sup> with its emphasis on privacy and self, mediation autonomy is connected to other human beings; it requires cooperation and collaboration with other persons whose values may differ.<sup>69</sup>

Mediation autonomy has two components which are linked to the principle of informed consent. First, conceptually, the principle of autonomy distinguishes mediation from the adjudicatory dispute resolution processes. Instead of allocating decisionmaking power to a third party, the parties who are affected by a dispute retain such power.<sup>70</sup> Second, mediation autonomy operates as a corrective to paternalism. As a limiting principle, it gives the mediator power to con-

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fini & Gerald S. Clay, *Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations?*, 1994 A.B.A. SEC. DISP. RESOL. 8.

66 In practice, however, relational and communal values may not control. Depending upon the kind of mediation and whether lawyers are involved, the exercise of autonomy in mediation can be an adversarial or nonexistent experience. See, e.g., James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); Stacy Burns, *The Name of the Game Is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases*, 15 MED. Q. 359, 362-63 (1998) (describing mediation of large money damage cases by acting and former judges in a public courts).

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

68 See Nedelsky, *supra* note 60.

69 Thus, mediation autonomy operates individually and communally and in this regard it shares feminist and communitarian concerns with the interdependence of all members of the moral and political community. See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* 261 (1993) (stating that mediation and arbitration are better than adversarial litigation); Nedelsky, *supra* note 60, at 8.

70 The ability to make such choices distinguishes mediation from adjudication.

trol only the process in which parties' decisionmaking occurs, while the parties retain the power to decide and control the outcome.<sup>71</sup>

### B. *Human Dignity Protected Through Informed Consent*

The principle of informed consent promotes respect for the fundamental value of human dignity in several aspects of mediation decisionmaking.<sup>72</sup> First, the value of dignity is most frequently associated with the right to participate in decisionmaking. When disputing parties can participate directly in the bargaining process, their perceptions of procedural fairness are enhanced. Second, the principle of informed consent guards against unwanted intrusions into highly personal aspects of parties' lives. There is the potential for a high degree of personal exposure in mediation that makes parties' privacy interests vulnerable.<sup>73</sup> As described in one informed consent form: "Mediation may involve the risk of remembering and disclosing unpleasant events. Your disclosures may lead you to feel vulnerable, and the negotiations you enter into can arouse emotions, such as fear and anger, or feelings of anxiety, uncertainty, or frustration."<sup>74</sup> When parties can

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71 Alison Taylor makes this point so well: "The clients are in charge of the mandate, scope and outcome of mediation, and the mediator is in charge of the process." Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 *MEDIATION Q.* 215 (1997). Of course, in some forms of evaluative mediation, the parties may give the mediator substantial control over the outcome. See *infra* notes 102-10 and accompanying text (discussing evaluative and facilitative approaches to mediation); see also Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 16 *MEDIATION Q.* 75 (1998) (arguing that the mediator's power over the process derives from the parties' consent).

72 For a discussion of the meaning of human dignity values, see Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 *YALE L.J.* 683, 686 (1975).

73 Of course, savvy parties represented by mediation advocates might insist that mediators meet privately with parties in a caucus in order to guard against such vulnerability. For a further discussion of the caucus, see *infra* notes 146-50 and accompanying text. It is not just emotional interests, however, that may be at risk. One author has observed that in the business setting, parties are not comfortable with full disclosure of internal business information. "Full disclosure is inconsistent with maintaining a competitive advantage over one's rival. In negotiation, information is a form of power: the greater the information disparity the greater advantage . . . . Most trial attorneys will not encourage their clients to participate in mediation if full disclosure is required." Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 *WILLAMETTE L. REV.* 703, 713 (1997).

74 Bob Helm, *Mediators' Duties, Informed Consent, and the Hatfields Versus the McCoy's*, 21 *MEDIATION Q.* 65, 73 (1988) (claiming that mediators fail to disclose fully about the limits of confidentiality).

decide for themselves whether they can tolerate this kind of exposure or personal invasion, the value of human dignity is enhanced.

Third, the principle of informed consent promotes understanding and alleviates the fears associated with lack of information. When parties come to mediation without sufficient knowledge of what is occurring, there is a greater likelihood that they will consciously or unconsciously resist mediation and thus never fully give consent to participate.<sup>75</sup>

Finally, recognition of individual human dignity contributes to a mediation process that is free of fraudulent and coercive influences.<sup>76</sup> The principle of informed consent requires that mediators be honest with both parties and disclose whatever information is necessary to prevent deliberate fraud, manipulation, and trickery.<sup>77</sup> This aspect of the human dignity value of informed consent operates throughout the mediation process.<sup>78</sup>

### C. *Efficiency Promoted by Informed Consent*

The principle of informed consent promotes educated decision-making and thus contributes to efficient dispute resolution.<sup>79</sup> It makes agreements more stable and durable.<sup>80</sup> The idea of consent promotes satisfaction with the mediation process,<sup>81</sup> results in greater compliance<sup>82</sup> with mediated settlement agreements, and realizes

75 See Maria R. Volpe & Charles Bahn, *Resistance to Mediation: Understanding and Handling It*, 13 NEGOTIATION J. 297 (1987) (arguing that fear of the unknown and lack of information creates resistance to mediation).

76 Substantial power imbalances should be included in this category.

77 Before parties make a final decision to enter into the mediation process, mediators should inform them that they will make such disclosures. See *infra* notes 240-44 and accompanying text (discussing baseline levels of disclosure for mediators).

78 It differs, therefore, from the first three aspects of the human dignity value that pertain to the decision to enter into the mediation process.

79 See Strauss, *supra* note 48, at 336-39.

80 See James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer-Mediator*, 38 S. TEX. L. REV. 769, 795 (1997) ("[S]ettlements that are achieved by means of withholding information from litigants face the risk of collateral attack if the parties later find out there was additional information they should have had when they settled their case.").

81 See Guthrie & Levin, *supra* note 1; NANCY ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, AND PRACTICE* § 4:04 (2d ed. 1994).

82 Cf. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11, 47 (1984) ("Consent enlists a sense of personal obligation and honor in support of compliance, and consensual processes are more open than command to the establishment of reciprocal obligations and of detailed plans for carrying out the terms of an agreement.").

greater overall efficiency.<sup>83</sup> The factual disclosures encouraged by the practice of informed consent enhance the settlement process.<sup>84</sup> This allows for decisionmaking that is the product of reasoned judgment based on a sound factual foundation. Informed consent leaves parties with the feeling that the outcome was fair, and thus, there is less likelihood that parties will attempt to rescind or repudiate their agreements.<sup>85</sup>

### III. THE INADEQUACY OF INFORMED CONSENT IN MEDIATION: CURRENT LANDSCAPE

Interest in a principle of informed consent for mediation has evolved over the last two decades from an almost exclusive focus on divorce mediation to more broad-based conversations about the sufficiency of disclosures to which parties are entitled, the role of nonlawyers as well as lawyer-mediators, and the role of law in the mediation process.<sup>86</sup> The most explicit discussion of informed consent has emerged as a subtext in the ongoing debate about the merits of

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83 Particularly in court-connected mediation, this can save the courts substantial time in responding to challenges to agreements. See *infra* notes 151–74 and accompanying text.

84 Lawyers, particularly in business disputes, are unwilling to settle without a sufficient factual basis. Professor Nancy Rogers quotes a nonsettling attorney: “I have never settled a case in mediation. This is so because these [business] cases involve a great deal of discovery and once discovery is complete people just want to go to trial. People are unwilling to resolve cases without all the facts and thus extensive discovery.” Nancy H. Rogers & Craig A. McEwen, *Employing the Law To Increase the Use of Mediation and To Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842 (1998). The Rand Report shows mediation is less successful where discovery is not sufficient. See RAND REPORT, *supra* note 1, at 45–46; see also Imperati, *supra* note 73, at 713.

85 See, e.g., *Alvarez v. Reiser*, 958 S.W.2d 232 (Tex. Ct. App. 1997). The facts in *Alvarez* are troubling. After the parties mediated a divorce case, the wife discovered that her husband had misrepresented the value of his retirement and 401K accounts in the inventory he filed before mediation. She moved to “re-mediate” the funds issue but the presiding judge denied her motion and called the case to trial. At trial the wife stated that she did not consent to or was not in agreement with the mediated settlement. She testified that she believed the agreement was unfair because it did not include additional community funds. She also stated that she entered into the settlement agreement only after twelve and one-half hours of “complete duress.” Even though the trial court acknowledged that the mediation at some point became “Chinese torture,” and that “the agreement may not be fair to anyone,” it entered a consent judgment. Brief for Petitioner at 5, *Alvarez v. Reiser*, 958 S.W.2d 232 (Tex. Ct. App. 1997) (No. 11-96-206-CV) (petition for review denied June 5, 1998).

86 See, e.g., Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOTIATION L. REV. 87 (1997); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of*

mediators offering professional information or advice to parties.<sup>87</sup> Overall, informed consent discussions have been characterized by a concern with achieving fairness in the mediation process.<sup>88</sup>

### A. *Developing Informed Consent in Mediation: Literature Review*

Ethical concerns regarding informed consent first occurred in the late 1970s and early 1980s when lawyers began to practice divorce mediation.<sup>89</sup> Most questions were framed as professional responsibility inquiries about the role of the lawyer who acted as a mediator. How could lawyers possibly be neutral?<sup>90</sup> How could they mediate with nonlawyers without violating the unauthorized practice of law statutes?<sup>91</sup> What rules would govern their conduct?<sup>92</sup>

Several bar association ethics opinions responded to queries about the necessary disclosure requirements that attorney-mediators

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*Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53; ROGERS & McEWEN, *supra* note 81, §§ 6, 10, 11.

87 This is popularly known as the "evaluative versus facilitative" debate. See John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 106-08.

88 Professors Nancy Rogers and Craig McEwen include informed consent as an aspect of the continuing fairness debate in mediation. See ROGERS & McEWEN, *supra* note 81, § 2:02; Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); Stulberg, *supra* note 57.

89 See, e.g., Richard E. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 237-38 (1982) ("Principally, the problem seems to be that of obtaining consent that is sufficiently informed. For an informed consent, the attorney has to have made full disclosure of the important facts and considerations, and the person waiving the right of independent representation has to understand all of these.").

90 See, e.g., Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093 (1987); Sandra E. Purnell, *The Attorney As Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986 (1985); Wendy Woods, *Model Rule 2.2 and Divorce Mediation: Ethics Guidelines or Ethics Gap?*, 65 WASH. U. L.Q. 233 (1987). Many of these questions arose in response to a model of divorce mediation proposed by O. J. Coogler, that involved the use of an impartial advisory attorney. See O. J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENTS* 85-92 (1978).

91 See ROGERS & McEWEN, *supra* note 81, § 10.

92 For a discussion of the the early bar association ethics opinions, see Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Linda Silberman, *Professional Responsibility Problems in Divorce Mediation*, 7 FAM. L. REP. 4001 (1981). For an analysis of more recent bar association ethics opinions, see Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213 (1993).

should provide before parties could participate in mediation.<sup>93</sup> The predominant concern was that disputing parties would confuse the lawyer's role as mediator with that of an advocate and that this conceptual confusion would invalidate their consent to participate in mediation. One of the most significant ethics opinions, issued by the Association of the Bar of the City of New York, explicitly cautioned lawyer-mediators about the necessity for obtaining the parties' informed consent before agreeing to mediate divorce cases.<sup>94</sup> The opinion recognized, however, that some situations would be too complex for a party's consent to be "considered fully informed."<sup>95</sup>

Commentators offered more refined proposals to govern lawyers' participation as neutrals in mediation,<sup>96</sup> and in 1984, the American Bar Association adopted Standards of Practice for Lawyer

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93 See, e.g., Boston Bar Ass'n Comm'n of Professional Responsibility, Op. 78-1 (1978); Ass'n of the Bar of the City of New York Comm'n of Professional & Judicial Ethics, Op. 80-23 (1980); Connecticut Bar Ass'n, Formal Op. 35 (1982).

94 See Ass'n of the Bar of the City of New York Comm'n of Professional & Judicial Ethics, Op. 80-23 (1980). The opinion listed the following seven guidelines that should be followed before lawyers could participate in divorce mediation and noted that "underlying these guidelines is the requirement that the lawyers' participation in the mediation process be conditioned on *informed* consent by the parties." *Id.* at II.

First, the lawyer must clearly and fully advise the parties of the limitations on his or her role, and specifically, of the fact that the lawyer represents neither party and that accordingly, they should not look to the lawyer to protect their individual interests or to keep confidences of one party from the other. Second, the lawyer must fully and clearly explain the risks of proceeding without separate legal counsel and thereafter proceed only with the consent of the parties and only if the lawyer is satisfied that the parties understand the risks and understand the significance of the fact that the lawyer represents neither party. Third, a lawyer may participate with mental health professionals in those aspects of mediation which do not require the exercise of professional legal judgment and involve the same kind of mediation activities permissible to lay mediators. Fourth, lawyers may provide impartial legal advice and assist in reducing the parties' agreement to writing only where the lawyer fully explains all pertinent considerations and alternatives and the consequences to each party of choosing the resolution agreed upon. Fifth, the lawyer may give legal advice only to both parties in the presence of the other. Sixth, the lawyer must advise the parties of the advantages of seeking independent legal counsel before executing any agreement drafted by the lawyer. Seventh, the lawyer may not represent either of the parties in any subsequent legal proceedings relating to the divorce.

95 *Id.*

96 See, e.g., Crouch, *supra* note 89. Crouch proposed a preliminary written contract in which "[a]ll the warnings, waivers, and informed consents contemplated by this unique form of divorce negotiation should be embodied in the contract . . ." *Id.* at 248.

Mediators in Family Disputes.<sup>97</sup> These standards clarified the difference between the lawyer's role as partisan advocate and that of neutral mediator and established three "informed consent" duties for lawyers who mediated family disputes: (1) define and describe the process and its cost,<sup>98</sup> (2) assure that mediation participants make decisions based upon sufficient information and knowledge,<sup>99</sup> and (3) advise parties to obtain legal review prior to reaching an agreement.<sup>100</sup>

Later informed consent commentary focused more explicitly on the problem of achieving fairness in mediation. Scholars argued for informed consent based on fairness or justice principles and offered a variety of new rules and models to govern neutral lawyering.<sup>101</sup> More recently, informed consent discussions have taken place within the larger debate over the relative merits of facilitative and evaluative approaches to mediation.<sup>102</sup> Should mediators limit their activities to facilitating and managing the process of mediation or should they be allowed to influence the outcome by offering evaluations to the parties?<sup>103</sup> While there is no real consensus on what constitutes mediator

97 These standards were adopted by the House of Delegates of the American Bar Association in August 1984 [hereinafter ABA STANDARDS OF PRACTICE]. The standards are reprinted in GOLDBERG ET AL., *supra* note 1, at 469.

98 *See id.* at Standard I.

99 *See id.* at Standard IV.

100 *See id.* at Standard VI.

101 Professor Judith Maute, concerned with mediator accountability, proposed a rule detailing the neutral lawyers' obligations: "By undertaking to mediate a dispute capable of legal resolution when the parties are not independently represented, the lawyer mediator assumes a responsibility to tell the parties enough about the applicable law and its uncertainties so their settlement decision is adequately informed." Maute, *supra* note 57, at 366. *See also* Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991) (proposing that the ABA adopt Model Rule 2.4 to govern the conduct of lawyers who serve as mediators). Professor Leonard Riskin developed a model for neutral lawyering in mediation, arguing that lawyers should aim for an agreement that does not violate minimum standards of fairness. Lawyers would be permitted to give legal information in this model. *See* Riskin, *supra* note 92.

102 I must say that I agree with those commentators who recognize that the debate should not be framed in this way at all but that the question should be more related to when facilitation and evaluation are appropriate. *See, e.g.*, Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

103 There is extensive literature on this question. *See, e.g.*, Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO THE HIGH COST OF LITIGATION 62 (1996); James J. Alfani, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); John Bickerman, *Evaluative Mediator Responds*, in 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996); James B. Boskey, *Let 100 Flowers Bloom*, ALTERNATIVE NEWSL., Nov. 1996, at 1; Cris M. Currie, *Wanted: A*

evaluation, it is frequently equated with giving some form of legal information to parties.<sup>104</sup> Reduced to simple form, the claim of the pro-evaluation argument is that relevant (legal) information by the mediator can enhance informed consent and self-determination, values that should take precedence over competing values of neutrality and impartiality.<sup>105</sup> Beyond disclosure of "legal" information, commentators

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*Theoretical Construct for Mediation Practice*, 53 DISP. RESOL. J. 70 (1998); Dwight Golann & Marjorie Corman Aaron, *Managing the Merits: The Use (and Misuse) of Evaluation in Mediation*, DISP. RESOL. J. (1997); Imperati, *supra* note 73; Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, in 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996) [hereinafter Kovach & Love, *Evaluative Mediation*]; Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOTIATION L. REV. 71 (1998) [hereinafter Kovach & Love, *Mapping Mediation*] (arguing against evaluation); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 856-79 (1997); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Jonathan Marks, *Evaluative Mediation—Oxymoron or Essential Tool?*, AM. LAW., May 1996, at 48A; Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997); Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 701 (1997); Leonard L. Riskin, *Mediation Quandaries*, 24 FLA. ST. U. L. REV. 1007 (1997); Stark, *supra* note 80; Stempel, *supra* note 102; David U. Strawn, *Does a Mediator Have an Affirmative Duty To Assure That Consent To Settle Is Truly Informed?*, 3 JUST. RESOL. 1 (1998); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Ellen A. Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87 (1993) [hereinafter Waldman, *Legal Norms*]; DONALD T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997).

104 For a helpful understanding of evaluation as a continuum of directive behaviors, see Margaret Shaw, *Evaluation Continuum*, Prepared for CPR Ethics Commission, May 6-7, 1996. Inquiries submitted to Florida's Mediator Qualifications Panel exemplify the ethical dilemmas inherent in evaluative mediation. See, e.g., MQAP Op. 95-005C (on file with author) (Is a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, bound to inform that party of this matter? In this case, the ethics panel held that it was an ethical violation for the mediator to give legal advice to a party.); MQAP Op. 95-002D (While it is known that a mediator should not advise, can a question be asked even if the framing of the question tends to advise or inform one or both of the parties involved? The panel responded: It is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice by statement, question or any other form of communication.). For a thoughtful discussion of the lines mediators draw between proper and improper evaluation, see Stark, *supra* note 80, at 784-92.

105 In an earlier article, I adopted this position. See Nolan-Haley, *Court Mediation*, *supra* note 16; see also Stempel, *supra* note 102 (endorsing a flexible mediation model



following an informed consent approach have also called for greater disclosure of social norms,<sup>106</sup> community values,<sup>107</sup> and the individual mediator's choice of model.<sup>108</sup>

Those who reject evaluative approaches view orthodox mediation as a more facilitative process that could be weakened by evaluation.<sup>109</sup>

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that permits judicious use of evaluation); Moberly, *supra* note 103; Stark, *supra* note 80 (stating that the principal purpose of evaluation in mediation is to promote the parties' self-determination through informed consent); James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 487 (1996). Stark wrote:

When settling their disputes, disputants must be permitted to invoke legal norms if they choose to, and the mediator must take steps to ensure that the parties' choices are knowing and informed. In my view, any threat to the appearance of neutrality and impartiality is a necessary price that mediators must pay for party empowerment and informed consent.

*Id.* See also Waldman, *Legal Norms*, *supra* note 103. Gerard Clay argues that parties need evaluation in order to make informed decisions about their rights and interests. See Alfini & Clay, *supra* note 65. Other commentators observe that evaluation happens, see Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 57, 61 (1996), or think about it as a contractual issue, see Marjorie Corman Aaron, *Evaluation in Mediation*, in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 267-305 (1996) (discussing conditions that are appropriate for evaluation in mediation).

106 See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997) ("Heightened attention to the role of social norms in mediation is necessary to allow mediators to adequately explain their methodologies and to allow clients to supply informed consent to mediator interventions.").

107 See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternate Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997).

108 *E.g.*, Imperati, *supra* note 73, at 711 (offering nineteen decision points that mediators should consider discussing with parties prior to mediation); Lande, *supra* note 103; Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997) (arguing that a mediator should share information with the parties about the actions she is taking and the impact she intends to achieve).

109 Robert Benjamin, *What is Mediation Anyway? Ethical Issues, Policy Issues and the Future of the Profession*, NIDR NEWS, July/Aug. 1996, at 9; Currie, *supra* note 103, at 74 (arguing that evaluation techniques should "not be included on the list of ethical mediation techniques"); Kovach & Love, *Mapping Mediation*, *supra* note 103; Kovach & Love, *Evaluative Mediation*, *supra* note 103; Stark, *supra* note 80, at 775 n.11 (quoting symposium comments of Dean John Feerick) ("[S]elf-determination is the most basic principle of mediation. Facilitation follows from that . . . Evaluation weakens the facilitative process."); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 260-61 (1989) (characterizing the protection of rights conception of mediation as concerned with ensuring informed consent); Stulberg, *supra* note 57 (arguing

These commentators do not disagree that parties should have relevant information. Their claim, however, is that mediators should not provide this information. Some supporters of the facilitative model, however, would allow mediator evaluation if the parties request it and provide their "informed consent."<sup>110</sup>

Less attention has been focused on the meaning of consent in mediation. In his 1992 study of ethical dilemmas in mediation, Professor Robert Baruch Bush argued that "meaningful consent" required "an opportunity for free and informed choice by both parties regarding any options for settlement."<sup>111</sup> He identified three classic situations that affect the validity of consent: coercion, incapacity, and ignorance.<sup>112</sup> Other commentators have raised questions about the meaning of consent,<sup>113</sup> the nature of voluntariness,<sup>114</sup> and the factors affecting the quality of consent in mediation.<sup>115</sup>

### B. *Regulatory Landscape of Informed Consent in Mediation*

The proliferation of mediation programs over the last two decades has resulted in an extensive collection of statutes, court rules, and ethics standards to govern mediation practice.<sup>116</sup> The idea of informed consent is rarely articulated as an explicit value in these regu-

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that a uniform mediation statute should not contain an evaluative model). The Standards of Conduct for Mediators endorse a facilitative model. See JOINT STANDARDS OF CONDUCT, *supra* note 7, Standard I.

110 Love, *supra* note 103, at 941.

111 Bush, *supra* note 13, at 13.

112 See *id.*

113 See Menkel-Meadow, *supra* note 4, at 2692 nn.129-38.

114 E.g., James Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 NEGOTIATION J. 367 (1994).

115 Professor John Lande's examination of the factors affecting the quality of consent thoughtfully considers some of the internal and external influences on the consent process. See Lande, *supra* note 103. Professor Lande proposes seven indicators to judge the quality of consent:

- (1) explicit identification of the principles, goals, and interests, (2) explicit identification of plausible options for satisfying these interests, (3) the principals' explicit choice of options for consideration, (4) careful consideration of [these] options, (5) mediators' restraint in pressuring principals to accept particular [substantive] options, (6) limitation on use of time pressure, [and] (7) confirmation of [principals'] consent [to selected options.]

*Id.* at 869-78. See also Carla E. Munroe, *Court-Based Mediation in Family Law Disputes: An Effectiveness Rating and Recommendations for Change*, 13 PROB. L.J. 107 (1996) (arguing that "knowing consent" be defined in law because it is an essential element of procedural due process).

116 See generally ROGERS & McEWEN, *supra* note 81, ch. 12. Throughout the balance of this article, I will refer to ethics codes, standards, and court rules as "regulations."

lations,<sup>117</sup> but it is expressed instead through disclosure requirements for mediators and, to a lesser extent, in consent regulations for the parties. Systematic analysis of informed consent requirements is difficult. A substantial amount of regulation takes place at the local level, and in some cases, within the same state mediation practice can be governed by multiple regulations.

## 1. Disclosure Requirements

Disclosure requirements for mediators are a prevailing feature in most mediation statutes and ethical standards.<sup>118</sup> Regulations vary in the amount and type of information that parties should receive: some states have elaborate disclosure provisions while others take a “bare bones” approach. At a minimum, most regulations require that mediators provide procedural information about mediation.<sup>119</sup> Be-

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117 For some notable exceptions, see Appendix A. With respect to private standards, see THE OREGON MEDIATION ASSOCIATION, STANDARDS OF MEDIATION PRACTICE (1993) (Responsibilities to the Parties, Section 2, requires the “informed consent” of the parties “prior to the beginning of substantive negotiations . . .”). These standards are discussed more fully in Imperati, *supra* note 73. In some states, informed consent is explicitly linked to self-determination. See, e.g., GA. ALTERNATIVE DISP. R. APP. CT. ETHICAL STANDARDS FOR MEDIATORS (1995); ALA. CODE OF ETHICS FOR MEDIATORS STANDARD 4 (1996). See generally Deborah A. Ledgerwood, *Family Mediation in St. Louis County: Steeled Against the Critics?*, 52 J. MO. B. 351, 353 (1996) (finding that mediators have a duty to “assure informed consent”).

118 E.g., GA. ALTERNATIVE DISP. RESOL. R., APP. C, ETHICAL STANDARDS FOR MEDIATORS, Standard I (1995) (requiring an explanation of nine items of information in disclosure); FLA. R. CERTIFIED & CT. APPOINTED MEDIATORS 10.020 (d) (5) (detailed disclosure); THE CENTER FOR DISPUTE SETTLEMENT, INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION, Rule 3.2(b) (1992) [hereinafter NATIONAL STANDARDS] list ten items of process information which courts should provide to parties and their attorneys: *Information on process*: (1) the nature and purpose of mediation; (2) confidentiality of process and records; (3) role of the parties and/or attorneys in mediation; (4) role of the mediator, including lack of authority to impose a solution; (5) voluntary acceptance of any resolution or agreement; (6) the advantages and disadvantages of participating in determining solutions; (7) enforcement of agreements; (8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented; (9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court; (10) the advantages and disadvantages of a lack of formal record. *Id.*

119 E.g., MO. R. CIV. P. 88.06(a)(3) (West 1997) (stating that mediators should define and describe the process of mediation); N.C. R. OF S. CT. FOR THE DISP. RESOL. COMM’N, STANDARDS OF PROF. CONDUCT, Standard IV(A) (West 1997); STANDARDS FOR PRIVATE AND PUB. MEDIATORS IN THE STATE OF HAW. (adopted by the Hawaii Supreme Court on April 22, 1986; standards are aspirational) (“Before beginning mediation and throughout the process, mediators shall educate parties about the mediation pro-

yond basic process information, disclosure requirements may include information about how mediation differs from other forms of conflict resolution,<sup>120</sup> any mediator conflicts of interest,<sup>121</sup> relevant laws,<sup>122</sup> costs,<sup>123</sup> and settlement options.<sup>124</sup> A few states have specific additional disclosure provisions for unrepresented parties.<sup>125</sup>

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cess, distinguish mediation from other procedures, explain the respective responsibilities of the mediator and the parties, affirm the party's willingness to participate in such a process, and fully explain any applicable policies, procedures, and guidelines.").

120 See, e.g., IDAHO R. CIV. P. 16(j)(19), MEDIATION OF CHILD CUSTODY AND VISITATION DISP., R. 7(a)(I) (West 1997) (mediator must describe the difference between mediation and other forms of conflict resolution including therapy and counseling); N.C. R. OF CT. 6(B)(b) (West 1997) (implementing mediated settlement conferences in superior court civil actions); S.C. R. OF CT., ALTERNATIVE DISP. RESOL., CIR. CT. MEDIATION 7(b)(3) (West 1997).

121 See, e.g., ALA. CODE OF ETHICS FOR MEDIATORS, Standard V(B) (West 1997); FLA. STAT. ANN. MEDIATOR CONDUCT R. 10.070(b) (West 1997); IND. ALTERNATIVE DISP. RESOL. R. 7.3(6); N.J. CIV. R. 301.1 (g)(2)(B) (West 1997).

122 E.g., IOWA CODE ANN. § 654A.1 (West 1995) (farmer-lender mediation); WYO. STAT. ANN. § 11-41-105(a), (b) (Michie 1997) (farmer-lender mediation). However, some ethical standards explicitly prohibit mediators from giving legal advice. See Moore, *supra* note 10, at 303 ("At no time shall a mediator offer legal advice to parties in dispute.") (citing CODE OF PROFESSIONAL RESPONSIBILITY FOR MEDIATORS). Others do not permit legal advice unless a party's attorney is present. See ALA. CODE OF ETHICS FOR MEDIATORS, Standard 7(d) (1996) ("A mediator may discuss possible outcomes of a case, but a mediator may not offer a personal or professional opinion regarding the likelihood of any specific outcome except in the presence of the attorney for the party to whom the opinion is given.").

123 See IDAHO R. CIV. P. 16(j)(7)(a) ("The mediator has a duty to define and describe for the parties the process of mediation and its cost during the initial conference before the mediation conference begins . . ."); MO. CT. R., S. CT. R. OF CIV. P. 88.06(a)(1) (relating to legal separation and child support); N.C. R. FOR DISP. RESOL. COMM'N., STANDARDS OF PROF. CONDUCT, Standard IV.A(6); N.C. SUPER. CT. R. 6B(c); S.C. R. OF CT., ALTERNATIVE DISP. RESOL., CIR. CT. MEDIATION, R. 7(b)(9). See also STANDARDS OF CONDUCT, *supra* note 7, Standard VII.

124 E.g., MASS. S. CT. UNIF. R. ON DISP. RESOL. 6(I) (LEXIS 1998); NATIONAL STANDARDS, *supra* note 118, Rule 11.2.

125 E.g., ALA. CODE OF ETHICS FOR MEDIATORS, Standard 3(a)(5) (1996). Standard 3(a)(5) provides:

[I]n the event a party is not represented by an attorney, the mediator should explain: (1) That the parties are free to consult legal counsel at any time and are encouraged to have any settlement agreement resulting from the mediation process reviewed by counsel before they sign it; and, (2) That a mediated agreement, once signed, is binding and can have a significant effect upon the rights of the parties and upon the status of the case.

Iowa mediation rules require that mediators give the following warning to unrepresented parties:

## 2. Consent Requirements

There is much less emphasis in the regulations on consent than on disclosure. Many states require parties to sign agreements indicating their consent to enter into the mediation process.<sup>126</sup> The content of consent forms varies. On some forms the parties indicate that the required disclosures were made by the mediator before they began to mediate,<sup>127</sup> or that they have been advised of their rights and obligations.<sup>128</sup> Other consent forms specifically state that parties know that

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### WARNING

Without review and advice by your own independent legal counsel, you may be giving up legal rights to which you are entitled, or running certain risks of which you are not aware, with respect to the following types of issues:

- (1) Real and personal property division.
- (2) Income tax consequences resulting from an agreement regarding division of property, alimony, or child support.
- (3) Accurate documenting and recording of conveyances and proper title to real estate or personal property.
- (4) Alimony.
- (5) Child custody, visitation and support.
- (6) Court costs and attorney fees.
- (7) Subsequent modifications and substantial changes in circumstances.
- (8) Court disapproval of any submitted agreement which is contrary to the parties', or an affected child's legal rights.

The above is not a complete list of legal rights and is not meant to be. There may be other considerations unique to the circumstances of your individual case. You should consult a lawyer for advice.

*Id.* See also IOWA R. GOVERNING STANDARDS OF PRAC. FOR LAW. MEDIATORS IN FAM. DISP. 6 (effective February 1987); DEL. CT. R. CIV. PRO. 16.2(I) (1996); NATIONAL STANDARDS, *supra* note 118, Rule 1.4 (urging courts to provide that "pro se litigants make informed choices about mediation").

126 *E.g.*, Michigan, letter from Douglas A. Van Epps, J.D., Director of Community Dispute Resolution Program (Apr. 4, 1998) (form on file with author); Nebraska, letter from Kathleen Severns, Director, Office of Dispute Resolution (Apr. 1998) (form on file with author); Oklahoma, letter from Sue Darst Tate, ADR System Dir., (Apr. 29, 1998) (consent form on file with the author); Nevada, e-mail from Phil Bushard, D.P.A. Mediator, Family Mediation Program, Second Judicial District Court, Nevada (parties read and sign groundrules for mediation) (copy on file with author). For a sample of an agreement to mediate in community context, see Thomas Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 Ky. L.J. 855 (1993).

127 In Georgia, parties sign a waiver statement. Telephone Interview with Ansley Boyd Barton, Director of the Georgia Office of Dispute Resolution (April 1998).

128 See, *e.g.*, DEL. R. OF CT., SUPER. CT. R. OF CIV. P., Interim Rule 16.2, VOLUNTARY MEDIATION (d) (1996). Regarding written consent to mediation, the rule state:

Prior to the commencement of the mediation conference, the disputing parties shall enter into a written consent which specifies the methods by which the parties shall attempt to resolve the issues in dispute. The written consent

the mediator has no duty to inform them of their legal rights,<sup>129</sup> or that they understand the confidentiality of the process.<sup>130</sup> When an agreement is reached in mediation, some states require that the parties and their attorneys sign a writing.<sup>131</sup>

Consent provisions are also covered indirectly through general prohibitions against mediator coercion.<sup>132</sup> Finally, mandatory mediation programs generally ignore any requirements for consent and specify some form of good faith participation.<sup>133</sup>

### 3. Remedies for Violation of Disclosure and Consent Requirements

What are the consequences of violating the norms surrounding informed consent? The issue of remedies is complicated by at least

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form shall include the following: (1) The rights and obligations of parties to the mediation; and (2) The confidentiality of the conference. The written consent shall be signed by the parties, their counsel, and the mediator.

*Id.*

129 See, e.g., MINN. STAT. ANN. § 572.35(1) (West 1988) (“A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights . . .”).

130 E.g., Kansas, KAN. SUP. CT. R. OF MEDIATION 901(b)(1); New Jersey, Mercer County Custody Mediation Program (form on file with author); New Mexico, letter from Victoria B. Garcia, Esq., Director, Court Alternatives (June 16, 1998) (form on file with author). See Philip J. Ritter, *ADR: What About Confidentiality?*, 51 TEX. B.J. 26, 27 (1980) (“Most [ADR] centers . . . require that each party sign an agreement or waiver. These agreements usually provide that disputants will protect the confidentiality of the [ADR] process . . .”).

131 E.g., FLA. R. CIV. P. 1.730(b).

132 E.g., IND. R. ALT. DISP. RESOL. 7.5(a); TENN. SUP. CT. R. 31, APP. A(5)(b); MISS. R. OF CT., PILOT MEDIATION PROGRAM IN CH., CIR., AND COUNTY CTS., § 9(b) (West 1997); UTAH R. OF CT.-ANNEXED ALTERNATIVE DISP. RESOL. 104, CODE OF ETHICS FOR ADR PROVIDERS, Canon VIII(a) (Process and Terms of Settlement in Mediation) (West 1998). See also MOORE, *supra* note 10, at 300 (“At no time should a mediator coerce the parties into an agreement.”) (citing CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS).

133 See, e.g., ME. REV. STAT. ANN. tit. 19 §§ 214, 518 (West 1997); ME. CODE PROF. RESP. 3.4 (H)(1); KAN. STAT. ANN. § 72-5430(c)(4) (1980); WASH. REV. CODE § 59.20-080(2). See generally ROGERS & McEWEN, *supra* note 81, § 7:04; Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation*, 43 A.L.R. 5th 545 (1996). The National Standards for Court-Connected Mediation Programs caution that courts may require parties to participate in mediation only when “they provide clear and complete information about the precise process and procedures being required.” This includes information that “they are not required to make offers and concessions or to settle.” NATIONAL STANDARDS, *supra* note 118, R. 11.2.

two factors. First, many states provide for mediator immunity unless there has been willful mediator misconduct.<sup>134</sup> Second, there is no generally recognized tort for mediator malpractice.<sup>135</sup> Thus, the legal remedies for violation of disclosure and consent requirements are limited in most states to procedural mechanisms such as removal from approved lists of mediators<sup>136</sup> or decertification.<sup>137</sup> While criminal penalties may result from unlawful disclosure of confidential mediation information,<sup>138</sup> few penalties exist for the mediator's failure to give required disclosures.<sup>139</sup>

### C. *Practices and Policies for Disclosure and Consent*

#### I. Disclosure and Consent

In general, disclosure and consent practices in mediation are understudied. Disclosure of basic process information, including confidentiality rules, is typically carried out by the mediator in her opening statement. This is supplemented in some states with premediation disclosure through brochures that may be sent to parties in advance, or

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134 See, e.g., COLO. REV. STAT. § 13-22-306 (1991). See generally ROGERS & MCEWEN, *supra* note 81, at § 11:03.

135 See ROGERS & MCEWEN, *supra* note 81, at § 11:03.

136 See, e.g., Ledgerwood, *supra* note 117, at 353 (reporting that in the St. Louis County Program, noncompliance with the requirements, including duty to assure informed consent, "may result in removal from the court approved list of mediators."). The National Standards for Court-Connected Mediation Programs recommend continued monitoring with possible removal from mediation roster. See NATIONAL STANDARDS, *supra* note 118, Rule 6.6.

137 See, e.g., VA. COMPLAINT PROC. FOR MEDIATORS CERTIFIED TO RECEIVE CT.-REFERRED CASES (March 1997) (copy on file with the author). See generally ROGERS & MCEWEN, *supra* note 81, at § 11:04.

138 See ALA. CODE § 24-8-12(a) (1992) (disclosure of information from conciliation hearings in housing disputes is a misdemeanor); 42 U.S.C § 2000g-2 (1994) (stating that in mediation conducted under the auspices of the U.S. Community Services Mediation, unlawful disclosure of mediation information results in criminal liability).

139 The Minnesota Civil Mediation Act permits the imposition of criminal liability on a mediator for failing to provide parties with a written statement of "educational background and relevant training and experience in the field." MINN. STAT. § 572. 37 (1996). A Virginia statute permits a mediated agreement to be vacated where specific disclosures were not made. See VA. CODE ANN. § 8.01-576.12 (Michie 1993) (permitting courts to vacate mediated agreement where neutral failed to inform parties in writing at the commencement of the mediation process that: "(i) the neutral does not provide legal advice, (ii) any mediated agreement will affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so").

made available in mediation centers and court programs<sup>140</sup> or through videos describing the mediation process.<sup>141</sup> We know very little about what is permitted to count as informed consent and whether parties understand disclosures that have been made. Studies are conflicting. Some show that judges use subtle coercion to provide the air of consent without actually obtaining it from unrepresented parties.<sup>142</sup> Others show greater party understanding and satisfaction with the mediation process.<sup>143</sup>

## 2. Mediator's Influence on the Consent Process by Information Control

In mediated negotiations, the mediator has considerable control over the flow of information generated during bargaining, and this may have subtle effects on the consent process. Whenever a mediator assists parties by identifying and reframing the issues in a dispute, she may influence the result of the mediation and the authenticity of the parties' self-determination.<sup>144</sup> Each interjection by a mediator during

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140 Telephone Interview with Arlene Richardson, Assistant Director of ADR programs in Alabama (June 2, 1998); Virginia has a brochure, *Mediation: A Consumer Guide*, that is distributed to parties (copy on file with the author).

141 The procedures used in Utah represent a good example of premediation disclosure through the use of an ADR video. Utah has a voluntary court-annexed alternative dispute resolution program. Civil cases in specified districts courts are automatically referred to the ADR program. When a complaint is filed, the court clerk notifies the parties of the referral and they may then choose from the available options, one of which is mediation. The court brochure states that parties are asked to "make an informed choice." To assist in this decisionmaking process, parties and their counsel are required to watch a short video entitled, *ADR: A Different Choice*. The film explains mediation and nonbinding arbitration. Parties who choose not to pursue ADR after watching the video sign a statement that they have reviewed the videotape and discussed ADR with their counsel and have decided to defer use of ADR (copy of brochure on file with author).

142 See Munroe, *supra* note 115.

143 See Charlene E. Depner et al., *Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Models*, 32 FAM. & CONCILIATION CTS. REV. 306, 310 (1994) (reporting that parties in mandatory court-connected custody mediation program believed that procedures were described clearly).

144 Scholars refer to this process as "selective facilitation." David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC. REV. 613 (1989). Professor James Stark notes that this is similar to the problem of "pigeonholing" in legal interviewing:

The mediator leads the discussion in certain directions but not others, facilitates the examination of particular subjects but not others—a consequence of poor listening or deficient imagination or some bias, perhaps unconscious, on the mediator's part. . . . In such cases, the mediator's selective



the mediation process affects how the parties interact with each other and the direction of their negotiations.<sup>145</sup>

The mediator's control over the information flow increases when she meets privately with parties in a caucus.<sup>146</sup> The mediator decides what information to solicit in caucus and then how much of that information to reveal to the opposing party. In this filtering process, she may select only the information that, in her judgment, will lead to settlement.<sup>147</sup> Alternatively, a mediator may learn of a settlement offer in caucus, but not transmit it too early in the process for fear that it will not be accepted by the other party.<sup>148</sup> Information filtering continues throughout the mediation process<sup>149</sup> and gives the mediator significant information control both in the general session and in the caucus. This may subtly affect the parties' exercise of self-determination and their ultimate consent to any agreement reached in mediation.<sup>150</sup>

#### D. Challenges in Court to Mediation Settlement Agreements

A thin but growing jurisprudence of "mediation" informed consent lurks in the interstices of contract law as unsatisfied litigants attempt to set aside their mediated settlement agreements, alleging

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facilitation creates a risk not just of inefficient service, but of biased, weak and deficient agreements.

Stark, *supra* note 105, at 481.

145 See Angela Garcia, *The Problematics of Representation in Community Mediation Hearings: Implications for Mediation Practice*, 22 J. SOC. & SOC. WELFARE 23, 26 (1995). Garcia describes an empirical study of three ways in which mediators represent what parties say: first, mediators may represent a disputant by rephrasing or repeating; second, they make statements consistent with the disputants' position but go beyond rephrasing; and third, mediators "may create their own arguments;" thus, mediators have a "subtle influence over the outcome of the process." See also Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISP. RESOL. 141.

146 A caucus is a private meeting with one of the parties and the mediator. See JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 107-12 (1987). For a discussion of how the caucus presents several opportunities for mediators to engage in deceptive behavior, see John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997).

147 This is true even though many standards caution mediators against simply pushing for settlement. See, e.g., NATIONAL STANDARDS, *supra* note 118, Rule 11.

148 If mediators conduct the mediation session in joint session, there is less opportunity for mediators to manipulate information.

149 See Stark, *supra* note 105, at 481 ("Mediators sometimes withhold or manipulate information because it works in achieving settlement.").

150 See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325-26 (1994) (stating that a critical source of power for mediators is to respond to parties' disparate information); see also Moffitt, *supra* note 108.

various failures of disclosure and impediments to consent.<sup>151</sup> Courts typically treat the issue of enforceability under general principles of contract law and “mediation-inspired”<sup>152</sup> agreements are treated like other settlement agreements.<sup>153</sup> The defenses available in contract—fraud, duress, undue influence, and unconscionability—are equally available in mediation.<sup>154</sup> However, in those states that have enacted

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151 Some states specifically provide for the enforcement of agreements reached in mediation. *See, e.g.* GA. CODE ANN. § 45-19-32 (1997); HAW. REV. STAT. § 378-5(I) (1997); IND. CODE § 22-9-1-6(p) (1997); KY. REV. STAT. ANN § 344.610 (Michie 1997). The extent to which courts should intervene in informed consent cases raises important questions for future examination. First, should court intervention be based on the substance of the mediation with a higher standard of scrutiny applied where important rights are involved? Some states, for example, require court review of divorce mediation agreements. *E.g.*, ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1997); MO. R. CIV. P. 88.06; MONT. CODE ANN. § 40-4-305 (WEST 1997); N.D. CENT. CODE § 14-09.1-07 (1991); OR. REV. STAT. ANN. § 107.765 (1997); WASH. REV. CODE ANN. § 26.09.015 (West 1986 & Supp. 1997); WIS. STAT. ANN. § 767.11(12) (West 1993). Second, should there be a higher standard for review of mediated agreements than for regular settlement contracts?

152 *See Cary v. Cary*, 894 S.W.2d 111, 112 (Tex. Ct. App. 1995) (court refused to uphold judgment resulting from court-ordered mediation where one party withdrew consent).

153 *See Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1083–84 (8th Cir. 1997) (upholding settlement agreement where parties arrived at settlement unaware that judge handed down summary judgment motion); *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. Ct. App. 1996) (finding mediated child custody agreement enforceable and remanded for trial after one party withdrew consent); *Martin v. Black*, 909 S.W.2d 192, 194 (Tex. Ct. App. 1995) (reversing judgment enforcing mediated settlement where fact issue existed on one party's intent to be bound and that party requested a jury trial on that fact issue); *In re Marriage of Ames*, 860 S.W.2d 590, 591 (Tex. Ct. App. 1993) (court upheld mediated divorce settlement despite one party's withdrawal of consent but remanded for inconsistencies with trial court judgment); *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36 (Va. 1995) (enforcing settlement of legal malpractice claim where plaintiff objectively manifested intent to settle).

154 A related group of “consent” cases challenges consent on technical or procedural insufficiencies. *See Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So.2d 515 (Fla. Dist. Ct. App. 1994) (holding that settlement agreement reached during mediation was not binding in the absence of one party's signature); *Jordan v. Adventist Health System/Sunbelt*, 656 So.2d 200 (Fla. Dist. Ct. App. 1995) (enforcing agreement signed by parties but not by lawyers as required by Florida Rules of Civil Procedure), *rev. denied*, 663 So. 2d 630 (Fla. 1995); *Singer v. Singer*, 652 So.2d 454 (Fla. Dist. Ct. App. 1995) (enforcing mediated agreement that had been incorporated into the final judgment despite provisions in the agreement for the later preparation of a more formal document), *appeal after remand*, 706 So.2d 914 (Fla. Dist. Ct. App. 1998); *Graves v. Graves*, 649 So.2d 284 (Fla. Dist. Ct. App. 1995) (holding that orally announced mediation agreement that was not reduced to writing and filed with the court was not enforceable); *Stempel v. Stempel*, 633 So.2d 26 (Fla. Dist. Ct. App. 1994) (upholding “bare bones” mediation agreement, supplying missing terms), *cause*

statutes treating mediation settlement agreements differently from ordinary settlement agreements,<sup>155</sup> courts follow a modified contract law approach.<sup>156</sup>

Cases alleging consent deficiencies in mediated agreements include claims of intimidation,<sup>157</sup> coercion,<sup>158</sup> withholding of information,<sup>159</sup> misrepresentation,<sup>160</sup> and undue influence by either the mediator, opposing parties, opposing counsel, or the parties' own attorneys.<sup>161</sup> Allegations of insufficient disclosures by attorneys,<sup>162</sup> mediators,<sup>163</sup> and opposing parties<sup>164</sup> are claimed as the basis of lack of real consent. Courts have been particularly sensitive to the claims of unrepresented parties.<sup>165</sup>

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*dismissed*, 639 So.2d 982 (Fla. 1994); *Burckhard v. Del Monte Corp.*, 56 Cal. Rptr. 2d 569 (Cal. Ct. App. 1996) (reversing decision enforcing settlement agreement signed by attorneys rather than the parties themselves).

155 See *ROGERS & McEWEN*, *supra* note 81, at § 4:13 nn.26-41.

156 See, e.g., *Haghighi v. Russian-American Broad. Co.*, 945 F. Supp. 1233 (D. Minn. 1996) (enforcing mediation settlement agreement that failed to state it was binding despite MINN. STAT. § 572.35), *certified question answered by* 577 N.W.2d 927 (Minn. 1998).

157 See *Murphy v. Padilla*, 49 Cal. Rptr. 2d 722 (Cal. Ct. App. 1996) (refusing to enforce oral agreement made by attorneys in mediation).

158 See, e.g., *McEnany v. West Delaware County Community Sch. Dist.*, 844 F. Supp. 523 (N.D. Iowa 1994) (enforcing mediated settlement where plaintiff consented for attorney to enter into settlement on her behalf).

159 See *Alvarez v. Reiser*, 958 S.W.2d 232 (Tex. Ct. App. 1997) (enforcing mediated settlement agreement where wife tried to withdraw consent because she was unaware of her husband's increase in retirement and 401K plans).

160 See *Hur v. City of Mesquite*, 893 S.W.2d 227 (Tex. Ct. App. 1995) (involving an agreement based on false information and misrepresentation of authority).

161 See, e.g., *McKinlay v. McKinlay*, 648 So.2d 806 (Fla. Dist. Ct. App. 1995) (holding that wife who asked court not to enforce mediated settlement agreement based on duress or intimidation could not assert privilege for matters concerning mediation communications to prevent mediator from testifying).

162 See *In re Marriage of Banks*, 887 S.W.2d 160 (Tex. Ct. App. 1994) (enforcing mediated settlement agreement although wife sought to repudiate divorce mediation agreement claiming *inter alia*: (1) her attorney did not advise her regarding reimbursement law; (2) she felt she had no right to refuse to sign the settlement agreement; (3) she was induced to sign the agreement by duress or fraud).

163 See *Wright v. Brockett*, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991) (involving claim by unrepresented tenant that mediator did not inform her of her legal rights).

164 See, e.g., *Alvarez*, 958 S.W.2d at 232.

165 See *Wright*, 571 N.Y.S.2d at 662, 664. This case arose under a New York statute which treats mediation agreements as an arbitration award. The Wrights filed suit to have the court order Brockett out of her apartment in their building. They sought enforcement of a mediated agreement, whereby Brockett agreed to vacate the apartment. She subsequently refused to do so, arguing *inter alia* that (1) she agreed to vacate only because the "situation at the apartment was so unpleasant;" (2) she was

A second category of failed consent cases are principal/agent situations where an agent, typically an attorney, participated in the mediation instead of the principal.<sup>166</sup> Under traditional agency analysis, a principal is bound by the acts of the agent acting within the scope of her authority.<sup>167</sup> The courts, however, have not been consistent in applying agency analysis to cases involving contested mediation agreements.<sup>168</sup> Some courts have upheld mediated settlement agreements made by attorneys on behalf of their clients, based on traditional agency analysis,<sup>169</sup> while others require direct participation by the parties.<sup>170</sup>

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not represented by counsel during the mediation; (3) the mediator did not advise her of her rights. The court noted that the parties did not sign a consent to arbitrate and that the form they did sign did not "advise unrepresented parties that their agreement to mediate their dispute would be treated as though it were a legally enforceable arbitration award." The court was troubled by the agreement because it was unclear as to whether it had been made under duress and thus denied the motion to enforce the agreement. *See also Cafferata v. Peysers*, 597 A.2d 1101 (N.J. Super. Ct. App. Div. 1991) (holding that medical malpractice action was not barred by reason of parties' pro se settlement of related claim in mediation-type proceedings); *cf. Fischer v. Heck*, 675 A.2d 254 (N.J. Super. Ct. Law Div. 1996) (holding that tenant's complaint against landlord for return of security deposit not barred by settlement of related claims).

166 *See Banks*, 887 S.W.2d at 160.

167 *See* RESTATEMENT (SECOND) OF AGENCY: LIABILITY BASED UPON AGENCY PRINCIPLES § 140 cmt. a (1958).

168 In *Kaiser Foundation Health Plan v. Doe*, the court upheld a lawyer-controlled mediation agreement based on agency theory. *Kaiser Found. Health Plan v. Doe* 903 P.2d 375, 378 (Or. Ct. App. 1995), *opinion modified on reconsideration*, 908 P.2d 850 (Or. Ct. App. 1996), *review denied*, 927 P.2d 600 (Or. 1996). One of the problems with some attorneys' behavior in mediation is the lack of a meaningful informed consent doctrine to govern the lawyer-client relationship. *Cf. Carr v. Runyan*, 89 F.3d 327 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 962 (1997) (applying agency theory and apparent authority where mother sent daughter to represent her in mediation).

169 *E.g., Carr*, 89 F.3d at 327 (upholding a settlement agreement when a daughter acted as agent for mother); *Kaiser*, 903 P.2d at 375; *Koval v. Simon-Telelect, Inc.*, 693 N.E.2d 1299 (Ind. 1998) (holding that attorney has inherent power to settle claim when attorney attends settlement procedure governed by Rules for Alternative Dispute Resolution (ADR) if parties are directed or agree to appear by authorized representatives); *Scott v. Randle*, 697 N.E.2d 60 (Ind. Ct. App. 1998) (enforcing settlement agreement where attorney had actual and apparent authority to settle but had not obtained consent of each client).

170 *See* *Murphy v. Padilla*, 49 Cal. Rptr. 2d 722, 727-28 (Cal. Ct. App. 1996). The court's language is significant:

The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing

Mediation consent cases have also arisen in connection with mandatory, court-ordered mediation programs.<sup>171</sup> Consent is usually a nonissue as statutes and court rules typically require attendance and more often, "good faith participation."<sup>172</sup> Courts have imposed sanctions for failure to attend mediation<sup>173</sup> but have not required that parties reach a settlement in mediation.<sup>174</sup>

### *E. What Is Missing from the Current Landscape?*

The current mediation landscape does not yet include a working principle of informed consent. While scholars have acknowledged the importance of the idea of informed consent in promoting fairness, the practice of informed consent falls short of this ideal. Regulations support the concept of informed consent through disclosure and consent requirements but show little appreciation of their constitutive elements. Process information is typically privileged over outcome information. The parties' understanding of disclosures is too often assumed.

#### 1. Inadequacy of Disclosure and Consent

Disclosure provisions are generally limited to information about the mediation process, i.e., duties of the mediator, rules of confidentiality, costs, and conflict of interest. Little attention has been focused

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upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement.

*Id.* (quoting *Levy v. Superior Ct.*, 896 P.2d 171, 175 (Cal. 1995)).

171 See *ROGERS & MCEWEN*, *supra* note 81.

172 See, e.g., IND. CODE ANN., tit. 34, Rules for ADR, Rule 2.1 (West 1996) (requiring parties to mediate in good faith but not requiring them to settle); see also English, *supra* note 133; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993).

173 See *Triad Mack Sales & Serv., Inc. v. Clement Bros. Co.*, 438 S.E.2d 485, 488 (N.C. Ct. App. 1994) (affirming default judgment for failure to attend court-ordered mediated settlement conference).

174 See *Decker v. Lindsay*, 824 S.W.2d 247, 251 (Tex. Ct. App. 1992) (upholding mandatory referral to an ADR procedure but not mandatory settlement); see also *State v. Carter*, 658 N.E.2d 618 (Ind. Ct. App. 1995). In this case the court made it clear that there are other goals in mediation besides settlement:

Settlement of the whole case is not the only goal of mediation; 'agreement' is another goal, whether it be a factual stipulation, an agreement to forego jury trial in favor of binding arbitration, an identification of issues, a reduction of misunderstandings, a clarification of priorities, or a location of points of agreement. Thus, even where the odds of resolution are slim, mediation can be beneficial because other goals might be achieved.

*Id.* at 623.

on the kind of information that promotes informed outcomes. Disclosures about the consensual nature of the mediation process fail to adequately address the various dimensions of the consent process.

The current regulatory structure fails to distinguish the different levels of consent required at each stage of mediation decisionmaking. There is an unstated assumption that consent is a package deal, that consent to enter into the mediation process means consent to continue participation and consent to reaching an agreement. This lumping together of consent is problematic. Moreover, it ignores the possibility that informed consent may include informed refusals to participate in mediation.<sup>175</sup>

## 2. Failure to Account for Understanding

Current disclosure standards fail to emphasize the importance of understanding, a fundamental requirement of self-determination.<sup>176</sup> It matters little if parties are told that mediation is a process of assisted negotiation if they do not understand the continuing consensual nature of mediation, the process of reaching an agreement, and the contents of the agreement itself.<sup>177</sup> Unrepresented parties, in particular, need to understand the full ramifications of a mediated settlement agreement. They need to understand, for example, that a settlement accomplished through mediation might preclude them from bringing a future claim based on the same incident.<sup>178</sup> This type of disclosure

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175 Cf. Elysa Gordon, *Multiculturalism in Medical Decisionmaking: The Notion of Informed Waivers*, 23 FORDHAM URB. L.J. 1321 (1996).

176 Some notable exceptions include: N.C. STANDARDS OF PROF'L CONDUCT, N.C. R. OF CT., R. OF THE N.C. S. CT. FOR THE DISP. RESOL. COMM'N, N.C. STANDARDS OF PROF'L CONDUCT, Standard IV (Adopted May 10, 1996) (providing that the mediator should make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process); ILL. CT. R. AND PROC., REVISED ADMIN. ORDERS OF THE CIR. CT. OF THE 11th JUD. CIR. APP. D., STANDARDS AND PROC. FOR McLEAN COUNTY CT.-REFERRED DIVORCE MEDIATION, Standard XI (providing that the mediator should promote equal understanding by the participants).

177 See Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 SW. U.L. REV. 1317, 1330, n.29 (1992) (stating that understanding is necessary for meaningful informed consent).

178 For example, the elderly woman who agrees in mediation to accept \$100 as settlement for her slip-and-fall injuries should be made aware that any future injuries that arise out of the same accident may not be compensable because of the settlement of this suit in mediation. Language to this effect is contained on the stipulation of settlement form which is signed by parties who successfully mediate disputes in New York City's small claims courts: "Upon such payment all parties shall be released from liability to each other concerning the matters in this dispute." (form on file with the author).

may not produce a high success rate of settlements, but it increases the likelihood of results that are fair and substantially just.

#### IV. TOWARD A THEORY OF INFORMED CONSENT FOR MEDIATION

I now address the central inquiry of this article—what does the principle of informed consent require for disclosure and consent in mediation? The response to this normative question develops the beginning of a framework within which to fashion a usable body of legal rules to guide mediation practice.<sup>179</sup>

I have suggested that the principle of informed consent matters in mediation because it serves the same function as courts in promoting fairness. A robust theory of informed consent requires that parties be educated about mediation before they consent to participate in it, that their continued participation and negotiations be voluntary, and that they understand the outcomes to which they agree. Informed consent serves the values of autonomy, human dignity, and efficiency. It guards against coercion, ignorance, and incapacity that can impede the consensual underpinnings of the mediation process. But to say this is just the beginning of the inquiry. A theory of informed consent for mediation must take into account not only the relationship between the principle of informed consent and the values it serves, but how this principle should operate in the parties' decisionmaking acts, the practices which foster it, and its limitations.

##### A. *Informed Decisionmaking: A Foundational Value*

A principle of informed consent for mediation should focus broadly on the parties' acts of decisionmaking throughout the mediation process.<sup>180</sup> Decisionmaking is the operative concept.<sup>181</sup> The purpose of disclosure is not to engage parties in the mediation process or to commit them to a particular result. Rather, disclosure should assist parties in understanding relevant information and educate them so that they may make informed choices about whether or not to participate in mediation and whether or not to continue their participation

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179 This whole area is complicated by a number of considerations which I will defer until Part V of this Article, for example, whether there is representation of the parties, the place where mediation occurs, and how concerns about neutrality can be accommodated.

180 Such a focus does not privilege the specific act of consenting to participate in the mediation process. Cf. Goldstein, *supra* note 72, at 691 (arguing in the medical context for a focus on decisionmaking without giving bias to consent).

181 A number of mediation scholars emphasize the importance of decisionmaking. See, e.g., Lande, *supra* note 103; Riskin, *supra* note 92; Stulberg, *supra* note 57.

in mediation.<sup>182</sup> Consent to continued participation in mediation is not a *fait accompli* simply because disclosures have been given. In short, disclosure is not simply about informing, but about educating parties toward greater understanding.<sup>183</sup>

Informed consent analysis in mediation has focused on competing views of what values matter:<sup>184</sup> self-determination or informed decisionmaking, neutrality or fairness.<sup>185</sup> Discussion then proceeds as to what value trumps the other or how to balance competing goals.<sup>186</sup> In my view, informed decisionmaking should be understood not as a competing value, but as a prerequisite for the exercise of self-determination.<sup>187</sup> When parties understand what they are doing in the mediation process and what they are not doing, when they understand what their agreements mean and what legal entitlements they may have waived in making such agreements, then they may be said to have truly exercised self-determination.

### B. *Decisionmaking Models in Mediation*

Informed consent is the vehicle through which autonomy and self-determination are measured in mediation. These values do not operate in a vacuum but become operative throughout the parties' acts of decisionmaking, as well as in the final agreement. Thus, essential to any discussion of informed consent in mediation is an understanding of mediation decisionmaking.<sup>188</sup> In this section, I sketch

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182 See Lande, *supra* note 103, at 866-79.

183 For an elaboration of this concept in the physician-patient relationship, see ROBERT A. BURT, *TAKING CARE OF STRANGERS* 124-43 (1979) (calling for increased conversation as part of an informed consent doctrine).

184 Similar value debates have also occurred in the legal and medical professions. In medicine, the debate has been patient autonomy versus health-related values. See APPELBAUM ET AL., *supra* note 25, at 130-48. In law, it has been client-versus-lawyer autonomy. See *infra* notes 54-56 and accompanying text.

185 See, e.g., NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 137-48 (1987).

186 See, e.g., Margaret L. Shaw, *Does a Mediator Have an Affirmative Duty To Assure That Consent To Settle Is Truly Informed?*, 1998 A.B.A. SEC. DISP. RESOL. ("At the heart of what we are trying to do when we examine our responsibility for claims or defenses not raised by parties or their counsel is to balance the goals in mediation of self-determination and informed decisionmaking."); see also Bush, *supra* note 13; Stark, *supra* note 80.

187 See Nolan-Haley, *Court Mediation*, *supra* note 16, at 47.

188 I note here the valuable contribution of Professor Leonard Riskin's work on mediator orientations in which he presents a conceptual model for understanding the kinds of problems brought to mediation and the role of mediators in working with them. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). My lens,



four models of decisionmaking that are based on differing relationships that can exist between mediators and disputing parties. Unlike other mediation models described in the empirical and theoretical literature,<sup>189</sup> my focus is not with the mediators' but with the disputants' behavior.<sup>190</sup> My purpose in this section<sup>191</sup> is neither to evaluate nor to recommend, but to explain how parties exercise autonomy and self-determination in mediation in order to elaborate a theory of informed consent that accommodates the realities of practice.<sup>192</sup> The principle of informed consent does not depend for its vitality on any particular practice model but must be operationalized in all decision-making models.

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however, is different. I focus on the parties to the dispute and on their exercise of autonomy in decisionmaking rather than on activity by the mediator.

189 A number of mediation models and styles have been identified in the theoretical and empirical literature. See, e.g., ROBERT A. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (describing transformative mediation); DEBORAH KOLB, *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994) (describing range of mediator practices); JOHN PAUL LEDERACH, *PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES* (1995) (describing prescriptive and elective mediation training models); Alfini, *supra* note 66; Jeanne M. Brett et al., *Mediator Style and Mediation Effectiveness*, 2 NEGOTIATION J. 277 (1986) (describing shuttle diplomacy and deal-making); Freshman, *supra* note 107 (community enhancing model); Kenneth Kressel et al., *The Settlement-Oriented vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53 (interest-based and rights-based model); Riskin, *supra* note 188; Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 J.L. & POL'Y 7 (1986) (describing bargaining and a therapeutic style of mediation); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723 (1996) (describing norm-generating, norm-educating and norm-advocating models); Waldman, *Social Norms*, *supra* note 106. See generally Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217 (1995).

190 Although much has been written on the variety of mediator styles, there is less understanding on how these styles affect the interchange between disputing parties and the mediator.

191 See *infra* Part V where I suggest using an informative decisionmaking model for unrepresented parties in mandatory court mediation.

192 In constructing these models, I have adapted the work of Ezekiel and Linda Emanuel whose comprehensive research in bioethics has informed much of the current informed consent discussion in clinical medical practice. Noting the struggle in the medical profession over the patient's role in decisionmaking, these authors responded to the question of what should be the ideal relationship between physician and patient and identified several decisionmaking models. See Emmanuel & Emmanuel, *supra* note 29. In this Article, I collapse their *interpretive* into the *informative* model. See *infra* note 197 and accompanying text.

## 1. Four Models of Autonomy

The exercise of autonomy in mediation may be understood through four models of mediator-party relationships: paternalistic, instrumentalist, informative, and deliberative.<sup>193</sup> These relationships determine the kind of autonomous decisionmaking that occurs.<sup>194</sup>

In the *paternalistic* or “dictated autonomy” model, the mediator acts primarily as the parties’ surrogate in assessing what outcome might be best. The parties’ decisionmaking is supported by the mediator’s presentation of selected information as well as by the mediator’s explicit opinion of what should be done.<sup>195</sup> Autonomy is exercised not only by the parties’ agreement to mediate, but by their concurrence in the mediator’s determination of what is best.

In the *instrumentalist* or “limited autonomy” model, the parties’ objective is simply to reach settlement. Their decisionmaking is strongly influenced by the mediator’s presentation of selected information to each party to close the deal. The mediator highlights risks over any other kind of information—“You never know how the judge will rule.”<sup>196</sup> The presumption is that taking the offer would signal that the case would be over. Autonomy is primarily exercised by the parties’ agreement to mediate because the mediator exercises subtle influence to close the deal to reach agreement.

In the *informative* or “assisted autonomy” model, the mediator acts as an information conduit, providing parties with information that is relevant to their needs and interests.<sup>197</sup> Receiving this technical expertise gives parties the means to exercise control. The mediator also assists parties in exploring individual values and in selecting outcome options that realize those values. The parties make the ulti-

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193 Several mediation models described in the theoretical and empirical literature may fit different parts of the decisionmaking models which I describe. In this Article, however, I deliberately do not try to match my descriptions with existing models. As with the physician-patient models described by the Emmanuels, these models do not reflect reality but are “Weberian ideal types.” Emmanuel & Emmanuel, *supra* note 29, at 2221. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947).

194 Although these models reflect styles that can be combined, they are each distinguishable.

195 Unrepresented parties would be most vulnerable under the paternalistic model.

196 The Emmanuels refuse to elaborate on the instrumentalist model, associating it with morally objectionable cases. See Emmanuel & Emmanuel, *supra* note 29, at 2222. My purpose in using it is purely descriptive. For a description of instrumentalism, see Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1692 (1997).

197 This may include information related to both legal and nonlegal interests and to the parties’ sense of fairness and justice.

mate decision about what values matter and what outcome should be pursued. Decisionmaking is influenced by the factual and substantive information given by the mediator, and autonomy is maximized through the parties' use of information to control ultimate decisionmaking.

Finally, in the *deliberative* or "reflective autonomy" model,<sup>198</sup> the mediator provides parties with the same factual and legal information described in the *informative* model but also helps the parties understand, articulate, and finally, choose the values that should govern their ultimate choices. Disputing parties are encouraged not simply to examine personal preferences, but to consider—through consultative processes, deliberation, and dialogue—alternative choices, their worthiness, and their implications for settlement. Decisionmaking is influenced by activist mediator behavior in helping parties expand appreciation of values and then choose the values that are important in resolving their disputes. The mediator engages in moral deliberation and helps the parties prioritize preferences. Coercion is avoided. Autonomy is expressed in self-understanding and moral self-development. Disputing parties come to know more clearly who they are and how the various outcome options affect their knowledge of self and their identity.

These models offer competing conceptions of autonomous decisionmaking and may operate in all the disparate conditions in which mediation occurs: with represented and unrepresented parties, in voluntary or mandatory, private or court-connected mediation programs.<sup>199</sup> A robust theory of informed consent must accommodate the reality of these different decisionmaking models, and the elements of disclosure and consent that I discuss in the following section must be operationalized within all of them.

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198 There is a rich literature that calls for greater deliberation in client counseling. See, e.g., Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256 (1992); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996); Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990).

199 Skilled mediation advocates would be able to help their clients make choices about an appropriate or desirable type of mediator-party relationship. Unrepresented parties generally lack this ability. See *infra* notes 271–87 and accompanying text (discussing the mediator's disclosure duties with respect to unrepresented parties).

### C. *Disclosure and Consent Standards in Mediation*

The principle of informed consent in mediation honors the values of autonomy, human dignity, and efficiency. What do these values imply about the kind of information that should be disclosed to parties in mediation in order to achieve good consent? Informed decisionmaking and the exercise of self-determination in mediation presupposes capacity to choose and knowledge to make choices.<sup>200</sup> Several commentators have considered the factors that affect whether consent in mediation is voluntary and educated: the extent to which there are time pressures, coercion, information gaps, incapacity, language barriers, power imbalances, and the ability of parties to reject proposals.<sup>201</sup> In the following section, my focus will be on the informational aspects of consent.

#### 1. Elements of Disclosure

Knowledge is a critical source of power in negotiations<sup>202</sup> and the key component that distinguishes “raw” from “informed” consent in mediated negotiations. The issue of disclosure raises some of the most troublesome questions affecting the mediation profession today. What kind of disclosure is needed for good decisionmaking? What is the appropriate scope of disclosure? How should it be effectuated? Who is the agent of disclosure? What is the role of law?

There are two aspects of disclosure in mediation. The first relates to information that parties should have before making an educated decision about whether or not to enter into the mediation process. I will call this information “participation disclosure.” The second aspect of disclosure relates to the information parties need in order to reach an informed and fair outcome. I will call this information “outcome disclosure.”

The information contained in “participation disclosure” should inform parties about the nature and purpose of the mediation process. It should promote their general understanding of how media-

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200 In this Article, I include information as part of knowledge.

201 See, e.g., Boskey, *supra* note 114, at 370 (ability to reject proposals); Bush, *supra* note 13 (describing power imbalance); Lande, *supra* note 103, at 866–79, 898 (listing seven factors that may be used to form a continuum of quality of consent in mediation); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & Soc’y Rev. 11 (1984) (ability to reject proposals).

202 See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 257 (1986); cf. DAVID SADOFSKY, *KNOWLEDGE AS POWER: POLITICAL AND LEGAL CONTROL OF INFORMATION* (1990).

tion differs from adjudication, the mediator's role and how it differs from that of an arbitrator or judge,<sup>203</sup> the specific norms that will govern the procedural aspects of the process,<sup>204</sup> and the rules governing consent.

"Outcome disclosure" requires that parties have a general understanding of the relevant facts and understand their own interests and values.<sup>205</sup> I am not suggesting that the level of factual detail be as great as what might be achieved through the discovery process,<sup>206</sup> but it should be reasonably sufficient for the parties to make agreements based on sound judgment. "Outcome disclosure" also requires information about relevant legal and social norms. The location where mediation occurs determines the context of such disclosures.<sup>207</sup>

Many commentators have argued for greater disclosure requirements.<sup>208</sup> More disclosure will not guarantee that parties will actually

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203 Implicit in any discussion of the mediator's role is an explanation of either the kinds of decisionmaking relationships that can exist between parties and the mediator or the individual mediator's view of the decisionmaking relationship between parties and the mediator. The point is that parties need to be able to make knowledgeable choices about the kind of mediation process in which they will participate.

204 This explanation is contextual and depends upon where the mediation occurs. In the informal courts, for example, in addition to explaining the process of mediation, it is important to explain the legal effect of a mediated settlement agreement and what can be done if the agreement is violated. Additionally, in settings where different process options are available, such as mediation and arbitration, parties should understand the differences between these processes.

205 A recent study conducted by the Rand Institute suggests that if a party's informational needs are not met by obtaining the kind of information provided through discovery, that may be an impediment to settlement in mediation. Thus, if cases are referred to mediation before sufficient discovery has been completed, they may not settle. See RAND REPORT, *supra* note 1, at 20.

206 I recognize that such an approach could be used to make mediation as costly and lawyer-dependent as litigation and arbitration. Some court rules, however, do require discovery in mediation. See, e.g., IOWA R. GOVERNING STANDARDS OF PRAC. FOR LAWYER MEDIATORS IN FAM. DISP. 4 ("The mediator shall assure that there is full financial and factual disclosure, such as each would reasonably receive in the discovery process, or that the participants have sufficient information to waive intelligently the right to such disclosure."); KAN. R. RELATING TO MEDIATION 901; *cf.* ILL. R. RELATING TO MEDIATION I.A.2 (mediation should be based on full disclosure of all facts related to the dispute so that a fair and equitable agreement can be reached).

207 In settings such as courts or administrative agencies where legal consequences may attach, parties should have access to information regarding options offered by alternative legal processes or know that they are deliberating without such knowledge.

208 See, e.g., Helm, *supra* note 74, at 70 (1988) (arguing that mediators disclose the risks of confidentiality and possible loss of privacy if mediator has a duty to warn of threats); Imperati, *supra* note 73, at 742-43 (listing nineteen items which mediators should disclose); Lande, *supra* note 103; Moffitt, *supra* note 108 (arguing for disclosure of mediator style). It should be noted that in some mediation programs, parties

use the information<sup>209</sup> or even make reasonable decisions but, coupled with understanding, it should contribute to educated decision-making. There is, however, a danger in disclosure overload. If too much information is lumped under the umbrella of informed consent, then the principle is both too broad and too narrow and is not likely to be helpful. As I discuss in Part V, the challenge, in implementing the principle of informed consent in practice, is to tailor disclosure to the informational needs of the parties.<sup>210</sup>

## 2. Elements of Consent

There is a great deal of muddled thinking about the concept of consent in mediation. Under the prevailing regulatory structure, there is often a subtle assumption that if parties consent to enter into the mediation process, they have also consented to: a) continued participation and negotiations in mediation, b) reaching an agreement in mediation, and c) accepting the outcome that is reached. Each of these processes, however, are separate aspects of mediation decision-making that require consent. Parties must understand this and know that they can walk away from mediation at any time during the process.

Meaningful consent must be voluntary and should be given with an understanding of its attendant consequences.<sup>211</sup> Consent to participate in the mediation process, what I will call "participation consent," has several dimensions. It involves a conscious, knowledgeable decision to enter into the mediation process and to continue participating in mediation through good faith negotiations.<sup>212</sup> This is more

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have disclosure responsibilities towards each other. *See, e.g.,* Nevada, Family Mediation Program in the Family Division, Second Judicial District Court, Washoe County, Mediation Rules: "(3) Disclosure in mediation: Parties are expected to share all information pertinent to the issues in the presence of both parties." (copy on file with author).

209 Even when parties have knowledge of their rights, it does not mean that they will exercise these rights to the detriment of mediation.

210 *See infra* Part V.

211 Professor James Boskey suggests three components to voluntariness: 1) each party must understand that they can walk away from the mediation process, 2) no factual misunderstandings exist that the mediator could have corrected or that the mediator created to force a settlement, 3) the mediator should inform each party if they are wrong about the law governing an issue. *See* Boskey, *supra* note 114, at 370.

212 One of my students in the Fordham Law School Mediation Clinic observed about her experience in Manhattan Small Claims Court that "participation consent" was achieved with little effort:

During my limited mediation experience, I found that for the most part, it was not difficult to get the parties to consent to mediation. The usual hesi-

than a matter of signing a form agreement to mediate. It involves an ongoing commitment to honor the integrity of the mediation process.

"Participation consent" is a fluid concept that develops more fully over time and is strengthened as parties gain trust in the mediator.<sup>213</sup> Trust is an important part of the mediation process and enhances the fiduciary relationship between the mediator and disputing parties.<sup>214</sup> Mediators gain their power from the consent of the disputing parties. To the extent that parties do not trust the mediator, the mediator's influence is weakened<sup>215</sup> and the parties' participation consent is diluted.<sup>216</sup>

Consent to the outcome reached in mediation, what I will call "outcome consent," involves a separate decision to accept the agreement that is reached with an understanding of its content, its consequences, and what options are being waived by such consent. This requires sufficient factual and substantive information. In this sense then, disclosure and consent are linked concepts and, without sufficient disclosures, "outcome consent" is suspect.

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tancy stemmed from either not understanding the process and the fact that they were not obligated to participate in mediation or from a desire on the part of the parties to 'see the judge.' After a bit more of a methodical approach to explaining the process and what their options were, all of the parties readily consented to the mediation process and were willing to proceed.

(copy on file with author).

213 This point is well stated by Suzanne Terry:

This increased trust is gained by the mediator's restatement of issues, correct interpretation of feelings, and maintenance of enough order during the process so that each party feels both freedom for self-expression and sufficient restraint not to exceed limits. As trust grows, the parties may allow the mediator more liberties in exploring substantive issues and emotional responses to the content and steps of the process.

Suzanne Terry, *Conciliation: Responses to the Emotional Content of Disputes*, MEDIATION Q., Summer 1987, at 45. The role of trust in mediation may depend in large measure upon context. In the sometimes chaotic settings of one session mediations that occur in the informal courts, it may be more difficult to establish a trust relationship than in a custody or divorce mediation that may involve several sessions. In general, the role of trust in mediation is understudied and merits further theoretical and empirical research.

214 See William Ross & Jessica LaCroix, *Multiple Meanings of Trust in Negotiation Theory and Research: A Literature Review and Integrative Model*, 7 INT'L J. CONFLICT MGMT. 314, 317 (1996).

215 See Mayer, *supra* note 71.

216 The meaning of trust differs depending upon the relationship between the negotiating parties and the mediator. For an extensive review of the literature on trust in negotiation and mediation, see Ross & LaCroix, *supra* note 214.

#### D. Waiver of Informed Consent Rights

Waiver is an exception to the legal doctrine of informed consent.<sup>217</sup> It is generally defined as a voluntary and intentional relinquishment of a known right.<sup>218</sup> There are two dimensions of waiver in mediation practice. First, parties may waive the disclosure of information related to the mediation process,<sup>219</sup> discovery, and information about their legal rights.<sup>220</sup> The second aspect of waiver relates to legal entitlements. By agreeing to attempt to resolve disputes through the mediation process, parties may, in effect, be waiving their right to seek redress through the formal legal system and the right to receive the benefits of that system.<sup>221</sup> The elements of a valid waiver in mediation require at a minimum that parties know they have a right to certain disclosures, as well as the right to their legal entitlements and to make alternative agreements in mediation.

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217 Other exceptions include therapeutic privilege and emergency situations. See APPELBAUM ET AL., *supra* note 25, at 66–79.

218 See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 836 (3d ed. 1987) (citing 28 AM. JUR. 2d, *Estoppel and Waiver* § 154 (1966)). The elements of a valid waiver in the physician-patient relationship require that patients know they have a right of waiver. Patients must know that physicians have a duty to disclose certain information, that they have the legal right to make decisions about their treatment that cannot be rendered without their consent, and that decisionmaking includes the right to refuse treatment. See APPELBAUM ET AL., *supra* note 25, at 70.

219 See *supra* notes 203–07 and accompanying text.

220 For an excellent discussion of the right not to receive information, see Gordon, *supra* note 175.

221 The stakes could be significant. Consider the case of *Liebeck v. McDonald*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). The defendant declined to settle the case based on the mediator's recommendation of \$225,000, and a jury awarded the plaintiff \$160,000 in compensatory damages. See Elizabeth Sherowski, *Hot Coffee, Cold Cash: Making the Most of Alternative Dispute Resolution in High-Stakes Personal Injury Lawsuits*, 11 OHIO ST. J. ON DISP. RESOL. 521, 522 (1996); see also Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996). Parties may also be unwittingly waiving other rights when they enter into the mediation process. One commentator has suggested that because mediators do not always disclose to parties the limits of confidentiality that they may have a duty to warn parties that they may be waiving privacy rights. See Helm, *supra* note 74, at 69. The question of waiver comes up in different contexts in mediation. Another commentator has suggested that with respect to the issue of conflicts of interest, "mediators face broader conflicts than attorneys representing clients." John Bickerman, *Handling Potential Conflicts in Mediation*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 83 (1996). "[I]n the adversarial context, as a rule, an attorney can never switch sides in a litigation despite the parties' informed consent. Mediation may pose similar non-waivable conflicts that outweigh the parties' preference for a particular mediator." *Id.*



What does the principle of informed consent require for waivers in mediation? As a general proposition, a waiver of rights requires sufficient knowledge, understanding, and voluntariness. Where waivers of constitutional rights are involved, a great deal of understanding and knowledge is required.<sup>222</sup> Likewise, in tort law, where parties enter into exculpatory agreements, substantial disclosure and understanding is necessary, particularly if the parties have minimal education, resources, and/or bargaining power.<sup>223</sup> In mandatory arbitration cases where parties waive the right to participate in a judicial forum, courts require a "knowing and voluntary" waiver.<sup>224</sup>

Under what circumstances should waivers be honored in mediation? Some mediation regulations recognize the right to waive the

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222 See, e.g., *North Carolina v. Butler*, 441 U.S. 369 (1979) (holding that an explicit statement of waiver is not invariably necessary to support a finding that defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver' of fundamental constitutional rights (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) . . . ."); see also Jonathan A. Damon, "Far From a Mere Formalism": *The Importance of Informing an Accused of Her Indictment After Patterson v. Illinois and Harvey v. Michigan*, 23 COLUM. HUM. RTS. L. REV. 93, 130-31 (1991-92).

223 See, e.g., William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U. L. REV. 717 (1988) (arguing against exculpatory clauses in residential leases).

224 Some courts have refused to uphold mandatory arbitration agreements where employees had not knowingly waived their rights. See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 116 S. Ct. 61 (1995) (court reversed order compelling arbitration where employee did not knowingly enter into agreement to arbitrate employment dispute). In the culture of employment arbitration, prospective employees typically sign agreements to arbitrate all disputes that arise in connection with their employment. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990) (enforcing agreement compelling arbitration of all claims arising out of employment when claim against employer was one for violation of the Age Discrimination in Employment Act (ADEA)). Compare *Duffield v. Robertson Stephens & Son*, 144 F.3d 1182 (9th Cir. 1998), cert. denied 119 S.Ct. 445 (1998) (distinguishing post-1991 Title VII claims from the pre-1990 ADEA claims found arbitrable in *Gilmer* and holding that under the Civil Rights Act of 1991, employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court); with *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702 (4th Cir. 1997), judgment vacated 1998 U.S. LEXIS 7270 (Nov. 16, 1998) (holding that union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination must be "clear and unmistakable").

Congress has amended the ADEA to provide that all waivers of rights under the Act must be "knowing and voluntary." Older Workers Benefit Program Act of 1990, 29 U.S.C. § 626(f)(1) (1990). See generally *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1677-79, 1684-85 (1996) (advocating a subjective standard for a knowing waiver in mandatory arbitration).

kind of factual information that might be disclosed through traditional discovery techniques.<sup>225</sup> The American Arbitration Association's Consumer Due Process Protocol for arbitration and mediation permits consumers to waive any of the principles in the Protocol, including fairness, if "they have sufficient specific knowledge and understanding of the rights they are waiving . . . ."<sup>226</sup> Some commentators have suggested, however, that waivers not be permitted where power imbalances are too great,<sup>227</sup> and at least one court has held that the protection of confidentiality afforded to communications made during mediation cannot be waived.<sup>228</sup>

Certainly, permitting parties to waive the right to receive information in mediation is consistent with the values honored by informed consent and respects individual competence to engage in autonomous decisionmaking.<sup>229</sup> Likewise, permitting parties to waive legal entitlements that a court might award them is consistent with the values supported by informed consent. It is questionable, however, whether waivers that affect the normative standard of fairness in mediation should ever be permitted, although I recognize that this may smack of the very paternalism that the principle of informed consent is designed to avoid. Nevertheless, as a matter of public policy there are some waivers that the law does not enforce; I would include in this category waivers which implicate fairness.<sup>230</sup>

## V. INTEGRATING INFORMED CONSENT THEORY AND PRACTICE

How can the principle of informed consent be honored in mediation? Integrating disclosure and consent principles into mediation

225 See, e.g., IOWA R. GOVERNING STANDARDS OF PRAC. FOR LAWYER MEDIATORS IN FAM. DISP. 4(A) (1989).

226 CONSUMER DUE PROCESS PROTOCOL, *supra* note 57, at 36 (identifying specific minimum due process standards that embody the concept of fundamental fairness, including informed consent). See generally Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, 53 DISP. RESOL. J. 8 (1998).

227 See, e.g., Waldman, *Multiple Model Approach*, *supra* note 106, at 740-42 (discussing circumstances under which parties would not be allowed to waive social and legal norms); Stulberg, *Fairness*, *supra* note 57, at 945 (proposing that a uniform mediation statute contain a nonwaivable right to counsel).

228 See *People v. Snyder*, 492 N.Y.S.2d 890, 891-92 (N.Y. Sup. Ct. 1985).

229 See Goldstein, *supra* note 72, at 686.

230 In my view, information about the mediation process is essential to secure consent to participate. Participation disclosure information, therefore, should be nonwaivable unless a person is well-versed in the mediation process. See generally Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (describing three different forms of paternalism in which law does not allow people to waive rights).

practice raises critical questions about the practical possibilities for achieving educated decisionmaking in all the disparate circumstances and conditions under which mediation occurs. Parties come to mediation in courts, community dispute centers, public agencies, and private providers' offices with varying degrees of voluntariness and legal representation. Mediation consumers range from sophisticated, repeat players who are represented by lawyers to illiterate and unrepresented parties. How much disclosure is required in each of these settings and who should provide it? Who should assure that parties understand disclosures and who should determine the legitimacy of their consent?

The trend has been to view the disclosure and consent requirements of informed consent regulations through a one-size-fits-all lens. Regulatory structures typically treat all parties in the same manner.<sup>231</sup> Statutes and court rules catalogue the various kinds of information that must be disclosed and prescribe forms that parties sign as evidence of legitimate "consent."<sup>232</sup> The time has come to move beyond this current monolithic vision of mediation practice and pay more attention to context.<sup>233</sup>

A working theory of informed consent in mediation requires an understanding, not only of the substance of the principle of informed consent, but of the practices that foster it. I suggest a new direction for informed consent practice in mediation. Disclosure and consent requirements should be tailored to the informational needs of individual disputants. What disclosures will enhance this person's ability to understand, define, and decide her dispute? Courts, public agencies, private providers of mediation services, and lawyers who represent parties in mediation all have informed consent responsibilities.<sup>234</sup> My

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231 See *infra* notes 118–33 and accompanying text.

232 See *supra* Section III.B.

233 For a different claim that mediation fails to value context, see McEwen, *supra* note 57, at 1353.

234 One of the overarching challenges for policymakers in developing informed consent protocols is determining the disclosure and consent duties of all who offer mediation services. In this regard, some commendable work has already begun. See NATIONAL STANDARDS, *supra* note 118 (detailing information that courts should provide to judges, court personnel, the bar and parties and their attorneys); DRAFT PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, CPR-GEORGETOWN COMMISSION (Oct. 1998) (proposing "reasonable disclosure of key information about ADR provider organizations"); SPIDR LAW AND PUBLIC POLICY COMMITTEE, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 18 (1991) ("Mandatory participation should be used only when a high quality program . . . provides clarity about the precise procedures that are required."); QUALIFYING NEUTRALS: THE BASIC PRINCIPLES, REPORT OF SPIDR COMMISSION ON

primary concern in this Article, however, is with the mediator's informed consent duties.

### A. *The Mediator's Informed Consent Responsibilities*

In Part I of this Article, I discussed how the legal doctrine of informed consent governs decisionmaking between doctors and patients, and to a lesser extent, between lawyers and clients. In both of these professional relationships we are careful to look at the basis of consent rather than the consent itself because in both cases, the person seeking the consent is a fiduciary of the one asked to give it, and the fiduciary is hired for her specialized knowledge.<sup>235</sup> Mediators, likewise, are fiduciaries. They occupy a position of trust with disputing parties, and it is important that a robust principle of informed consent govern this fiduciary relationship.<sup>236</sup>

The mediator's informed consent duties arise out of the fiduciary relationship established between the mediator and the disputing par-

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QUALIFICATIONS 8 (May 1989) ("programs offering dispute resolution services should disclose their selection criteria"); AAA CONSUMER PROTOCOL, *supra* note 57, at 15, 35-36; *cf.* Guthrie & Levin, *supra* note 1, at 900 (calling for courts to provide premediation education); Kurtzberg & Henikoff, *supra* note 189 (discussing mediation providers' responsibility to provide legal information).

235 These situations are quite different from buying a car, for example, where the buyer is protected only by fraud law, which places a lower burden on the seller than the doctrine of informed consent. In these cases, there is a need for disclosure because a reasonable person would need information and a basis for finding a duty. Also in these situations, absent disclosures, the person is not really considered to have consented because she did not know what she was agreeing to. Thus, the amount of information is also important in determining if there is really consent.

236 Mediation practice reflects much of the informed consent culture of medicine and law and thus it is tempting to conceptualize the mediator's role as similar to that of the physician and the lawyer in securing informed consent. But there are important functional differences between mediators, physicians and lawyers. First, the fiduciary duties owed by mediators differ from those of physicians and lawyers. The physician owes a duty only to his or her patient. The lawyer owes a duty to his or her client and the court system. The mediator however, owes an obligation to both parties to maintain the integrity of the mediation process. Second, the nature of decisionmaking differs. Unlike clients and patients who "theoretically" engage in collaborative decisionmaking with their physicians and lawyers, disputants' decisionmaking in mediation is not done primarily in collaboration with the mediator but with the other disputing party and also with their own lawyers if they have one. The mediator simply assists the decisionmaking process. The nature of the fiduciary relationship between mediators and disputing parties merits extended discussion and is beyond the scope of this Article. *See supra* notes 213-16 and accompanying text (discussing relationship of trust to "participation consent" in mediation). *See* Arthur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 CINN. L. REV. 731 (1984).

ties. Unlike physicians and attorneys, who owe a direct fiduciary duty to their patients and clients, respectively, the mediator is said to represent the integrity of the mediation process and it is in this sense then that the mediator has a special fiduciary relationship with both parties to a dispute. This relationship is complicated, however, by the concept of mediator impartiality, a value that is central in the mediation process.<sup>237</sup> Given the inherent boundaries of the fiduciary relationship between the mediator and disputing parties, there is much discussion about what kind of information mediators can and should provide. There is little dispute that mediators should provide information to both parties about the nature of the mediation process, but agreement stops there.<sup>238</sup> Whether mediators should be permitted to give more substantive information, professional evaluations, or opinions is the subject of intense debate.<sup>239</sup>

In my view, there are baseline levels of disclosure that must be satisfied for all parties in mediation.<sup>240</sup> Mediators should describe the nature and purpose of the mediation process, the mediator's role, and the norms that will govern the process.<sup>241</sup> Parties should understand that these norms may be negotiated and renegotiated throughout the process. Likewise, parties should understand that if the mediator learns information during the mediation session that would result in one party making an agreement based on fraud or misrepresentation, then the mediator will disclose that information before parties consent to any outcome.<sup>242</sup> These disclosures should be made before parties begin to participate in mediation.<sup>243</sup> Finally, mediators

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237 See JOINT STANDARDS OF CONDUCT, *supra* note 7 ("The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.").

238 For a discussion of other kinds of information which commentators suggest that mediators disclose to parties, see text accompanying notes 106-08.

239 Whether mediators can and should ever include evaluation in their services depends upon one's conceptual understanding of mediation. See *supra* Part II.

240 See *supra* Part IV.

241 The parties should understand that their consent to continued participation in mediation and to the outcome should be voluntary.

242 In this regard, see FLA. ST. MED. R. 10.110(3) (West 1997), which provides: "Integrity of the Agreement. The mediator shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability, or unconscionability would be enforceable." See also text accompanying notes 203-04 for a more detailed discussion of the elements of "participation disclosure."

243 Such disclosures are not only required by the human dignity value of informed consent, see *supra* notes 72-78 and accompanying text, but by some state regulations

have a responsibility to insure that the parties have a minimum level of understanding of the outcomes to which they agree.<sup>244</sup>

### B. *Sliding-Scale Model of Informed Consent Disclosures*

Beyond these baseline levels of disclosure, I propose a sliding-scale model of informed consent disclosures. This suggests a contextual approach that examines the location of mediation, voluntariness of the parties' participation, and their representational status. Careful consideration of a mediation's location helps to determine the parties' reasonable expectations for the mediation process, the kinds of disclosure that meets those expectations, and the level of consent necessary to respect the values served by informed consent.<sup>245</sup> Under a sliding-scale model of informed consent disclosures, the mediator's additional informed consent responsibilities correspond to the degree to which parties participate in mediation voluntarily and to whether they are represented by counsel.<sup>246</sup> Parties who are represented by attorneys and who voluntarily choose to mediate are in a significantly different situation than unrepresented parties who are required to mediate.<sup>247</sup>

#### 1. Degrees of Voluntariness

##### a. Voluntary Mediation

The distinguishing characteristic of voluntary mediation is consent. The parties consent to participate in mediation, to remain in mediated negotiations, and to the outcome reached in mediation.<sup>248</sup> In a voluntary setting, the parties' expectations for mediation are

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that require honesty between the parties in mediation. See, e.g., Nevada, Family Mediation Program in the Family Division, Second Judicial District Court, Washoe County, Rule 3, n.243 (on file with author). Also see the text accompanying notes 205-07 for a discussion of the elements of "outcome disclosure."

244 The extent of this responsibility depends upon whether the parties are represented by lawyers. See *infra* note 292 and accompanying text.

245 See *supra* Part III.

246 This approach is similar to that followed by the SPIDR Commission on Qualifications which shows sensitivity to dispute context and assumes that mediator styles of practice will differ depending on the context. See SPIDR REPORT, *supra* note 18; *Ensuring Competence and Quality in Dispute Resolution Practice*, in REPORT 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS 5 (1995).

247 These parties can decide, for example, what kind of mediator relationship they wish and their attorneys can inform them about the mediator's background.

248 See Boskey, *supra* note 114; Lande, *supra* note 103.

based on a contractual relationship with the mediator.<sup>249</sup> Parties bargain for what they want in both a jurisdictional system—i.e., public, court-connected, private provider—and in a mediator.<sup>250</sup> Beyond the basic disclosure requirements, therefore, the kind of information that mediators provide would be governed by contract.<sup>251</sup> Parties might deliberately choose a decisionmaking model with strong mediator input as in the *paternalistic or instrumentalist* decisionmaking models,<sup>252</sup> or they may opt for a more collaborative approach as in the *deliberative* decisionmaking model.<sup>253</sup> In short, a contractual approach to informed consent gives parties a great deal of freedom in structuring their own decisionmaking processes, and it may be helpful in resolving some of the difficult problems affecting mediation practice today.<sup>254</sup>

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249 Because parties voluntarily choose to mediate, they have greater responsibility in the decision to select a particular mediator. See DRAFT PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, CPR-GEORGETOWN COMM'N, at 8; SPIDR LAW AND PUBLIC POLICY COMM., MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991); cf. Schuck, *supra* note 29, at 906, 958 n.227 (citing authors who have proposed a contractual approach to informed consent in medicine).

250 This approach is followed in the AAA CONSUMER PROTOCOL, *supra* note 57, at 36.

Education of users should also include some treatment of the distinctive styles and strategies employed by mediators . . . . Participants need to decide in advance of selection the approach they want a mediator to adopt.

*Id.* Some sectors in private industry are also adopting this approach. The National Association of Securities Dealers (NASD) requires more background information on mediators so people know who they are choosing. See NAT'L ASS'N OF SECURITIES DEALERS MEDIATION R. 10404(b) (1997). The construction industry is also supportive of such disclosure. See Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 372 (1998). Finally, several commentators support the notion that mediators should disclose their styles of mediation so that parties may bargain for their choice of style. See, e.g., Imperati, *supra* note 73; Lande, *supra* note 103; Moffitt, *supra* note 108.

251 This approach gives guidance on the difficult issue of whether mediators should give legal advice or identify legal issues. See, e.g., Imperati, *supra* note 73, at 738.

252 See *supra* Part IV.

253 See *supra* Part IV.

254 The facilitative versus evaluative conundrum, for example, could be understood as an agreement for a process-driven or result-driven mediation. See Feerick et al., *supra* note 87, at 103 (remarks of Professor Leonard Riskin).

## b. Mandatory Mediation

A mandatory mediation program is one in which the parties' participation is compelled.<sup>255</sup> Such programs are increasingly visible in the private and public sector<sup>256</sup> and, in my view, it is unclear whether the principle of informed consent can ever be truly satisfied with them. What is certain, however, is that heightened protection should be given to the principle of informed consent in mandatory mediation programs.<sup>257</sup> A critical concern here is the extent to which compulsion to enter the mediation process may stigmatize the voluntariness of the outcomes that result. Thus, greater vigilance should be directed toward helping parties achieve voluntary outcomes.<sup>258</sup> Parties must understand that their initial attendance at a

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255 There are numerous critics of mandatory mediation programs. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 441-46 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1547, 1549-51 (1991); see also MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 144-46 (1991); Andre G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 *HARV. WOMEN'S L.J.* 272, 272-73 (1992); Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 *BEHAV. SCI. & L.* 151 (1990); Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 *GOLDEN GATE U. L. REV.* 717, 721-31 (1993); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 *CLEARINGHOUSE REV.* 431, 435-36 (1985). But see Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *WILLAMETTE L. REV.* 565 (1997) (reporting studies in the small claims court context showing little support for claim that parties are pressured to accept unfair settlements in mandatory mediation).

256 In private mediation settings, mandatory mediation clauses are adopted by industries and inserted into contracts. See, e.g., AAA CONSUMER PROTOCOL, *supra* note 57; see also Thomas J. Stipanowich, *On the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry*, in *AMERICAN ARBITRATION ASSOCIATION, ADR & THE LAW* 65, 66-67 (1997) (noting growing use in construction industry); Stipanowich, *supra* note 250, at 373 (discussing adoption of mandatory mediation clauses in architect contracts).

257 There may be, for example, a stronger case for requiring disclosure of the mediator's style and practices. Cf. Richard Delgado & Helen Leskovic, *Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice*, 34 *UCLA L. REV.* 67, 129 (1986).

258 For an example of an excellent court rule that shows such sensitivity, see MASS. ST. CT. UNIF. R. ON DISP. RESOL. 6(i).

Inappropriate Pressures to Settle. Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for nonsettlement by the parties . . .

*Id.* See also IND. CODE ANN., tit. 34, App. on ADR, Rule 2.1 (West 1996) (parties are required to mediate in good faith but are not required to settle). See NATIONAL STAN-



mediation session does not imply that they will continue negotiations and reach an agreement. Mediators must understand the difference between compulsion to enter into the mediation process and compulsion or coercion to continue negotiations in mediation, or to reach an agreement. The latter behaviors have no place in a process labeled "mediation."<sup>259</sup>

## 2. Location of Mediation

The location of mediation may have a considerable influence on the parties' expectations for the kind of information that should be disclosed.<sup>260</sup> Depending upon where mediation occurs—in a court, community dispute center, administrative agency, or private law office—relevant legal and social norms should suggest the appropriate disclosures.

### a. Court Mediation

Special caution should be exercised when mediation occurs in court, an area that represents perhaps the largest growth in the institutionalization of mediation practice. Instead of a judge to guard the fairness of the dispute resolution process, it is the mediator who assumes this responsibility. The principle of informed consent acts as a check on the mediator's power and helps to promote fairness.

Presumably, parties who choose to resolve disputes through the judicial system want what the courts have to offer—adjudication based on legal norms. Their expectations for a legal dispute resolution process are put on hold when they are diverted to mediation, whether by individual choice or by court mandate.<sup>261</sup> In identifying the practices that foster informed consent in court mediation, it is useful to focus separately on the dimensions of disclosure in mediation. Parties need information that educates them about the mediation process and information that helps them to achieve a fair outcome. The informa-

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DARDS, *supra* note 118, at Rule 5. See generally Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAM. & CONCILIATION REV. 156 (1993).

259 Overall, we need empirical study to identify the subtle kinds of coercion that occur in mandatory mediation programs and its effect on the voluntariness of any outcome that results. For example, in the informal courts where docket control may be a primary motivation for mediation, a mediator may tell parties "If you folks do not reach an agreement today in mediation, you may have to come back to court three or four times before a judge will be able to hear your case." What impact does this statement have on a party's decision to settle in mediation?

260 See Burns, *supra* note 66 (describing several differences between judicial mediation in the public courts and in private settings).

261 See Nolan-Haley, *Court Mediation*, *supra* note 16, at 63.

tion contained in process disclosures must be clear about how mediation differs from adjudication by a judge or arbitrator, the norms governing the court mediation process, and how agreements reached in mediation will be enforced. Disclosures that help parties to achieve fair outcomes may include a general overview of the range of legal entitlements that might be available to parties through court adjudication.<sup>262</sup>

### 3. Representational Status

When parties are represented by lawyers in mediation, we should be able to assume that lawyers do their job and provide their clients with enough information for them to engage in informed decision-making.<sup>263</sup> In situations where lawyers actually negotiate for their clients in mediation, any semblance of informed consent in mediation will depend in large measure on the attorney's adherence to the principle of informed consent in the lawyer-client relationship.<sup>264</sup> As a

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262 Such disclosures would depend on the parties' representational status and on their expectations when they initially sought to resolve their dispute in court. This is not to encourage outcomes which approximate legal remedies, but to insure that agreements based on nonlegal values are at least informed by the law. This may require a duty of greater disclosure to unrepresented parties. See *infra* Part V.B.3 (on unrepresented parties).

263 This would include information about the kind of mediation process the parties wish. The extensive literature on mediator styles and practices helps the mediation advocate to know what processes are available and to advise clients accordingly. See *supra* note 103. Thus, legal representation enhances the participants' informed decisionmaking. See ILL. CT. R. 11, No.14 (describing the role of an attorney representing parties in mediation).

264 Opinion is mixed about the value that lawyers bring to mediation. Lawyers' participation in mediation has been encouraged because it can improve the fairness of negotiations in mediation and protect parties from settlement pressures. See, e.g., Rogers & McEwen, *Employing the Law*, *supra* note 84; McEwen et al., *supra* note 57, at 1394 ("[l]awyers' participation in the mediation session . . . buffers the pressures to settle" which parties may experience); Stulberg, *supra* note 57, at 943-44 (arguing for lawyers in court mediation). On the other hand, lawyers may undermine the mediation process by adapting negotiating strategies that are incompatible with the goals of mediation. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 986 (1979) ("Lawyers may be more likely than lay people to adopt negotiating strategies involving threats and the strategic misrepresentation of their client's true preferences in the hope of reaching a more favorable settlement for the client."); Lande, *supra* note 103, at 876 ("Although the participation of the principals' lawyers in mediation may provide some assurances of high-quality consent, if the lawyers are strongly motivated to reach some settlement in the mediation, their presence may undermine rather than support the principals' decisionmaking ability . . ."). As mediation becomes increasingly institutionalized in the court system, it may have to be taken into account in litigation planning. For a

general rule then, the mediator's informed consent responsibilities to represented parties and their lawyers are limited to disclosure of baseline information.<sup>265</sup>

The situation is quite different when parties come to mediation without lawyers. Unrepresented parties pose the most significant challenge to implementing the principle of informed consent in mediation practice. Where mediation takes place in a mandatory setting, or where only one of the parties in the mediation is represented by counsel, the situation is even more serious.<sup>266</sup> Regulatory structures vary in their approach to unrepresented parties in mediation: some statutes specifically prohibit mediators from giving professional opinions unless attorneys are present;<sup>267</sup> others require that mediators advise unrepresented parties to consult with attorneys before signing any agreements.<sup>268</sup> The latter approach is not particularly helpful given the pervasive problem of inability to afford legal counsel.<sup>269</sup> The

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discussion of the value that lawyers add to litigation bargaining, see Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 137 (1997) ("Our experimental results support the hypothesis that lawyers, on average, evaluate litigation options differently than litigants, with lawyers' evaluations more likely to be consistent with the expected value analysis presumed by economic models of litigation. Because the monetary cost of trial—relative to settlement—is high, it follows that lawyers will favor settlement more often than their clients.") See Ronald J. Gilson & Robert H. Mnookin, *Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?*, in BARRIERS TO CONFLICT RESOLUTION 185 (Kenneth Arrow et al. eds., 1995) (exploring notion that lawyers may be able to cooperate with each other in situations where clients cannot). For a helpful discussion and guidelines for lawyers who advocate for clients in mediation, see Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-Adversarial Setting* (forthcoming in 14 OHIO ST. J. ON DISP. RESOL. (1999)).

265 See *supra* notes 240–44 and accompanying text.

266 See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997).

267 See, e.g., ALA. CODE OF ETHICS FOR MEDIATORS, Standard 7(d) (1997).

268 E.g., DEL. CT. R. CIV. P. 16.2(I); ALA. CODE OF ETHICS FOR MEDIATORS, Standard 7(b).

269 See CONSORTIUM ON LEGAL SERVICE AND THE PUBLIC, AMERICAN BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, A FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1996); COMMISSION ON NONLAWYER PRACTICE, AMERICAN BAR ASS'N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 35 (Aug. 1995) [hereinafter NONLAWYER ACTIVITY] (citing studies on inability of low-income and middle-income households to obtain legal services); Deborah Chalfie, *Break the Lawyers' Legal Advice Monopoly*, NEWS-DAY, Dec. 3, 1989, at 4 (noting studies that show low- and middle-income people being "shut out of America's legal system" because they cannot afford lawyers); John Greenya, *A Crisis of Inadequate Representation: Report of the D.C. Bar Public Service Activities Corporation Landlord Tenant Task Force*, THE WASHINGTON LAWYER 42, Nov.–Dec.

problem of unrepresented parties in the mediation process, however, is not just a "poor person's" issue. Some statutes permit mediators to exclude lawyers from mediation sessions.<sup>270</sup>

Under a sliding-scale model of informed consent disclosure, mediators owe a greater duty of disclosure to unrepresented parties than they owe to parties who come to mediation with lawyers.<sup>271</sup> Fairness demands that each party understand what it is doing when it engages in mediation decisionmaking. As a general proposition, more information is required for those who may lack the ability to negotiate effectively for themselves.<sup>272</sup> Overall, we must pay more attention to the methodology of process disclosures that are typically given by the mediator in an opening statement to the parties.<sup>273</sup> Informed con-

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1998 at 42; Susan Freinkel, *Breaking Up Is Hard To Do*, RECORDER, Nov. 2, 1992, at 1 (discussing the increase in number of litigants without lawyers in California courts); The Honorable Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 FORDHAM L. REV. 5, 8 (1994) ("eighty percent of the poor and the working poor in the United States do not have access to legal services"); Louis S. Rulli, *Pennsylvania Review, 1994—Forward: Pennsylvania Legal Service at Risk*, 68 TEMP. L. REV. 541, 544 n.17 (1995) ("as much as 80% of the civil legal needs of the poor are unmet with current resources") (citing AMERICAN BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994); AMERICAN BAR ASS'N, NATIONAL SURVEY OF THE CIVIL LEGAL NEEDS OF THE POOR (1989); REPORT OF THE PENNSYLVANIA BAR ASS'N TASK FORCE FOR LEGAL SERVICES TO THE NEEDY (1990)). A 1987 study of the legal needs of the poor in Massachusetts found that no more than 15% of the total legal needs of the poor were being met. See MASS. LEGAL ASSISTANCE CORP., MASS. LEGAL SERVICES PLAN FOR ACTION 3 (1987) [hereinafter MLAC Plan for Action]. "Between 85% and 92% of the low income people in Louisiana who had civil legal needs in 1991 were not represented by an attorney." William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 19 S.U. L. REV. 273 (1992). See also NEW YORK STATE BAR ASS'N COMMITTEE ON LEGAL AID, NEW YORK LEGAL NEEDS STUDY: FINAL REPORT (December 1993) (stating that no more than 14% of the poor's overall need for legal assistance was being met); REPORT OF ADVISORY COUNCIL OF MARYLAND LEGAL SERVICES CORPORATION, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR (1988). See generally Sophia M. Deseran, *The Pro Bono Debate and Suggestions for a Workable Reform*, 38 CLEVELAND ST. L. REV. 617, 636-37 (1990).

270 E.g., CAL. FAM. CODE § 3182 (West 1998); IDAHO CT. R. 16(j), 8(B) (child custody and visitation disputes); KAN. STAT. ANN. § 23-603(a)(6) (West 1997); WIS. STAT. ANN. § 767.11(10)(a) (West 1997); ARIZ. REV. STAT., LOCAL R. OF PRAC. SUPERIOR CT. MARICOPA COUNTY 6.8(e) (giving the mediator the discretion to exclude counsel in domestic relations mediation).

271 This may result in the mediator engaging in practices that could be considered a form of evaluative mediation.

272 See Volpe & Bahn, *supra* note 75, at 304 (recommending that mediators give information when parties lack ability or skills to negotiate adequately).

273 It should be noted, however, that in many community-based mediation programs, intake staff members provide process information to the parties before the mediation session begins.

sent, however, is not just an “event” that occurs in the opening stages of the mediation process. Rather, it involves continual education of parties. If information about the mediation process is given in the mediator’s opening statement, it should be repeated at regular intervals to make sure that parties understand.<sup>274</sup> We should also rethink where, how, and by whom process information is given. Does process disclosure have to be one event or could it be accomplished in stages? How should it be accomplished? Certainly, some information can be disclosed by the mediator, while courts and other public agencies could offer disclosure through manuals,<sup>275</sup> videos,<sup>276</sup> and outline guides.<sup>277</sup>

C. *Unrepresented Parties in Mandatory Court Mediation: The Case for an Informative Decisionmaking Model*

Justice and fairness questions are implicated when unrepresented parties are required to mediate in court.<sup>278</sup> This is particularly true for the poor and uneducated.<sup>279</sup> Parties who come to court expecting

274 There is a danger that parties who are nervous, or who may be in court for the first time, do not listen to the opening statement very carefully. The National Standards for Court-Connected Mediation Programs do show sensitivity to pro se parties in mediation, particularly to the feeling that they must settle. See Shaw et al., *supra* note 258.

275 See Kurtzberg & Henikoff, *supra* note 86.

276 See *supra* note 141 (discussing Utah’s approach).

277 One unhappy court mediation consumer has suggested that courts might provide an outline or some instruction for both parties to follow. See Wendy Clark, *One Consumer’s View of ADR*, NIDR (Summer/Fall 1993), at 15. We must also be sensitive to the problem of illiteracy in the United States. See WORLD ALMANAC AND BOOK OF FACTS 832 (1998) (citing a 4% illiteracy rate in the United States).

278 An eloquent summary of the dilemma faced by mediators is found in the Mediator’s Manual for New York City Housing Court:

One goal of mediation is empowerment of the parties through participation in the process—through meaningful bargaining and self-determination. Yet without knowledge of one’s rights, how can a party truly bargain or determine the future? Pro se tenants who may face eviction from their homes and pro se landlords who may face loss of their home, life-savings and/or property are both entitled to participate in the mediation process from positions of knowledge of rights rather than ignorance. Remember, what’s at stake here is shelter—a basic human necessity.

Mediator’s Manual for New York City Housing Court (prepared by Gail Davis, Esq. 1997) (copy on file with the author).

279 See Depner et al., *supra* note 143, at 310, 316 (reporting high satisfaction with custody mediation in California and observing that “information and community referrals may be particularly helpful to clients who have less formal education and fewer financial resources”); Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & Soc’y

to see and present their case to a judge are not necessarily prepared to engage in a private bargaining session with their opponents (even if it is chaired by a neutral and knowledgeable mediator) and there is something unsettling about requiring them to do so without knowing the range of their legal options and entitlements.<sup>280</sup>

In an ideal world, a court could assign lawyers to provide legal information to unrepresented parties or to assure that they understand the information that may have been provided by courts in the form of brochures, manuals, and videos, etc. As a practical matter, however, it is usually the mediator who is available to inform and guide unrepresented parties. Where unrepresented parties are ignorant of their legal rights, an *informative* decisionmaking model<sup>281</sup> should be offered to them. The mediator acts as a conduit of legal information to promote the parties' understanding.<sup>282</sup> The *informative* model does not include telling parties what outcome should be followed.<sup>283</sup> Parties decide for themselves what value they place on the legal information that has been provided to them and they decide for themselves what outcome should be reached.

How do we know whether an unrepresented tenant would really agree in mediation to vacate her home if she knew that she was not

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Rev. 767 (1996) (empirical study of small claims actions in New Mexico found that minority plaintiffs and white, non-Hispanics made agreements in mediation which on the average represented less money than the court awarded similar plaintiffs). The authors propose that mediators might clarify two forms of mediation, one that replicates the court model and one that is facilitative, and determine which of them is appropriate in a particular dispute. See *id.* at 793.

280 For a disturbing account of what happens to unrepresented tenants in one housing court's mediation program, see Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOTIATION L. REV. 85, 91-92 (1996).

When tenants arrived at court, an official directed most of them upstairs to mediation . . . . Tenants received little guidance through the process. The court officials gave no explanation of mediation, nor did they mention its voluntary nature. Mediation was never distinguished from negotiation, the process in which most tenants participated. No information was available regarding the rights and responsibilities of the landlords or tenants. Similarly, no one was available to answer questions.

*Id.* at 92-93.

281 I assume here that the mediator is competent to offer such a model.

282 In this regard, the mediator should explain the meaning and purpose of the informative model—that legal information is provided so that parties can make reasonably educated decisions. At the same time, parties should understand the limitations of this kind of legal information. See Stark, *supra* note 80, at 797. Finally, parties should be able to freely reject this type of mediator-party relationship.

283 In this respect, the informative model is similar to the approach adopted by the A.B.A. STANDARDS OF PRACTICE, *supra* note 97, at Standard IV.

required to do so?<sup>284</sup> How do we know whether parties would agree to nominal damages if they knew that a statute provided treble damages? How do we know whether a debtor would agree to pay a debt in mediation if she knew the statute of limitations on the debt had already expired? The point is that we do not know the answers to these questions and that is why, in the interests of justice and fairness, we should err on the side of greater information about the law. An *informative* decisionmaking model can provide such disclosure.

I argue that unrepresented parties are entitled to receive information about their legal entitlements when a court requires them to participate in mediation.<sup>285</sup> This does not mean that they should know with certainty how a court would rule.<sup>286</sup> Rather, they should have an understanding of the range of possible outcomes and laws that may affect those outcomes. In small claims court, for example, an unrepresented claimant in mediation should understand that in court she might receive the amount for which she sued or she might receive nothing at all. If a statute of limitations or treble damage award statute were relevant to a claimant's case, that claimant should be aware of their existence and their possible impact on recovery. At the same time, however, the claimant should understand that an agreement reached in mediation might be more beneficial to her than a court ruling based on law.<sup>287</sup>

I do not advocate that court mediation sessions replicate the adversarial model or that mediation outcomes approximate what is available in court. I do argue, however, that when courts require unrepresented parties to mediate, that their mediation outcomes be *informed* by law. This is not to suggest that, once informed of their legal entitlements, parties will automatically seek legal remedies in the mediation process. Other nonlegal values may matter more. But if the principle of informed consent means anything in court mediation, it means that parties should be able to decide for themselves

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284 See, e.g., *Wright v. Brockett*, 571 N.Y.S.2d 660 (N.Y. Sup. Ct. 1991).

285 Several scholars support giving some kind of legal information to parties. See, e.g., Maute, *supra* note 57; Stark, *supra* note 80, at 795; Waldman, *supra* note 103, at 152 (“[M]ediators better serve their clients if they can offer sufficient legal information to permit continued negotiation, thus limiting the role of independent counsel to that of a fine-tuning specialist.”); Weckstein, *supra* note 103, at 530. For a description of several landlord-tenant mediation programs that provide legal information to parties, see Kurtzberg & Henikoff, *supra* note 86 at 116 (arguing that mediation programs should consider it part of their professional responsibility to inform uniformed parties of their rights).

286 This would not even be possible with attorney representation.

287 This equally important understanding requires that parties also have an appreciation of their nonlegal interests.

what values do matter. They should know what legal entitlements they are waiving in the name of autonomy and self-determination. By understanding both their legal and nonlegal interests, they can make tradeoffs among these interests that are at least reasonably educated.

#### *D. Addressing Some Concerns with the Informative Decisionmaking Model*

##### 1. Neutrality

Permitting mediators to give legal information to unrepresented parties poses a threat to neutrality, a primary value of mediation.<sup>288</sup> Whether such a practice should be permitted, therefore, is a highly debated question. Some commentators have called for an activist approach in providing legal information to parties,<sup>289</sup> while others believe that absolute neutrality is required.<sup>290</sup> In my view, we should not approach this issue as a question of absolutes. As Sara Cobb and Janet Rifkin have observed, there are degrees of neutrality in mediation.<sup>291</sup> Perhaps the real question should be: when is absolute neutrality called for and when is a modified approach preferable? I argue that when court programs require unrepresented parties to enter the mediation process, fairness demands that these parties know their legal options before making final decisions in mediation. A modified approach to mediator neutrality permits mediators to employ an *informative* decisionmaking model and give unrepresented parties such information.

##### 2. Mediator Ignorance of Legal Information

Depending upon the court program in which mediation takes place, a wide range of legal knowledge may be required and mediators, whether or not they are lawyers, will not always know the relevant legal information that should be disclosed to parties.<sup>292</sup> This is a complex problem that raises questions about who should be permitted to mediate in court mediation programs. Overall, we need to give serious attention to how we train mediators who assist unrepre-

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288 The intervention of an unbiased neutral is one of the defining characteristics of mediation.

289 See, e.g. Maute, *supra* note 101; Schuwerk, *supra* note 18; Stark, *supra* note 80, at 796; see also *supra* note 105 and sources cited therein.

290 See, e.g., Barbara Filner & Michael Jenkins, *Performance-Based Evaluation of Mediators: The San Diego Mediation Center's Experience*, 30 U.S.F. L. REV. 647, 649 (1996).

291 See SARA COBB & JANET RIFKIN, PRACTICE AND PARADOX: DECONSTRUCTING NEUTRALITY IN MEDIATION, LAW AND SOCIAL INQUIRY 5 (1991).

292 This is particularly true in Small Claims Court where a wide variety of legal issues come into play. See, e.g., Thomas A. Dickerson, *Applying Consumer Protection Laws in Small Claims*, N.Y.L.J., Sept. 21, 1998, at 1.



sented parties in court mediation programs.<sup>293</sup> Integration of the principle of informed consent in mediation practice does not mean that parties will have perfect information.<sup>294</sup> At the very least, however, mediators can inform parties that their legal rights may be affected and that they should consult with a lawyer if they are able before making final decisions about continuing participation in mediation or making final decisions in mediation. This suggestion may seem disingenuous given the pervasive inability to afford lawyers.<sup>295</sup> It does alert parties, however, to proceed with caution, and it should promote greater understanding of outcomes achieved in mediation.

### 3. Unauthorized Practice of Law Restrictions

Mediation practice by lawyers has sparked considerable debate about whether mediation is the practice of law and how this question implicates ethical rules governing lawyer behavior.<sup>296</sup> There is much

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293 See generally SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING DISPUTE RESOLUTION PRACTITIONER'S: GUIDELINES FOR COURT-CONNECTED PROGRAMS (State Justice Institute 1998).

294 Such a perfection standard is not even required in the physician-patient or lawyer-client relationship. See *supra* Part II. Rather, the informative model attempts to provide unrepresented parties with sufficient legal information to promote reasonably educated choices.

295 The difficulty that low income and moderate income parties will have in accessing lawyers is well-documented. See *supra* note 269. Fortunately, there are some innovative mediation programs that provide assistance to pro se parties. See New York City Housing Court Mediation Manual (1997) (on file with the author). Another example of what could be done is the MASSACHUSETTS SUPREME COURT UNIFORM RULE ON DISPUTE RESOLUTION 6(I) which provides in part:

The court shall give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties. In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

See also Kurtzberg & Henikoff, *supra* note 86 (describing landlord-tenant mediation programs that provide legal information to unrepresented parties).

296 See, e.g., Symposium, *Is Mediation the Practice of Law*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM 1 (1996); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering As Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631 (1997). For a view of the practicing bar on this issue, see MICHIGAN BAR STANDING COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, Op. RI-278 (1966) (document drafting by an attorney-mediator is a legal service) and NEW YORK BAR

less debate on the question of whether nonlawyer mediators who give legal information to unrepresented parties may be in violation of unauthorized practice of law restrictions.<sup>297</sup> Several bar association ethics opinions on divorce mediation have held that nonlawyer mediators who provide various forms of legal assistance in mediation would be engaged in the unauthorized practice of law.<sup>298</sup> In my view, we need to reconsider the value of this doctrine as increasing numbers of parties appear in court, unable to afford legal representation,<sup>299</sup> and are required to mediate before they may have a trial. At a minimum, rules governing disclosure of legal information in mediation should be broad enough to permit mediators to identify legal issues that may arise.<sup>300</sup> We should also consider permitting nonlawyer mediators to give legal information in carefully circumscribed situations.<sup>301</sup>

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ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS, Formal Op. 678 (1996) (offering advice in mediation by lawyer-mediators may be the practice of law).

297 See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

298 See ROGERS & McEWEN, *supra* note 81, at § 10:05; see also *Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195 (1st Cir. 1985).

299 See *supra* note 269.

300 This assumes that the mediator is aware that a legal issue may be involved. For an excellent example of sensitivity to the plight of pro se parties, see *Mediator's Manual for New York City Housing Court* (1997) (on file with the author) ("As mediators, we are prohibited from rendering legal advice to the parties; however, we must be aware of and able to identify legal issues which may arise which would render the process itself or any agreement entered into unfair and inappropriate.").

301 Several commentators support relaxation of rules prohibiting unauthorized practice. See, e.g., Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS, 209 (1990); *Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment*, in REPORT OF THE COMMISSION ON PROFESSIONAL RESPONSIBILITY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 190-209 (March 1995) (giving "preliminary endorsement to a deregulated licensing approach that permits greater nonlawyer practice in specified areas but establishes minimal requirements in order to protect the public while simultaneously increasing the availability of low-cost, accessible legal services to all"). Attorney General Janet Reno has called for greater access to justice and has suggested a proposal for licensed community advocates who would be trained to assist parties in dealing with common legal problems. See The Honorable Janet Reno, Address at the 1999 Annual Meeting of the Association of American Law Schools in New Orleans, Louisiana (Jan. 9, 1999). Extensive analysis of the unauthorized practice doctrine in relation to mediation practice is beyond the scope of this Article. Cf. NONLAWYER ACTIVITY, *supra* note 269.

## VI. CONCLUSION

Informed consent has a central role to play in mediation. Without it, mediation's promises of autonomy and self-determination are empty. This Article has given the theoretical and policy justifications for a reform of mediation practice that honors the principle of informed consent.<sup>302</sup> I have argued for a contextualized approach that takes into account mediation's location, the voluntariness of the parties' consent, and their representational status. This kind of analysis will lead to a more informed practice of mediation decisionmaking than exists currently and provide a perspective that can more prudently guide a mediator's conduct. The proposed approach promotes greater fairness in mediation, particularly for parties who do not have lawyers. And fairness is what matters at the end of the day.

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<sup>302</sup> While there is not yet a uniform statute to govern mediation practice, a joint working group of the Uniform Law Commission and American Bar Association, under the direction of Professor Nancy Rogers, is currently engaged in efforts to draft such a statute. I urge the commission to include in the uniform statute a robust concept of informed consent that is sensitive to the plight of unrepresented parties in mandatory mediation programs.