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Lawyers, Clients, and Mediation

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LAWYERS, CLIENTS, AND MEDIATION

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Next to the confrontation between two highly trained, finely honed batteries of lawyers, jungle warfare is a stately minuet.[1]

Peacemaking, problem-solving lawyers are the legal profession's equivalent of doctors who practice preventive medicine. Their efforts are generally overshadowed by the heroics of surgeons and litigators.[2]

I. INTRODUCTION

The legal profession needs help. The predominant adversary culture of competitiveness[3] and preoccupation with the autonomous self are all too-familiar descriptions of American lawyering, for which Professor Mary Ann Glendon offers a much needed corrective. Glendon argues eloquently for more civility in the practice of law,[4] more delib-

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1 BILL VEECK, THE HUSTLER'S HANDBOOK 335 (1965).

2 MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 107 (1994).

3 *See, e.g.*, Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 511 n.9 (1994).

4 GLENDON, *supra* note 2. Glendon joins other critics in her concern for the disoriented condition of the legal profession. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ, THE BETRAYED: PROFESSION LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994). The sorry state of affairs has led some states to develop civility standards to guide attorney's professional behavior. *See New York State Standards of Civility, discussed in* N.Y. STATE BAR NEWS, Nov.–Dec. 1997, at 1, 3 (standards on file with the author). *But see* 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) (arguing that a business paradigm is more likely to improve the conduct and reputation of the bar).

eration between lawyers and clients,[5] and a more relational understanding of autonomy.[6] She appeals to lawyers' creative capacity to develop more fully as peacemakers[7] rather than as "connoisseurs of conflict."[8]

In this essay, I locate Glendon's appeal in the mediation process and explore how her principles of civility and vision of deliberation can help in developing a theory of representational mediation practice.[9] How can lawyers respect the dignitary and participatory values of mediation and at the same time protect client interests? What are the values which differentiate mediation from the "hired gun" mentality of adversarial practice? This essay explores these questions in the client counseling context and suggests an approach to mediation client counseling which is based on a deliberative process. The deliberative process model calls for greater attention to the principle of informed consent in mediation.[10]

II. MEDIATION'S POTENTIAL FOR PEACEMAKING

A. Rights Rhetoric and the Adversarial Culture

There is an immediate connection between what Glendon has observed as America's rights obsession and the legal profession's excessive adversarial behavior. In much the same way that exaggerated rights rhetoric impedes public deliberation,[11] lack of civility in lawyering can interfere with private deliberations between lawyers and clients. The push to absolutes in both extremes fails to respect the dignity of the human element, an overriding force which drives Glendon's social and professional values.[12]

Mediation offers enormous potential for lawyers to recognize and honor the missing human dignity dimension in current versions of

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5 *See* GLENDON, *supra* note 2, at 35–36.

6 *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109–44 (1991).

7 *See* GLENDON, *supra* note 2, at 101, 247.

8 *See id.* at 40–59.

9 The role of the lawyer who represents a party in connection with the mediation process is conceptually and professionally distinguishable from that of the lawyer who mediates a dispute between two parties. *See infra* text accompanying notes 47–59.

10 This is part of my larger project which examines the nature of informed consent in mediation.

11 Glendon claims that rights rhetoric fails to recognize the "social dimensions of human personhood." GLENDON, *supra* note 6, at 109.

12 *See, e.g., id.* at 179.

adversarial lawyering.[13] It is a process governed by mutual respect, not by the rugged individualism or rudeness which too often characterizes adversarial law practice.[14]

Mediation is best understood as an extension of the negotiation process. It is an informal process based on principles of individual sovereignty and self-determination.[15] In the context of mediation practice, this means that the parties affected by a dispute decide the outcome of the dispute.[16] The language of mediation can be a powerful antidote to what Glendon labels the "exaggerated absoluteness of our American rights rhetoric,"[17] for human relationships matter more in mediation than do absolute legal rights.[18] The discourse on mediation practice presents mediation as offering a new vision for lawyers[19] largely because it pays more attention to the dignity of human persons than to the abstractness of legal rules.[20]

The civility principles Glendon extols are important for one set of goals which has inspired mediation practice—dissatisfaction with the

13 *See generally* Leonard L. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29 (1982); Jacqueline Nolan-Haley & Maria R. Volpe, *Teaching Mediation as a Lawyering Role,* 39 J. LEGAL EDUC. 571, 579–80 (1989).

14 *See, e.g.,* Raoul Lionel Felder, *I'm Paid to Be Rude,* N.Y. TIMES, July 17, 1997, at A23.

15 *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (American Arbitration Ass'n, American Bar Ass'n, and Society of Professionals in Dispute Resolution 1994) [hereinafter MODEL STANDARDS]. *See also* John D. Feerick, *Toward Uniform Standards of Conduct for Mediators,* 38 S. TEX. L. REV. 455 (1997).

16 In the words of the late law Professor Lon Fuller: "[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves." Lon L. Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 308 (1971).

17 GLENDON, *supra* note 6, at 45.

18 Professor Fuller's classic definition of the mediation process captures these essential characteristics. Mediation, he observes, has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Fuller, *supra* note 16, at 325.

19 *See* Riskin, *supra* note 13, at 57.

20 Long before the current popular appeal of mediation, John Noonan reminded us of the extent to which law has ignored persons in favor of rules. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 9–14 (1976). Scholars continue to be concerned with the extent to which law and legal education undervalue the human element. *See, e.g.,* Julius G. Getman, *Human Voice in Legal Discourse,* 66 TEX. L. REV. 577 (1988); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

cut-throat tactics of the adversarial culture.[21] Cooperation, courtesy, decency, dignity, mutual respect, and reasoned discourse—the principles which permeate Glendon's appeal to lawyers—hark back to timeless values that are important for public behavior. They embody the best values of the common law tradition[22] and, in my view, are precisely the principles which will make all the difference in representational mediation practice.[23]

B. The Problem

The growth of the alternative dispute resolution (ADR) movement,[24] and mediation in particular, is slowly transforming the practice of law, but little attention has been paid to the normative questions of how that transformation should take place, how lawyers should behave, and what rules should govern their behavior. Much needs to be done if representational mediation practice is to be distinguishable from adversarial-style lawyering.[25]

Lawyers are the dominant players in the adversary system. Scholars have characterized the "standard conception" of their role as one which honors the principles of partisanship and nonaccountability.[26] Translated into practice, this has meant zealous advocacy for clients with little moral responsibility for helping clients achieve their goals.[27]

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21 For a discussion of additional goals which have inspired the development of mediation and other ADR processes, see STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 6–9 (2d ed. 1992).

22 *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (1969). I thank Catherine McCauliff, my first teacher of English legal history, for reminding me of this connection.

23 For a discussion of the influence of these values in the early development of legal ethics in the adversary system, see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO J. LEGAL ETHICS 241 (1992); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 32–39 (1994) (discussing the gentleman-lawyer tradition).

24 ADR has developed over the past twenty-two years. Mediation was promoted as a nonjudicial method of dispute resolution at the Pound Conference in 1976. *See* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 65 (1979).

25 One writer has described a new "dispute resolution environment as a 'liti-mediation' culture, in which it becomes taken for granted that mediation is the normal way to end litigation." John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997). *See generally* 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).

26 *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY xx (1988).

27 *See id.*

Existing models for lawyers who assist clients in mediation are based largely on the dominant ethic, and this raises a question of fit. Is the traditional zealous advocate, sometimes "hired gun," model of the adversarial system consistent with the primary participatory and dignitary values of mediation? Should lawyering in mediation replicate the adversarial model? I think not. Mediation practice should be grounded in deliberative and problem-solving processes.[28] Unfortunately, lawyer-controlled mediations often look like muscled settlement conferences, and negotiation in mediation looks like aggressive trial advocacy. Meanwhile, clients are kept in the dark.[29] Why are so many lawyers missing the point?

Part of the problem may be lawyers' knee-jerk reactions to Rambo-style mediators,[30] but at a deeper level, the problem is a conceptual one. Many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible.[31] As a result, in experimenting with representational mediation practice, too many lawyers are pouring new wine into old wineskins. This explains why the human dignity, mutuality of respect, and responsible client decisionmaking that have been absent from much of traditional adversarial practice are often missing in current versions of representational mediation practice.[32]

In reflecting on how Glendon's principles can help in developing a theory of representational mediation practice, I will focus primarily on client counseling activity, that complicated set of interactions between lawyers and clients which defines their professional relationship.[33] In my view, to the extent that mediation client counseling is firmly grounded in a deliberative and problem-solving process, mediated negotiations will be responsive to clients' real needs and interests. Then we may just begin to see a law practice in which the human element really does matter.

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28 *See* GLENDON, *supra* note 2, at 102–08.

29 *See infra* text accompanying note 83.

30 *See, e.g.*, Lande, *supra* note 25, at 850; James J. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991).

31 This theme was echoed at the International Conference of the Society of Professionals in Dispute Resolution (SPIDR) held in September 1997 in Orlando, Florida. One workshop, "Bringing Out the Best in Lawyers," explored the destructive effect that lawyers can have on a mediation session (audiotape on file with the author).

32 *See infra* text accompanying notes 80–86.

33 *See* David Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 737–40 (1988).

III. UNDERSTANDING MEDIATION AS THE CLIENT'S PROCESS

A. *Defining Mediation*

A conceptual understanding of the mediation process is essential in developing a theory of representational mediation practice. Several competing definitions of mediation make this a difficult task.[34] At its most basic level, mediation is an extension of the negotiation process.[35] A third-party, the mediator, assists disputing parties in resolving their disputes. A number of mediation models[36] are identified in the literature, and there is much debate about the extent to which mediator assistance is appropriate.[37] Depending upon the philosophical orientation of the practitioner, mediation may be viewed instrumentally as an efficient settlement process,[38] or in broader terms as a healing[39] or transformative process.[40]

B. *Listening to Clients*

The controlling principle of mediation is self-determination. This means that the parties involved in a dispute participate in its reso-

34 One of the current textbooks used in some law school mediation courses describes ten definitions of the mediation process. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 16–17 (1994).

35 To the extent that the mediation process focuses on parties' real needs and interests rather than on the positions they assert, it is a process based on problem-solving negotiation. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

36 *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS (1994); Kenneth Kressel et al., *The Settlement-Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

37 *See, e.g.*, James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Riskin, *supra* note 36.

38 *E.g.*, Alfini, *supra* note 30, at 47. It should be noted that mediation can be a voluntary or mandatory undertaking. While the essence of the actual mediation process is voluntary, increasingly, mediation is becoming a procedural requirement for trial or administrative relief.

39 *See* Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Special Issue, *Beyond Technique: The Soul of Family Mediation*, 11 MEDIATION Q. 1 (1993).

40 *E.g.*, BUSH & FOLGER, *supra* note 36.

lution and are able "to reach a voluntary, uncoerced agreement."[41] Thus, mediation is frequently exalted for its empowerment aspects.[42] What does this mean for representational mediation practice? For lawyers, this translates into a relinquishment of their central role in presenting a client's case.[43] Clients tell their own stories in mediation to the mediator, their lawyers, and their opponents. These are stories which might not be heard in the official legal system constrained by rules of evidence and procedure. Feelings and emotions are valued. Dignity is attached to stories simply because they come from people who lived those stories.

Client storytelling is an integral part of the mediation process. It captures the human element which is so often missing when lawyers do most of the talking and translate client stories into legal contexts.[44] Lawyers and clients who listen to each other have greater understanding and appreciation of the other person's real interests. In listening to clients tell their stories in mediation, lawyers can develop greater empathy and compassion, virtues which help them become more skilled at problem-solving *with* their clients instead of *for* their clients.[45] Finally, the emphasis on client narrative supports the kind of deliberative process that Glendon advocates for lawyers and clients—exploring all angles of a problem in a give-and-take based on mutual respect for the dignity of the other person.[46]

In the following section, I sketch the varied roles of lawyers in representational mediation practice and consider how current lawyer-client decisionmaking models often fail to support the dignitary and participatory values of mediation.

IV. Lawyering in Mediation

The most familiar role of lawyers in the mediation process has been their activity as neutrals trying to facilitate the resolution of disputes between parties. However, lawyers also represent parties in mediation. The scope of representational lawyering in mediation

41 Model Standards, Standard I, Comment.

42 *E.g.*, Bush & Folger, *supra* note 36.

43 Some clients may prefer to have their lawyers speak for them in mediation. *See infra* text accompanying notes 53–57.

44 Professor Robert Dinnerstein reminds us of the importance in the clinical movement of clients being able to tell their stories in the advocacy and litigation setting. *See* Robert D. Dinnerstein, *Clinical Texts and Contexts*, 39 UCLA L. Rev. 697, 723–25 (1992) (book review).

45 This should also be true in traditional adversarial law practice when lawyers listen to their clients.

46 *See* Glendon, *supra* note 2, at 35–36.

encompasses the functions which lawyers perform generally for clients: counseling, negotiation, evaluation, and advocacy.[47]

A. *Counseling*

The lawyers' counseling function is dominant in representational mediation practice. The fundamental question, whether dispute settlement by mediation best meets the clients' needs,[48] requires consideration of both structural and emotional factors within the context of each client's situation.[49] If a client decides to enter into a mediation process, counseling includes numerous planning and participation decisions.[50] In the growing number of jurisdictions where clients are required to participate in mediation,[51] counseling also would include decisions about the nature of this participation.[52]

B. *Negotiation*

Even though parties are encouraged to speak for themselves,[53] lawyers may negotiate for their clients in mediation; much of the liter-

47 *See* Preamble to the MODEL RULES OF PROFESSIONAL CONDUCT, § 2, A Lawyer's Responsibilities, *in* 1996 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (Thomas D. Morgan & Ronald D. Rotunda, eds., 1996).

48 There is little empirical data comparing mediation to other forms of dispute resolution. *See* Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259 (1996). For a prediction of a rule that would require lawyers to allow clients to pursue mediation, see 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, 825–839 (1990).

49 *See, e.g.*, DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 125–26 (1996); Robert A. Baruch Bush, *"What Do We Need Mediation For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996); Robert H. Mnoonkin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

50 *See infra* text accompanying notes 128–31.

51 *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE §§ 7:01–07 (2d ed. 1994).

52 *See* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required?*, 38 S. TEX. L. REV. 575 (1997); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993); 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).

53 *See supra* text accompanying notes 41–46.

ature on lawyering in mediation focuses on this role.[54] Some programs exclude attorneys from participating in mediation,[55] but with the growth of mandatory mediation it is not surprising that lawyers are participating in mediation to a greater degree.[56] Clients may not relish the prospect of a face-off with opposing counsel, particularly in light of the reported behavior of some attorneys in mediation.[57]

C. *Evaluation*

Lawyers may review agreements made in mediation before clients make a final commitment to the agreement. This "independent counsel" role of the lawyer was first recognized by the American Bar Association in 1984 with adoption of the standards of practice for family mediators[58] and is continued today in many ethical codes and court rules.[59] Evaluation is a critical lawyering function, particularly where parties have not been represented by counsel during the mediation process.

D. *Lawyer-Client Interactions in Mediation*

1. Weakness of Current Decisionmaking Models

Lawyers' professional conduct is governed by the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, neither of which specifically addresses the role of the representational lawyer in mediation.[60]

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54 Some authors refer to this as the lawyer's advocacy role in mediation. *See, e.g.*, JOHN W. COOLEY, MEDIATION ADVOCACY (1996); Michael Lewis, *Advocacy in Mediation: One Mediator's View*, DISP. RESOL. MAG., Fall 1995, at 7.

55 This exclusion has been the subject of considerable criticism. *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

56 Critics of divorce mediation in particular have urged more attorney participation and the current trend is toward attorney involvement. *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

57 *See, e.g.*, McKinley v. McKinley, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995) (claiming that attorney badgered and intimidated a party during a mediation).

58 *See* ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, adopted by the House of Delegates of the American Bar Association, August 1984, *reprinted in* GOLDBERG ET AL., *supra* note 21, at 469.

59 The codes generally provide that parties be allowed to consult with their attorney before signing a mediation agreement. *E.g.*, *id.*; FLA. FAM. LAW RULES PROC. § 12.740(f)(1) (1997).

60 The Rules are equally silent on the role of the lawyer-mediator. The Model Rules refer to an intermediary function which has been equated with common repre-

The Model Rules offer, at best, only theoretical guidance. Rule 1.2(a) provides that a lawyer must abide by a client's decision about whether or not to settle.[61] In practice, this rule has translated into a model of decisionmaking which has given attorneys enormous control. Following the ends/means approach, the client decides the "ends" of a given problem and the attorney decides the "means."[62]

Little attention was paid to the concept of client decisionmaking until the late 1970s, when scholars began to suggest the relevance of the informed consent doctrine in legal practice.[63] The traditional allocation of authority was criticized by numerous scholars who argued for greater client involvement and more sensitivity to client needs.[64] A rich counseling literature focusing on "client-centeredness" developed, in which arguments were advanced against paternalistic lawyering in favor of greater client participation.[65] In lawyering for elite clients, however, discussion focused not on how to empower clients but on how to remain moral when already empowered clients used lawyers as hired guns.[66]

Client-centeredness has remained the leading model of counseling, although there is considerable theoretical debate about its mean-

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sentation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1995) [hereinafter MODEL RULES].

61 *Id.* Rule 1.2(a).

62 *Id.* Rule 1.2; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7–7 (1980). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.3, at 156–57 (1986).

63 Roger W. Andersen, *Informed Decisionmaking in an Office Practice,* 28 B.C. L. REV. 225 (1987); 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); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession,* 128 U. PA. L. REV. 41 (1979); Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue,* 1980 AM. B. FOUND. RES. J. 1003; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy,* 65 N.C. L. REV. 315 (1987).

64 *E.g.,* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 124–272 (1978); DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH 185–86 (1977); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (1991).

65 *See, e.g.,* Dinnerstein, *supra* note 44 and sources cited therein. More recently, some scholars have rejected the paternalism/participation dichotomy and argued instead for lawyer-client relationships based on other values. *E.g.,* SHAFFER & COCHRAN, *supra* note 23, at 40–49 (friendship); Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship,* 22 J. CONTEMP. L. 383, n.5 (1996) (ethics of care).

66 Glendon's critique of lawyering focuses on large firm practice.

ing. The divide has fallen essentially along two lines: between those who favor greater client autonomy[67] and those who argue for some species of paternalism.[68] The views of practicing lawyers, however, more tempered by the realities of practice, show that decisions about the allocation of decisionmaking authority in the lawyer-client relationship are far more contextual than the theoretical debate would suggest.[69]

Current attorney-client decisionmaking models fail to reflect the reality of mediation—a highly contextualized process built on the process of self-determination. The critical decisionmaking questions in representational mediation practice are concerned not with the extent to which *clients* should be allowed to participate, but rather with the manner in which *lawyers* should be involved.[70] How can lawyers as "wise counselors"[71] help clients exercise their self-determination? Put more simply, how can lawyers help clients benefit from the mediation process?

2. Some Problems with Mediated Negotiations

Traditional lawyering in negotiation undervalued client presence and participation; lawyers simply did not bring clients to the bargaining table.[72] Thus, the literature on legal negotiation focused largely on lawyer-to-lawyer dynamics.[73] Given the traditional emphasis on

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67 *E.g.*, Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

68 *See, e.g.*, David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454. Beyond the theoretical debate about paternalism, the problem of lawyer manipulation of clients still remains. *See* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1306 n.361 (1994).

69 *See, e.g.*, Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1106 n.14 (1996).

70 For a description of the types of decisions which lawyers and clients must consider, *see infra* text accompanying notes 127–31.

71 Glendon describes those ideals in part as the belief "that lawyers can often serve their clients best by discouraging litigation, or by deliberating with them about a proposed course of action, rather than by unquestioningly carrying out the client's desires." GLENDON, *supra* note 2, at 35–36.

72 I refer here primarily to dispute negotiations. *See generally* Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of* G. Heileman Brewing Co. v. Joseph Oat Corp., 69 WASH. U. L.Q. 1059 (1991).

73 *See, e.g.*, Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 24. More recent negotiation scholarship on lawyering has focused both on the dynamics of the lawyer as negotiating agent for the client and on negotiating the termsof the attorney-client relationship. *See, e.g.*, William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interac-*

lawyers' performance in negotiation, it is not surprising that many of the existing models of mediated negotiations focus on the lawyer rather than on the client as the primary participant.[74] Even though mediation is an extension of problem-solving negotiation and should give disputants control, many lawyers persist in following adversarial negotiation styles and still control the settlement process.[75] In some cases, lawyer-controlled mediation simply replicates a variation of traditional settlement conferences where lawyers dominate and clients' real interests may not be satisfied.[76]

The literature offers conflicting advice. Some commentators criticize lawyers for abandoning their advocacy role in mediation.[77] Others argue that lawyer advocacy is inconsistent with mediation.[78] Thus, it is not surprising that many lawyers do not know how to represent clients in mediation.[79] The less than ideal representative lawyers may act like combatants[80] or, just as some lawyers do in adversarial

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tions, 77 CORNELL L. REV. 1447 (1992); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration,* 44 BUFF. L. REV. 71 (1996)

74 *See* John B. Bates, Jr., *Using Mediation To Win For Your Client,* PRAC. LAW., Mar. 1992, at 23; Stephen Patrick Doyle, *Trial Lawyers Should Add Skilled Participation in Mediation to Services They Provide to Clients,* BNA ADR Rep., Sept. 27, 1990, at 325; James D. Knotter, *Settling the Entrenched Case Through the Mediation Process,* 49 DISP. RESOL. J. 23 (1994); Chris Martin, *Representing A Client in Mediation,* COMPLEAT LAW., Fall 1996, at 34.

75 *E.g.,* Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want",* 12 OHIO ST. J. DISP. RESOL. 253 (1997).

76 *See, e.g.,* Kaiser Found. Health Plan of the Northwest v. Jane Doe, 903 P.2d 375 (Or. Ct. App. 1995). However, there are some hopeful reports of lawyers' behavior in mediation. *See, e.g.,* McEwen, *supra* note 56; Riskin, *supra* note 72, at 1061.

77 *See, e.g.,* Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation,* 28 FAM. L.Q. 177 (1994).

78 *See, e.g.,* Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel",* MEDIATION Q., June 1986, at 17, 26–27.

79 This situation should change as scholars and practitioners begin to focus on representational mediation practice. *See, e.g.,* EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 245–53 (1997); COOLEY, *supra* note 54; ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 75–80 (1994); GOLDBERG ET AL., *supra* note 21, at 445–49; JOHN S. MURRAY ET AL., PROCESSES OF DISPURE RESOLUTION: THE ROLE OF LAWYERS (2d ed. 1996); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 436–442 (2d ed. 1997); ROGERS & MCEWEN, *supra* note 51, at § 4:11; David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest,* 8 ME. B.J. 38, 45 (1993); *see also supra* note 49.

80 *See, e.g.,* Charles Guittard, *Preparing for Mediation and Negotiation,* PRAC. LAW., Oct. 1991, at 65 ("Your client needs you to participate in mediation because he wants your advice as if it were an invisible suit of armor."). However, some critics may prefer to have a lawyer be a combatant; *see, e.g.,* Bryan, *supra* note 77.

practice, they may fail either to understand or to present their clients' underlying needs and interests,[81] try to take control of the process,[82] fail to inform clients about what is happening in mediation,[83] or coerce clients into settling.[84] Worse still are some of the reported ethical violations: deliberately misrepresenting facts[85] or violating the confidentiality of a mediation session.[86]

The failure of many lawyers to understand the conceptual differences between adversarial lawyering and mediation practice strongly suggests the need to develop a theory of "good" representational mediation practice. But there are competing interests. On the one hand, we must safeguard client voice and encourage client participation. At the same time, however, the demands of professionalism require that lawyers guide clients towards responsible decisionmaking. In my view, the activity of client counseling plays a critical role in managing these tensions. In the following section I explore ways in which mediation client counseling can manage the tensions between client participation and attorney control. Specifically, I consider how Glendon's view of deliberation and her civility principles can inform a "good" theory of mediation client counseling.

V. MEDIATION CLIENT COUNSELING: THINKING ABOUT A DELIBERATIVE PROCESS

Too often, lawyer-controlled mediation is not preceded by any meaningful deliberation with clients. Lawyers do not listen to their clients but presume to know their goals and then dictate what should occur in mediation. Sadly, this behavior can sabotage the mediation process.

Deliberation is a necessary pre-condition to client decisionmaking, both in the mediation counseling relationship and in the mediation process.[87] Prudential discussions between lawyer and client

81 *E.g.*, Heumann & Hyman, *supra* note 75.

82 *E.g.*, *id.*

83 *See* Kaiser Found. Health Plan of the Northwest v. Jane Doe, 903 P.2d 375 (Or. App. 1995) (alleging failure to inform client of arbitration provision in mediation settlement agreement).

84 *E.g.*, McEnany v. West Del. County Community Sch. Dist., 844 F. Supp. 523 (N.D. Iowa 1994) (finding that even if an attorney threatened to withdraw if the party did not settle as the party claimed, it occured after the mediation).

85 *See In re* Waller, 573 A.2d 780 (D.C. App. Ct. 1990).

86 Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995).

87 Commentators have called for deliberation in various aspects of the attorney-client relationship. *See, e.g.*, Kronman, *supra* note 4; Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Colin Croft, *Reconceptualizing American*

about the relative merits of particular courses of action help to achieve participatory and educated client decisionmaking, the hallmarks of the informed consent doctrine. Deliberation honors the reasoning power of clients and lawyers. In the give and take of argument and debate, lawyers and clients gain a better understanding of each other's views. In short, the methodology of deliberation brings lawyers and clients together and thus fosters mutual respect and trust.[88]

A. Glendon's Vision of Deliberation

In its broadest sense, deliberation is understood as a process of careful calculation and reasoned dialogue.[89] It is a method of discourse in which individuals debate the merits of particular activities.[90] Deliberation is reflective activity, requiring active participant engagement.

Glendon's view of deliberation is grounded in her respect for the intrinsic value of every human being. If the deliberative process is to

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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); Tanina Rostain, *The Company We Keep: Kronman's* The Lost Lawyer *and the Development of Moral Imagination in the Practice of Law*, 21 LAW & SOC. INQUIRY 1017 (1996) (book review).

88 This should have a carryover effect into mediation so that parties are better able to experience what Lon Fuller has referred to as the central quality of mediation—its "capacity to reorient the parties toward each other." Fuller, *supra* note 16, at 325.

89 *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 527 (2d ed. 1987); OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 381 (1991). *See also* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 32 n.176 (1995). Deliberation does not occur in every situation but only in those cases where there may be doubt or differences of opinion. Aristotle identifies spelling as an example of activity about which people do not deliberate. *See* ARISTOTLE, THE NICHOMACHEAN ETHICS, Book III, 85 (J.A.K. Thomson trans., Penguin Books 1971).

90 In the political sphere, deliberation is endorsed by civic republicans as an optimal decisionmaking process. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). Calls also resound for greater involvement in deliberative decisionmaking in a wide variety of settings including the courts and the government. *See, e.g*, AMY GUTMAN, DEMOCRATIC EDUCATION 50–52 (1987); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 229 (1996); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991). *But see* Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309 (1997).

go beyond what she describes as the "mere clash of unyielding interests, and to end in seemingly irreconcilable conflicts," then it must rest on some basic social assumptions:

> the belief that each and every human being possesses great and inherent value, the willingness to respect the rights of others even at the cost of some disadvantage to one's self, the ability to defer some immediate benefits for the sake of long-range goals, and a regard for reason-giving and civility in public discourse.[91]

Glendon's civility principles are assimilated in her understanding of deliberation. Together they provide an account of deliberation which focuses on humanity and accountability. Elite clients would be required to listen to their lawyers and not assume that the ethic of client loyalty buys them hired guns. Poor or otherwise unempowered clients would expect that their lawyers would listen to them and not perpetuate paternalistic behavior. In short, Glendon's view of the deliberative process implies reciprocal rights and responsibilities for lawyers and clients, a concept which is noticeably absent from the prevailing lawyer or client autonomy models of decisionmaking.[92]

B. Deliberation in the Mediation Counseling Relationship

What Glendon has observed in the political sphere, that the deliberative process "requires time, information, and forums where facts, interests, and ideas can be exchanged and debated,"[93] is equally true in the lawyering process. Deliberation in mediation client counseling does not just happen; there are a series of "first information events" which precede it: lawyers' understanding of their clients' perspective and goals and clients' understanding of what will occur in counseling as well as a general understanding of relevant law. In short, mediation client counseling based on deliberation calls for greater attention to the principle of informed consent.

1. Preconditions for Deliberation

First, lawyers must understand their clients' perspective—the facts as well as the clients' emotional state.[94] While this ability has been recognized in the litigation context as possibly "an ethically required practice skill,"[95] it may be more important in the mediation

91 GLENDON, *supra* note 6, at 179.

92 *See supra* text accompanying notes 61–69.

93 GLENDON, *supra* note 6, at 179.

94 *See* BINDER & PRICE, *supra* note 64, at 52–68.

95 Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 133 (1996).

process where clients often participate without lawyers. The content of attorney-client deliberation takes into account the totality of the clients' circumstances and may include the economic, social, psychological, moral, political, and religious consequences of actions.[96]

Second, lawyers must attempt to understand[97] and not presume to know their clients' initial goals.[98] Even though client goals may change during deliberation,[99] lawyers must be respectful of client preferences from the beginning of the counseling relationship.[100]

Third, lawyers must ensure that clients have a general understanding of what will occur in the counseling interaction. Clients must be informed that deliberative counseling has as its goal informed decisionmaking, both in the attorney-client relationship and in the mediation process, and be advised of the roles that both attorney and client will play in it.[101] Clients must also be educated about the mediation process and understand its essential differences from litigation. Unlike adjudication, where disputes are resolved by strangers or are "settled" by lawyers and judges in the absence of clients, the mediation process allows clients to participate actively in resolving disputes.[102] In adjudication, legal principles serve an important function in settling a dispute between two parties authoritatively.[103] In mediation, however, the parties involved in the dispute decide the outcome,

96 The inclusion of non-legal interests in client counseling has also been advocated by other commentators. *See, e.g.*, BINDER & PRICE, *supra* note 64, at 8–9. Professor Peter Margulies has proposed a specific rule of professional responsibility that would require lawyers to deliberate with their clients regarding both the interests of third-party non-clients and the moral, policy, and psychological consequences of legal action. *See* Margulies, *supra* note 87.

97 This is equally true in the litigation context. *See* O'Sullivan et al., *supra* note 95, at 139.

98 *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1600 (1995).

99 *See* BINDER & PRICE, *supra* note 64, at 272 n.36.

100 While this point should be self-evident and is frequently true with respect to elite clients, it has not been the case with poor clients. *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

101 This is not necessarily happening right now. *See, e.g.*, Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 704 (1988).

102 The traditional conception of lawyer professionalism did not include any significant client participation or control over the outcome of disputes. *See* William Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 BYU L. REV. 767, 783.

103 *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

which can be based not only on legal, but on nonlegal, principles and values.

Finally, clients must have a general knowledge about the relevant law governing their case, so that during deliberation they may meaningfully evaluate alternative courses of actions.[104] Clients' knowledge of their legal rights honors the principle of informed consent. This is particularly important in jurisdictional settings where mediation is mandatory. Clients who know their legal rights are able to give informed consent, not only to their full participation in mediation, but also to any agreement reached in mediation.

2. The Foundation of Trust

Trust, an essential part of all human relationships,[105] provides the foundational structure for the mediation counseling relationship. This conception of lawyering is not peculiar to mediation practice; rather, it builds on the work of those who have advocated more trust and cooperation in the practice of law.[106]

There is a natural sequence to the development of trust relationships in mediation practice. Clients must be able to trust lawyers to guide them through decisionmaking; clients *qua* disputants must be able to trust the mediator to guide them in decisionmaking.[107]

Client trust must be acquired. Despite the self-evident necessity of trust, lawyers should not assume that it is a given in the mediation counseling relationship. In view of the negative public persona of the legal profession, lawyers must consciously seek to earn what Anthony Giddens has called "active trust":

> Active trust is trust which has to be won, rather than coming from the tenure of pre-established social positions or gender roles. Active trust presumes autonomy rather than standing counter to it, and is a powerful source of social solidarity, since compliance is freely given rather than enforced by traditional constraints.[108]

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104 *Cf.* Pepper, *supra* note 98, at 1546–47. Certainly all clients should have this knowledge. However, mediation clients in particular require knowledge of the law because they may play a more active role speaking for themselves in the mediation process.

105 *See* Edmund D. Pellegrino, *Trust and Distrust in Professional Ethics, in* ETHICS, TRUST, AND THE PROFESSIONS 69–85 (1991).

106 *See, e.g.*, Gilson & Mnookin, *supra* note 3, at 564; Williams, *supra* note 73.

107 *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 38 (1984).

108 ANTHONY GIDDENS, BEYOND LEFT AND RIGHT 14 (1994). Sissela Bok develops Giddens' thinking in bioethics, arguing that professionals must "win back the active trust that they no longer can count on receiving automatically." Sissela Bok, *Shading*

Active trust implies a mutuality of obligation. Lawyers and clients trust each other.[109] Active trust reinforces client respect. Mutual trust reinforces the relational nature of client autonomy. Together they help to build a counseling model based on mediation rather than litigation principles.

Ethical considerations require that lawyers be sensitive to the potential for abuse of trust.[110] All clients are to some degree vulnerable and they must trust that their vulnerability will not be exploited.[111] If a client is scarred in the mediation counseling relationship, it will be difficult if not unlikely that a trust relationship can be established in mediation. Trust is hard to regain once it is lost.[112]

3. Integration of Legal and Non-Legal Interests

An explicit goal of deliberative mediation counseling is to structure a decisionmaking process, which like the mediation process, is responsive to clients' needs and respectful of individual values. This requires purposeful integration of legal with non-legal interests.[113] The information the lawyer initially acquires is continually integrated with new data about the clients' real interests in order to achieve a contextualized understanding for decisionmaking.[114]

Lawyers are not generally accustomed to helping clients understand the connections between their non-legal and legal interests.[115] In integrating clients' legal and non-legal interests, lawyers must also learn to be sensitive to their clients' emotions[116] and be able to inte-

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the Truth in Seeking Informed Consent for Research Purposes, 5 KENNEDY INST. ETHICS J. 1, 11–12 (1995).

109 Sadly, lack of trust is too often characteristic of the relationship between lawyers and their clients. *See* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981).

110 *See* Williams, *supra* note 73, at 62; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 527.

111 *See* Pellegrino, *supra* note 105, at 73.

112 As Sissila Bok has observed, "[I]t is far harder to regain trust, once lost, than to squander it in the first place." Bok, *supra* note 108, at 11.

113 Several commentators have urged client counseling of non-legal interests. *See, e.g.*, BINDER & PRICE, *supra* note 64; Margulies, *supra* note 87 and sources cited therein; Pepper, *supra* note 98, at 1602–04. *See also* MODEL RULES, *supra* note 60, Rule 2.1 & cmt.

114 In this respect, integration shares similarities with the contextual reasoning advocated by some feminist thinkers. *See, e.g.*, Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1636–42 (1991).

115 *See, e.g.*, Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1671–87 (1989).

116 *See* BINDER & PRICE, *supra* note 64, at 22.

grate these emotions into their understanding of the facts. Lawyers must also provide clients with a full understanding of the consequences of various courses of actions.[117] Thus, a client who wished to offer an apology as part of a mediated settlement would first be informed about the legal consequences of an apology.[118] Or, a client who was adamant about commencing litigation would need to be informed about the emotional and financial consequences of litigation.

4. Exchange and Debate

The heart of the deliberative process is the exchange of ideas and debate between attorney and client about ends and means, goals and strategies. In this process of co-deliberation, active trust is enhanced and the autonomy of both lawyer and client is honored. The idea of debate is important, for it distinguishes deliberative from non-deliberative counseling.

Deliberation occurs only in cases of doubt or difference of opinion. Thus, during the exchange and debate, the client's goals may change.[119] The counseling image in the exchange and debate phase is that of the lawyer as educator guiding her client through the decisionmaking process. It is the image recalled by Glendon of the wise counselor who helps her client "explore all angles of a problem"[120] and "develop new insights, ideas and perspectives."[121] The lawyer engages the client in prudential conversation focused on specific interests and achievable goals. The point is to arrive at solutions which are responsive to individual needs.

a. The Lawyer's Opinion

People come to lawyers because they need, or think they need, legal advice or access to the legal system which is not otherwise available to them acting on their own. Implicit in this arrangement is the idea that a lawyer will navigate and advocate; in short, protect them. Thus, it may be appropriate for the lawyer to offer her opinion in

117 For an example of this approach in an administrative law context, see Jamie Heller's argument for "full-picture counseling": Jamie G. Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503 (1994).

118 *See* Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. DISP. RESOL. 115. For a discussion of possible conditions for the effectiveness of apology in mediation, see Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

119 *See* Pepper, *supra* note 98, at 1601.

120 GLENDON, *supra* note 2, at 36.

121 *Id.* at 36.

mediation counseling.[122] This is not done to "impose" a decision or to substitute the lawyer's judgment for that of the client's. Rather, it is done to enhance the client's knowledge and to give her a better understanding of the range of available options. Certainly clients may disagree with their lawyers, but the lawyers' ability to focus on the specific issues involved enables them to disagree constructively with their clients.[123]

The success of mediation counseling depends upon the lawyer's ability both to help clients achieve self-governance and to protect clients from themselves. The exercise of self-determination is of questionable value if clients choose harmful results. Thus, in the give-and-take of deliberation, lawyers must guide clients to proper choices within the realm of self-determination.

b. Information for Discussion

The dialogue between lawyers and clients must take into account practical, ethical, and moral considerations. At a practical level, the decision about what information should be discussed is contextual. Much depends upon whether the client decides to participate in mediation. My purpose here is not to analyze the factors which should be considered in deciding for or against mediation.[124] Rather, I offer a deliberative process model to guide client counseling on this question. The deliberative model can also guide the client's future interactions in the mediation process with the mediator and the other disputing party.[125]

If a client decides voluntarily[126] that mediation is the appropriate course of action, then a number of practical decisions must be examined, including:[127]

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122 In mediation counseling, a lawyer's opinion may make a difference in whether parties use the mediation process. *See, e.g.*, Pearson et al., *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitations Issues*, J. DIVORCE Fall/Winter 1982, at 17, 29.

123 *See* GLENDON, *supra* note 2, at 102–03.

124 For an excellent discussion of the advantages of mediation over bilateral negotiation between lawyers, or over other forms of alternative dispute resolution, see ROGERS & MCEWEN, *supra* note 51, §§ 4:04–06.

125 *See infra* text accompanying note 135.

126 Different considerations may apply when a client is required to mediate. *See supra* note 52 and sources cited therein.

127 In the non-mediation counseling context, there is little data on the kinds of decisions lawyers typically examine with their clients. *See* BINDER & PRICE, *supra* note 64, at 268 n.30.

a) What mediation model best meets a client's needs?[128]
b) Who is the appropriate mediator?[129]
c) What is the client's role?[130]
d) What is the lawyer's role?[131]

Lawyers and clients must also be sensitive to the ethical and moral implications of client decisionmaking in mediation.[132] The private nature, autonomous rule-making powers, and flexible procedures of mediation offer potential for abuse.[133] Representational lawyering in mediation is a relatively new practice area and little attention has been devoted to the moral and ethical issues confronting lawyers.[134] We need more theoretical and empirical study in this area.

C. Deliberation in Mediation Counseling Enhances the Mediation Process

Mediation client-counseling based on deliberation provides structure for client decisionmaking both in the attorney-client relationship and in the mediation process. The deliberative approach informs behavior which can guide clients' future interactions in the mediation process.[135] Decisions in the counseling relationship are made by cli-

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128 *See supra* note 36 and sources cited therein.

129 Lawyers who are repeat players are often in a better position than clients to select mediators. *See* Lande, *supra* note 25, at 847.

130 Depending upon the degree of participation clients choose, lawyers may prepare clients to negotiate for themselves in the mediation session. This may involve taking on the role of coaching or active consulting. While lawyers cannot predict the outcome of negotiated mediations for clients, they can prepare clients by teaching them about the stages of negotiation and strategies. *See* Williams, *supra* note 74, at 34.

131 *See generally* MURRAY ET AL., *supra* note 79, at 370–71; ROGERS & MCEWEN, *supra* note 51, § 4:08; *Cf.* Gilson & Mnookin, *supra* note 3, at 556; Susan W. Harrell, *Why Attorneys Attend Mediation Sessions,* 12 MEDIATION Q. 369 (1995). *But see* Lande, *supra* note 25.

132 A discussion of the ethical issues confronting lawyers in representational mediation practice is beyond the scope of this article. *See generally* Feldman, *supra* note 87.

133 *See, e.g.,* Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation,* 26 RUTGERS L.J. 155 (1994).

134 On the other hand, there has been some analysis of the ethical issues confronting mediators. *See, e.g.,* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications,* 1994 J. DISP. RES. 1; Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment,* 21 FLA. ST. U. L. REV. 701 (1994).

135 Mediation client counseling differs from traditional negotiation client counseling where lawyers, not clients, will be the primary participants in the negotiation. In helping clients to deliberate in pre-mediation counseling sessions, lawyers are really preparing their clients for future deliberations in mediation.

ents after reasoned deliberations with their attorneys.[136] Decisions may be informed by attorneys' views, but the views are not "imposed" on the client. Likewise, in the mediation process, decisionmaking belongs to the disputing parties after deliberations with the mediator and each other.

VI. CONCLUSION

As we approach the twenty-first century, lawyers must reaffirm a commitment to professionalism in which the problem-solving and peacemaking activities of mediation are valued in the practice of law. Glendon's critique of the adversary culture is a powerful catalyst for beginning to think about developing a theory of representational lawyering in mediation. She helps us understand what it means to practice law with civility and humanity. Her vision of deliberation is rooted in a deep respect for the dignity of every human being and provides a structural framework for us to conceive of a legal practice in which the human element matters, a good practice, driven by the values of cooperation, courtesy, and mutual respect. The principles of civility and professionalism which Glendon extols inspire the transformation which must take place. Lawyers and clients who can truly listen to each other, who can debate civilly with one another, and who can persuade each other based on reasoned discourse will make all the difference.

136 I realize that some clients may prefer to waive the right to participate significantly in decisionmaking. *Cf.* Elysa Gordan, Note, *Multiculturalism in Medical Decisionmaking: The Notion of Informed Waiver*, 23 FORDHAM URB. L.J. 1321 (1996).